ABSTRACT

Just Judgment?: James Wilson on the Relationship Between Popular Sovereignty and Judicial Review

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Judicial review has come to be the most important power of the American judiciary. Recent decisions made by the Supreme Court show that questions about judicial power are just as relevant today as they were at the time of the American Founding. Debates about judicial review are based on distinct understandings of the nature of judgment and the relationship between judicial review and the people. However, contemporary debates have taken on a character that misses the importance of judgment and draws a false dichotomy between judicial review and popular sovereignty. This thesis evaluates the problems with these contemporary arguments and examines James Madison's, Alexander Hamilton's, and the Anti-Federalist Brutus's views on the judiciary and the nature of judgment. Ultimately, I turn to the thought of James Wilson to provide an alternative understanding of judicial power. Wilson's distinct understanding of popular sovereignty, human nature, and the faculty of judgment provide the grounds to show that judicial review and popular sovereignty are compatible.

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JUST JUDGMENT?: JAMES WILSON ON THE RELATIONSHIP BETWEEN POPULAR SOVEREIGNTY AND JUDICIAL REVIEW

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TABLE OF CONTENTS

CHAPTER ONE

Judicial Power and Judicial Review

"The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.' Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect…History and tradition guide and discipline this inquiry but do not set its outer boundaries…When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[1] –Justice Anthony Kennedy, majority opinion in *Obergefell v. Hodges*

"This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."[2] –Justice Antonin Scalia, dissenting opinion in *Obergefell v. Hodges*

In the above quotes from the majority and dissenting opinions in the landmark case of *Obergefell v. Hodges*, Justice Anthony Kennedy and Justice Antonin Scalia provide two distinct views on the role of the judiciary: one on the nature and role of judgment in judicial decisions and one on the nature and role of popular sovereignty in judicial decisions. For Justice Kennedy, those that wrote the Bill of Rights and Fourteenth Amendment (and the Constitution as a whole) could not fully conceive of what rights should be granted to future generations. Thus, for Justice Kennedy it is up to the Court to extend protection to liberties that have been revealed through "new insight."[3] In his dissent, Justice Scalia is at odds with the view presented by Justice Kennedy and

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[1] *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.,* 576 U.S. ___, 10-11 (2015) (Kennedy, J., for the Court).

[2] *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.,* 576 U.S. ___, 1 (2015) (Scalia, J., dissenting).

[3] *Obergefell* (Kennedy, J., for the Court), 11.

the majority. For Justice Scalia, it is the will of the people that should be the basis for the Court's decisions. Judges must look to the historical circumstances surrounding the adoption of provisions such as the Bill of Rights and Fourteenth Amendment to provide the basis for judicial verdicts.[4]

Although these two views do much to represent contemporary thinking about judicial power, each is problematic in its own way. Justice Kennedy's case for "reasoned judgment" has two significant flaws. First, he provides no basis, historical, moral, or otherwise, for the argument that decisions by the Court should be based on this "reasoned judgment" nor does he define what "reasoned judgment" is. Lacking any account of a moral order or a natural law, he does not provide any grounds to determine what counts as a valid "new insight" that should provide the basis for judicial decisions. Secondly, because there is no way to determine what constitutes a valid "new insight," decisions made by the Court amount to nothing more than the personal insights, opinions, and thoughts of the nine justices of the Court. In practice, reasoned judgment is synonymous with the will of the members of the Court. Although some might see Justice Scalia's conception of how judgments are to be made as an antidote for these problems, his conception has a problem of its own: using popular sovereignty alone is still using will as the basis for exercising judicial power. Justice Scalia is able to acknowledge this problem but cannot remedy the fact that using the will of the people alone may fail to protect rights the Framers viewed as important and unalienable, no matter what the people's will may be.

[4] *Obergefell* (Scalia, J., dissenting), 1-4.

