How Judges Decide: James Wilson's Theory of Constitutional Interpretation

Geena Bournazian

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How Judges Decide: James Wilson’s Theory of Constitutional Interpretation

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Requirements for Commonwealth Honors in Political Science

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A quote that has kept me motivated throughout my research, from me to you:

“Knowing is not enough; we must apply. Willing is not enough; we must do”

(Johann Wolfgang von Goethe).

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Chapter One: Introduction

Constitutional law scholars are in general agreement that judges, when interpreting the Constitution, apply reasoning not explicitly found in the Constitution. However, where these scholars disagree is over what types of reasoning or bodies of thought judges should apply when rendering their decisions and interpreting the Constitution. This introduction takes up their competing arguments. First, writers like Hadley Arkes and Robert George argue for the natural law interpretation of the Constitution, which requires judges to focus on the substantive moral reasoning that defines right and wrong in a particular case. In doing this, judges would have recourse to the principles of natural law when making these decisions. The purpose would be to connect the natural law with constitutional law. Second, there is the natural rights argument. Randy Barnett, a natural rights scholar views the responsibility of judges in terms of protecting the inalienable rights individuals have, preceding the formation of government. In order for the law to be legitimate and morally binding, the government must provide adequate procedures for the protection of these rights. Where the natural law argument requires judges to articulate principles of how one ought to live, the natural right argument turns its attention to government and requires judges to assess the propriety of restrictions placed on individuals by government. The natural law tradition believes there is a correct choice. The theory of natural rights focuses on the ability of individuals to make these choices for themselves. Finally, the common law approach emphasizes that judges operate within a legal framework where they are to make their decisions on important legal questions with a heavy reliance on precedent. The common law approach is represented by the writing of James Stoner, who believes the common law approach is distinguished from the other two alternatives because of its reliance on prudent choice.

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1 The fourth argument, that of Ronald Dworkin, is addressed in the fourth chapter of this thesis.
This thesis pursues the larger question of how judges should make decisions through an analysis of the political and legal writings of James Wilson. In particular, the following research question is addressed: In what manner and to what extent does James Wilson provide a theory of Constitutional interpretation? Wilson is of particular interest for the topic of constitutional interpretation because all three schools of constitutional thought claims ties to Wilson. In addition, he is one of six men to sign both *The Declaration* and the *Constitution*, making him a very influential and important founding father. However, Wilson is often forgotten amongst the other Founders. Serving as one of the first Supreme Court Justices, his ideas on constitutional interpretation can help unlock the many ambiguities the Constitution contains in order to help modern judges answer important constitutional questions. The thesis of this research is that Wilson provides a democratic theory of constitutional interpretation that combines natural law and natural rights principles on a scientific foundation. This paper specifically focuses on Wilson’s view of the role of a judge, and how judges should make their decisions.

In pursuit of this question, I employ the method of textual analysis recommended by Leo Strauss (1988). Strauss’ method of textual analysis focuses on understanding past thinkers as they understood themselves. This analysis requires three tasks of the researcher. The first is that one must suspend their own opinions and questions in order to better understand the thought process and inquires of the author. The second is that one is to rely, as much as possible, on what the author says directly and indirectly. It is important in this step not to make assumptions or to inflate unnecessary information with more meaning that is originally intended. The final task is that one should use the author’s words directly when possible, and not rely on secondary sources. The use of Strauss’ methodology has been used on previous studies of James Wilson which justifies its use here (see Valesquez 1996; Zink 2009).
This chapter examines the three different schools of constitutional interpretation so that they can be understood and applied to James Wilson’s own writings. The first section of the literature review focuses on the natural law theory. Here, Hadley Arkes provides a theory of constitutional interpretation that does not focus on the strict interpretation of the text, but focuses on interpreting the “spirit” represented in the Constitution. Arkes argues that judges should look to moral principles to help in this interpretation. Robert George agrees that judges should have recourse to moral principles when interpreting the Constitution, but differs from Arkes on originalism. For Arkes, if a judge recognizes a bad law, the judge should declare it unconstitutional. George disagrees, placing this duty in the hands of the legislature to apply the natural law when creating the laws. For George, if a law is bad, the Court should ignore it if it is not within their grant of power. The second section examines the natural rights theory through Randy Barnett. Barnett believes the role of a modern judge has degenerated from its original purpose. He believes that if judges had recourse to natural rights when making their decisions, they would be more effective in preserving the integrity of the Constitution. According to Barnett, if a law is not supportive of the natural rights of an individual or of a group of individuals, then it is not legitimate. This illegitimacy, for Barnett, allows individuals to disobey the law because it is not morally correct. Barnett also supports originalism, specifically the original meaning interpretation of the Constitution. The implications this has on his overall theory of constitutional interpretation will be discussed in this section. The last section examines the common law theory through James R. Stoner. According to Stoner, judges using the common law theory of constitutional interpretation are required to make decisions based on prudence and precedent, focusing specifically on the English common law. The common law is adaptable, and therefore is able to form to the needs of each new generation. This is good in the
sense that the common law is flexible and fits the people, but bad in the sense that it can create instability through frequent changes. This tension will be further analyzed in the last section.

**Hadley Arkes, Robert George and Natural Law**

Hadley Arkes (1990) has identified a key tension in contemporary legal reasoning. Arkes believes that judges make false rationalizations while deciding upon a case that are separated from moral reasoning. Arkes argues that morality and the law should be considered together, and not be divorced from one another. For Arkes, divorcing law from morality undermines the very purpose of the law, which is to determine what is right and what is wrong. To divorce the two is essentially saying that there is no standard of right and wrong, just and unjust. In rejecting this proposition, Arkes advocates the traditional position that all law has as moral background. According to Arkes, the law of morality is antecedent to any written law and requires judges to read the Constitution in light of the moral principles that inform right and wrong.

In the drafting of the Constitution, the Founders paid careful attention when creating the judicial branch. They created a separate and independent judiciary to ensure that an unbiased, apolitical entity would decide and answer the most important legal questions asked in the newly formed nation. However, in order for the decisions made by these courts to have authority, they had to ensure that the branch would be powerful. Arkes points to a clause in Article III, Section 2 of the Constitution stating “the judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution” (Arkes 1990, 21). Using this clause as the basis of his argument, Arkes identifies the job of a judge based on the writings of Brutus, a New York writer during the founding. Brutus is especially interesting because he is an Anti-Federalist, many of the issues he points to, are not necessarily issues for Arkes. He quotes Brutus stating that judges are “empowered to explain the Constitution according to the reasoning spirit of it, without being
confined to the words or letter” (Arkes 1990, 21). Arkes agrees with this line of reasoning and supports the idea of an active judiciary, which is not confined to the literal text of the Constitution, but instead makes the effort to interpret what the Constitution represents, or its spirit. Considering this, Arkes would also support the use of an unwritten constitution in the British system. England has been able to maintain a steady form of government, without having a written constitution because they are not confined by the literal words of a governmental document. This is an issue often cited of the written nature of the Bill of Rights. Although it was a requirement of the Anti-Federalists for ratification of the new Constitution, it constricts and confines what are considered to be inalienable rights held by all humans by placing them in writing.²

Failure to recognize this fact plagues contemporary legal reasoning. According to Arkes, contemporary legal reasoning is faulty because of the indeterminacy of the positive law that judges are so reliant upon. He argues that judges are molding the Constitution to their argument, rather than trying to determine what the Constitution says, and then applying that understanding to their argument. Arkes states “when there is a resolve to use the law, the arts of argument will be strained to the implausible” (Arkes 1990, 6). Arkes uses the example of the expansion of the Commerce Clause to apply to the Lake Nixon Club in Daniel v. Paul (1969). Although the club was private, located away from main highways, and could only be accessed by country roads, the Court still expanded the jurisdiction of the Commerce Clause by questioning whether or not the ingredients in the food provided at the club facility had been shipped through interstate commerce, and whether or not the records in the jukebox on the premises had been pressed out of state. Under the guise of the Commerce Clause, the Court has expanded many other aspects of the Constitution in order to use national regulation on a variety of personal activities. Arkes

² On this point Arkes is in agreement with Alexander Hamilton (see Federalist #84, 442-451).
believes judges are wrong in doing this because their arguments do not reflect the moral principles guaranteed by the Constitution. Instead, judges focus on how to decide upon a case using irrelevant connections to set precedents. Arkes articulates this point stating:

Instead of leading our jurists to focus on the substantive moral ground that defines the wrong in any case, or instead of directing them to the principles that truly bear on the jurisdiction of the national government, our jurisprudence has induced our lawyers to expend their genius in producing the most contrived fictions. Those fictions may be taken as formulas that somehow settle the case, even when they illuminate nothing about the grounds of judgment that are necessary for the law. And for the sake of fitting their decisions to these formulas, the jurists have had to absorb canons of reasoning that must ever be embarrassing to scholars who have any mildly rigorous training in philosophy (Arkes 1990, 6).

For Arkes, it is important to recognize the connection between morality and the law, and to consider morality when interpreting how to apply that law. Arkes uses the example of slavery to explain this point. He states:

The traditional connection between morals and law could be expressed briefly in this way: When we invoke the language of morals, we move away from statements of merely personal taste or private belief; we offer a judgment about the things that are universally right or wrong, just or unjust. When we say then, that any act stands in the class of a “wrong” - that is wrong for anyone, for everyone, to hold slaves; that no one ought to hold slaves; that anyone may rightly be restrained from owning slaves, even if the holding of the slaves would serve his interests (Arkes 1990, 38).

Prior to the Civil Rights Amendments, slavery was permitted according to both positive law and our nation’s Constitution. However, this does not necessarily mean that slavery was “right,” or “just.” President Lincoln recognized this, and rather than follow the text of the Constitution,
reflected upon natural law, and recognized that slavery was wrong. This line of reasoning is what Arkes is trying to promote.3

In accordance with the previous example, Arkes argues that judges should have recourse to moral principles outlined in the Constitution. He grounds his reasoning based on his conception of the intentions of the Founding Fathers. According to Arkes, natural law is antecedent to any form of constitutional or positive law. It provides moral truths, in which the Founding Fathers sought to uphold in the drafting of the Constitution. Arkes states:

They understood that the federal government had the authority to reach every legitimate object of its concern -- to reach, if need be, past the states, and to act directly on individuals. This authority required no arcane renderings, no ingenious reading of passages hidden in the Constitution. As our jurists understood, that authority was contained in the simplest truths established about the national government that was created in 1787 (Arkes 1990, 10).

These moral truths determine what is considered “right” and “wrong,” “just” and “unjust.” Arkes applies this idea of moral truths to the Founding, stating “if we should try to understand the principles of American law, it would be necessary to move outside the Constitution... We would be drawn back, then, as the Founders were, to those principles of ‘natural justice’ that existed before the formation of any government” (Arkes 1990, 10). This interpretation of the intentions of the Founding Fathers suggests that arguments for originalism are a correct reading of the Constitution, and follow his line of reasoning. Arkes recognizes the arguments of Raoul Berger and Robert Bork, who he claims “have regarded any appeal to ‘natural rights’ - any appeal beyond the text of the Constitution -- as a pretext for evading the discipline of the Constitution”

3 The danger of this line of reasoning is that it makes the Constitution give way to what is moral. This is potentially problematic because if a judge interprets a law as being inconsistent with the natural law, would Arkes suggest to disobey that provision of the Constitution? Given Arkes concept of originalism, it would seem unlikely. The implications of this would be that Arkes places in the hands of the judge the ability to strike down a constitutional provision if it is not consistent with the natural law. This is not the case for all natural law theorists, as will be discussed in the analysis of Robert George.
(Arkes 1990, 14). It is interesting that these two writers would disagree with Arkes, since they both claim to originalist reasoning. If this were true, they would be supportive of natural law reasoning because it is what the Founders intended.\(^4\) Arkes also recognizes Professor Sanford Levinson’s argument against the idea of natural law and moral truths, in which Levinson establishes a theory of “constitution faith.” Levinson argues “there are no moral ‘truths’ that make one meaning of the Constitution more authoritative or compelling than another” (Arkes 1990, 11), and that the Constitution holds authority because the people allow it. However, Arkes argues that by investing the whole of our interpretation upon the text of the Constitution, explicit or implicit, without recourse to moral principles, the interpretation would be incorrect. Arkes states “the Constitution produced by the Founders cannot be understood or defended if it is detached from those moral premises” (Arkes 1990, 17). He further argues that his opponents have given the majority the power to delegate right and wrong. This is an extreme fault in those opponents line of reasoning, because it was very obvious in the drafting of the Constitution and in the writing of *The Federalist* that the Framers intended to control and hinder majority factions from forming.\(^5\) Arkes argues “In place of moral truths that hold their truth in all places,” contemporary jurisprudence emphasizes “‘conventional’ truths that are ‘posited’ or set down or accepted, in different places, as a reflection of the opinions that are dominant in any country. By ‘right’ and ‘wrong,’ then, we mean: that which has been accepted or rejected, by a majority” (Arkes 1990, 15). From this perspective, it is clear that the Founding Fathers had not intended on a society in which justice was based upon the opinion of the majority. Examining

\(^4\) Both Robert Bork (1990) and Raoul Berger (1969) are key figures in the “restraint process” tradition, in which judges should not consult extra-constitutional means unless they are looking within themselves. This tradition stresses original meaning, and considers the originalist tradition to be the only neutral option in constitutional interpretation.

\(^5\) See *Federalist* #10 (42-49) for the Framers’ intention to control the violence of majority factions.
this distinction, between the intentions of the Founders and the majoritarian democracy that exists today, is important in understanding the implications it has for modern jurisprudence.

Arkes believes modern jurisprudence and legal reasoning is very distinct and different from the intentions of the Founding Fathers. He states:

We should be aware, then, that there is a radical separation between the jurisprudence of the Founders, and the jurisprudence offered by conservatives and liberals in our own day. The jurisprudence of the Founders was built on the connection that was traditionally understood between morals and law. The Constitution they finally produced, was our second Constitution, could be understood and justified, only in moral terms, only by an appeal to those standards of natural right that existed antecedent to the Constitution (Arkes 1990, 17).

In the drafting of the Constitution, the Founding Fathers intended to present a document that contains abstract moral principles that would guide people in their everyday lives while also providing for a successful and orderly society. Arkes makes the argument that the Founding Fathers had no intentions of originalist understanding. These men, being trained in the ancient and modern philosophies of human nature, knew there would be situations that would arise that they could not predict. Therefore, creating a binding legal document that would restrict actions from dealing with these unknown situations in the future would not make sense. Arkes states “since in law all cases cannot be foreseen, or expressed, it is necessary, that when the decrees of the law cannot be applied to particular cases, there should somewhere be a power vested of defining those circumstances, which had they been foreseen the legislator would have expressed” (Arkes 1990, 21). If judges are confined to using the plain text of the Constitution, they would

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6 It is important to note here that when Arkes refers to natural right, he is not referring to the commonly recognized Lockean natural right. Rather, he is presenting his own understanding of natural law, and misusing the phrasing of “natural right” to represent this idea. A better explanation of the natural law being referred to here is given by Robert George when he states “What matters is the validity – the truth – of the theory and its capacity to shed light on why we ought to do or refrain from doing certain things which it is in our power to do or refrain from doing, but which we have the effective freedom – the choice – to do or refrain from doing”
not be able to truly reflect and decide upon a case with equal and fair justice. In order for judges to arrive at the best answer to a given case, it is imperative they consult natural law.

Robert P. George gives an in depth description of the natural law in three principles. The first principle is “a set of principles directing human choice and action toward intelligible purposes” (George 2001, 102). This set of principles is directed toward what George refers to as “basic human goods.” According to George “It is the integral directiveness of these goods that excludes certain options as practically unreasonable, even in circumstances in which they are, to a certain extent, rationally grounded, and thus distinguishes what is morally right from what is morally wrong” (George 2001, 3). This idea entails that when faced with a situation where multiple solutions may seem rational, one must reflect upon this set of principles to decide which option is the best choice. By concretely applying practical reason through these principles, one can better identify morally right and wrong answers, even in a situation where both options appear to be rational. In addition to this, George explains that these principles “prescribe actions which people have reasons to perform because they constitute opportunities to realize for themselves and/or others benefits whose intelligible value is not merely instrumental” (George 2001, 17). Instrumental goods are goods that are worthwhile for their own sake, so it is not difficult for people to realize the benefits in participating in action that work towards these goods. However, when the benefit is not worthwhile in its own sake, it is up to the individual to reflect on the morality of an action and to understand its beneficial impact, even if the act itself does not provide beneficence.

George’s second principle of natural law posits that natural law contains a “set of ‘intermediate’ moral principles which specify the most basic principles of morality by directing choice and action toward possibilities that may be chosen consistently with a will toward integral
human fulfillment and away from possibilities the choosing of which is inconsistent with such a will” (George 2001, 102). This second principle is similar to the first in that it teaches individuals to act in the benefit of the whole, as opposed to the individual benefit. George describes this stating “the most basic principles refer to ends or purposes which provide non-instrumental reasons for acting. These principles identify intrinsic human goods as ends to be pursued, promoted, and protected, and their opposites as evils to be avoided or overcome (George 2001, 102). According to George, the natural law provides this, and it is the job of the law maker and the citizen to pursue actions that will achieve these ends. George states “moral norms guide action by directing choice toward fully reasonable possibilities and away from possibilities that, while not utterly irrational, are practically unreasonable” (George 2001, 118). By consulting the moral norms established by the natural law an individual can modify their own action to achieve intrinsic human goods.

Finally, George’s third principle is that the natural law contains “fully specific moral norms which require or forbid certain possible choices” (George 2001, 102). These fully specific norms are what are best exemplified through the creation of the law. George states “it is in the order of ‘doing’ that we identify the need to create law for the sake of the common good. The lawmaker creates an object – the law – deliberately and reasonably subject to technical analysis – for a purpose that is moral, and not itself merely technical” (George 2001, 107). These lawmakers use both practical reason and moral norms in order to establish a law that is good and morally right, stating “Where the laws are just, authorities serve their communities well; where they are unjust they serve their communities badly. The moral purpose of a system of laws is to make it possible for individuals and sub-communities to realize for themselves important human goods that would not be realizable in the absence of the laws” (George 2001, 107). Although the
first two principles of natural law suggest that individuals are able to establish through practical reasoning, moral norms that exist within the confines of the natural law, the third principle seems to suggest that without law, individuals would not be able to arrive at a complete understanding.

Having established the three principles of natural law, George presents the question of the judiciary’s position in combining positive law and natural law. George states “The vexed question of American constitutional interpretation is the scope and limits of the power of judges to invalidate legislation under certain allegedly vague and abstract constitutional provisions” (George 2001, 110). George’s view of the judge is more limited than Arkes. For Arkes, if a law is bad, then a judge should void it. For George, it is the job of the legislature to translate the natural law into positive law, and for a judge to invalidate a bad law would be outside of the scope of power granted to the judiciary. George states “to the extent that judges are not given power under the Constitution to translate principles of natural justice into positive law, that power is not one they enjoy; nor is it one they may justly exercise” (George 2001, 111). Arkes would disagree. The Constitution itself, according to Arkes, is based upon natural law moral principles. The job of the judge is to translate and apply these principles when different constitutional questions are presented. By not allowing a judge the power of judicial review, in the sense of determining the moral right or wrongness of a given piece of legislation, the judge is essentially powerless in its role as a check on the legislature. George states that the natural law theory treats the role of a judge as “fundamentally a matter for determination, not for direct translation from the natural law. It does not imagine that the judge enjoys a matter of natural law a plenary authority to substitute his own understanding of the requirements of the natural law for the contrary understanding of the legislature or constitution maker in deciding cases at law” (George 2001, 110). George believes it is not within the scope of power for a judge to be any
more than a voice as to what the Constitution or facts presented determine. By allowing a judge to translate the natural law, the fear is that the judge will not correctly translate what it is the natural law entails. Instead, the judge will reflect upon their personal understanding of natural law, and wrongfully apply it. George describes what he believes to be the role of the judge, stating “for the sake of the rule of law, understood as ordinarily a necessary condition for a just system of government, the judge is morally required to respect the limits of his own authority as it has been allocated to him by way of an authoritative determination” (George 2001, 110). This authoritative determination would be either the constitution maker or the legislature as described previously.

Despite the differences between Arkes and George, there is one similarity that is key. For both Arkes and George, the law must be understood in light of the moral principles of the natural law. The Constitution itself does not say whether or not it is the job of the legislature of the judge to do this. This is a source of disagreement between Arkes and George. What is known is that the natural law is proscriptive, and teaches individuals how one ought to live.

**Randy Barnett and Natural Right**

Randy E. Barnett argues that in order for a Constitution to have legitimacy, it must protect natural rights. This line of thinking is different from the common idea that a Constitution gains its legitimacy by being recognized by the consent of the governed. The people as sovereign provide authority to the government to allow it to make decisions on their behalf. Barnett rejects this theory, and provides his own theory for constitutional legitimacy grounded in the protection of natural rights. He argues that the Constitution as it was originally written is

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7 Natural rights can be describes as “Natural or inherent rights were the rights persons have independent of those they are granted by government and by which the justice or propriety of governmental commands are to be judged” (Barnett 2004, 58). The purpose of the natural rights theory is to protect individual’s rights from the government.
not reflected in modern jurisprudence. He believes that by recognizing the true meaning of the Constitution, and the true basis of legitimacy, the Constitution as it was intended can be restored to its respected authority.

To describe the distinction between the intended Constitution and its modern interpretation Barnett states “The Constitution that was actually enacted and formally amended creates islands of government powers in a sea of liberty. The judicially redacted constitution creates islands of liberty rights in a sea of governmental powers” (Barnett 2004, 1). Barnett believes that modern judges are doing their job incorrectly, and are destroying the true meaning of the Constitution because they do not have recourse to natural rights. Barnett creates the analogy of natural rights to building a bridge, stating “A respect for these rights is as essential to enabling diverse persons to pursue happiness while living in society with others as a respect for fundamental principles of engineering is essential to building a bridge to span a chasm” (Barnett 2004, 81). It is essential that the government, and inherently their lawmaking/constitutional interpretation have recourse to natural rights. According to Barnett, the Founders supported these views of natural rights, conceptualizing rights as both limited and limitless (Barnett 2004, 53). It is important that the law have respect for the natural rights of one individual, while at the same time restricting them so they do not infringe on the natural rights of others.

Barnett addresses the issue of the common conception of legitimacy by defining it as “whether a particular legal regime is accepted by the public or some substantial portion thereof” (Barnett 2004, 48). Barnett argues against this definition, claiming that legitimacy and the validity of the law is determined by “whether a validly enacted law merits the benefit of the

The natural law theory focuses more on the question of how one ought to act, as opposed to placing restrictions on government.
doubt and a prima facie duty of obedience” (Barnett 2004, 48). He argues that people should not follow the laws because a majority has approved it. Instead, citizens should look towards a given law, and decide whether or not it is morally acceptable and does not infringe upon their natural rights. If it does, then the law should not be followed or recognized. Barnett states “human laws that violate natural rights are not obligatory; only those human laws that respect natural rights can be obligatory” (Barnett 2004, 85). He supports this statement stating “we should care, and consequently, may owe a prima facie duty to obey a law, only if the processes used to enact laws provide good reasons to think that law restricting freedom is necessary to protect the rights of others without improperly infringing the rights of those whose liberty is being restricted” (Barnett 2004, 51). To Barnett, it is important that people follow the law because they are bound by their conscience to do so, not because it is what the government tells them to do (Barnett 2004, 76). In support of this he states, “A lawmaking system is legitimate, then, if it creates commands that citizens have a duty to obey. A constitution is legitimate if it creates this type of legal system” (Barnett 2004, 12). If a legal system supports laws that infringes upon the liberties of others, then it is restricts natural rights and cannot bind the people in conscience, but must instead do so through coercion. Barnett states “For a law is just and therefore binding in conscience, if its restrictions are (1) necessary to protect the rights of others and (2) proper insofar as they do not violate the preexisting rights of the persons on who they are imposed” (Barnett 2004, 44). Barnett’s formulation of legitimacy therefore rejects the idea that the consent of the majority is the source of the people’s attachment to the law.

Barnett bases his theory on the idea of natural right, which states that people have rights antecedent to the formation of government, and that people formed societies in order to better
protect these rights. He uses the Founders as a support of this theory, stating that the Founders view was “first come rights, and then comes the Constitution” (Barnett 2004, 4). Therefore, Barnett believes “if a constitution contains adequate procedures to protect these natural rights, it can be legitimate even if it was not consented to by everyone; and on that lacks adequate procedures to protect natural rights is illegitimate even if it was consented to by a majority” (Barnett 2004, 4). In his opinion, the Founders had this theory in mind when creating the Constitution. However, in order for the Constitution to be approved and ratified, some of the minor details of the Constitution needed to be changed in order to win over the majority. Would this be considered an example of why the Constitution does in fact derive its authority from the people? The words of the preamble would seem to suggest that the power to authorize the new Constitution was directly by the people. The Preamble to the United States Constitution states “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America” (Preamble). The term “We the people” has been used as a common phrase when discussing the liberties and rights guaranteed to the public by the Constitution. However, Barnett would argue the answer to the previously posed question is no. Barnett believes that consent can only be recognized as a legitimate source of authority if it is unanimous. Majority consent does not compel the people to follow the law. Barnett states “For

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8 The clearest expression of this in the American political tradition is in the second paragraph of The Declaration of Independence where it is written: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any form of government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

9 Accordingly, the Constitutional requirement (Article VII) that the consent of nine of thirteen states is required to ratify the Constitution would be a concession to prudence according to Barnett and not an example of the Founder’s commitment to majoritarian principles.
consent to bind a person, there must be a way to say ‘no’ as well as ‘yes’ and that person himself or herself must have consented… No person can literally consent for another” (Barnett 2004, 21). Therefore, majority consent would not be satisfactory to the legitimacy of government.

With the theory of natural rights in mind, the job of judges is to interpret the meaning of the text of the Constitution, while simultaneously ascertaining gaps in constitutional understanding. Filling in these gaps allows for the construction of new interpretations and applications of the law. However, Barnett is a strong supporter of originalism, believing the original meaning interpretation is the best. Barnett believes that “constitutional legitimacy based on natural rights, rather than popular sovereignty or consent, can ground a commitment to originalism” (Barnett 2004, 117). It is important to note here that he argues strictly for the original meaning interpretation and not original intent. Original intent is what the Founders’ intended in the drafting of the Constitution. Original intent proves hard to support due to the lack of historical evidence to support the claims to the Founding Fathers’ intentions. Original meaning examines how the people interpreted the Constitution when it was ratified. Barnett recognizes that the Constitution has vague language, which allows for construction within a certain extent for proper interpretation. Barnett states “interpretation determines the meaning of words. Constitutional construction fills the inevitable gaps created by the vagueness of these words when applied to particular circumstances. Vagueness must exist before construction is warranted, however, and any construction must not contradict whatever original meaning has been discerned by interpretation” (Barnett 2004, 100). The distinction he makes here is important between interpretation and construction. Many originalist thinkers assume that by interpreting the Constitution without a rigid textual reading is incorrect. However, Barnett distinguishes interpretation, which is determining what the words mean, from construction which
modernizes and changes the Constitution to adapt to modern political questions. Barnett recognizes that there is a need for both when interpreting the meaning of the Constitution. Each of these factors is not mutually exclusive, and is dependent on the other. It is important that construction has recourse back to the text of the Constitution, but is not confined to that text.

Barnett describes the modern power of judicial review as “not limited to refusing to enforce an unconstitutional law being applied to an individual… Modern judicial review also includes a power to command or order other branches of government to follow the judiciary’s interpretation of the Constitution” (Barnett 2004, 143). Barnett views the judiciary as a powerful entity, with power over the other two branches. He sees the court as not just a check on the legislature and executive, but as a policer of their actions and roles, with the Constitution providing their authority.

**James Stoner and the Common Law**

Stoner evaluates the common law tradition through Coke, who he views as an innovator in the common law tradition. He states “‘What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the Authorized Version of the Bible have been to religion, Coke has been to the public and private law of England’” (Stoner 1992, 15). English law, as well as the law of the United States, places certain emphasis on the importance of precedent. Since the common law itself is unwritten, and needs to remain so, precedent represents what is most analogous to what a written form of the common law would or could be. Stoner writes “One never can and never should forget the source of American common law, nor should one ignore that its spirit pays homage to the wisdom embedded in tradition… common law is said to exist wherever precedents have the force of law, although traditionally precedents are seen to indicate common law, not create it” (Stoner 1992, 6). It is important to remember
that precedent upholds the law, but can be faulty. It indicates what the law should be, but can be altered at any time and is not a permanent determination of what action should be taken in every situation, universally.

The most important aspect of the common law tradition for Coke is how it is used when making judicial decisions. The importance of precedent in judicial decision making is to fill and address the gaps and ambiguities left in the written law through broad construction. Coke believes judges should think like common law lawyers and look towards the applicable general aspects of the law, as well as like a member of Parliament, looking at the particulars. Stoner outlines Coke’s conception of the aspects of common law into five points (Stoner 1992, 19). The first is “Law is concerned first of all with right and wrong, not simply with policy, as we tend to assume today” (Stoner 1992, 19). This is important with Coke’s conception of precedent, because it is important to not just accept a law because it is written. Positive law is not always “right,” and it is important for judges and lawyers to look at positive law, in comparison with the reasoning of common law to determine whether or not it is “right,” or “wrong.” The idea of denying a law’s legitimacy based on its moral foundation is also seen in the natural law theory and the natural rights theory as previously noted. The second aspect Stoner describes is “the law Coke is concerned with is English law, especially English common law, not universal law, and it is characterized above all by land law and due process, which together form the basis of English liberties” (Stoner 1992, 19). It is important to understand that the common law is concerned with the general aspect of right and wrong, but not on a universal level. It is important that a judge look to the given facts of a case as well, since not all former precedent can necessarily be applied in every case. Although a case may seem similar, it is important to look at the intricacies in the case, and determine whether or not the case precedent that is going to be applied is truly
analogous to the case at hand, or something different. According to this line of reasoning, it is the job of judges to decide this. This differs from the natural right or natural law perspective that Arkes and Barnett both share. For both of those writers, the law is universal, and has recourse to natural law/natural right principles which are universal. Coke does not seem to agree with this line of thinking. The third tenet of Coke’s common law is “while it belongs to one land, law has a variety of sources, many of which are in the distant past, though the question of law’s origin is altogether secondary to the question of its rightness” (Stoner 1992, 19). This tenet is similar to the second, in which a law must be looked at in the detail of its application, and not be applied universally without considering whether or not it is the right authority for a given situation. However, Coke’s version of “right” has recourse to common law only, and does not have recourse to what has been suggested by the previously analyzed writers.

The fourth tenet of Coke’s common law is “law is rational, though one must take special care to understand what Coke means by legal reason” (Stoner 1992, 19). Coke’s legal reasoning is very important to the overall understanding and distinction of Coke’s school of thought compared with Hobbes. Coke believes reason is within a certain set of institutions, stating “Reason is not original and comprehensive; rather, it takes what is given and works upon it, improves it” (Stoner 1992, 23). This reasoning falls in line with the approval of using precedent. Rather than being an active judge, who creates law, Coke looks for judges to reason with the law that is provided, and determine whether or not it can be applied. The idea is not to invalidate the reasoning of previous judges and courts, but to use their decisions to work for modern concerns. It is important to refine the law, rather than create it to try to find a definitive decision or answer to a legal question. The law is indefinite, and the common law being unwritten, ensures its
indeterminacy and need for application of particulars rather than application of broad general concepts. According to Stoner, reasoning for Coke is

Not the sole cause of law; it takes much for granted, from custom, perhaps or from authority. But reason permeates the law; testing whether any proposition advanced conforms to the law as a whole, determining when law must be reformed to meet abuses, explaining authorities and thus preparing them to serve as precedents in future cases that may arise (Stoner 1992, 26).

Based on this, Coke argues that judges, when interpreting and deciding legal questions, should look at the particulars and determine where precedent can fill in the gaps that the ambiguities in the law create. In order to do this, Stoner would argue that one should look towards Coke’s idea of the common law, which would encourage a form of originalism when interpreting the Constitution, but not a rigid interpretation that is typically associated with originalist thought. This originalism would still allow judges to look outside of the text of the Constitution, but only to the extent of using the common law as an interpretative tool.10 Stoner writes “But surely here Coke is giving to judges only the power to except out of general words a situation in which a maxim of common law would be violated; there is no reason to say that this cannot count as statutory interpretation every bit as much as in the precedent he cites” (Stoner 1992, 57).

Although Coke is in full support of a less rigid form of originalism, he does not support judicial activism necessarily in the way it is practiced in the United States. This line of thinking is in direct opposition to Hobbes, who believes you should look towards general principles within the law and apply those to a given case, rather than looking towards the particulars of precedent and the common law conception of right and wrong. Along this line of reasoning is support from Coke for judicial review, but in a limited sense. Stoner writes “Coke’s precedents and his entire corpus of writing about the law suggests that from his point of view the innovation would have

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10 For examples of rigid originalist thinkers, see the decisions of Justice Antonin Scalia and the writings of Robert Bork.
to argue that judges must restrict themselves to the mechanical application of statutes whenever possible” (Stoner 1992, 61). By restricting a judge to precedent, it is hard to imagine innovation in the law. This is a perfect example of why Hobbes opposes the common law reliance on precedent.

The fifth tenet warrants more discussion because it involves a major distinction between Coke and Hobbes. The fifth tenet is “what is law remains to some extent a question that can never be definitively answered, thought the tentativeness or openness of law itself is worthy of notice” (Stoner 1992, 19). Coke and Hobbes differ on their approach to the law. Where Coke looks at the question of “What is Law” Hobbes looks towards the question of who rules, and how to ensure the authority of the sovereign is absolute. Stoner writes “The law, to Coke, is thus a science in something like the Aristotelian sense of a practical science, joining reason and knowledge of particulars, yet contained not in books as a body of knowledge but in the minds of those who can use it. This is why, despite Coke’s insistence on recording cases, documenting legal developments, and studying old books, the common law itself remains unwritten” (Stoner 1992, 18). Coke relies on meaningful interpretation of the law through the application of the common law, trusting the reasoning of others to come to the right answer. Hobbes, however, is more calculated with his legal reasoning. Hobbes does not favor the idea of an unwritten rule of law that is supposed to govern the way the written law is interpreted. He instead looks towards the role of the sovereign to determine what is right and what is wrong within the law. Stoner quotes Hobbes, states “Civil Law, is to every Subject, those Rules, which the common-wealth commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule” (Stoner 1992, 73). However, Coke would disagree with Hobbes’ favor with a written
or sovereign given form of law. Stoner states “Coke recognizes that the obscurity of the origin of common law is in some respects the secret of its success: It makes the law in its most fundamental points unwritten and thus leaves it always dependent upon reason for its discovery, confirmation, and elaboration” (Stoner 1992, 67). Coke’s style of reasoning is similar to Aristotelian prudence. This relies on reflection of the ancient philosophers as well to interpret the true meaning and purpose of the law. Stoner describes Hobbes’ opposition to this by stating “it must be clear that the manner of thinking characteristic of the common lawyer belongs rather to the drunkenness of the old moral philosophers than to the sobriety of scientific reason” (Stoner 1992, 84). Hobbes’ science of politics does not include precedent, because he believes precedent is binding and constricts the rule of law to what other judges have decided. However, if precedent did not exist, there would be no consistency within the law which would not work in an organized society. Coke’s understanding of the law is separate from this understanding. Hobbes seems to think that law is a product of politics, something created by the sovereign, where the sovereign, whoever it may be, has the ultimate authority to decide the outcome of a given legal issue. Coke does not agree with this according to Stoner, who claims “his responses make clear that politics is an activity either within law or beside law, rather than that law is a product of politics” (Stoner 1992, 28). Stoner’s analysis seems to suggest that Coke and the common law tradition would not agree with grounding law within science. The common law tradition emphasizes flexibility. By basing the law on scientific principles, this flexibility is lost.

Flexibility is an important function of the common law tradition in terms of why the common law should apply to American constitutionalism and the question of how judges should make decisions. In order for the Constitution to fit the people of the United States, and for the people to see it as legitimate, it must fit their values. It is important then, in the drafting of the
Constitution, that the English common law be used as a basis for creating a new form of
government. The English common law was what the people were accustomed to and aware of.

Therefore, it would seem impractical to consult outside sources when creating a system of law.

By completely starting from scratch and consulting outside sources of law, the new system of
government would not fit the people. Stoner explains this need for familiarity with the law in the
drafting of the Constitution when he describes the common law tradition as:

    The common law approach to politics involves the citizen or legislator conceiving
his task as judge or advocate within a legal frame: viewing each controversy as a
matter, not for free invention or for fresh deduction from first principles, but for
judicious choice, with attention to precedent always in order but authoritative
solution always elusive. The common law proceeds by reason, but by reason that
collects and judges particulars – by a sort of Aristotelian practical reason – rather
than by reason in the modern, Enlightenment, analytical sense – the reason that
breaks apart and reassembles (Stoner 1992, 177)

By consulting the English common law, the Founders exercised prudent choice when developing
a new system of law. The flexibility of the common law allows it to be molded to the needs of
the people it governs, and is therefore a more prudent choice to constitutional interpretation than
the use of scientific reasoning according to Stoner.

**Chapter Overview**

The remainder of this thesis is organized as follows.

Chapter Two discusses James Wilson’s concept of popular sovereignty. This chapter will
discuss how Wilson’s concept of popular sovereignty is multi-dimensional, consisting of
principle sovereignty and derived sovereignty, which will be explored through these two
dimensions, as well as its implications for the U.S. The first dimension will focus specifically on
the placement of principle sovereignty in the hands of the people. The second dimension of
sovereignty is displayed through the structure of government as provided by the Constitution.
Derived sovereignty can be viewed in the constitutional structure of government through representation, separation of powers, and federalism.

Chapter Three elaborates on the role of the judge as Agent-plus in Wilson’s thought. By applying Wilson’s multidimensional concept of sovereignty, the role of the judge can be used as a guide to understanding Wilson’s overall theory of constitutional interpretation. Here I will examine the judge and the judicial system, as well as Wilson’s restrictions on judges through the three specific roles he designates for them. Wilson’s judge has the responsibility of carrying out the role of an agent, a representative and an educator of the people.

Chapter Four turns its attention to Ronald Dworkin’s theory of constitutional interpretation. Focusing on Dworkin’s value based theory of interpretation, particular attention is paid to the implications of Dworkin’s theory of the moral reading for how one understands the law and judicial decision making. The chapter will also discuss Dworkin’s ultimate rejection of the majoritarian premise and originalism. The chapter ends with a discussion of the similarities and differences between Dworkin’s constitutional theory and Wilson’s, where Wilson rejects Dworkin’s theory for its tendency to provide judges too much power without the proper constitutional limitations.

Chapter Five summarizes Wilson’s theory of constitutional interpretation and compares it with the four theories that are analyzed in the previous chapters. Then it discusses one of Wilson’s own judicial opinions from the case of Chisholm v Georgia (1793), and shows how Wilson’s theory works in practice, as well as discusses its implications for modern jurisprudence.
Chapter Two: James Wilson’s Theory of Popular Sovereignty

In the creation of the United States Constitution, the delegates at the Constitutional Convention were faced with many difficult issues that were in need of resolving from the Articles of Confederation. One of these issues is the problem of sovereignty. As Madison explains in “Federalist #39,” the proposed Constitution presents a mixed governmental system, including both national and federal divisions of power. Madison describes the new Constitution as:

In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national (Federalist #39,199).

In the formation of the United States Constitution, the delegates created an “American” form of sovereignty, including a division of powers between the national government and the respective individual state governments. This new “American” form of sovereignty is important because of its strong commitment to popular sovereignty, an issue that has been widely debated since the ratification of the Constitution. According to Mogg, the commitment to popular sovereignty combined with the need to overcome its practical problems is essential to the formation of an American conception of sovereignty (Mogg 2006, 10; see also Greene 1986).

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1 The Articles of Confederation did not provide a proper government structure for the colonists. The Articles had the issue of dividing power among the states and national government, as well as determining sovereignty, the nature of representation, and the extent of powers granted to the national and state governments. For issues with the Articles of Confederation see the Federalist Papers #21-23, 99-116; #30, 146-48; #36-38, 172-193; #40, 200-203; #42-44, 215-236; #46, 242; #54, 285-286; #78, 401.

2 The topic of sovereignty is central to the great political debates of American political history. These debates include Lincoln/Douglas and Webster/Hayne.
The widespread acceptance of popular sovereignty in America is not without its problems however. Nowhere is this clearer than with the judicial branch. According to the logic of popular sovereignty, the people are the sole sovereign. The judicial branch is not popularly elected, but appointed. Therefore, there are no direct ties between the judicial branch, and the sovereign, the people. Due to this lack of connection, the question of the legitimacy of these decisions is raised. If decisions run counter to the beliefs or values of the people, what would create attachment to the law? This creates problems especially for the discussion of judicial review. A central issue is that the Court, through judicial review, has the ability to rule against the wishes and preferences of the people. Wilson works to reconcile this tension between popular sovereignty and judicial review.

This chapter begins by laying out a multi-dimensional understanding of sovereignty. Using the logic of the principle/agent relationship, sovereignty can be conceptualized as consisting of principled and derived dimensions. The former refers to the authority from which power is derived (the power that makes government) and the latter to the authorizing power granted to the agent to work toward the ends of society. The second and third sections of this chapter find in the political and legal thought of James Wilson evidence indicating that he understands sovereignty in these terms. According to Wilson, the American people are the principle sovereign and are responsible for the creation and limitation of government. Unlike other social contract theorists, Wilson does not view government/society as artificial. Viewing man as a social creature who naturally enters society and government, Wilson argues that government is natural. Government at both the national and state levels, are created to execute the will of the people. This does not mean that they have unlimited authority to pursue these ends. Wilson limits the power of government by conceptualizing the relationship between
principled and derived sovereigns as a representative trust where government is further restrained by checks and balances as well as federalism. These restrictions ensure that derived sovereignty can safely be placed in government and prevent tyranny. Finally, the chapter concludes by considering Wilson’s understanding of sovereignty as elucidated here in light of other scholarly interpretations. Other scholarship mistakenly views sovereignty as a single dimension. Not only is this an inaccurate reading of Wilson, but calls into question accounts of Wilson on judicial decision making that incorrectly maintain that sovereignty consists only of a single dimension.

Sovereignty as a Multi-Dimensional Concept

The United States Constitution is grounded on a single, multidimensional theory of sovereignty (Mogg 2006, 3). This single, multidimensional theory of sovereignty can be conceptualized as a principle-agent relationship. In government, the principle-agent relationship is present to determine how authority should be allocated. The principle, in the situation, is where the initial authority comes from. Looking towards the creation of the United States Constitution, each Founding Father had a different idea of where this authority originates. Patrick Henry captures the apparent nature of this tension when he states:

My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask who authorized them to speak the language of, *We, the People*, instead of *We, the States*? States are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all the States (Storing 1985, 297).
Generally, scholars follow the dichotomy identified by Henry by focusing on the choice between national sovereignty on the one hand, and state sovereignty on the other hand. When one employs the principle-agent relationship when looking at sovereignty, one finds that the simple national/state sovereignty dichotomy obscures a more fundamental distinction in the American understanding of sovereignty.

In order to understand the framework of the principle-agent relationship applied in the United States Constitution, it is important to discuss each dimension of this model in detail. The first dimension is principle sovereignty. Principle sovereignty is the authority from which power is derived. This is the authority on which government is created. However, the questions that are most often debated when discussing principle sovereignty is: Who is the final authority? Who are the parties to the contract? There are three answers to the question according to the Founding Fathers. First, the people in their collective capacity are held sovereign. According to this understanding, every decision made by the people in their collective capacity is deemed to constitute the common good. The concern with this understanding is clearly identified by James Madison in “Federalist #10” as the problem of faction. Madison identifies faction as “a number

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3 Literature showing that the Founders created a confederal system where the states are sovereign includes Berger (1987). Literature arguing that the Founders created a national system where the American people are sovereign includes Wood (1998, 362), Rossiter (1966), Onuf (1988), and Diamond (1992). Finally literature arguing that the Founders were guided by neither principle nor abstract political philosophy, but by their private interests includes Beard (1935).

4 Interpretations of theorists addressing the topic of sovereignty demonstrate that the principle/agent relationship has historically informed the debate over sovereignty (Mogg 2006). For a theorist like Bodin, the sovereign is seen as the “earthly image of God” (Bodin 1992, 46). However, the sovereign in his example fits into the principle-agent model and serves as the agent. For Bodin, the principle is the laws of God and nature (Bodin 1992, 10). For Hobbes and Locke, the principle appears to be the people in the state of nature (Locke 1980, 47-48; 52-53; 56; Hobbes 1994, 110). This is not to suggest that Hobbes and Locke are in complete agreement on the topic of sovereignty. While Hobbes views the sovereign as ultimate in power and authority (Hobbes 1994, 109) Locke views the difference of express and tacit consent as a way of determining the power of the selected sovereign upon the people in their collective capacity (Locke 1980, 347-48).
of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” (The Federalist #10, 43). The job of government according to Madison is “To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and form of popular government, is then the great object to which our inquires are directed” (The Federalist #10, 45). The fear of faction was widespread among the Founding Fathers in the creation of the Constitution.