Although drastically different (and perhaps diametrically opposed), the views presented by Justice Kennedy and Justice Scalia have the same problem. Both obviate the role of judgment and replace it with will: the will of the judges in the case of Justice Kennedy and the will of the people at the time of the Founding in the case of Justice Scalia. The heart of the problem with both views is that each misses the importance of judgment, both theoretically and as the Framers saw it. For the Framers, it was not will alone that should govern. For example, natural rights and the consent of the governed were fundamental truths for the Framers. The protection of these fundamental truths is not and should not be based on will. These are moral claims always to be protected and are indispensable aspects of democratic government.

The preceding discussion clearly illustrates two things. The first is that contemporary debates about the nature of judicial power often miss important issues that the Framers were fully aware existed. Second, the discussion illustrates that questions about judicial power are just as relevant today as they were at the time of the Founding. Questions about judicial power and the proposed answers are of great theoretical and practical importance. Conclusions drawn in response to questions and debates have the potential to affect the structure and power of government. Furthermore, these debates affect the way the Court makes decisions, decisions that have immediate and tangible effects on the American people. That being said, Justices Kennedy and Scalia both get one thing right: answering questions about judicial power requires evaluating and understanding the nature and role of judgment as manifested in judicial review.

Broadly speaking, this thesis seeks to explore what sort of power judgment is and examine how judgment and judicial review are related to popular sovereignty. The

conclusions drawn in this examination allow one to answer questions about how judicial power is or is not able to represent the people. Before moving forward with questions such as these, it is necessary to understand what the power of judicial review is and examine where it comes from. I begin the task of understanding what judicial review is by defining concepts that will be important throughout the rest of this thesis.

Defining Terms: Popular Sovereignty, Judicial Review and Judicial Supremacy

Although endlessly debated, judicial review has come to be the most substantial power of the American judiciary. But what exactly is it? Judicial review is the power to decline to apply and enforce laws contrary to the constitution. When speaking of judicial review, William M. Meigs writes:

> By it the judiciary is elevated to a most important position and is made a potent factor, indeed, in the political history of the country. The great frequency of its application, the extent of its effects in any view, and the finally decisive power so commonly claimed for it by many, render it so great a feature in our system that no time spent in its study and investigation can be wasted.[5]

As Meigs points out, the importance of judicial review cannot be argued with. Unfortunately, discussions of judicial review often take the existence of the power for granted and fail to examine its origins. Conclusions drawn about the merits of judicial review miss something important if they do not consider where the power comes from.

The power of judicial review arises from the fact of popular sovereignty. In the American political system, popular sovereignty is the notion that people are the supreme ruler. This means that the people always retain sovereignty. Thus, judicial power is not invested in an institution, rather in the people. The judiciary is tasked with interpreting

[5] William M. Megis, "The Relation of the Judiciary to the Constitution," *American Law Review* 19, no. 2 (March-April 1885): 176.

the Constitution, a constitution made by the people, for the people. It cannot be overstated that the people, and *not* the judiciary, are sovereign. But how does this relate to judicial review? Judicial review is important to the sovereignty of the people because it is the mechanism by which the judiciary ensures that the states, the legislative branch, and the executive branch do not infringe upon the Constitution or the sovereignty and rights of the people.

In operation, judicial review is a function of the powers the judiciary is granted, the ways in which these powers are carried out, and the checks that other branches of government have on the judiciary. Of particular importance in this regard is judicial independence. Judicial independence is the fact that the legislative branch and the executive branch have no direct say in the decisions made by the Court. Judicial independence is also a function of the fact that justices cannot be removed by any branch or the people for an unpopular decision. On a related note, some have made the case for judicial supremacy: the idea that decisions made by the Court and its interpretations of law are the final word (until the Court changes its mind). I provide this definition because it is important not to equate judicial independence with judicial supremacy. The two are distinct concepts that have independent effects on the power of the judiciary.