The second holds that the states are sovereign. This understanding is that the people are represented through their respective states. The states themselves are seen as individual sovereigns containing both principle and derived sovereignty. In thinking about the first two understandings of principle sovereignty, the Constitution can be read as supporting both interpretations. The Preamble, on the one hand, begins with “We the People…” and ratification of the Constitution, on the other hand, is done on a state-by-state basis (Article VII). Both conceptions of principle sovereignty support the decision of the Founding Fathers in the drafting of the Constitution to include a series of checks and balances and a clear separation of powers. The idea of federalism would ensure that the principle sovereign would retain their sovereign power while creating a separate federal government. This would remain true whether the Founders believed the principle sovereign was the people in their collective capacity, or the separate states. A third option is suggested by Mogg (2006) where the people are sovereign at the state level, but not at the national level. For example, the people of Massachusetts are viewed as the principle, and the Massachusetts state government serves as the agent. The Massachusetts state government gains their power from the people who reside in Massachusetts.
Therefore, the Massachusetts state government is responsible for carrying out the wants and needs of the people in their state. Each state deals with different issues depending on their constituents. According to Mogg, it does not appear that states can possess both aspects of sovereignty. To the extent that states do contain principle and derived sovereignty, it is only with regard to the ratification or amendment of the Constitution (see Article V and Article VII).

Derived sovereignty is the second dimension of the principle-agent relationship. Derived sovereignty is the authority/power that the principle grants to the agent. Another way of looking at this bond is as a trust. The principle sets standards to achieve a specified goal (ends of government). The agent is entrusted with power from the principle to work towards that goal, and satisfy the principle’s standards. In accordance with this conception of the principle/agent relationship of sovereignty, what can be agreed upon by all is that principle sovereignty is absolute, indivisible, and nontransferable (Mogg 2006, 184-85). Without these three aspects, the principle-agent relationship cannot work.

The aspect of sovereignty being absolute means that it is only limited by the ends of government. This is important because it is by the ends of government that the value of society is evaluated. Depending on which political theorist one looks to, there are many different “ends of government” that limit the derived sovereign and inform our evaluation of the derived sovereign’s performance. For Bodin, it is the acceptance of God. Bodin states “For as much as by the goodness of the end we measure the worth and excellence… so that by how much the end of every city or commonwealth is better or more heaven-like, so much is it be to be deemed
worth to excel the rest” (Bodin 1962, 3D). For Locke, the preservation of property serves as the ends of government (Locke 1980, 27-28; 45-46). Locke believes this is achieved when government is conceptualized as a trust who is responsible for dictating the life, liberty, and property of the people. For Rousseau, the end of government is the common good. Rousseau says the purpose of government is to “defend and protect, with the whole of its joint strength, the person and property of each associate, and under which each of them, uniting himself to all, will obey himself alone, and remain free as before” (Rousseau 1994, 54-5). Rousseau looks at the role of sovereignty in terms of a community where the sovereign is governed by the general will of the people. The general will is absolute in areas of common interest, limited only by the ends of government (Mogg 2006, 70). In order to achieve each of these ends of government, it is essential the principle sovereign contain absolute authority. If the principle sovereign does not retain absolute authority, it will not be able to properly delegate power to the agent in the principle-agent relationship.

Indisvolibility is the inability to divide the authority of the principle sovereign. The principle sovereign contains all of the authority, and although power can be derived from this initial authority, it can never be dissolved or divided. The principle sovereign always retains its power. The principle sovereign serves as the final and sole authority. There can only be one principle sovereign. If there is more than one principle sovereign, an issue is created in the principle-agent relationship. It becomes inverted. If more than one principle sovereign exists, it allows the agent to strategically become the principle. If the agent does not agree with the dictates of one principled sovereign, they can turn to another based on their own preference.

5 For the 1962 version of Bodin, citations refer to the page number and section.
This creates an issue in achieving the ends of government as designated by the principle sovereign. If the agent has the ability to choose how they use the power allocated to them with full discretion, the principle is essentially dividing their power and sharing it with the agent. This is why indivisibility is important to maintaining the principle-agent model.

The last aspect of the principle/agent relationship is that principle sovereignty remains nontransferable. Hobbes makes this very clear when he discusses the obligation of the sovereign to maintain his/her/their power. For Hobbes this serves as a limitation upon his ultimate sovereign, stating “There can be no breach of the covenant on the part of the sovereign; and consequently none of his subjects, by any pretense of forfeiture, can be freed from his subjection” (Hobbes 1994, 111). Derived sovereignty however must be transferable. Making the second dimension of sovereignty transferable allows for an open acceptance of the decisions made with the power of the derived sovereign, while also binding the whole to its actions. The principle sovereign has the initial, non-transferable authority so that it can better allocate and transfer power to the agent, so that it can perform certain functions. The agent is in place so that it can act towards the goals the principle wishes to achieve. Where the principle is limited by the ends of government, the agent works towards those ends. This is clearly seen in the United States Constitution with the separation of powers. Each branch is allocated certain powers in order to achieve the ends of government, which are essentially the happiness and the acceptance of the people at large. This sentiment can be found in Alexander Hamilton’s analysis of the Preamble of the Constitution in “Federalist #84,” in which he states that the Preamble “is a better recognition of popular rights, than volumes of those aphorisms, which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government” (Federalist #84, 445). The restriction of principled
sovereignty being non-transferable assures the first two aspects of principled sovereignty (absolute and indivisible), further maintaining the need for a single sovereign.

Political theorists have given considerable attention to the three aspects of principled sovereignty. Given the two dimensions of indivisibility and nontransferable, the key question is who or what is sovereign? For Rousseau, it is the separation of sovereignty from power, Locke trust, and Blackstone suffrage. For Hobbes and Blackstone, sovereignty is artificial in nature. Therefore they disagree with the concept of authority being non-transferable and feel power must be transferred either indirectly or directly. For Bodin, the power is transferred from the people to the sovereign King. Once the power is transferred to the King, it cannot be returned. According to Locke and Rousseau, sovereignty is real and serves as a social construct of government. Locke looks at government as a social construct and manifestation of popular sovereignty, including a trust similar to the model of the principle-agent relationship. Rousseau focuses heavily on the transfer of power. According to Mogg (2006, 72), the Founders conception of sovereignty is somewhere between Locke and Rousseau in their commitment to popular sovereignty. The Founders refine Locke’s position, and provide avenues in which popular sovereignty can be exercised within the confines of government. The Founders also refine Rousseau into a less robust view of sovereignty and the transfer of power. The Founders, using the principle-agent relationship of principle and derived sovereignty, attempted to resolve the tension created by political theorists’ analysis of what sovereignty should have recourse to when drafting the Constitution. They were faced with the challenge of creating a situation where they

\[6\] Wilson supports the idea of Lockean trust, stating “when such trust is abused, it is thereby forfeited, and devolves to those, who gave it” (Wilson 2007, 441). Locke looks at trust in government to secure the individual rights and liberties of the people.
can all accept the indivisible nature of sovereignty, while at the same time seeming to divide it. The Founders respond to the issue of indivisibility by creating a federal system. Although there is a division of powers between the national and state governments, the national government remains supreme. This is clearly exemplified in the Supremacy Clause of the Constitution found in Article VI. The power of the states can never overpower the federal government if the initial authority is given to it.

**James Wilson: Principle Sovereignty**

For Wilson, the principle sovereign is the people, and derived sovereignty is seen as an administrative function left to the national government and the states. According to Wilson’s pyramid of government, “The authority, the interests, and the affections of the people at large are the only foundation, on which a superstructure, proposed to be at once durable and magnificent, can be rationally erected” (Wilson 2007, 833-34). The people in their collective capacity serving as the principle sovereign are essential to Wilson and are essential in the creation of government and society. Wilson states “the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner they shall deem it expedient” (Wilson 2007, 441). As to why Wilson places principled sovereignty in the hands of the American people, it is necessary to consider his view of human nature.

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7 It is also important to note that Wilson refers to the people in the national sense, not the people of their respective states. This distinction was stated earlier in the discussion of who should be viewed as the principle sovereign according to the Founders.
Wilson views humans as social creatures, therefore making the formation of society and desire to better maintain their natural liberty and property a consequence of a natural inclination/instinct. Wilson notes “It is not fit that man should be alone” (Wilson 2007, 621). This sentiment of sociability which is natural in all humans drives men together in order to better their own lives, and to help maintain their own self-preservation. Wilson describes society as:

Each individual would engage with all the others to join in one body, and to manage, with their joint powers and wills, whatever should regard their common preservation, security, and happiness. In consideration of this engagement, made by each individual with all the others, all those others would engage with each individual to protect and defend him from injury, and to secure him in the prosecution of every just and laudable pursuit. These reciprocal engagements from each individual to all the others, and from all the others to each individual from the political association. Those who do not enter into them are not considered as a part of the society (Wilson 2007, 553-54).

In accordance with the separation and division of sovereignty within this newly formed society, Wilson states “When the society was formed, it possessed jointly all the previously separate and independent powers and rights of the individuals who formed it, and all the powers and rights, which result from the social union” (Wilson 2007, 556). With the people being the principle

8 This touches on the tension between natural law and natural right found in Wilson’s political and legal thought. In “Rethinking America’s Modernity,” Eduardo Velasquez focuses on Wilson’s natural law teaching (Velasquez 1996, 194). Wilson views natural law with an emphasis on self-preservation, which is most likely influenced by Hobbes and Locke (Velasquez 1996, 195). Through a further analysis of Wilson on Scripture, Velasquez shows that Wilson’s initial praise of Thomistic natural law turns out to be an argument in favor of modern natural right, where happiness or pleasure is the foundation of natural law (Velasquez 1996, 200-205). Given this emphasis, it is then possible to reject the Thomistic reading of Wilson and instead focus on Wilson’s grounding of natural law on feelings (moral sentiment) where reason serves as a servant of human emotions (Velasquez 1996, 199). In “The Language of Liberty and Law,” James R. Zink makes an effort to reconcile the primacy of natural rights with the political necessity of fostering a sense of civic duty and attachment for the public good amongst the citizenry in Wilson’s political thought. He supports the idea that Wilson was a strong supporter of natural rights serving as the standard of legitimacy that requires the ongoing consent of the governed beyond the initial establishment of government (Zink 2009, 449). Zink also mentions the affiliation with Thomistic natural law, but agrees with Velasquez that Wilson is more of an advocate for natural rights. Zink states “…Wilson’s writings and speeches make apparent the founding generation’s thoroughgoing commitment to the natural rights political philosophy” (Zink 2009, 443).
sovereign in which the authority to create government is based, it is clear that the consent of the people is essential to create and maintain the state. Consent works for Wilson because of man’s social nature. This is important because it distinguishes Wilson’s liberalism from Barnett’s (2004). The idea of common consent being the root in the origin of society is what creates a sense of equality and security. According to Wilson, “consent is the sole obligatory principle of human government and human laws” (Wilson 2007, 579). Wilson explicitly states this later in his lectures, stating “…with one common consent, whatever regards their preservation, their security, their improvement, their happiness. In the social compact, each individual engages with the whole collectively, and the whole collectively engage with each individual” (Wilson 2007, 636). This common consent creates a bond between the individual and others that agree to enter into society.

Wilson’s emphasis on consent speaks to a similarity between his thought and that of Locke. However, it is important to note that there is a distinction between Wilson’s political thought and Locke’s social contract theory. Locke argues that the primary reason man leaves the state of nature in order to enter society is to secure and enjoy property (which includes life, liberty, and estate) (Locke 1980, 46). Wilson, drawing on the philosophy of the Scottish Enlightenment, views man as a social animal, which is much closer with the ancient understanding of the creation of society.⁹ According to Wilson, the idea of society served as an

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⁹ Velasquez reviews Wilson’s conception of man as a social animal. He states “Above all, the principles of sociability are not incompatible with the view that government is constituted by the consent of the governed. Consent implies mutual recognition of and thus mutual regard for the rights of our fellow human beings” (Velasquez 1996, 211). Velasquez also touches upon Wilson’s idea of the moral sentiment, which suggests that individual passions are necessary in order to maintain good government and a healthy society (Velasquez 1996, 211). He further emphasizes this, stating “Wilson’s purpose in alerting us to the role necessity plays in bringing us together is not to deny the spontaneous and genuinely other-directed passions by which human society is bonded” (Velasquez 1996, 213). In the Section VI on Consent, Velasquez also makes the argument that Wilson’s “social” animal is
attractive option for savage man living in the state of nature. Wilson describes society as “the powerful magnet, which by its unceasing though silent operation, attracts and influences our dispositions, our desires, our passions, and our enjoyments” (Wilson 2007, 621). Society is able to do this through the creation of laws and the development of social obligation through the creation of government.

Once man has formed society, there appears to be a necessity for the creation of government. According to Wilson, government is instituted in order to increase the liberty of the people, perfect society, and protect their natural rights. Wilson states “Government was instituted for the happiness of society… let government – let even the constitution be, as they ought to be, the handmaids; let them not be, for they ought not to be, the mistresses of the state” (Wilson 2007,635). The people being the principle sovereign for Wilson, it is important that government be instituted not only by their consent, but also by their will. Wilson asks the question “Does man exist for the sake of government? Or is government instituted for the sake of man” (Wilson 2007, 1053)? Given Wilson’s strong support of a social contract theory, and of the common consent of man being the only legitimate force of obligation of individuals to the laws of society and government, it would appear that he agrees with the later statement. Wilson describes the mutual dependence that society imposes on the people, stating “Society supposes mutual dependence: mutual dependence supposes mutual wants: all the social exercises and enjoyments may be reduced to two heads – that of giving, and that of receiving: but these imply different aptitudes to give and to receive” (Wilson 2007, 637). Although man is expected to forfeit some of his natural liberty in order to empower society, society and government is not the more “gregarious,” than “political,” which suggests his rejection of Wilson’s social animal as similar to that of Aristotle or Thomas (Velasquez 1996, 214). This idea is dependent upon Wilson’s conception of man in the state of nature, which is influenced by his teaching in the Scottish Enlightenment.
sovereign. Wilson describes natural liberty as “provided he does not injury to others; and provided some public interests do not demand his labors. This right is natural liberty. Every man has a sense of this right. Every man has a sense of the impropriety of restraining or interrupting it” (Wilson 2007, 638). The people retain their natural liberty for the most part, when entering upon society due to the knowledge Wilson describes. However, Wilson also identifies two restraints on natural liberty. The first restraint is that his/her actions may not harm another. This concept falls within the lines of equity. The government must protect the natural liberty of all citizens, therefore restricting others from doing anything that would prevents another from expressing their natural liberty. The second restraint requires that their action may not interfere with the needs of society as a whole. This entails that people will push aside their selfish desires in order to attribute to the betterment and perfection of society. This action is driven by the moral sentiment. Wilson further emphasizes this point, stating “The right of natural liberty is suggested to us not only by the selfish parts of our constitution, but by our generous affections; and especially by our moral sense, which intimates to us, that in our voluntary actions consist our dignity and perfection” (Wilson 2007, 639). According to Wilson’s conception of human sociability, a social duty is created by society. Libertarians often argue that the act of consent is not binding and consequently, there is only a duty to obey the laws of society when there is unanimity (Barnett 2004, 12, 25). Wilson’s social duty serves as an effective response to this argument through his conception of the laws serving as an educational function.

Laws serve as the educational function in expressing social duties, in order to create better citizens. Wilson describes the science of law as “the study of every free citizen, and of every free man. Every free citizen and every free man has duties to perform and rights to claim.
Unless, in some measure, and in some degree, he knows those duties and those rights, he can never act a just and independent part” (Wilson 2007, 435). In order for individuals to become better citizens, it is important they know what is required of them in order to maintain society. Wilson says “Our progress in virtue should certainly bear a just proportion to our progress in knowledge” (Wilson 2007, 525). Good laws educate individuals to not only become virtuous citizens, but also serve to educate the people on natural law, while also serving as a protector for natural rights. Wilson describes the importance of education stating “But law and liberty cannot rationally become objects of our love, unless they first become the objects of our knowledge” (Wilson 2007, 435). The laws should teach the people about how to discover the law of nature, and therefore obligate them to act by those laws. Wilson describes the laws of nature as “the measure and the rule; they ascertain the limits and the extent of natural liberty” (Wilson 2007, 639). Natural law serves as a standard for how individuals “ought” to live. The natural law, which is endowed into our hearts by God according to Wilson, is accessible to us through the guidance of the moral sentiment. Natural rights serve as a standard for how government ought to behave. Natural rights are a restriction on the government’s encroachment on the people’s natural liberty. Once the people have gained a proper understanding of the natural law and natural rights, they are able to determine the proper course of action for bringing society closer to enlarging the right of natural liberty to a point beyond that achieved in the state of nature. Therefore, in order for the people to serve as the principle sovereign in Wilson’s conception of popular sovereignty, it is required that the people are educated on the natural law and natural rights. Wilson emphasizes this point stating “the principles of a law education are matters of the greatest public consequence” (Wilson 2007, 44). It is only through this education that limited
government is possible. Wilson states “Among the ancients, those who studied and practiced the sciences and jurisprudence and government with the greatest success, were convinced and, by their conduct showed their conviction, that the fate of the states depends on the education of the youth” (Wilson 2007, 906). In order for society to be happy, Wilson considers education to be a necessary tool. Without knowledge of the laws of nature, the people will not be able to successfully form a society that will benefit their wants and needs.

With this conception of natural liberty, it is important to create a society that will allow for this natural liberty to be maintained and protected. If this natural liberty is not protected, the people at large will not consent to it. According to Wilson “The only rational and natural method, therefore, of constituting civil society, is by the convention or consent of the members, who compose it. For by a civil society we properly understand, the voluntary union of persons in the same end and in the same means requisite to obtain that end. This union is a benefit, not a sacrifice: civil is an addition to natural order” (Wilson 2007, 635). If entering into society requires the complete forfeit of individual rights and natural liberty, there is no obligation to the rules and laws created by this new society. Wilson states “Every citizen, as soon as he is born, is under the protection of the state, and is entitled to all the advantages arising from that protection: he, therefore, owes obedience to that power, from which the protection, which he enjoys, is derived” (Wilson 2007, 641). In accordance, Wilson states the purpose of government is to “secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind”

\[^{10}\text{This conception of the laws serving as an education tool is supported by ancient political theorists. See Aristotle’s Nicomachean Ethics (2002, 1103a-b; 1152a; 1179b-1180; 1111b :). On the relationship between education and perfectibility in the thought of Wilson see Zink (2009, 453).}\]
(Wilson 2007, 1061). Therefore, according to Wilson, the answer to his previously proposed question is “Man does not exist for the sake of government, but government is instituted for the sake of man,” which remains consistent with his idea of the people serving as the principle sovereign (Wilson 2007, 1083).

For Wilson, the people in their collective capacity serve as the principle sovereign. Principle sovereignty is absolute, indivisible, and nontransferable and as such, “the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner they shall deem it expedient” (Wilson 2007, 441). Government is instituted in order to better secure and protect the natural rights, liberties, and property of citizens. Obligation and attachment to this government is instituted through a common consent, similar to the initial consent of savage man entering into society. Wilson states “I would say, that no other person on earth can oblige him, but that he certainly can oblige himself. Consent is the sole principle, on which any claim, in consequence of human authority, can be made upon one man by another” (Wilson 2007, 572). It is the job of government to maintain the common consent, and achieve the goals set forth by the will of the people with the derived power it receives.

**James Wilson: Derived Sovereignty**

Society and government receive their power and authority from the people. Madison makes this point in “Federalist #39,” stating “we may define a republic to be, or at least may bestow that name on, a government which derives all its power directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government, that it be
derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it” (Federalist #39, 194). Wilson supports this idea of the government deriving all power from the people in its collective capacity when he discusses the concept of trust. He equates this concept with the revolution principle, stating “that, the sovereign power residing in the people; they may change their constitution and government whenever they please – is not a principle of discord, rancor, or war: it is a principle of melioration, contentment, and peace” (Wilson 2007, 443). In order for the people to trust the authority bestowed in government, they must know they are the ones who originally allocated that power, and that the power contained within government is for the purpose of working towards their own happiness. Consequently, it is important that government does not infringe upon the natural liberty of its citizens. This is an action that would betray the trust and obedience bestowed upon it. Wilson states that “in order to obtain the blessings of a good government, a sacrifice must be made of a part of our natural liberty” (Wilson 2007, 1055). However, it is important to note that man does not sacrifice his natural liberty completely. Wilson identifies the job of government as enlarging and securing “the exercise of the natural liberty of man: and what I say of his natural liberty, I mean to extend, and wish to be understood, through all this argument, as extended, to all his other natural rights” (Wilson 2007, 1055). This argument for the job of government reflects the natural rights influence in James Wilson’s political thought.

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11 For Wilson, this connects the Constitution to what, for him, is the central theme of the American Revolution; popular sovereignty. The second paragraph of the Declaration of Independence states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” Society and government is formed in order to serve as an agent to the wants and preferences of the people, therefore reinforcing the idea of popular sovereignty as a principle-agent relationship.
The derived sovereign has the job of achieving the ends of government in which the principle sovereign intends. For Wilson, the ends of government as previously stated are to increase the liberty of the people, perfect society, and to protect the natural rights of individuals. These ends of government entail a need for equality, happiness and trust of the people. Trust in particular, refers to the earlier discussion regarding the nature of the principle-agent relationship where the principle authorizing the agent to do something can be viewed as a trust. Two separate jobs are implied by the nature of this trust. The first is the power of a delegate. The agent must supply what the people want. However, what the people want is not always what is best for society. Therefore, the second job of the agent is to serve as trustee. The government must review what the people want, and determine the best way to achieve this, without negatively effecting society. As trustee, the agent is granted considerable power and it is thus necessary to prevent the agent from abusing this power. Wilson achieves this and ensures that the agent works toward the ends of society through the Constitution’s system of representation, the separation of powers, and federalism.