All this being said, the power of judicial review is not a power explicitly granted in the Constitution. Moreover, the power of judicial review was never explicitly discussed at the Constitutional Convention. In fact, the "intent" of the Founders can be interpreted to support arguments for and arguments against judicial review. On the one hand, Alexander Hamilton explains that it is necessary for there to be a way to give efficacy to constitutional provisions. For example, there must be a constitutional power

to ensure prohibited acts are not undertaken by state governments. The Framers chose to give this power to the judiciary.[6] On the other hand, there is evidence to suggest that someone like James Madison did not support the power of judicial review, at least conceived in certain terms. Both Madison and James Wilson advocated for giving the defensive authority the Court holds today to the executive and judicial branches together. The executive would exercise an absolute veto that would be associated with a Council of Revision comprised of the executive and members of the judiciary.[7] It is important to note that in many ways, this Council of Revision (the power most similar to judicial review as we conceive of it today) was legislative in character.[8]

The fact that judicial review is not an explicitly granted power has led to substantial debate about what judicial review is and where it does (or does not) come from. Leonard W. Levy writes:

> The problem of legitimacy begins, of course, with the fact that the framers neglected to specify that the Supreme Court was empowered to exercise judicial review. If they intended the Court to have the power, why did they not provide for it?[9]

This is not to say that the power of judicial review necessarily does not exist, rather that its existence requires legal and theoretical justification. The justifications developed over the years are numerous and will be explored in the next section of this chapter.

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[6] Alexander Hamilton, "Federalist No. 80" (1788), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003), 474.

[7] Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, Connecticut: Yale University Press, 1966), 21, 28.

[8] C. Perry Patterson, "James Madison and Judicial Review," *California Law Review* 28, no. 1 (November 1939): 25.

[9] Leonard W. Levy, "Judicial Review, History, and Democracy: An Introduction," in *Judicial Review and the Supreme Court: Selected Essays,* ed. Leonard W. Levy (New York, New York: Harper Torchbooks, 1967), 2.

For now, it is important to note that because that judicial review is nowhere explicitly granted, even its definition is up for debate. Although the definition I provide at the outset of this section accurately describes judicial review at its most fundamental level, contemporary thinking often conceives of judicial review in a different, or perhaps more specific, way. For example, Alexander Bickel writes that judicial review is most basically understood as "the constitutional review of actions of the other branches of government, federal and state."[10] Others such as Henry Commager would describe the process of judicial review as such:

> Where the question of constitutionality is raised, the judiciary subjects the act anew to scrutiny—theoretically on constitutional grounds alone, never on those of expediency. Where it concludes that the act involved is contrary to the constitution, it voids the act.[11]

These definitions incorporate a component that the more traditional notion of applying different laws in different cases does not: the power to "void" a law. There is something distinctly different about refusing to apply a law in a particular case and declaring a law invalid and void. Different conceptions or definitions of the power of judicial review will ultimately lead to different conclusions about the nature of the judiciary and how the judiciary interacts with the people.

The preceding discussion shows that there is no question that judicial review is an incredibly important judicial power and is the complex result of a number of factors. However, clearly, this does not mean that there are no questions about how this power should be defined and exercised. One of the most important questions asked about

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[10] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Connecticut: Yale University Press, 1986), 1.

[11] Henry Steele Commager, "Judicial Review and Democracy," *The Virginia Quarterly Review* 19, no. 3 (Summer 1943): 418.

judicial review is how, why, and to what extent is the power consistent with American republicanism? Has the development of the judiciary in America been consistent with democratic principles or has its path deviated along the way? These questions are important because the nature of American judicial power is directly related to the representative nature of the courts. In other words, the manner in which the judiciary exercises its power determines the degree to which the courts directly represent the people.

In the remainder of this chapter, I will survey existing arguments regarding American judicial power and judicial review. This includes introducing arguments about where the power of judicial review comes from and explaining arguments that challenge judicial review and judicial independence as anti-democratic. Finally, I will provide introductory remarks on the nature of the judgment of the Court.

Arguments for Judicial Review

Contemporary debates regarding judicial review and judicial supremacy rest on an assumed dichotomy between popular sovereignty and judicial review. Those that make the case for judicial review either do not seem to think that judicial review will undermine popular sovereignty or view judicial power as invested in an institution and not the people. Here, I present some of the arguments in favor of judicial review.