*Representation*

It is important to Wilson that representation be free and equal. Wilson defines representation as “the chain of communication between the people and those, to whom they have committed the exercise of the powers of government” (Wilson 2007, 834). However, Wilson recognizes the need for artificial persons to serve as actors in government in order to better achieve what they people want and need.\(^{12}\) Wilson states “To the legitimate energy and weight of

\(^{12}\) According to Wilson, in the eyes of government, people are divided into two kinds; natural and artificial. Wilson states “Natural persons are formed by the great Author of nature. Artificial persons are creatures of human sagacity
true representation, two things are essentially necessary. (1) That the representatives should express the same sentiments, which the represented, if possessed of equal information, would express. (2) That the sentiments of the representatives, thus expressed, should have the same weight and influence, as the sentiment of the constituents would have, if expressed personally” (Wilson 2007, 837). Wilson wants representatives to have strong links with the people’s sentiments, but at the same time echoes a similar notion of refining the voice of the people seen in “Federalist #10.” There, James Madison writes that the government created by the United States serves to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom at best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations” (The Federalist #10, 46). However, refinement does not allow for unrestrained discretion. It is important that representatives remain true to the will of the people. Wilson states “The members will be apt to forget the source from which they have received their powers. Every government, in order to preserve its freedom, has frequent need of some new provisions in favor of that freedom. Such new provisions are most likely to spring from those, who have been recently animated by the inspiration of the people” (Wilson 2007, 723). It is necessary to the legitimacy of a representative government that the people retain trust in their representatives. If representatives act against the will of the people, the people have the right to remove them.

Frequent elections serve as an important feature of free and true representation because they assure that the government is aware of the new and changing opinions of the people at large. Wilson states “A representation, inadequate, unequal, and continued too long, is inconsistent and contrivance; and are framed and intended for the purposes of government and society” (Wilson 2007, 829). Government requires artificial persons in order to achieve the ends of government.
with the principles of free government: for by such a representation, it is probably the sense of
the people will be misapprehended or misrepresented, or despised” (Wilson 2007, 723). It is
essential to the principle-agent relationship that the wants and needs of the people are not
misinterpreted. If the wants and needs of the people are not known to government actors, the
agent in the principle agent relationship cannot work towards the ends the principle is
designating for their happiness. This need is expressed through not only the frequent election of
Congress, but also the existence of term limits on the President, and the term limits on local
authorities. Term limits guarantee that if the people are not satisfied with their government
officials, they will be able to express their dissatisfaction in the next election. Term limits help
to retain the authority of the people as principle sovereign.

It is also essential to Wilson’s theory of representation that suffrage be free and open as
well. Wilson states “Every citizen, who circumstances do not render him necessarily dependent
on the will of another, should possess a vote in electing those, by whose conduct his property, his
reputation, his liberty, and his life, may be all most materially affected” (Wilson 2007, 838).
Wilson believes that the right of suffrage is the most important connection between the people at
large and government. It serves as the strongest link in the principle-agent relationship. Wilson
states “the right of suffrage, properly understood, properly valued, and properly exercised, in a
free and well constituted government, is an abundant source of the most rational, the most
improving, and the most endearing connection among the citizens” (Wilson 2007, 836). The
right of suffrage also entails the people at large to be educated, by good laws, what is necessary
and essential to maintaining a healthy and happy society. Wilson describes the purpose of
representative government in length, stating:
Men, frail and imperfect as they are, must be the instruments, by which government is administered. But, in order to guard against the consequences of their frailties and imperfections, one effort, in the contrivance of the political system, is, to provide, that, for the offices and the departments of the state, the wisest and the best of her citizens be elected. A second effort is, to communicate to the operations of government as great a share as possible of the good, and as small a share as possible of the bad propensities of our nature. A third effort is, to increase, encourage, and strengthen those good propensities, and to lessen, discourage, and correct those bad ones. A fourth effort is, to introduce, into the very form of government, such particular checks and controls, as to make it advantageous even for bad men to act for the public good. When these efforts are successful, and happily united; then is accomplished what we truly mean, when we speak of government of laws, and not of men; then every man does homage to the laws; the very last as feeling their care; the greatest as not exempted from their power (Wilson 2007, 695-96).

If representation is true and equal, the people will feel an obligation and obedience toward the government created by it. Representative government serves as the best tool for the people at large to have their wants and needs achieved.

*Separation of Powers*

Another important aspect of derived sovereignty for Wilson is the clear separation of powers designated in the Constitution. The most important aspect of Wilson’s conception of separation of powers is the maintenance of clear boundaries between the three branches. Wilson states:

The independency of each power consists in this, that its proceedings and the motives, views, and principles, which produce those proceedings should be free from the remotest influence, direct or indirect, of either of the other two powers. But further than this, the independency of each power ought not to extend. Its proceedings should be formed without restraint, but, when they are once formed, they should be subject to control (Wilson 2007, 707).

Wilson intimates the importance of independency in order to insure that each branch has an equal amount of authority, therefore legitimizing its use of authority over the people at large.
However, it is also important to note that without one branch, the other two could not exist due to the allocation of powers given to each. Wilson states “Between these three great powers of government, there ought to be a mutual dependency, as well as a mutual independency” (Wilson 2007, 707). This mutual dependency is essential in achieving what the will of the people designates because it provides checks against the misuse of derived power. Wilson, along with other Founding Fathers, views the establishment of this system of checks and balances/separation of powers as introducing a novel idea to the problem of perfecting government. Hamilton describes the separation of powers in the following terms:

The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature, by deputies of their own election; these are either wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained, and its imperfections lessened or avoided (Federalist #9, 38).

Wilson attributes the Constitution as the main enforcer of these boundaries. Wilsons states “By the invigorating and overruling energy of a constitution, the force and direction of the government are preserved and regulated; and its movements are rendered uniform, strong, and safe” (Wilson 2007, 712). The existence of the United States Constitution, in its written form, serves as the ultimate security against power encroachment by the government. This security is intimated in “Federalist #47,” where Madison describes tyranny as “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (Federalist #47, 249). The separation of powers between legislative, executive, and
judiciary, is an effective prevention from tyranny. This is especially true when political power is allocated along the vertical dimension of federalism.

In addition to the separation of powers between the three branches of government, the Constitution also places internal checks within each branch of government, to provide more security to the authority the people hold as principle sovereign. The legislative power, according to Wilson, must be “absolute, uncontrolled, irresistible, and supreme” (Wilson 2007, 579). Wilson’s reasoning for this involves the legislative branch’s authority to create law which must be a reflection of the principled sovereign’s will. Wilson states “the power, which makes the laws, cannot be accountable for its conduct” (Wilson 2007, 579). Since the law is of upmost importance to Wilson, it is important that nothing can interfere with the power of creating the laws. Wilson states “Human laws are nothing else but the decrees of the supreme power, concerning matters to be observed, by the subjects, for the public good of the state” (Wilson 2007, 579). Laws are created by the agent, Congress, from the derived power of the supreme power the people, in order to maintain the happiness of the people at large. This ensures the power of lawmaking to just one branch of government, allowing for clarity and consistency. Although the power of lawmaking is specifically allocated to the legislative branch, Wilson emphasizes “the powers of the government, whether legislative or executive, ought to be restrained” (Wilson 2007, 873). During the Constitutional Convention, Wilson was a strong supporter of bicameralism. Bicameralism forces members of both houses to create laws that would best serve the people, and would best abide by the regulations set forth by the Constitution. Requiring each house to get the approval of the other house in order to pass a bill into law ensures the bill has been carefully reviewed by both the aristocratic Senate and the
popularly elected House of Representatives. Wilson states “Every bill will, in some one or more steps of its progress, undergo the keenest scrutiny. Its relations, whether near or more remote, to the principles of freedom, jurisprudence, and the constitution will be accurately examined: and its effects upon the laws already existing will be maturely traced” (Wilson 2007, 848). This extra check allows extra security for the people’s wants and preferences. Wilson states the existence of a bicameral legislature will ensure “their sentiments, and views, and wishes, and even their passions, will have received a deep and recent tincture from their sentiments, and views, and wishes, and passions of their constituents” (Wilson 2007, 849). Both chambers of the national legislature should be open to the public according to Wilson. Wilson states “the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained” (Wilson 2007, 857). The checks of bicameralism, frequent elections, and open sessions ensure the legislative branch maintains its law making power, but does not over-extend its power and encroach on the authority the people maintain.

Although Wilson supports bicameralism in the legislature, he is not a supporter of a multiple executive. Wilson believes a single executive is more conclusive to maintaining boundaries between the three branches of government. Wilson states “the legislature, in order to be restrained, must be divided; whereas the executive power, in order to be restrained, should be one” (Wilson 2007, 873). A single executive represents unity, which is attributed with the

13 When the Constitution was originally ratified, only the House of Representatives was popularly elected. The Senate was originally elected by state legislatures until the passage of the Seventeenth Amendment in 1913 which allowed for direct election of Senators.
quality of energy in the executive branch. In “Federalist #70,” Alexander Hamilton describes energy as a leading characteristic in the definition of good government (Federalist #70, 362). He states that energy is “essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises of assaults of ambition, of faction, and of anarchy” (Federalist #70, 362). With this conception of energy expressed in The Federalist, Wilson stresses the necessity of term limits and popular election, as well as electoral election as placing limits upon the executive power. When discussing the election of the president, he turns to ancient elections of a supreme ruler. He praises the selection of a King by the old Saxons who selected their ruler based on merit, instead of heredity. Wilson describes this selection as democratic, stating “His title rested upon the good opinion of the freemen; and it seemeth to be one of the best gems of his crown, for that he was thereby declared to be most worthy of the love and serve of the people” (Wilson 2007, 874). Election upon merit by the people ensures the best candidate was chosen. However, consistent with his theory on representation, Wilson supports the existence of an electoral college. Wilson places restrictions on the Electoral College, mandating they vote by ballot, which he describes as “the silent assertor of liberty: with equal justness, it may be called the silent assertor of honesty” (Wilson 2007, 876). This process should, according to Wilson, to be the most effective in securing an effective single executive that would make the best decisions on behalf of the people.

The last branch, the judicial branch, is of particular interest when studying Wilson’s political thought. Wilson views the judicial branch as responsible for the maintenance of boundaries between the three branches of government. The Court cannot
void what is not contained within its proper sphere. The Court cannot make law.

However, the boundaries of the Court extend to

All cases, in law or equity, arising under the constitution, the laws, or the treaties
of the United States; to all cases affecting public minister and consuls; to all cases
of admiralty and maritime jurisdiction; to controversies, to which the United
States shall be a party; to controversies between two or more different states;
between citizens of the same state, claiming lands under grants of different states;
and between a state, or the citizens thereof, and foreign states, citizens, or subjects
(Wilson 2007, 895).

In accordance with this jurisdiction, Wilson believes the concept of judicial review is an implicit
power granted to the judicial branch in the creation of the Constitution. However, Wilson views
judicial review as a power granted to the judicial branch that serves as a similar check on both
the executive and legislative branches. Wilson states that “Each house will be cautious and
careful, and circumspect, in those proceedings, which, they know, must undergo the strict and
sever criticism of judges, whose inclination will lead them, and whose duty will enjoin them, not
to leave a single blemish unnoticed or uncorrected” (Wilson 207, 847). If a law passed by
Congress or the states is viewed as unconstitutional, the Court has the power to void the law.
However, the Court cannot void a law on any other authority. Wilson also makes a point to
distinguish the judicial branch as not containing executive power. Wilson states “It is sometimes
considered as a branch of the executive power but inaccurately. When the decisions of courts of
justice are made, they must, it is true, be executed; but the power of executing them is
ministerial, not judicial. The judicial authority consists in applying, according to transactions in
cases, in which the manner or principles of this application are disputed by the parties interested
in them” (Wilson 2007, 703). These checks ensure the Court acts within the boundaries
provided in the Constitution.
Federalism

Wilson was also a supporter of federalism. Wilson is often attributed as a nationalist, who wished to demolish state authority all together (see Wilmarth Jr., 2003, 172-184). However, this is not Wilson’s intention. Wilson describes federalism as “forming one nation, great and united; and as forming, at the same time, a number of separate states, to that nation subordinate, but independent as to their own interior government” (Wilson 2007, 832). For Wilson, the national government should derive its authority directly from the people rather than requiring the mediation of the states. Wilson’s idea of the national government containing the ultimate sovereignty over the states is best exemplified in his opinion in Chisholm v Georgia (1793). In his opinion, he explains how the state of Georgia, cannot have superiority over their natural creator, the people. The people, containing the ultimate authority, establish states to better achieve the ends they desire. According to Wilson, the states were established to “perfect” an already existing union (Wilson 1785, 66-68). For Wilson and his fellow Founding Fathers, unity was the central goal in the creation of the United States Constitution. Hamilton explains the priority of unity as a means of providing security. He states “A firm union will be of the utmost moment to the peace and liberty of the states, as a barrier against domestic faction and insurrection” (Federalist #9, 37). Although Wilson and Madison both agree with Hamilton on the need for unity, they recognize that the Constitution makes specific distinctions between national power and federal power (Federalist #39, 199). This creates another check against the encroachment of power by the government.

Conclusion
According to James Wilson, sovereignty is a multi-dimensional concept. The people serve as the principle sovereign, from which all power and authority should be derived. The government serves as the derived sovereign, created and maintained in order to fulfill the wants and preferences of the people. Wilson states “The dread and redoubtable sovereign, when traced to his ultimate and genuine sources, 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 and despised, may be appreciated as the first and fundamental principle in the science of government” (Wilson 2007, 25) Included in this is the central role of consent. Only through consent can government be considered legitimate to Wilson.

In order to better understand Wilson’s conception of sovereignty, it is important to compare his theories with those of his fellow founding fathers. In Power vs. Liberty (2000), James H. Read compares Wilson and Jefferson on this topic. According to Read, the central question that needs to be answered in regards to sovereignty is “How is it possible to reconcile powerful government with the liberty of those subject to its authority” (Read 2000, 90)? Wilson’s answer is to make the people sovereign. Thomas Jefferson on the other hand, feared the energetic government that Wilson proposes. According to Read, Wilson is assured that the people, as sovereign, stand as an effective check and boundary on such encroachment of power by the government. Central to this disagreement between Jefferson and Wilson is that Jefferson views the Constitution as creating a nation of sovereign states, where sovereignty is recognized primarily at the state and local levels (Read 2000, 90). Wilson, however, argues for a more robust concept of national sovereignty, where the people form the union at the national rather than state level. Wilson’s concept of energetic government and popular liberty reinforce one another (Read 2000, 90). According to Wilson, the creation of a federal government with a clear
separation of powers with internal and external checks and balances creates an energetic
government that is still subject to the will of the people.

Read, however, disagrees with Wilson’s dedication to the people serving as sovereign.
Read instead agrees with Gordon Wood (1998), and Edmund Morgan (1989), that sovereignty is
a mere “fiction,” that the people are tricked into believing in order to legitimize government
(Read 2000, 114-117). Accordingly, Read thinks Wilson was just as easily fooled into believing
the people served as the original authority. Read is incorrect in his study of Wilson. First, it is
important to note that all three of these scholars misinterpret Wilson and his contemporaries by
dismissing the idea of popular sovereignty amongst their political thought. Although historically
popular sovereignty does not appear to exist, it does not mean that the concept of popular
sovereignty is not an important element to Wilson’s political thought. It is also wrong to assume
that Wilson and his contemporaries believed in popular sovereignty as a way of scamming the
people into believing the “fiction” Morgan describes. To Wilson, civic participation and
people’s voice in government is crucial to the success of society. Another issue is that these
scholars are too reliant on the idea of sovereignty as a single dimensional concept. Read
specifically views Wilson as looking at popular sovereignty as a unitary concept. However, as
demonstrated above, Wilson views sovereignty as a multi-dimensional concept, where the
principle-agent relationship between the people and government exists. Like Hobbes, there are
easily identified markers of sovereignty in Wilson’s political and legal thought. This same
model of power is exemplified in the Constitution. These scholars make the mistake of
confusing Wilson’s conception of sovereignty, with his conception of power.
Given Wilson’s idea of popular sovereignty, it is important to discover its implication for judges. The position of a judge is to interpret and apply the law to different situations. However, the job of interpreting is perhaps the most difficult. How a judge should interpret a specific law is important, because a judge is supposed to be a neutral party. Neutrality is impossible in human nature. Judges consult extra-constitutional means when deciding cases. In order to answer this question, it is important to view Wilson’s conception of popular sovereignty and its implication for judges when making decisions. A judge, being an appointed office, has no direct link to the people as every other branch of government does. The next chapter will explore how Wilson’s concept of judicial authority secures this link, and maintains the idea of the people as principle sovereign.
Chapter Three: James Wilson on Judges as Agents-Plus

Serving as one of the first members of the United States Supreme Court, Wilson had the job of shaping the role of a judge, as well as its implications for society and the law based on the newly adopted Constitution. According to Wilson, a constitution is

that supreme law, made or ratified by those in whom sovereign power of the state resides, which prescribes the manner, according to which the state wills that government should be instituted and administered. From this constitution the power of government must be directed and controlled: of this constitution no alteration can be made by government; because such an alteration would destroy the foundation of its own authority (Wilson 2007, 304).

Wilson’s definition of a constitution relies upon the idea of sovereignty as a multi-dimensional concept, based on a principle-agent relationship. The Constitution is the supreme law. The people, as principle sovereign make the Constitution, and will their power to the agents of the government which they have created. These agents are designed to pursue the will of the people, and limited by the division of powers, and the boundaries set in the Constitution, in order to prevent tyranny. According to this logic, a judge serves as an agent of the people. A judge is to represents the wants and interests of the people. However, the nature of a judge cannot be treated the same as the nature of a representative in Congress. Representatives in Congress are supposed to be the most accurate voice of the people, with little or no alteration. Judges, on the other hand, are entrusted with the job of upholding the Constitution, while simultaneously educating the people on the law. Therefore, they can be considered as Agents-Plus. Judges serve as both an agent and educator of the principle sovereign, aiding the people in understanding their position as principle sovereign. Judges help educate the people to make them better citizens through their decision making and interpretation of the Constitution. According to Wilson, an educated citizenry is necessary for self-government. With a better
understanding of their citizenship, the people can direct their efforts towards the perfection of society, which is what Wilson seeks for the principle-agent relationship of sovereignty to achieve.

As Agents-Plus, it is important that judges read the Constitution as it was originally founded, in order to uphold and defend the will of the principle sovereign. It is essential that judges not interpret the Constitution by societal standards. Through this clarification, judges protect the Constitution from breaking down. By enforcing the boundaries between the three branches of government, judges serve as one of the greatest checks on tyranny. Wilson states “Nothing is more to be dreaded than maxims of law and reasons of state blended together by judicial authority. Among all the terrible instruments of arbitrary power, decisions of courts; whetted and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds” (Wilson 2007, 706). The fear of absolute government and tyranny is why the courts have the job of maintaining boundaries between state and federal jurisdictions and the three branches of government. Wilson’s use of policy here indicates that judicial decisions should not be based on political considerations. Decisions should reflect constitutional principle, which is nothing more than the will of the sovereign people.

This chapter addresses Wilson’s conception of judges as an Agents-Plus in three different roles. The first role is as agents. Judges are not to serve as political agents, in order to preserve the proper balance between the three branches of government. Wilson stresses the importance of an independent judiciary in completing the duties necessary of judges. Wilson also believes that as agents, judges should rely on scientific reasoning when making their decisions. The second
role is as representatives. Wilson designates three jobs to judges as a representative: (1) Not to make law, but to interpret it in light of the Constitution, (2) To promote a true science of law and to follow precedent grounded on scientific principles instead of Aristotelian prudence, and (3) Judicial review must be textually based. The third role is as educators. According to Wilson, judges have the social responsibility of educating the people (the principle sovereign) through their judicial decisions. This education not only clarifies the Constitution and the law, but also serves to educate the people about the nature of their responsibilities as principle sovereign. Included in this is Wilson’s concept of the moral sentiment, and its relationship with reason (the science of law). Wilson clarifies this relationship with his idea of judgment and its relationship with reflection, memory, and reason.

**Judges as Agents**

Since judges are representatives of the people, it is important that they are independent from the other branches of government. Wilson argues that the Courts “ought to be completely independent… They should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by anything, except their own behavior and consequences” (Wilson 2007, 704). Important to Wilson is that judges are not political agents. Where the executive and legislative branches have popularly elected members, either directly or indirectly, they become political agents that are restrained by the will of the people. This forces political agents to change their platform according to trends in the general populace. Since Supreme Court judges are appointed for life, they do not have concern with reelection, and therefore can make their decisions honestly according to the Constitution. This does not mean that judges are not agents of the people, it simply means that they are held above the fray of politics, and serve
only to protect the Constitution, which is the original expression of the people’s will. Wilson asks:

Can dignity and independence be expected from judges, who are liable to be tossed about by every veering gale of politics, and who can be secured from destruction, only by dexterously swimming along with every successive tide of party? Is there not reason to fear, that in such a situation, the decisions of courts would cease to be the voice of law and justice, and would become the echo of faction and violence (Wilson 2007, 704-05)?

The independence of the courts is crucial to maintaining a boundary between not only the three branches, but between the courts and politics. Since the court is not supposed to be a political body, its authority and power is very constricted. Hamilton, in “Federalist #78,” describes this issue stating “The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” (Federalist #78, 402). The Court’s authority relies upon the Constitution, rather than the current politics of society. This jurisdiction allows for judges to take on the responsibility of maintaining the Constitution, and most importantly, maintaining the boundaries between the three branches.

Maintaining these boundaries is one of the Supreme Court’s most important jobs. Wilson states “Liberty and security in government depend not on the limits, which the rulers may please to assign to the exercise of their own powers, but on the boundaries, within which their powers are circumscribed by the constitution. He who is continually exposed to the lash of oppression, as well as he who is immediately under it, cannot be denominated free” (Wilson 2007, 705). The enforcement of boundaries ensures that government will not become tyrannical.
The most important boundary to enforce is between the judicial and the legislative departments. The legislature creates the law, the judiciary interprets the law. Wilson argues “In consequence of it, the bounds of the legislative power – a power the most apt to overleap its bounds – are not only distinctly marked in the system itself; but effectual and permanent provision is made, that every transgression of those bounds shall be adjudged and rendered vain and fruitless” (Wilson 2007, 743). Using the power of judicial review, the Court can strike down a law if it conflicts with the Constitution. This allows the judiciary to maintain this boundary between the two branches. Wilson explains when he states “This regulation is far from throwing any disparagement upon the legislative authority of the United States. It does not confer upon the judicial department a power superior, in its general nature, to that of the legislature; but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superior power of the constitution – the supreme law of the land” (Wilson 2007, 743).

According to Wilson, an act should be declared unconstitutional by the Supreme Court if it violates the spheres of power (on an institutional level), or if it usurps power for the legislature. In “Federalist #51,” James Madison shares the same sentiment on the maintenance of boundaries in order to prevent the usurpation of power by another branch. Madison states “the society itself will be broken into many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority” (Federalist #51, 270). One of Madison’s biggest fears was the creation of a majority faction. The division of power, and the maintenance and enforcement of those divisions prevents against majority faction, and protects the interests of the minority. The enforcement of boundaries serves to maintain the Constitution is and always will be the supreme law, in which no branch of government can infringe upon.
In the case where the Constitution does not provide clear guidance, or consists of conflicting protections, judges should be entrusted to make equitable decisions. Wilson relies upon Aristotle’s definition of equity, which is “the correction of that, in which the law is defective, by being too general” (Wilson 2007, 924). According to Wilson’s understanding, the science of law is used to educate a judge on justice and equity. Wilson responds to arguments calling for separate courts of law and equity by arguing that equity is an inherent aspect and concern of the law and that the two cannot be separated.¹ Wilson critiques the British system, stating “When we find a court of law and a court of equity placed in contradistinction to each other, how natural is it to conclude, that the former decide without equity, and that the latter decides without law. Such a conclusion, however, is greatly erroneous” (Wilson 2007, 925). He describes the combination of a court of equity and a court of law when interpreting constitutional issues stating:

It has, indeed, been said, concerning a court of equity, that it determines by the spirit, and not by the letter of a rule. But ought not this to be said concerning a court of law likewise? Is not each equally bound – does not each profess itself to be equally bound – to explain the law according to the intention of those, who made it? In the interpretation of laws, whether strictly or liberally, there is not a single maxim, which is not adopted, in the same manner, and with the same force, by both courts. Hitherto, then, we find no difference between a court of law and a court of equity (Wilson 2007, 925).

Although others have tried to make the argument that courts of equity and law should remain separate entities, Wilson does not agree. Wilson states “law and equity are in a state of continual progression; one occupying incessantly the ground, which the other, in its advancement, has left. The posts now possessed by strict law were formerly possessed by equity; and the posts now possessed by equity will hereafter be possessed by strict law” (Wilson

¹ This is a key concern of the Anti-Federalists. See Arkes’ (1990, 21, 23-25) discussion of Brutus.
2007, 933-34). Here, Wilson appears to separate law and equity on the one hand, and science on the other. Science is grounded and proven, and informed by reason. This supports the theory of Hobbes, who believes scientific reasoning should be applied to the law. Hobbes says “reason is the pace; increase of science, the way; and the benefit of mankind, the end” (Hobbes 1994, 26). This suggests that both Hobbes and Wilson believe the use of scientific reasoning is the driving force which should solidify the law, justice and equity. For Wilson, applying scientific reasoning with equity helps to aid judges in translating the Constitution while simultaneously improving society. This sentiment is derived from Aristotle as well. Wilson attributes this idea to Aristotle, stating “equity may be well deemed the conductor of law towards a state of refinement and perfection” (Wilson 2007, 934). The idea of equity serving as a tool to refining and perfecting society, also suggests that equity can serve as an end of government and society. While Wilson attributes the creation of government as the agent for the will of the people, equity can serve as one of the ends government is designated to achieve.

**Judges as Representatives**

The second job of judges is to serve as representatives of the will of the people. On this front, Wilson identifies three important jobs designated for judges. The first is that they should not make the law (Wilson 2007, 738). Making the law is the job of the legislature. Judges have only the function of interpreting the law in light of the Constitution. Wilson states “In the United States, the judges stand upon the sure basis of the constitution: the judicial department is independent of the legislature” (Wilson 2007, 738). A judge can determine the constitutionality of the law, and strike it down with the power of judicial review, if and only if it is found to be unconstitutional. A judge has no other power to strike down a law other than this power,
limiting their ability to create the law. However, Wilson states “In many cases, the jurisdiction of the judges of the United States is ascertained and secured by the constitution; as to these, the power of the judicial is coordinate with that of the legislative department” (Wilson 2007, 738). The coordination between the legislative branch and the judiciary was of particular importance to Wilson. Since the judiciary serves as the final check on a new law, judges must coordinate with lawmakers in order to best serve the needs of society, in accordance with the Constitution.

According to Wilson, however, the Constitution does not provide the necessary means for coordination. During the Constitutional Convention, Wilson was a strong supporter of a Council of Revision. A Council of Revision allows judges a broader role in the legislative process, by giving the federal judiciary a veto power over the legislative branch. The veto would allow the Court to interject its opinion on a law, before there is ever an issue or case involving that specified law. For Wilson, The Council of Revision serves a preventative measure, ensuring that no national law could be unconstitutional. Any bill that would become a law would have to be approved by a Council of Revision, ensuring that before it becomes a law, it is constitutional. Wilson thought this power would be safe when, on June 4th 1987, he argues that “this power would seldom be used. The Legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat. Its silent operation would therefore preserve harmony and prevent mischief” (Madison 1966, 63). This extra check ensures that the law would be better, and would therefore create popular attachment to the new government under the Constitution. Hamilton, in “Federalist #27,” states “confidence in, and their obedience to, a government will commonly be proportioned to the goodness or badness of its administration” (Federalist #27, 132). Madison agrees with Hamilton on the need for an efficacious administration being the key to solving the problem of popular attachment (see
“Federalist #25-#26,” 122-132; “#46,” 253; and Flaumennatt, 1992). The Council of Revision would add efficiency to the national administration and consequently increase popular attachment to the Constitution and the new national government. According to Wilson, this would largely be a consequence of the judiciary’s ability to remonstrate “against projected encroachments on the people as well as themselves” (Madison 1966, 336). According to Wilson, the Council of Revision would not only solidify the boundaries between the three branches, but would also serve as a check against the encroachment of the government on the power of the sovereign people, or attempts to infringe their natural rights.

Despite proposing the Council of Revision on three separate occasions (June 4, July 21, and August 15, 1787) delegates at the Constitutional Convention ultimately rejected the idea. According to Arthur E. Wilmarth Jr., the rejection of a Council of Revision serves as a rejection of Wilson’s conception of popular sovereignty (Wilmarth 2003, 167). The concern with Wilson’s argument for a Council of Revision is that it would provide judges with too much authority, effectively inhibiting their ability to decide cases impartially. Moreover, it would blur or remove the line separating the judicial and legislative departments. However, Wilson was a strong advocate of maintaining boundary lines, and did not think that empowering the judiciary with a Council of Revision would endanger them. This would not be consistent with Wilson’s legal theory. The Council of Revision, in fact, serves as an extension of the judge’s role as an educator. A Council of Revision allows judges to provide their wisdom and knowledge of the law to any bill advocated for by the people. Since the legislative branch is popular and has electoral accountability, Wilson’s fear is that the legislature would be too easily controlled by the will of the people. Since the people at large are not as educated in the law, Wilson fears laws supported by the people would be counterproductive to the ends of society. A Council of
Revision would aid in this education by teaching the people and their elected representatives what is Constitutional. This clarification would help to educate members of Congress on their responsibilities as an elected official, and therefore lead to better lawmaking. In addition, it would allow the people to better understand their role as principle sovereign, therefore perfecting society.

The second role of judges as representatives is that judges “should implement ‘principles and rules of genuine policy and natural justice’ for the purpose of promoting a true science of law” (Wilson 2007, xxiii). According to Wilson, the term “science” is viewed as progress in reflection of enlightenment principles. For Wilson, the use of precedent is seen as necessary, but not in every situation. Each new case and new decision improves upon or uses precedent, almost like a science experiment. In science, a result is only deemed legitimate if it can be replicated. This is the same for the law. If precedent cannot be applied to more than one case that is similar in nature, then the decision should be improved upon and changed. Wilson uses his knowledge of the natural sciences and applies them to the law using the writings of Lord Francis Bacon.  

Wilson describes the science of law while mentioning the importance of Lord Bacon in the following:

I think I may venture the position – that in no science can richer materials be found, and that, in no science, have rich materials been more neglected or abused, than in the science of law – particularly of the common law. Listen to the sentiments of my Lord Bacon, in his book on the advancement of learning. It is well known, that the vast object of this exalted and most comprehensive genius was, to erect a new and lasting fabric of philosophy, founded, not on hypothesis or conjecture, but on experience and truth. To the accomplishment of this design, it was necessary that he should previously review, in all its provinces and

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2 On the tension between Bacon and Lord Coke’s understanding of the common law in England see Stoner (1992, 15, 33, 67).
divisions, the state of learning as it then stood. To do this effectually required knowledge and discernment, exquisite and universal; such were happily employed in the arduous task (Wilson 2007, 1026-1027).

The use of science for Wilson is very important in the interpretation, as well as the teaching of the law. Wilson looks towards the law, as well as the interpretation of it, as an advancement of learning. Applying the science of law is important to the overall job of judges, because they are entrusted with clarifying the law of the Constitution for the people. The science of law serves as a way of improving the existing law, as well as an aid in interpreting what the law intends through replication. The use of science and the emphasis on replication suggests that through the use of scientific principles and reason, a judge can better clarify the law, leading to uniformity in the interpretation of it. If interpretation of the law, and more importantly the Constitution, is more uniform, it will be easier to educate the people on its meaning. This also supports Wilson’s idea that the law and its application is universal in nature, which should facilitate, on one hand, the perfection of society and the cultivation of American citizens, on the other. For example, if similar laws are interpreted differently in two different states, then two different lessons are learned by the people. This works against Wilson’s national impulse. Therefore, for Wilson, a scientific grounding for precedent is surer than the grounding of precedent currently and historically found in the common law.³

³ Wilson’s emphasis on using scientific principles as a basis for the law serves as a rejection of the idea of the common law in its traditional formulation. The most common comparison Wilson makes on the common law is that between the newly created United States Constitution and the government of Great Britain. For one, he notes that in Great Britain, judges are appointed by the crown. Wilson states, “The judicial department, therefore, does not depend upon the representation of the people, even in its remotest degree” (Wilson 2007, 721). Without popular representation, and the existence of a monarchy, it would appear that the Courts of Great Britain have no link to the people. However, according to Wilson’s conception of the common law, it appears that the common law has an adaptive quality, allowing it to adapt to the growing needs of the people. Wilson states “The same principle of accommodation in a system of common law, will adjust its improvement to every grade and species of improvement made by the people, in consequence of practice, commerce, observation, study and refinement. As the science of
The science of law also helps to maintain the idea of the judiciary as a pyramid. The courts, according to Wilson, should resemble a pyramid. Wilson states “Its base should be broad and spacious: it should lessen as it rises: its summit should be a single point…there should be a regular, progressive gradation of jurisdiction” (Wilson 2007, 945). The gradation of jurisdiction provides options, as well as limits them. The higher up the pyramid, the more limited the power of the court becomes. This is helpful in maintaining the boundaries of the Supreme Court.

Giving the Supreme Court the final authority is potentially dangerous, therefore the pyramid provides limitations on the court’s power. The potential danger is seen in the fact that the court is not popularly elected, and is not accountable for its decisions. The fear is that an overpowered court could degenerate into an aristocracy. In addition to this, he states “a supreme court legislation is the most noble, it is the most slow and difficult of sciences. The jurisprudence of a state, willing to avail itself of experience, receives additional improvement from every new situation, to which it arrives; and, in this manner, attains, in the progress of time, higher and higher degrees of perfection, resulting from the accumulated wisdom of ages” (Wilson 2007, 774). Although its adaptability has led to its perfection in some circumstances, it is also a troublesome quality. Wilson describes the common law as “nothing else but common reason—that refined reason which is generally received by the consent of all” (Wilson 2007, 750). Containing the consent of all does not necessarily legitimize the common law. It is the job of judges to refine the law and educate the people on it so that it is consistent with pursuing a true science of law and natural justice. Judges have the job of educating the people on what is right and wrong, but cannot do so through the common law. Wilson states “the rich composition of the common law is formed from all the different ingredients, which have been enumerated; yet, when we descend to particular principles and rules, it is very difficult, it is often impossible, to ascertain the particular source, from which such rules and principles have been drawn” (Wilson 2007, 769). Without being able to identify its source, attachment to the common law seems improbable. The existence of evidence in science increases the probability of attachment, because it contains principles that have been tested and proven. The common law does contain scientific principles for example, as Wilson explains “common law, like natural philosophy, when properly studies, is a science founded on experiment. The latter is improved and established by carefully and wisely attending to the phenomena of the material world; the former, by attending, in the same manner, to those of man and society” (Wilson 2007, 777). However, this describes precedent, in which judges refer to prior decisions and make a new decision based upon new evidence. Although the common law contains provisions for a solid government, it does not provide the concreteness a good administration requires when making judicial decisions. The adaptability of the common law is both a strength and weakness, where the rigidity and consistency of scientific principles will always remain a strong base for government.

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4 This limitation on the Supreme Court’s power is best seen in the case of *Marbury v. Madison* 1803. In *Marbury*, the Supreme Court denied cert because Marbury had filed for original jurisdiction. The Supreme Court only has the power of appellate jurisdiction, therefore making Marbury’s claim outside the sphere of the Supreme Court’s jurisdiction.
prohibits the abuse, and protects the exercise, of every inferior judiciary power” (Wilson 2007, 945). The creation of the United States court system allows for the science of law to function properly. Each district has its own federal court, and appellate court to which the law is interpreted and applied. However, the Supreme Court has the ultimate authority, and makes the ultimate decision of whether or not a decision or law is constitutional.

The third role of a judge as representative is that judicial review should always been text based (Wilson 2007, xxiii). This should be seen as a limitation. Although the power of judicial review is an implicit power with the function of ascertaining the validity of a statute, Wilson limits this implicit power by requiring judge’s decisions involving judicial review to be strictly text based. Since the Constitution is the supreme law of the land, and is the will of the sovereign people, Wilson believes it provides the proper criteria for making this determination. Wilson describes judicial review as:

If the validity of a statute or treaty of the United States, or of an authority exercised under them, be drawn in question, in any suit in the highest court of law or equity of a state, in which a decision of the suit could be had; and a decision is against their validity – if the validity of a statute of any state, or of an authority exercised under that state, is, in any suit in such court, drawn in question, as repugnant to the constitution, treaties or laws of the United States; and a decision is in favor of their validity – if the construction of any clause of the constitution, of a treaty, of a statute of the United States, or of a commission held under them, is, in any suit in such court, drawn in question; and a decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause – a final judgment or decree, in all these cases, may, upon a writ of error, be reexamined and affirmed or reverse in the supreme court of the United States (Wilson 2007, 897).

The power of judicial review is used when the Constitution is not clear about a certain issue, or if there are conflicting principles. Grounding judicial review in text also limits the power of the Supreme Court from overstepping their jurisdictional boundaries. It also allows for a legitimate
check on the acts of the legislature. In recognition of this, Hamilton refers to the judicial branch as an “intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority” (Federalist #78, 404). Maintaining the proper balance between the three branches of government constitutes a significant part of a judge’s responsibilities. A judge wants to promote a true science of law, and reach natural justice according to Wilson, therefore the power of judicial review works towards that goal, by refining the wants and needs of the people, by limiting them with the Constitution. Hamilton, picking up on this point, goes further and says “the interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body” (Federalist #78, 404). Judicial review stands as the strongest check against legislative encroachment, and aides in the enforcement of boundaries between these two branches. In order to better understand these boundaries, it is important to look at the three jobs Wilson designates for judges.

Although a judge is an appointed position, a judge serves as equally a representative as an elected official. According to Wilson, judges serve as an Agents-Plus, serving as not only an agent of the will of the people, but also as an educator. Judges are entrusted with the responsibility to interpret and protect the Constitution, while at the same time, educating the people on its proper understanding. Wilson designates three jobs to judges. The first, that they cannot make law, is important to maintaining the boundary between the judiciary and the legislature. Wilson’s fear of legislative encroachment is seen in his support of a Council of Revision. However, even in his support of a Council of Revision, judges were seen only as advisors to provide guidance, using their acquired knowledge of the law, to ensure that all laws
were beneficial to society and the will of the people. A second job for judges is that they must promote natural justice through the use of a true science of law. For Wilson, a true science of law is understood as grounding the law in scientific principles and applying those reasonable principles to reach the most justifiable decision. Using precedent grounded in these scientific principles, and not the common law is important to Wilson’s view on judges. The third job of a judge requiring the grounding of judicial review in text provides limitations, as well as guidance to judges. Although Wilson agrees that judges use extra constitutional means to make decisions, the text of the Constitution still stands as the most important tool to interpretation for Wilson. This restriction maintains the legitimacy of the Constitution, while still allowing for judges to use other tools in order to answer questions that the Constitution is silent on. Now that the three jobs of judges have been determined, it is important to view how they put these roles into action.

**Judges as Educators**

The third most important function of a judge is to serve as an educator of the sovereign people. Judges are entrusted with this education, because they are seen as knowledgeable individuals, enlightened by studying the law and what Wilson refers to as the science of law. In the example that the people ask Congress to do something that is outside the government’s derived power, or is inconsistent with the ends of government, the Court has the job of recognizing that this is unconstitutional, and has the job of educating the people on why what they are asking is inconsistent with the ends of government as designated by the Constitution. Wilson describes a judge as “He who is qualified to teach, is well qualified to judge; and he, who is well qualified to judge, is well qualified to teach” (Wilson 2007, 447-48). According to Wilson, a judge has the social responsibility of bettering society. A judge does this by educating the people on the law through their decisions.
When interpreting the Constitution, judges use what Wilson refers to as “common sense” (Wilson 2007, 819). This “common sense” is informed by Wilson’s concept of the moral sentiment, which is used to resolve the tension between natural right principles and common law principles. Wilson states that when making decisions, a judge must “pry into the secret recesses of the human heart, and become well acquainted with the whole mortal world, that they may discover the abstract reason of all laws” (Wilson 2007, 458). This implies two important concepts for Wilson. When he refers to “the secret recesses of the human heart,” he is referring to the moral sentiment. Wilson states that the moral sentiment “from its very nature, is intended to regulate and control all our other powers. It governs our passions as well as our actions” (Wilson 2007, 512). For Wilson, the concept of the moral sentiment is “In short; if we had not the faculty of perceiving certain things in conduct to be right, and others to be wrong; and of perceiving our obligation to do what is right, and not to do what is wrong; we should not be moral and accountable beings” (Wilson 2007, 512). Therefore, according to Wilson, the moral sentiment serves as our internal check on right and wrong, placed in the hearts of individuals by God.5

Another way of conceptualizing the moral sense is as conscience. This is an important quality of a judge, because judges require the proper understanding of right and wrong while making decisions. According to Wilson, “His conscience or moral sense determines the end, which he ought to pursue; and he has intuitive evidence that his end is good: but the means of attaining this end must be determined by reason” (Wilson 2007, 514). Reason is the second part of Wilson’s understanding of the “common sense,” as well as judicial decision making. Once a

5 This idea coincides with Wilson’s conception of natural rights, natural law, the state of nature, and human nature.
judge has consulted with the moral sense to determine what is right or just, they must use reason in order to execute what the moral sense is telling them to do. Wilson states “Thus, though good and ill, right and wrong are ultimately perceived by the moral sense, yet reason assists its operations, and, in many instances, strengthens and extends its influence” (Wilson 2007, 514). Reason and the moral sense work together to find the best possible outcome for a situation. The moral sense cannot act without reason, because reason provides what the moral sense cannot. Wilson states “reason serves to illustrate, to prove, to extend, to apply what our moral sense has already suggested to us, concerning just and unjust, proper and improper, right and wrong” (Wilson 2007, 514), while in addition, “reason contributes to ascertain the exactness, and to discover and correct the mistakes, of the moral sense… It considers the relations of actions, and traces them to the remotest consequences” (Wilson 2007, 515). However, this is not to suggest that reason is superior to the moral sense. According to Wilson, “the ultimate ends of human actions, can never, in any case, be accounted for by reason” (Wilson 2007, 519). However, the fault of reason is that it “presents false appearances to our moral sense” (Wilson 2007, 518). Although it may seem that reasoning can be used to solve an issue in the natural sciences, in the science of law, the moral sentiment is required. According to Wilson, “the dictates of reason are neither more general, nor more uniform, nor more certain, nor more commanding, than the dictates of the moral sense” (Wilson 2007, 517). Therefore, it is important, given the strengths and weaknesses of both the moral sense and reason separately, that the two work together.

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6 A connection here can also be made to Aristotelian deliberation. In Aristotelian deliberation, a goal is identified, and the method is to work backwards from where you are in order to devise a plan, and then to execute that plan. It would seem that Wilson placing Aristotle within the scientific foundation of the law identified earlier. In his *Nicomachean Ethics*, Aristotle describes deliberation as “The one who deliberates in a way described seems to be inquiring and analyzing just as one would with a geometric diagram” (1112b 20-22). Aristotle also talks about the issue of unrestrained passions controlling decision making, stating that people who rely on passion after deliberating about a topic “do no stick to the things they decided by deliberating” (1150b 20-22). For Aristotle and Wilson, the combination of reasoning and the passions (moral sense) should be use to aid in decision making, but can be dangerous if used separated.
According to Wilson’s conception of the moral sense, it would seem that using a pure science of law if inadequate when making decisions. Wilson believes good judges need the combination of the science of law and the moral sense in order to arrive at the right decision. Wilson states “Truth may, indeed, by reasoning, be rendered evident to the understanding; but it cannot reach the heart, unless by means of the imagination” (Wilson 2007, 469). This suggests that science is silent on the question of right and wrong. However, the moral sense also cannot be the only influence on judicial decision making either. Wilson states “Laws may be promulgated by reason and conscience, the divine monitors within us” (Wilson 2007, 470). Both coordinate with one another in order to arrive at a just and equitable decision. The moral sense, without the use of reason appears to have no restrictions. This tension between the moral sense and the science of law is solved by Wilson’s conception of judgment.

The first important part of Wilson’s conception of judgment is reflection. Wilson believes that experience, as well as reflection on the experience of others is a very important influence on judicial decision making. Wilson describes the action of reflection as “By this power, the mind makes its own operations the subject of its attention, and views and examines them on every side” (Wilson 2007, 586). While reasoning and the moral sense both used when making decisions, reflection serves as the best restriction against the passions of the moral sense. Wilson states “how utterly impossible is it to make any clear and distinct observations on our faculties of thought, unless the passions, as well as the imagination, be silent and still” (Wilson 2007, 586). Once reflection has restricted the overbearing passions the moral sense can sometimes present, one can apply the science of law and come to a decision that is consistent with the dictates of natural justice. Reflection allows for the discovery of truth, and therefore the right and best answer for a given situation.
A second component of Wilson’s conception of judgment is the relationship between judgment and memory. According to Wilson, “Judgments are intuitive, as well as discursive, founded on truths that are self evident, as well as that are deduced from demonstration, or from reasoning of a less certain kind. The former, or intuitive judgments, may, in the strictest sense, be called the judgments of nature” (Wilson 2007, 599). When Wilson refers to demonstration, he is referring to experience, or memory. According to Wilson, judgment and memory are mutual assistants. Wilson states “Memory furnishes the materials which judgment selects, adjusts, and arranges. Those materials selected, adjusted and arranged are more at the call of memory than before: for it is a well known fact, that those things, which are disposed most methodically and connected most naturally, are the most distinct, as well as the most lasting objects of remembrance: hence, in discourse, the utility as well as beauty of order” (Wilson 2007, 597). Without memory, judges would not have the ability to collect and organize information in a particular case. Memory also allows for reflection, not only on personal experience, but also on evidence and precedent. Judgment uses memory in order to make affirmative or denial distinctions. This ability is keen when relying upon the moral sense for a scale of right and wrong. Wilson describes judgment as “an important operation of the mind; and it is employed upon the material of perception and knowledge. It is generally described to be, that act of the mind, by which one thing is affirmed or denied of another” (Wilson 2007, 599). However, he believes this definition is too limited, while at the same time too extensive. Wilson sees judgment as limited, because it can only be expressed by either affirmation or denial. There is no true gray area. He believes it is too extensive because it includes testimony as a conjuncture to judgment, when they are two completely different concepts with different implications. Judgment, in addition to memory, requires reasoning in order to function.
The third component of judgment for Wilson is the connection between judgment and reason. Wilson states that “with the power of judging, the power of reasoning is very neatly connected” (Wilson 2007, 600). Wilson sees judgment and reasoning as corresponding with one another in order to reach the right decision. This coincides with Aristotle’s practical judgment (1142a-1142b). According to Wilson, “reasoning is strictly the process, by which we pass from one judgment to another, which is the consequence of it. In all reasoning, there must be one proposition, which is inferred, and another, at least, from which the inference is made” (Wilson 2007, 600). Reasoning is the bridge between memory and judgment. Reasoning allows for judgment to make the necessary connections, and helps to organize and analyze the information contained within memories. This organization allows for a judge to think about memories in a restrained form. This restrained form is less likely to be overly passionate, and can aid a judge in his/her decision making in a clear and logical sense. However, Wilson points out that “reason, as well as judgment, has truth and falsehood for its objects: both proceed from evidence; both are accompanied with belief” (Wilson 2007, 600). Therefore, according to Wilson, reasoning and judgment cannot stand alone. Both have the ability to reach the wrong conclusion. Wilson’s solution to this is the moral sense. Wilson states “Our knowledge of moral philosophy, of natural jurisprudence, of the law of nations, must ultimately depend, for its first principles, on the evidence and information of the moral sense” (Wilson 2007, 803). The combination of the moral sense with judgment and reason is very important in understanding and interpreting the Constitution. According to Wilson, the Constitution contains common sense moral principles (Wilson 2007, 615). The Constitution does not explicitly state these principles, but it is required of a judge to identify them using reason. One of the strongest common sense moral principles contained within the Constitution is the protection of the innocent. Wilson states “the moral
sense restrains us from harming the innocent: it teaches us, that the innocent have a right to be secure from harm. These are two great principles, which prepare us for society; and with regard to them, the moral sense discovers peculiar inflexibility: it dictates, that we should submit to any distress or danger, rather than procure our safety and relief of violence upon an innocent person” (Wilson 2007, 627-628). The Constitution deals with common sense moral principles in a limited approach. It places restraints upon individuals in society through the use of a common sense. Each individual has a common, moral sentiment that tells them what is right and wrong placed in them by God. The Constitution, as well as the governmental institutions it creates, is intended to inform the people on this moral sentiment, and aid them in discovering it. The Constitution cannot simply be looked at as the will of the people, but as the will of the people that embodies and presumes and argument on certain moral principles.

Important to Wilson’s theory of judgment is the relationship between reason and common sense. According to Wilson, philosophy has a tendency to extent reason beyond its natural limits. Wilson states:

The defects and blemishes of the received philosophy, which have most exposed it to ridicule and contempt, have been chiefly owing to a prejudice of the votaries of this philosophy in favor of reason. They have endeavored to extend her jurisdiction beyond its just limits; and to call before her bar the dictates of common sense. But these will not submit to this jurisdiction: they plead to its authority; and disdain its trial; they claim not its aid; they dread not its attacks (Wilson 2007, 615).

Reason on its own cannot be used to make right and just decisions. When reason is extended beyond its proper sphere, it can pervert the dictates of right and wrong. According to Wilson, when reason is extended beyond its proper sphere it can enslave an individual. In order to ensure reason remains within its proper sphere, Wilson adds common sense to the equation. Wilson
argues “In this unequal contest between reason and common sense, the former will always be obliged to retreat both with loss and with dishonor; nor can she ever flourish, till this rival ship is dropt, till these encroachments are given up, and till a cordial friendship is restored. For, in truth, reason has no other root than the principles of common sense: it grows out of them: and from them it draws its nourishment” (Wilson 2007, 615). In order for the relationship to work, reason must feed off of the first principles established within individuals by God, presented by the common sense. Common sense provides the normative standards of natural law and natural right needed to create a just society. Reason must be representative of first principles, if common sense is to be interpreted and understood within its proper sphere. Wilson states “We assign reason to two offices, or two degrees. The first is, to judge of things self evident. The second is, from self evident principles, to draw conclusions, which are not self evident. The first of these is the province, and the sole province, of common sense, and, therefore, in its whole extent, it coincides with reason; and is only another name for one branch or one degree of reason” (Wilson 2007, 604). This relationship between reason and common sense is essential to keeping reason within its proper sphere, and allowing for effective reflection on first principles.

Discussion

Having distilled Wilson’s theory of how judges make decisions, it can now be placed alongside the other schools of thought. Although each has similar qualities to Wilson’s thought, each has significant differences as well. The first school is the natural law. According to the natural law, law and morality cannot be divorced from one another. The natural law also provides principles for how one ought to live, based on substantive moral reasoning that defines right and wrong. The natural law is universal, but not in the same sense as Wilson understands
universally. Arkes (1990) and George (2001) attempt to incorporate Thomistic natural law principles into a theory of jurisprudence, where Wilson grounds a theory of jurisprudence on scientific principles. Since the natural law argument focuses on the Thomistic idea of right and wrong, Wilson does not fit within its confines. Wilson believes that God has placed within each individual the dictates of right and wrong, he uses common sense, the moral sentiment, and reasoning rather than a strict reliance on the divine. Wilson focuses on the common sense, reaching inside ourselves for the dictates of morality. The traditional natural law argument, in contrast, argues that the source of natural law is external to man, in the form of a divine God. Where Wilson focuses on scientific reasoning, in addition to the moral sense, the natural law argument only focuses on the external dictates of their divine natural law. For Wilson, the natural law does not provide a thorough basis for decision making, but instead creates a very limited understanding of right and wrong based on divine reasoning.

Interpretation of the Constitution also poses a tension between Wilson’s thought and natural law. Arkes (1990) and Wilson both agree that the Constitution should be considered first when making judicial decisions. Arkes critiques modern jurisprudence, claiming that modern day judges mold the Constitution to their argument. Wilson would agree with the critique, given that the Constitution is the supreme law, and should be the final word on a given topic. Arkes also argues that The Constitution presents abstract moral principles in which individuals are to follow, therefore allowing for a broader interpretation. Arkes would allow for broader interpretation as long as it is consistent with his view of natural law. Wilson would agree that abstract moral principles are embedded in the Constitution, but does not agree with a loose interpretation of it. Wilson believes the Constitution should be read according to the text, and
should only use extra-constitutional means where the Constitution is either ambiguous or silent. Therefore Wilson’s political thought does not fit wholly within the natural law interpretive camp.

The second school is of natural right. According to natural rights theorists, if a law is against natural rights, judges should reject it as the government has the job of protecting the inalienable rights of individuals. Natural rights theorists also believe that legitimacy in government is gained by the proper protection of rights, not the consent of the governed. Barnett states “a duty to obey the law cannot be grounded on the consent of the governed when there has been anything less than unanimous consent and that, obviously, no government legal system can claim this degree of consent” (Barnett 2004, 30). According to the natural rights argument, the job of government is to secure individual rights, unless everyone, unanimously, can all agree that government does not have the means to execute a given action. Barnett goes on to claim that the phrase “We the People,” is a fiction, as well as the idea of popular sovereignty itself. This idea is in direct tension with Wilson’s idea of popular sovereignty. Wilson’s political thought focuses heavily on the importance of consent, as well as the people as principle sovereign. Wilson agrees that the government, as an agent of the people, and as part of their social responsibility should protect individual’s natural rights and improve society. This implies a trust between the sovereign people that the government will actively protect their natural rights. For Wilson, the government is simultaneously empowered and limited by this trust. For Barnett and other natural rights theorists, the government is limited. Natural rights theorists also believe that popular attachment is based on what an individual’s conscience dictates. If an individual believes a law, or the government is not protecting them properly, they have the right to deny/disobey that law. Wilson would disagree with this concept of political attachment, given the multiple provisions provided in the Constitution to ensure that the laws created and passed by
the legislature will be good laws. However, Wilson would agree that conscience is a necessary factor in determining right and wrong. Wilson’s moral sentiment, based on common sense principles provides guidance on right and wrong, in the same way individual conscience does.

The third school is of the common law in America. According to Stoner (1992), the common law requires judges to make decisions using prudence and precedent. A heavy reliance on precedent allows for judges to make decisions based on the prior decisions of other judges, while accounting for new evidence presented within a case. Wilson agrees with the use of precedent, but does not place a heavy reliance upon it. The common law is adaptable, changing with each generation to fit the needs of the people. The common law is unwritten, therefore allowing for flexibility. For Wilson, the common law does not provide a solid basis for judicial decision making. Instead, Wilson favors grounding the Constitution and its interpretation on scientific principles. Science is proven. The common law is dynamic and unstable. Although the common law has been perfected over time, science allows for replication. The common law does not rely on scientific reasoning, and is therefore nonreplicable. This creates tension within the law, and therefore a problem with popular attachment to the law. This tension is commonly seen within interstate law. If a given action is legal in one state, but illegal in another, the people can become confused, therefore damaging popular attachment to that law. In addition, if conflicting messages are being sent by the law, it is in effect undermining the ability of the sovereign people to perform their responsibilities. If the law is universal, and grounded on scientific principles, it will be more solidified, and therefore the people will be more likely to consent to it.
Wilson’s position on judicial decision making blends natural law and natural rights principles, based on a scientific grounding of the law. Wilson’s science of law is ultimately a scientifically informed understanding of precedent and judicial reasoning. Where the three competing interpretations of how judges should decide go wrong is in viewing the act of decision making as having to fall exclusively into a single intellectual camp. This requirement is inconsistent with what is generally regarded as the fundamental starting point to the study of American political thought. A single body of philosophy cannot accurately explain or describe American political thinking as Americas draw on multiple, often contradicting, intellectual traditions (Gibson 2007, 130-164; Gibson 2006, 7-63). Wilson’s multi-dimensional concept of popular sovereignty, as well as his understanding of what judges should have recourse to when making decisions serves as the perfect example of how multiple influences affect the political thought of our Founding Fathers.
Chapter Four: Ronald Dworkin and The Moral Reading

As previously stated, the question of “How judges should make decisions” is a controversial one. Having reviewed the three other schools of constitutional interpretation and identified James Wilson’s theory of how judges are to make decisions, it is important to consider the theory of Ronald Dworkin. Where the other three schools attempt to restrict the role and discretion of a judge, Dworkin seems to expand it by allowing judges to consult moral principles not necessarily found in the Constitution. This expansion is what links Dworkin’s theory of interpretation to Wilson’s theory. According to Dworkin, judges must have recourse to his theory of the moral reading, a value based theory of constitutional interpretation. Based on this theory, judges should articulate a theory of a given concept, such as equality or liberty, in a way that is consistent with his or her view of dignity. He emphasizes the importance of interpretation of these concepts, the source of which is the Constitution and the Bill of Rights. Using his idea of dignity, judges are to apply a latent set of moral principles to help them better understand these concepts.

However, judges will not admit to using such practices, in order to maintain the reputation for neutrality and independence. Dworkin recognizes this, stating “But it would indeed be revolutionary for a judge openly to recognize the moral reading, or to admit that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back and try to find other, usually metaphorical, descriptions of their own practice. There is therefore a striking mismatch between the role of the moral reading actually places in American constitutional life and its reputation” (Dworkin 1996, 3). Although it seems implausible, Dworkin believes judges should be more honest about what guides them in their decision making. He believes judges should not be so concerned with appearing neutral,
seeing that human nature does not allow one to make decisions impartially. Dworkin argues instead “Judicial independence does not consist in justices having no previous opinions about the issues that come before them but in their willingness to attend carefully and honestly to arguments on both sides, and to be ready to change their minds if convinced” (Dworkin 1996, 310). Impartiality is only a small role of a judge according to Dworkin. A judge that has the ability to review a case, reflect on precedent, and be able to make a valid argument for his/her decision is what is important to Dworkin. Dworkin uses the example of Justice Thomas’ nomination to the Supreme Court to explain why the neutrality thesis is not valid. He states:

‘the neutrality thesis’: that a Supreme Court justice can reach a decision in a difficult constitutional case by some technical legal method that wholly insulates his decision from his own basic convictions about political fairness and social justice. The thesis does not insist only that a justice can set aside his own interest, in reaching decisions, as of course he can and must. It also insists that justices can reach decisions uninfluenced by their own convictions about fundamental issues of political and constitutional philosophy (Dworkin 1996, 313).

Dworkin’s moral reading rejects the neutrality thesis, on the grounds of human nature and his view of how judges make decisions.

In this chapter I will examine Ronald Dworkin’s theory of constitutional interpretation, the moral reading. In order to do this, it is important to review Dworkin’s general theory of interpretation. According to Dworkin, his value based theory of interpretation trumps any other existing theory. Then I will discuss how this value based theory is the basis of Dworkin’s rejection of the majoritarian premise. Dworkin rejects the majoritarian premise with his concept of dignity. Next I will look at the moral theory in practice by looking at what methodology Dworkin wishes for judges to employ when making decisions. Then I will turn to Dworkin’s rejection of originalism by comparing his abstract moral reading to that of Robert Bork, a staunch originalist. I will then
conclude this chapter with a rejoinder, comparing Dworkin’s moral reading with James
Wilson’s concept of grounding the law on scientific principles in coordination with the
moral sense.

**Dworkin’s Moral Reading**

Dworkin offers his theory of the moral reading as a response to the question of “How
judges should make decisions?” According to Dworkin, the moral reading is a tool that judges
have recourse to when making decisions. The moral reading is the application of the abstract
moral principles that can be found in the Constitution to a given legal question or problem.
Dworkin states “the moral reading therefore brings political morality into the heart of
constitutional law” (Dworkin 1996, 2). Dworkin describes the idea of political morality as
“having a tree structure: law is a branch of political morality, which is itself a branch of a moral
general personal morality, which is in turn a branch of a yet more general theory of what it is to
live well” (Dworkin 2011, 5). This idea of morality is central to Dworkin’s theory. Many
scholars have offered critiques of the moral reading, stating that it “give[s] judges absolute
power to impose their own moral convictions on the public” (Dworkin 1996, 2), or that “it allows
one to inject one’s own moral philosophy into the Constitution without abandoning a claim of
textual fidelity” (Jacobsohn 1985, 416). However, the moral theory does not allow judges to
apply their own personal convictions, but instead gives judges the task of recognizing these
abstract moral principles, inherent in the text of the Constitution, and applying them to a given
legal question or problem. Dworkin states “the best explanation of the differing patterns of their
decisions lies in their different understandings of central moral values embedded in the
Constitution’s text” (Dworkin 1996, 2). Scholars may find fault in this because it affects the
neutrality of judges, making them political figures, opposed to legal experts. However, Dworkin
argues “The moral reading is not, in itself, either a liberal or a conservative charter or strategy” (Dworkin 1996, 3). For Dworkin, a judge serves as more of a “Philosopher King,” whose knowledge of the truth and morality allows him/her to arrive at a morally responsible decision.¹ Dworkin further clarifies this argument stating “Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges” (Dworkin 1996, 10). Although scholars argue that the moral reading gives judges too much power, Dworkin argues the moral reading has limitations.

One of these limitations involves Dworkin’s concept of interpretation. Dworkin states “Morality as a whole, and not just political morality, is an interpretive enterprise” (Dworkin 2011, 12). According to Dworkin, “our moral judgments are interpretations of basic moral concepts, and we test those interpretations by placing them in a larger framework of value to see whether they fit with and are supported by what we take to be the best conception of other concepts” (Dworkin 2011, 12). Interpretation of value is key to a judge in exercising moral responsibility, according to Dworkin’s model. This moral responsibility enables judges to place filters on their own personally held convictions, and apply a morally grounded interpretation to a given legal question. Dworkin states “our moral responsibility requires us to try to make our reflective convictions into as dense and effective a filter as we can and in that way to claim as much force as possible for conviction within the more general causal matrix of our personal

¹ Dworkin adopts the idea of a “Philosopher King” from Plato’s Republic. A “Philosopher King” has all of the qualities necessary to protect the laws and institutions of the state, because of their attraction to knowledge and truth, as well as embodying a gentle and temperate nature. See Plato’s The Republic Book VI, 484a-502c and 502c-511d.
history as a whole. This requires that we seek a thorough coherence of value among our convictions” (Dworkin 2011, 108). The ability to effectively filter one’s own personally held beliefs, in order to apply a morally responsible thought process are they key factors in creating an effective framework in which judicial decisions are to be based. Dworkin states “we must construct a larger structure of different kinds of value into which a conception of rationality fits – a structure that justifies a particular conception or understanding of what it is to have a reason” (Dworkin 2011, 51). This framework is meant to create a comprehensive theory of moral interpretation, therefore bringing unity to the value inherent in these concepts, which are “interconnected and mutually supporting” (Dworkin 2011, 10). Dworkin further supports the idea of applying a value based theory of constitutional interpretation by applying Hume’s principle. Dworkin summarizes Hume’s principle stating “no series of propositions about how the world is, as a matter of scientific or metaphysical fact, can provide a successful case on its own – without some value judgment hidden in the interstices – for any conclusion about what ought to be the case” (Dworkin 2011, 44). Hume’s principle explains that any argument has moral value attached to it, thereby necessitating a decision influenced by these moral values. No topic or argument can be separated from these moral values. In order to better understand the value theory in practice, it is important to look at Dworkin’s rejection of the majoritarian premise.

**Rejecting the Majoritarian Premise**

Dworkin identifies a critique which speaks to the inspiration of the moral premise. He states:

Constitutional scholars often say that we must avoid the mistakes of both the moral reading, which gives too much power to judges, and of originalism, which
makes the contemporary Constitution too much the dead hand of the past. The right method, they say, is something in between which strikes the right balances between protecting essential individual rights and deferring to popular will. But they do not indicate what the right balance is, or even what kind of scale we should use to find it. They say that constitutional interpretation must take both history and the general structure of the Constitution into account as well as moral or political philosophy. But they do not say why history or structure, both of which, as I said, figure in the moral reading, should figure in some further or different way, or what that different way is, or what general goal or standard of constitutional interpretation should guide us in seeking a different interpretive strategy (Dworkin 1996, 14).

The moral reading serves as an alternative to the majoritarian premise stated in the above quote. Dworkin ultimately rejects the majoritarian premise based upon his concept of dignity.

Dworkin’s concept of dignity has two defining principles. The first principle is “you must treat the success of your own life as a matter of objective importance” (Dworkin 2011, 255). The second principle is “authenticity, assigns each of us a personal responsibility to act consistently with the character and projects he identifies for himself” (Dworkin 2011, 261). Applying these two principles of dignity, Dworkin identifies the conditions of moral membership. The first condition is “each person must have an opportunity to make a difference in the collective decisions, and the force of his role” (Dworkin 1996, 24). Dworkin is a strong supporter of individual rights, and it is important that each individual has a choice in deciding what happens in his or her own life. Dworkin applies the first principle of dignity in the creation of this condition. He states “your reason for thinking it objectively important how your life goes is also a reason you have for thinking it important how anyone’s life goes: you see the objective importance of your life mirrored in the objective importance of everyone else’s” (Dworkin 2011, 260). The majoritarian premise denies this, forcing individuals to agree with the wants and needs of the majority, restricting their own individual rights and freedoms. Rather than viewing their decision making within the scope of morality to determine the best interest of their own lives and the community, they are compelled by majority opinion. Dworkin rejects the
majoritarian premise with his own conception of democracy along the lines of moral membership, stating “it denies that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational. It takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community as individuals, with equal concern and respect” (Dworkin 1996, 17). By allowing each individual member to reflect on moral principles, the law will be made with recourse to those moral principles, and better protect the individual rights and freedoms of citizens. Dworkin emphasizes this stating:

A political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect; unless, that is, its policies treat their fates as equally important and respect their individual responsibilities for their own lives. That principle of legitimacy is the most abstract source of political rights. Government has no moral authority to coerce anyone, even to improve the welfare or well-being or goodness of the community as a whole, unless it respects those two requirements person by person. The principles of dignity therefore state very abstract political rights: they trump government’s collective policies (Dworkin 2011, 330).

Therefore, it is the individual moral responsibility of citizens to determine what is right for their own lives. Government, whether through coercion or majority pressure, should not be the determinant of how people should live their lives. If it were so, the basic principles of democracy would be diminished.

The second condition of moral membership is “the political process of a genuine community must express some bona fide conception of equal concern for the interests of all members, which means that political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all” (Dworkin 1996, 25). Here, Dworkin’s idea of society departs from that of the Founding Fathers. Dworkin believes in a society
dedicated to equality, where the Founders were dedicated to a commercial society (Federalist #34, 164). Dworkin further explains this conception stating “Moral membership involves reciprocity: a person is not a member unless he is treated as a member by others, which means that they treat the consequences of any collective decisions for his life as equally significant a reason for or against the decision as are comparable to the consequences for the life of anyone else” (Dworkin 1996, 25). Dworkin’s concept of equality is directly connected with the first principle of dignity. He states “nothing could be a plainer violation of the first principle of dignity than acts that exhibit blatant prejudice – assumption of supposed superiority of one caste over another or of believers over infidels or Aryans over Semites or whites over blacks” (Dworkin 2011, 336). His understanding of prejudice applies universally. According to Dworkin, a governing body can only be legitimate if it applies its rules equally to all. Dworkin goes further to say that even a coercive government is legitimate only when it “attempts to show equal concern for the fates of all those it governs and full respect for their personal responsibility for their own lives” (Dworkin 2011, 352). If government is based upon the two principles of dignity, it is legitimate according to Dworkin.

The third condition of moral membership is “moral independence, the idea that individual freedom is furthered by self governance… Individual decisions inevitably affect shared collective values” (Dworkin 1996, 94). By considering Dworkin’s conditions for moral membership, and a society based on equality, it is clear the majoritarian premise does not work in practice. Each individual having the opportunity to reflect on the law and rules that guide them will be able to have a more informed opinion about the efficiency of that rule of law. This is also further supported by Dworkin’s first concept of dignity. Applying this, Dworkin believes that judges make decisions based on their own individual reflection upon the law, and do not
follow the political trends of the majority. Dworkin concludes his theory on moral membership in society, stating “a genuine political community must therefore be a community of independent moral agents. It must not dictate what its citizens think of independent moral agents. It must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction” (Dworkin 1996, 26). This idea is further supported by Dworkin’s second principle of dignity, applied in the framework of natural rights. Dworkin states “that individuals have a personal responsibility to define success in their own lives. That principle supports the traditional liberal rights of free speech and expression, conscience political activity, and religion that most human rights documents include” (Dworkin 2011, 336). These ideals can be found in the government of the United States. Dworkin commonly references the Bill of Rights to apply the idea of setting out abstract moral principles in the vague language of the Constitution, stating that the Bill of Rights “construct the constitutional skeleton of a society of citizens both equal and free” (Dworkin 1996, 73), by providing a list of rights entitled to the people.

In the application of the two principles of dignity, Dworkin restricts the legitimacy of government to its ability to embody these two principles. In this, Dworkin hopes to reject the opinion that liberty and equality are conflicting values, and hopes to instead define them together as “not only compatible but as intertwined” (Dworkin 2011, 331). Understanding the idea of the value theory of constitutional interpretation, it is important to view in the next section how the moral reading works in practice.

**The Moral Reading in Practice**
When interpreting the United States Constitution, Dworkin argues that judges should apply a moral reading to the text in order to establish its meaning. Dworkin believes the moral reading’s application of law “brings morality into the heart of constitutional law” (Dworkin 1996, 2), and arrives at what is closest to a “right” answer in legal questioning. However, many have argued against Dworkin’s moral reading theory claiming that it provides too much authority to judges to “impose their own moral convictions on the public” (Dworkin 1996, 2). Dworkin argues against these critics, by establishing two important restraints the moral reading places on individual judges. The first is that “constitutional interpretation must begin with what the framers said,” and the second is “constitutional interpretation is disciplined under the moral reading by the requirement of constitutional integrity” (Dworkin 1996, 10).

*Dworkin’s First Restraint*

When Dworkin mentions the first important restraint “what the framers said,” he is not referring to the conception of originalism. Originalists believe that Dworkin’s fundamental moral theory provides too much expansion to the words of the Framers, and provides false intentions through the interpretation of judges. Fans of the “living Constitution” theory argue the opposite, stating that “the Constitution is incomplete or open-ended, so that judges have no choice but to expand its provisions to meet new cases” (Dworkin 1996, 289). Dworkin offers another argument, referring to the moral reading as a midpoint between originalist thought and the idea of a “living constitution.” Dworkin makes the claim that “Originalism insists that it means what they expected their language to do,” and that “According to Originalism, the great clauses of the Bill of Rights should be interpreted not as laying down the abstract moral principles they actually describe, but instead as referring, in a kind of code or disguise, to the framer’s own assumptions and expectations about the correct application of those principles”
It is difficult for Dworkin to agree with the originalist strategy because it is too restrictive in its application (further explanation of Dworkin’s view on originalism can be found in his argument against Bork). Dworkin’s view on the Framers’ intentions in the creation of the Constitution is that “They intended to commit the nation to abstract principles of political morality” (Dworkin 1996, 294), by using “broad and abstract language appropriate to that aim” (Dworkin 1996, 272). Dworkin analogizes his theory with that of a father (the Framers) and his children (the people of the United States) providing instructions to his children. Dworkin states:

Suppose I [as that sagacious father] tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not expect that my “meaning” was limited to these examples for two reasons. First, I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act that was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind (Dworkin, 1977, 134).

According to Dworkin, it is unrealistic to believe that the Founders intended for us to interpret the Constitution as strict restrictions, but rather as guidelines for the people to follow in order to achieve Dworkin’s idea of morality. When the Constitution was crafted, it was with the intention to endure for a long period of time. The Framers knew that as technology developed and as the Constitution lasted through various generations, the knowledge they had would become outdated. Therefore, Dworkin’s theory seems very possible. The Framers, knowing the knowledge of the future was unattainable to them, wanted to create a governing doctrine that would be able to outlast multiple generations. In order to do this, the language could not be overly specific, and would need to rely on the moral principles in which Dworkin is suggesting,
in order to do this. This is why Dworkin does not support the theory of a “living constitution” either, because it would destroy the integrity of the law the Constitution provides. Therefore, Dworkin makes the argument for judicial activism, in which judges individually apply the moral reading of the Constitution to a given situation in order to arrive at the best answer to the legal question, while also protecting the integrity of the law by referring to precedent, and in the absence of precedent with a rational interpretation of the principle in question. Dworkin summarizes this idea by stating “The Constitution enacts abstract principles that judges must interpret, as best they can, according to their own lights” (Dworkin 1996, 299). Judges must reflect on the moral judgments reflected in the Constitution, regardless of whether or not it is what they believe in, and make their decision based on that interpretation. This therefore places a restriction on judges, so they are applying the moral reading to the Constitution, and not simply enforcing their own beliefs on a given situation in order to create law that would be beneficial to that personal or political view. According to Dworkin, the job of a judge is to “find a solution that respects both the reigning principles of equal concern and personal responsibility, and we must try to do this in a way that comprises neither principle but rather finds attractive conceptions of each that fully satisfy both” (Dworkin 2011, 3). By applying the principles of dignity to their decisions, judges will arrive at a morally responsible decision.

Dworkin’s Second Restraint

The second restraint the moral reading places on judges is the requirement of constitutional integrity. In order for judges to make a rational-based decision on a given case, they must refer to precedent, as well as uphold the integrity of previous decisions. Dworkin explains the use of integrity as a restraint on unruly judicial power stating “I emphasize these constraints of history and integrity, because they show how exaggerated is the common
complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us” (Dworkin 1996, 11). Dworkin describes integrity in several dimensions in accordance with the law. The first dimension is that integrity “insists that judicial decision be a matter of principle, not compromise or strategy or political accommodation” (Dworkin 1996, 11). This first dimension is closely related to the first restraint of relating back to the words of the Founding Fathers. It is important that we try to interpret what they intended for us in order to understand what the Constitution should be interpreted as for contemporary society. The second dimension of integrity “holds vertically: a judge who claims a particular right of liberty as fundamental that his claim is consistent with the bulk of precedent, and with the main structures of constitutional arrangement” (Dworkin 1996, 11). By looking towards precedent as a guide for future decision making, the law gains its legitimacy. If each individual judge were to decide a case based on circumstances not grounded in history and integrity, then the law would lose its authority. By keeping the law consistent, the law ensures citizens that what the law protects will be secured. The third dimension of integrity “holds horizontally: a judge who adopts a principle must give full weight to that principle in other cases he decides or endorses” (Dworkin 1996, 11). This dimension is very similar to the second dimension. If a judge decides that a fetus is not a constitutional person in the instance of a case on abortion rights, it cannot then decide another case where the fetus is considered a constitutional person. A judge must remain consistent with their interpretation of what the Constitution provides as an answer to a multiplicity of legal questions. This is consistent with Dworkin’s idea of equality. A judge must apply moral principles equally to all cases. This further preserves the integrity of the Constitution.

Dworkin on Originalism
To better understand Dworkin’s theory in practice, it is important to understand originalism, one of the main opponents to Dworkin’s theory. Dworkin’s moral reading theory offers an alternative to originalism. Robert Bork, a strong supporter of originalism, has been known by many critics to have a radical view on constitutional interpretation. He is a believer in textualism, and focusing on original intent.\(^2\) Robert Bork’s beliefs serve as a stark contrast to the moral reading theory, which is why his viewpoint is relevant.

*Robert Bork’s Originalist Theory*

In order to better understand Dworkin’s concept of the moral reading theory, it is important to understand why he rejects the originalist theory. His rejection of originalism is best seen in Chapters 12-14 of *Freedom’s Law* where Dworkin argues against the originalist Robert Bork. Dworkin first describes Bork as “a constitutional radical who rejects a requirement of the rule of law that all sides in that debate had previously accepted” (Dworkin 1996, 265). Bork believes the Constitution should be “guided by the intention of the framers, and nothing more” (Dworkin 1996, 267). However, Dworkin modifies this notion, stating:

> If we are to accept the thesis that the Constitution is limited to what the framers intended it to be, then we must understand their intentions as large and abstract convictions of principle, not narrow opinions about particular responsibility to judges than Bork’s repeated claims about judicial restraint suggest. For then any description of original intention is a conclusion that must be justified not by history alone, but by some very different form of argument (Dworkin 1996, 269).

Dworkin reinforces the idea that the Framer’s would not have intended to apply “narrow opinions on responsibility” because it would hinder the document from surviving.

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\(^2\) It is important to understand the difference between original intent, and original meaning. The theory of original intent is a theory of interpretation by which judges attempt to ascertain the meaning of a particular provision of the Constitution by determining how the provision was understood at the time it was drafted and ratified, focusing specifically how the Founders understood it. Original meaning focuses the understanding on the people of that time period, and how they would have understood the Constitution. In recent years, original intent has been abandoned due to a lack of substantial evidence to support the claims made under that theory. The use of original intent is a major contributor to Bork being labeled radical in his beliefs.
throughout generations. Dworkin states “time has given us the information and understanding that they lacked” (Dworkin 1996, 271), which was why the Constitution could not be interpreted as precise guidelines for everyone to follow. As time goes on, the levels of responsibility change with the influx of new technology and need for more security. However, Bork is confident that the originalist understanding of the Constitution is the correct interpretation. Dworkin summarizes Bork, stating:

First, any method not based on original understanding requires judges to make “major moral choices.” Second, judges cannot show that they have legitimate authority to make major moral decisions for the rest of the community. Third, in the absence of such authority, judges must only make decisions based on a moral theory the public would accept. Fourth, since people disagree deeply on matters of morality, no such moral theory exists, and judges therefore must not make moral choices (Dworkin 1996, 302).

On the first argument, that judges are required to make “major moral choices” for the rest of us under the moral reading theory, Dworkin argues “We cannot coherently assign these decisions back to the framers; we must make them, on grounds of political morality for ourselves” (Dworkin 1996, 297). It is beneficial for judges to be the ones who make these “major moral choices” because they are non-partisan, and are appointed based on their knowledge of legal texts, the rule of law, etc. Dworkin even argues for judicial activism, and argues that the Court, being the only countermajoritarian body in the United States Government, is the best interpreter of the law based on the abstract moral principles it presents. The prestige of the position of a judge on the Supreme Court, and the length of the appointment process ensures that judges do have the legitimate authority to make these decisions. Dworkin also argues that “Bork rejects the positions that judges have legitimate authority under our system of government to make controversial and important moral judgments in the course of a good faith interpretation of the Constitution.
But that view – that under the best understanding of our constitutional democracy judges do have such authority, legitimately – is very widely accepted” (Dworkin 1996, 302). In other words, although Bork rejects the authority of judges, the majority of other scholars and citizens alike recognize such authority.

The third argument is that judges would only make decisions based on what the public would accept. However, Dworkin argues this best when he states “The point of integrity is principle, not uniformity” (Dworkin 1996, 83). As previously stated, in order for any judicial decision to have authority and standing, it must uphold the integrity of previous decisions. Dworkin argues that “Judges in the mainstream of our constitutional practice are much more respectful of the framers’ intentions, understood as a matter of principle than Bork is. They accept the responsibility the framers imposed on them, to develop legal principles of moral breadth to protect the rights of individuals against the majority” (Dworkin 1996, 273). Judges adhere to protecting the rights of the individual when making their moral decisions, not based on what a majority party would like. This once again affirms Dworkin’s idea of the Court as a countermajoritarian body of the government. The Court interprets the law in a way that reflects on individual rights, and is not subject to pressure from the majority. This can be seen in Dworkin’s conceptualization of an ideal democracy, based on individual participation and reflection.

The fourth argument Bork makes, that not everyone can agree on one moral principle, is not seen as a problem for Dworkin. He states “The best explanation of the differing patterns of their decisions lies in their different understandings of central moral values embedded in the Constitution’s text” (Dworkin 1996, 2). It is important that each individual interpret the meaning of the Constitution for themselves, and this therefore
results in different moral theories. He states “We cannot coherently assign these decisions back to the framers; we must make them, on grounds of political morality, for ourselves” (Dworkin 1996, 297). This is not a bad thing for Dworkin, because these different moral theories will be forced to compete with one another, in order to arrive at what is the “best” interpretation of the constitutional principle in question. Dworkin rejects most, if not all of Bork’s arguments for originalism and concludes “The only impossibility in this story, in other words, is the impossibility of Bork’s rescuing his argument from self-contradiction” (Dworkin 1996, 302).

_Dworkin’s Rejection of Originalism_

Although Robert Bork’s argument for originalism seems weak, there are Supreme Court Justices today, such as Justice Scalia and Justice Thomas, who believe that originalism is the most appropriate way to interpret the Constitution. However, Dworkin rejects this theory on multiple levels. His first argument is a common one that can apply to all cases where there are multiple authors of a governmental document. Dworkin states “The thesis insists that judges interpret the Constitution to mean only what the framers intended it to mean. But the framers had two very different kinds of intention that, in very different senses, constituted what they meant. They had linguistic intentions, that is, intentions that the Constitution contain particular statements. They also had legal intentions, that is, intentions about what the law would be in virtue of these statements” (Dworkin 1996, 291). The originalist theory suggests that there is no distinction, and that the linguistic intentions are the same as the legal ones. Originalists equate what the words say, with what they were intended to mean. Dworkin also recognizes the difficulty in trying to determine exactly what the Framer’s intentions were. In “Modern
Jurisprudence and the Transvaluation of Liberal Constitutionalism,” Gary J. Jacobsohn lays out an argument for this difficulty. He states:

Initially Dworkin argues that “judges cannot decide what the pertinent intention of the Framers was… unless they make substantive political decisions of just the sort of proponents of intention or process think judges should not make.” And later he writes that “most of the delegates and congressmen who voted for the ‘broad’ provisions of the Constitution probably did not have an interpretive intention that favored concrete intentions. There is no reason to suppose they thought that congressmen and legislators should be guided by their, the Framer’s, conceptions of due process of equality or cruelty, right or wrong” (Jacobsohn 1985, 417).

Dworkin finds it very difficult, with the multiplicity of ideas surrounding the intentions for the language of the Constitution and the principles it entails, to find out exactly what they intended to say. Dworkin states “We must assume that the legal intentions of the framers were honorable rather than cynical. They intended to commit the nation to abstract principles of political morality about speech and punishment and equality, for example” (Dworkin 1996, 293-294).

Conclusion

Dworkin finds originalism to be an ineffective way of interpreting the Constitution. It is unrealistic to interpret the Constitution as presenting concrete regulations against the behavior of citizens in society, and not as a guide to providing abstract moral principles that would lead to a successful society. He therefore formally rejects the originalist theory, stating:

it is as indefensible in principle as it is unpalatable in result, moreover. It is as illegitimate to substitute concrete, detailed provision for the abstract language of the equal protection clause as it would be to substitute some abstract principle of privacy for concrete terms of the Third Amendment, or to treat the clause imposing a minimum age for President as enacting some general principle of disability for persons under that age (Dworkin 1996, 13-14).
According to Dworkin, what is more important is identifying the abstract moral principles inherent in the text of the Constitution. These moral principles are what society should be based on, because they ensure equality and the protection of individual rights, without completely altering the message the founding fathers present. Judges use the moral theory unconsciously when making decisions as a part of human nature. Dworkin’s moral reading theory serves as a valid alternative to originalism, and points to the many flaw originalism has.

**Wilson and Dworkin**

Now that Dworkin’s theory of constitutional interpretation has been identified, it is possible to compare it to James Wilson’s theory of constitutional interpretation. In this section, Dworkin’s theory of constitutional interpretation will be reviewed more in depth, focusing specifically on his idea of an ideal judge. Then the similarities between Dworkin and Wilson’s theories of constitutional interpretation will be discussed, followed by a discussion of the important distinctions between the two theories. To conclude, Wilson’s theory will be used to show why Dworkin’s theory is too radical according to the framework Wilson has established, and discuss its implications for how both Dworkin and Wilson should be interpreted.

**Similarities**

In order to understand where the theories between Dworkin and Wilson differ, it is important first to look at the similarities between the two. Both Dworkin and Wilson agree that the source of judicial decision making should be the Constitution, and that a set of latent moral principles should be applied when interpreting the Constitution. The Constitution itself is seen by both Wilson and Dworkin to contain moral principles. Both theorists also agree that maintaining the
integrity of the Constitution is important in judicial decision making. The Constitution should be the basis of all judicial decision making. In addition, Dworkin and Wilson both incorporate natural law and natural rights into their theory of constitutional interpretation. Both theories recognize that there are moral principles, by which the law should be based upon. They also agree that the Constitution contains these moral principles, and it is the job of the judge to interpret and to teach what these moral principles mean through their decisions.

Dworkin and Wilson also agree that a key aspect to a theory of constitutional interpretation is responsibility. Dworkin describes responsibility as “compatible with any assumption we can sensibly entertain about what causes our various decisions and what the neutral consequences are of those decisions” (Dworkin 2011, 12-13). This idea of responsibility influences his concept of dignity, more specifically the second principle. He states “We each have a sovereign ethical responsibility to make something of value of our own lives” (Dworkin 2011, 13). This idea is consistent with Wilson’s understanding of citizenship. Dworkin and Wilson both agree that an individual should respect the lives of others and they would their own. This idea of dignity is the basis of society. Wilsons states “We trust that, in the future, men, instead of knowing and treating one another as enemies, and as engaged in enterprises mutually destructive, will know and treat one another as friends, and as jointly operating in plans and systems for promoting prosperity, the virtue, and the felicity of the human race” (Wilson 2007, 936). An individual cannot be only concerned with themselves, because it would not be morally responsible. Instead, Wilson and Dworkin encourage looking at personal actions as contributing to the whole of society. Wilson expresses this idea of society working together stating “Let us, then, cherish; let us encourage; let us admire; let us teach; let us practice this ‘devotion to this public,’ so meritorious, and so necessary to the peace, and greatness, and happiness of the United States”
(Wilson 2007, 671). In order to do this, Dworkin emphasizes the importance of filters. Dworkin states “Responsibility requires us critically to interpret the convictions that seem initially most appealing or natural – to seek understanding and specifications of these initially appealing convictions with those two goals of integrity and authenticity in mind. We interpret each of these convictions, so far as we can, in the light of the others and also in the light of what feels natural to us as a suitable way to live our lives” (Dworkin 2011, 108-109). Through individual reflection on the morality of individual actions, individuals will learn to modify their actions to be morally responsible and beneficial to society as a whole.

Another similarity between the two theories is the rejection of the Causal Impact Hypothesis. Dworkin claims the Causal Impact Hypothesis is a myth stating “even if we assume that moral truth does have mysterious causal potency, that assumption could be of no help whatsoever in justifying our moral beliefs” (Dworkin 2011, 74). Dworkin’s major issue with the Casual Impact Hypothesis is that it claims to be value neutral. Dworkin states “CI is not a mistake about what there is. It is a confusion about what can count as an argument for the truth of a moral conviction. Only moral argument can. CI is a mistake because it violates Hume’s principle” (Dworkin 2011, 75). Dworkin disregards CI because Hume’s principle says that a value neutral theory is impossible. Hume’s principle restated is “any argument that either supports or undermines a moral claim must include or presuppose further moral claims or assumptions” (Dworkin 2011, 99). Wilson would agree with this. Wilson states “Laws may be promulgated by reason and conscience, the divine monitors within us” (Wilson 2007, 470). This suggests that even the law, which applies universally to society, is not value neutral. Wilson’s

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3 The Causal Impact Hypothesis assumes that there are preexisting moral facts that speak to moral truths. Individuals recognize moral principles by recognizing these moral facts, without any sort of value associated with it. Individuals recognize something is morally right because of these moral facts, not because of the values associated with these truths.
concept of judicial decision making supports this. As stated earlier, according to Wilson, a judge must use both reason and the common sense to arrive at a morally responsible decision. Scientific reasoning is inadequate by itself, and must be connected with a body of moral principles. Therefore, Wilson and Dworkin would both reject the Causal Impact Hypothesis on the basis of Hume’s principle, that a theory of interpretation cannot be value neutral.

Differences

After reviewing the similarities between the two theories in the previous section, this section will address the differences between the two theories. Wilson would argue that Dworkin’s theory pushes his framework too far, by pushing philosophy to its limits. Dworkin’s particular concept of a judge is as a Philosopher King, who governs because he knows the truth. This idea of a judge is in direct tension with Wilson’s concept of a judge as an educator for the sovereign people. Dworkin applies Hume’s principle to suggest that a morally superior decision would override the Constitution, because the Constitution is majoritarian. Dworkin’s rejection of the majoritarian premise leads to this conclusion. Therefore, according to Dworkin, a judge has the responsibility to arrive at the truth, without necessarily using the Constitution as the basis of his or her decision making. Wilson would reject this idea, on the basis that the Constitution is written to be democratic, and the sovereign will of the people. By removing the majoritarian aspect of the Constitution, its purpose would be essentially undermined. Dworkin’s view would provide too much discretion to judges, by encouraging them to consult dicta instead of consulting the Constitution itself. Dworkin would combat this with the two restraints he identifies in his theory of judicial decision making. The first is judges are to look at “what the framers said.” Dworkin uses the analogy of a father teaching his children about moral concepts to demonstrate that the Founders did not intend for the Constitution to be interpreted strictly.
Instead, they viewed the Constitution as a guideline of abstract moral principles. Dworkin states “The Constitution enacts abstract principles that judges must interpret, as best they can, according to their own lights” (Dworkin 1996, 299). This further encourages consulting outside sources to interpret the Constitution that have the possibility of being inconsistent with Constitutional principles and constitutional structure. The second restraint on judges Dworkin identifies is the requirement of constitutional integrity. He claims precedent and the responsibility of judges to respect previous decisions are enough of a restraint to avoid a judiciary with absolute power.

In response to Dworkin’s two restraints on judges, Wilson would respond that his theory is more concrete. Although Dworkin sees this as a good thing, stating “What interpretation lacks is exactly what gives science a sense of solidity” (Dworkin 2011, 155), Wilson’s theory creates a firmer and safer alternative. According to Wilson, judges should implement “principles and rules of genuine policy and natural justice for the purpose of promoting a true ‘science of law’” (Wilson 2007, xxiii). Wilson uses his concept of a true science of law in combination with the moral sense as the framework of how judges should make decisions. The science of law, which can be accorded with reason, acts as a restriction on the passions of the moral sense that could lead an individual to act on their own beliefs, as opposed to making a morally responsible decision. Wilson states “Every free citizen and every free man has duties to perform and rights to claim. Unless, in some measure, and in some degree, he knows those duties and those rights, he can never act a just an independent part” (Wilson 2007, 435). In order for citizens to exercise these duties, they must be educated on them. Wilson states “against this ungenerous application of one of the noblest propensities of our nature, the system of our education and our law ought to be directed with the most vigorous and unremitted ardor” (Wilson 2007, 670). Wilson is
concerned with educating the American citizenry so they can perform their responsibilities as principle sovereign, which indicates that Wilson is essentially concerned with the good and ultimately the perfection of the United States. His concern is fundamentally political. He places the role of education in the hands of the judge because the judge is a member of the most apolitical branch of government, and will therefore not interfere with the will of the people, unless it is inconsistent with the Constitution. In this case, Wilson’s judge has the job of educating the people on making morally responsible decisions by interpreting the Constitution and explaining its implications through their decisions. In contrast, Dworkin’s emphasis on the role of a judge as educator is both narrower and broader than Wilson’s. Dworkin is narrower in the sense that he is primarily concerned with judges, and not society. While Dworkin is concerned that the people be free to make moral choices, he seems to be rather neutral with regard to the nature of these choices. It is only important that individuals are free to make these choices, and that they are consistent with his two principles of dignity. Wilson’s view is that the people should be educated on what decision to make. Dworkin is broader in the sense that he is concerned with moral truth at a universal level, in contrast to Wilson who is concerned with the political implications of moral responsibility. The problem with Dworkin’s theory, is that he fails to recognize the first principle of constitutional design, that constitutions must fit the people in order to be legitimate and binding (Lutz 2006, 18; Aristotle 1984, 1289b10-25). Constitutions and the moral principles and values they embody must fit the moral principles and values of the people. Dworkin refuses to recognize this with his emphasis on philosophic truth at the expense of any political considerations.

The structure of the two theories is another important distinction. Wilson constructs an abstract framework to apply reason, in order to simplify that framework in a way that will be
easier for the sovereign people to understand. Dworkin pushes this framework further, by allowing judges too much power by focusing on finding truth through moral principles that are not necessarily found in the Constitution. Dworkin’s theory works from the top to bottom, starting with the truth, then focusing on key values, such as the two principles of dignity, deriving the truth from these values, with moral responsibility as a limitation. Wilson’s theory works from the bottom-up, with a moral document (the Constitution) as the base, and using reasoning based on scientific principles and the common sense to arrive at a morally responsible decision at the top. Wilson’s theory would be considered too narrow for Dworkin. However, Wilson would argue that his theory is narrow in order to better protect the people because it supports the majoritarian nature of the Constitution and is more applicable to its political implications.

A key issue between Dworkin and Wilson’s theory is the role of judge versus the legislator. Wilson strictly adheres to the idea of boundaries between the three branches set by the Constitution. However, Dworkin’s theory appears to blur those boundaries. Dworkin states “In conceptual interpretation the distinction between author and interpreter vanishes: we have together created what we each and together interpret” (Dworkin 2011, 157). According to this logic, the interpreter, the judge, becomes the author. This would entail that judges can make law, which is in direct tension with Wilson, and with constitutional boundaries. Viewing the job of judges as representatives, the first role of a judge is that judges should not make law. It is clear that Wilson does not agree that judges have the constitutional authority to make law in his proposal of a Council of Revision. A Council of Revision would not be needed if judges could make law. It is clear that the legislature is the only branch of government with the constitutional authority to make the law, and by Dworkin suggesting that “the author” and “the interpreter” are
not distinct from one another would suggest that the integrity of the Constitution would be diminished. This is fine for Dworkin because he is ultimately more concerned with moral than constitutional integrity. Wilson would agree that the Constitution should be interpreted with moral integrity. However he would disagree with Dworkin, and instead argue that the author of the Constitution does not change, consistent with his view of popular sovereignty. The Founding Fathers created the Constitution, and the job of a judge is to interpret the Constitution to the extent of an interpreter, not an author. If judges had this power, the Constitution would literally be a “living document,” subject to the trends and passions of society, thereby destroying its integrity and legitimacy as a moral document that withstands large spans of time. Giving judges this power blurs the distinction between the legislature and the judge, violating the constitutional principle of separation of powers. In doing this, Dworkin also violates one of his own limitations on the moral theory. Earlier, Dworkin was quoted saying that judges must respect the moral principles contained in the Constitution, as well as its “structural design.” By blurring the distinction between the legislative and judicial power, he is simultaneously blurring the distinction between legislative and judicial responsibility. This creates a problem with Dworkin’s moral theory, because he contradicts the limitations he places on it.

Dworkin bases his theory on a value based theory of interpretation, stating “we should treat moral reasoning as a form of interpretive reasoning and that we can achieve moral responsibility only by aiming at the most comprehensive account we can achieve of a larger system of value in which our moral opinions figure” (Dworkin 2011, 38-39). Although Wilson and Dworkin can both agree that a theory that is morally responsible cannot be value neutral, Dworkin rejects Wilson’s concept of common sense. Wilson offers an answer to this critique stating “This philosophy will teach us, that first principles are in themselves apparent; that to
make nothing self evident, is to take away all possibility of knowing anything; that without first principles, there can be neither reason nor reasoning; that discursive knowledge requires intuitive maxims as its basis; that if every truth would admit of proof, proof would extend to infinity; that, consequently, all sound reasoning must rest ultimately on the principles of common sense – principles supported by original and intuitive evidence” (Wilson 2007, 603-604). Wilson argues that all ideas initially begin from an intuitive maxim. This intuitive maxim allows for reasoning and reflection on which to derive the truth from. The example of first principles presents some concepts that are self-evident, and therefore do not necessarily need to be interpreted to be understood. However, there are other concepts, that are not self-evident, in which the common sense in combination with reason, must work to reach a morally responsible decision. Reasoning and interpretation alone are not enough to arrive at a morally responsible decision. Wilson states “Some first principle yield conclusions, which are certain; others yield such only as are probably. In just reasoning, the strength or weakness of the conclusion will always correspond to the strength or weakness of the principles, on which it is grounded” (Wilson 2007, 618). This idea connects back to Wilson’s concern with the political nature of constitutional interpretation. A morally responsible decision for Wilson is not only informed by general principles of morality, but is also formed by the particular considerations and values of the political community for which it governs. This is especially important in the role of a judge where Wilson would use their decision making as an attempt to bridge the divide between the general/universal maxims and the particular. Dworkin theory, on the other hand, seems to focus exclusively at a general level. This raises questions about Dworkin’s ability to reconcile theory and practice, where Wilson seems to have this as an aim of his theory of constitutional interpretation.
Wilson would also reject Dworkin’s value based theory because of its instability. Dworkin embraces the instability of his interpretive theory, stating “the active holism of interpretation means, on the contrary, that there is no firm ground at all, that even when our interpretive conclusions seem inescapable, when we think there really is nothing to think, we are still stalked by the ineffability of that conviction” (Dworkin 2011, 155). Wilson grounding decision on scientific principles is strengthened by its solidity. For Wilson, in the judge’s role as an educator uses the science of law as a basis of teaching individuals about their rights and duties. It is important that the basis of this education be solidified, as it is with the science of law. If Dworkin’s theory were to be followed, where interpretation does not have a solid basis, the education of individuals would be inconsistent and would prevent unity in society. Dworkin tries to combat this theory, stating that solidity is not necessary for morally responsible decision making. He states “the fact that the justifying goals of science are irrelevant to truth is another source of solidity in science. Knowing that people’s differences in what they take to be the justifying goals of science can play no role in fixing what they take to be scientific truth makes it profitable for us to expect convergence of opinion in that domain” (Dworkin 2011, 155). Dworkin disagrees with the use of solid principles because he does not believe they will equate to the truth, which is his central focus.
Chapter Five: Conclusion

This chapter serves to summarize Wilson’s theory of constitutional interpretation and identify its implications for modern jurisprudence. First, this chapter summarizes Wilson’s theory of constitutional interpretation. Second, it discusses the different sources of political philosophy that each of the theories discussed in Chapter One derive their ideas on constitutional interpretation from. The purpose of this discussion is to assist in the process of placing Wilson’s thought within the competing theories of how judges should make decisions. Lastly, I discuss James Wilson’s own judicial opinion in the case of Chisholm v Georgia (1793), to examine how his theory works in practice.

James Wilson’s theory of constitutional interpretation is distinguished from other theories of constitutional interpretation because of its unique reliance on popular sovereignty. Wilson employs a multi-dimensional understanding of sovereignty in the form of a principle-agent relationship. This principle-agent relationship consists of two dimensions, principled sovereignty and derived sovereignty. In this relationship, the principle sovereign is the American people, who are responsible for the creation and limitation of government through the drafting of the Constitution. The government is limited from infringing upon this principle sovereignty by the constitutional constraints of representation, separation of powers and federalism. The implication of this principle-agent relationship on the role of a judge attaches three responsibilities: as an agent to the people, as a representative and as an educator. These three responsibilities help to aid the people in recognizing their role as principle sovereign and understanding the nature of their responsibilities as the principle sovereign. When making decisions, Wilson argues that judges should use Hobbesian scientific reasoning with a combination of the moral sense to arrive at a morally responsible and accurate interpretation of
the Constitution. In order to understand where Wilson’s theory of constitutional interpretation fits in with the other established schools of constitutional interpretation, this chapter discusses the origins of each of the other theories of constitutional interpretation, and compares them with the origins of Wilson’s theory.

The natural law theory of constitutional interpretation is based on the writings of St. Thomas Aquinas. George states “the theory’s rootedness in the tradition of thought about practical reason and morality in which St. Thomas Aquinas is so central a figure…” (George 2001, 1). Although Wilson incorporates the natural law in his own theory of constitutional interpretation, he should not be considered as Thomistic. According to Velazquez in “Rethinking America’s Modernity: Natural Law, Natural Rights and the Character of James Wilson’s Liberal Republicanism,” Wilson explicitly distances himself from Aquinas’ natural law teaching. Velazquez states “Wilson’s turn to the Scots is not intended to support a Thomistic, classical republican, or civic humanist understanding of human nature, civil and political society, nor is it meant as a repudiation of modern, liberal social contract theory” (Velazquez 1996, 216). Velazquez makes this assertion based on Wilson’s account of humanity doing good, which according to Velazquez, provides evidence of Wilson’s reliance on Hobbes, Locke and the Scots, rather than on Christian Aristotelians (Velazquez 1996, 208). Wilson relies on these theorists, rather than Aquinas because he believes a key part of citizenship is reciprocal assistance. Velazquez states “Wilson’s natural law does not amount to a human being’s participation in the higher law of reason or logos… the law of nature is for Wilson… rooted in the passions, not least of which is the ubiquitous desire of self-preservation. Reason is thus an instrument in the service of fundamental feelings” (Velazquez 1996, 195-6). Wilson is also distinct from theorists of natural law because he believes that the individual remains prior to the
political community. This is contrary to both Aristotle and the Thomistic political animals (Velazquez 1996, 214). This idea of the individual existing before society implores a leaning towards the natural rights theory, rather than the natural law.

Wilson and Barnett both derive their ideas of natural rights thinking from John Locke. According to Velazquez, Wilson is attracted to Locke because “In Locke we thus find an explicit duty to respect the rights of our fellow human beings to life, liberty and estate” (Velazquez 1996, 209). These rights are the primary fact from which Wilson reasons towards civil society and government. However, where the two differ is on the issue of consent. Barnett argues that a government that is legitimized by consent can only be legitimate if the consent is unanimous. Barnett states “Anything less than unanimous consent cannot bind those who dissent” (Barnett 2004, 25). Wilson rejects this view of consent, arguing that a majority decision can be morally binding, and unanimity is not required for that consent to be considered legitimate. Wilson states “The only rational and natural method, therefore, of constituting civil society, is by the convention or consent of the members, who compose it. For by a civil society we properly understand the voluntary union of persons in the same end and in the same means requisite to obtain that end. This union is a benefit, not a sacrifice: civil is an addition to the natural order” (Wilson 2007, 635). By suggesting that unanimous consent is required for legitimate government, Barnett places a heavy restriction on the ability of government to aid the sovereign people as their agent. Barnett’s fear is that the people’s natural liberty will be hindered by less than unanimous consent, because the government as instituted by the Constitution places too much power in the hands of government. In contrast, Wilson argues that in the efforts to strive for perfection in society, government will lead to the expansion of natural liberty, while also protecting it because the people have consented to it. Wilson describes natural liberty as
“provided he does not injury to others; and provided some public interests do not demand his labours. This right is natural liberty. Every man has a sense of this right. Every man has a sense of the impropriety of restraining or interrupting it” (Wilson 2007, 638). Based on Wilson’s theory of the moral sense, every individual has a sense of natural liberty, and a sense that they should respect the natural liberty of others. Through this common sentiment, consent of the majority effectively engages people to participate in society. Wilson states “In the social compact, each individual engages with the whole collectively, and the whole collectively engage with each individual” (Wilson 2007, 636). As every individual works towards the ends of society, they are exercising their own natural liberty, while protecting the natural liberty of others. Government is instituted to protect this relationship, and to connect individuals with the moral sense to recognize that natural liberty is shared by all. This sense is what makes the law, and the Constitution morally binding, not unanimous consent.

The common law tradition focuses on Aristotelian prudence. According to Stoner, Coke agrees with Aristotle, and equates his view of prudence with jurisprudence. Stoner states “the completely virtuous man must be a judge, or at least a man of judgment” (Stoner 1992, 18). Wilson also derives some of his ideas from Aristotelian prudence, focusing on Aristotle’s view of equity. Wilson quotes Aristotle, stating “equity may be well deemed the conductor of law towards a state of refinement and perfection” (Wilson 2007, 934). Equity is used to correct the law for its defects, and places the judge in a position to correct these defects through their decision making. Wilson recognizes that the legislature does not have the ability to foresee every possible outcome of the legislation they pass, so he places the responsibility on judges to educate the legislature through its decision and constitutional interpretation. This idea of equity conforms a court of law and a court of equity into one body, which were separated as part of
English common law. According to Aristotle, the defects in the law are that they are too general. Equity is used as a means of conforming the law to the people it governs, and therefore making the law more particular. Wilson would agree that the law should be tailored to the people it governs. However, Wilson seems to replace Aristotle’s view of equity with Hobbesian scientific reasoning. His reason for this is that Hobbesian scientific reasoning provides a more solid foundation for the law and judicial decision making than the common law does. The common law is flexible and conforms to the people, but it does not provide a solid foundation for making decisions, other than precedent. By looking at the general principles within the law, rather than the particulars, a more comprehensive and legitimate form of law is created.

Dworkin’s theory of constitutional interpretation relies on the theories of Plato. According to Dworkin, Plato constructed his moral and political theories around interpretations of virtues and vices (Dworkin 2011, 184). Plato’s interpretation has two parts. The first is to “analyze each of the virtues and vices they took up by constructing conceptions of each that draw upon and reinforce the conceptions they favored of the others. They showed these virtues, that is, as forming a mutually supportive network of moral values” (Dworkin 2011, 184). The second stage was to find “interconnections between the network of moral concepts and ethics” (Dworkin 2011, 184). This idea of analyzing virtues and vices connects with Dworkin’s value based theory of interpretation, in which Dworkin argues that his goal of interpretation is to create a fully articulated idea of value for a given concept. Dworkin and Plato both focus on unity in this respect. Dworkin also discusses Plato’s conception of justice as counterintuitive, stating “he analyzes that concept to include a psychic condition of the agent. He seeks an account not of just actions but of a just person, and he identifies a just person, in the first instance, not as someone who cares about others but as someone who cares about the goodness of his own being”
This connects directly with Dworkin’s first principle of dignity, which states “you must treat the success of your own life as a matter of objective importance” (Dworkin 2011, 255). He then states that Plato’s concept of justice “tries to explain how the enlightened promotion of self gives one an interest in the well-being of others” (Dworkin 2011, 185). This idea connects directly to Dworkin’s second principle of dignity, which states “authenticity, assigns each of us a personal responsibility to act consistently with the character and projects he identifies for himself” (Dworkin 2011, 261). In order to have an effective and positive impact on others, one must focus on their own individual well-being first according to both Dworkin and Plato. Dworkin explains his concept of dignity further, stating “your reason for thinking it objectively important how your life goes is also a reason you have for thinking it important how anyone’s life goes: you see the objective importance of your life mirrored in the objective importance of everyone else’s” (Dworkin 2011, 260). Dworkin focuses on the self in both of his principles of dignity, rather than society as a collective whole.

This theory of interpretation does not fit within Wilson’s model for judges. Wilson focuses on the well-being of the people at large, placing the responsibility of educating the citizens about the law and the Constitution on judges. Wilson’s support of a majoritarian society would suggest that although the individual is important, equally as important is working together and recognizing each others’ wants, needs, and goals. Wilson says “Society is necessary as well as natural to us” (Wilson 2007, 630). Individuals are meant to work together and better one another, not necessarily work separate and distance from each other. Wilson supports this, stating “We trust that, in the future, men, instead of knowing and treating one another as enemies, and as engaged in enterprises mutually destructive, will know and treat one another as friends, and as jointly operating in plans and systems for promoting the prosperity, the virtue,
and the felicity of the human race” (Wilson 2007, 936). Dworkin’s support of individual improvement over the improvement of society as a whole is connected with his overall rejection of the majoritarian premise. Dworkin and Plato focus on individual virtue and happiness, which will lead to the virtue and happiness of the city. Wilson differs from this model, looking towards his idea of citizenship to work towards the virtue and happiness of the city.

Based on Wilson’s theory of constitutional interpretation, it would seem that Wilson would reject modern jurisprudence. Through their decision making, judges have effectively narrowed down the rights protected by the Constitution into spheres. This constriction of rights, Wilson would argue, is actually moving away from the intended purpose of the Constitution as the original will of the sovereign people. This is best exemplified in his own judicial opinion in the case of *Chisholm v Georgia* (1793). In this case, the state of Georgia refused to make payments pursuant to a contract for supplies from a South Carolina businessman. Once the merchant had died, the executor of his estate Alexander Chisholm brought suit against the state for the default payments. The state of Georgia made the argument that as a sovereign state, federal courts did not have the authority to prosecute. The question before the court was whether or not the state of Georgia was subject to the jurisdiction of the Supreme Court and the federal court system. In a 4-1 decision, the justices decided that the people of the United States intended to bind the states through the legislative, executive and judicial powers of the federal government, and that the sovereign power was contained within the people of the United States, not the “artificial person” of the State.

Wilson begins his opinion by discussing the topic of sovereignty. Wilson describes the problem of sovereignty, stating “As the state has claimed precedence of the people, so, in the same inverted course of things, the government has often claimed precedence of the state, and to
this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence” (Wilson 1793, 3). Wilson first addresses this problem by looking towards the text of the Constitution. Wilson states “To the Constitution of the United States, the term Sovereign, it totally unknown… With regard to one of the terms, ‘state,’ this authority is declared; with regard to the other, ‘sovereign,’ the authority is implied only” (Wilson 1793, 2). This statement about sovereignty exemplifies Wilson’s concept of the principle-agent relationship between the sovereign people and the government. By saying that sovereignty is implied only to the states signifies that the people hold sovereignty explicitly. Wilson describes the relationship stating “state governments were made for man, and, at the same time, how true it is that his creatures and servants have first deceived, next vilified, and, at last, oppressed their master and maker” (Wilson 1793, 2-3). The state of Georgia claiming they retain the sovereign power suggests a rejection that the people are the principle sovereign. The states were instituted to serve as agents to the people, and according to Wilson “a state [should] be considered as subordinate to the people” (Wilson 1793, 3). According to Wilson, each individual state is considered to be an “artificial person,” created to serve the people, who retain the sovereign power. Wilson describes this relationship, stating that the citizens of Georgia “did not surrender the supreme or sovereign power to that state, but, as to the purposes of the Union, retained it to themselves” (Wilson 1793, 5). In order to create legitimacy to the government, the principle sovereign must be within the people. Wilson states “laws 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” (Wilson 1793, 6). It is important to the idea of legitimacy that the sovereign power be in the body of the people and not the state, because if the state were to retain the sovereign power, the government would no
longer be majoritarian and democratic, but instead term into a form of despotism. The state, and the federal government, are created in order to aid the sovereign people in perfecting society. The states and the federal government create structure and order so that these goals can be achieved. Wilson describes the purpose for instituting government by comparing it to the election of a King. Wilson states “We, who are of as great worth as you, and can do more than you can do, elect you to be our King upon the conditions stipulated. But between you and us, there is one of greater authority than you” (Wilson 1793, 7). This suggests that although the people provide the government with authority, they do so knowing that they are the true principle sovereign, and have the ability to change the government when they feel it is necessary. It is the key to democracy that the chosen leaders of society are not seen as having more power than the individuals in society. Wilson states “Judges ought to know that the poorest peasant is a man as well as the King himself; all men ought to obtain justice, since, in the estimation of justice, all men are equal, whether the Prince complain of a peasant, or a peasant complain of the Prince” (Wilson 1793, 8). According to Wilson, all men should be subject to the same justice and equality.

James Wilson’s theory of constitutional interpretation is based on the multi-dimensional concept of popular sovereignty, where a principle-agent relationship exists between the individuals that make up society, and the government that provides order to society. Wilson’s ideas incorporate natural law, natural right, and Hobbesian scientific reasoning, in combination with his idea of the moral sense. It is clear when fully analyzing Wilson’s theory that he cannot be placed within any of the schools of constitutional interpretation entirely, because he incorporates multiple different philosophies within his own theory. By reflecting on Wilson’s theory of constitutional interpretation, and looking at its implications for modern jurisprudence,
it would seem that the Court has effectively restricted the rights of the people under the Constitution more so than was originally intended during its creation. When looking at the Constitution through Wilson’s perspective, the people are the true rulers of society, not necessarily the government, which is very different from how society is viewed today.
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