Marbury v. Madison

The operation of judicial review in the Supreme Court is historically traced to the Court's decision in the 1803 case of *Marbury v. Madison.* The justification for judicial review that Chief Justice John Marshall makes in this case is derived primarily from the

text of the Constitution. The essence of the need for judicial review is summed up well in Chief Justice Marshall's assertion that "it is emphatically the duty of the judicial department to say what the law is."[12] This is the duty of the Court because if the judiciary is going to apply a law to the case before it, it must expound upon and interpret the law. If one law is in conflict with another, the Court must decide which law governs in the case. It is here that the power to ignore or refuse to apply a law made by the legislature arises. If a law and the Constitution both apply, and if the two are in conflict, the Constitution must be the governing rule or standard due to its supreme nature and because it is from the Constitution that the legislature gains its power to make law.[13] It is from explanations like this that the Constitution comes to be known as the "Supreme Law of the Land."

Although the duty outlined by Justice Marshal is a significant one, it is important to note what he does not say is the power of the Court. The distinction between applying a law and voiding a law previously noted is again relevant. Justice Marshall writes that when two laws are in conflict (such as a statutory law and the Constitution), the Court must decide which "governs the case."[14] This does not mean that the law that does not govern is automatically void. The Court has only decided which law to apply in a particular case based on a unique set of facts and circumstances. Furthermore, Chief Justice Marshall does not preclude the legislature from also interpreting fundamental

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[12] *Marbury v. Madison,* 5 U.S. 137, 137 (1803) (Marshall, J., for the Court).

[13] *Marbury v. Madison,* 137.

[14] *Marbury v. Madison,* 138.

law.[15] Thus, judicial review as conceived in *Marbury* is an important power, albeit a limited one.

Separation of Powers and Checks and Balances

Since the decision in *Marbury v. Madison*, substantial scholarship has sought to lay the theoretical framework for judicial review based on general legal and democratic principles and has attempted to trace the power back to the "intent of the Founding." Here, I use the phrase "intent of the Founding" as opposed to intent of the Founding because scholars making arguments for judicial review often interpret the Founding in their own way and miss important issues and concepts that the Founders were fully aware of. An example of such an argument is Eugene Rostow's argument that:

> The power of constitutional review, to be exercised by some part of the government, is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather than order in society if there were no accepted authority to construe it…The limitation and separation of powers, if they are to survive, require a procedure for independent mediation and construction to reconcile the inevitable disputes over the boundaries of constitutional power which arise in the process of government.[16]

This argument is based on the principles of separation of powers and checks and balances. For Rostow, it is necessary for there to be a procedure to solve disputes that arise from the separation of powers and it is the judiciary that should be the branch to resolve these disputes. Although this argument seems uncontroversial on its face, it could be the case that viewing judicial review in this way actually undermines its very purpose because if there is a necessity to resolve disputes, why not let the legislature, the

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[15] Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1989), 98-99.

[16] Eugene V. Rostow, "The Democratic Character of Judicial Review," *Harvard Law Review* 66, no. 2 (December 1952): 195.

most representative body, handle the matter. In this conception, the role of the judiciary is severely diminished and perhaps even totally unnecessary because judicial power is nothing more than the power to arbitrate between other departments of government.

That being said, those that see judicial review as necessary in order to resolve disputes between different branches of government argue that the Framers clearly intended a power of judicial review to be granted. This is true in part because the power was already being exercised by state courts.[17] Furthermore, an argument of this nature asserts that the power of judicial review does not make the judiciary superior to the legislature or executive. Rather, the judiciary continues to be a coequal branch with its own distinct role.

Hamilton's View

The fact that the judiciary would not be superior to either branch was important for Hamilton. He argued that the power of the judiciary "supposes that the power of the people is superior."[18] Although Hamilton's view is similar Rostow's and others in this regard, it differs in an important respect. For Hamilton, the power of judicial review was not necessary because of separation of powers; rather it was an innate part of judicial power. The power arises from the fact that the American Constitution is a limited one, meaning that the Constitution has specific prohibitions and exceptions as to what legislative power can consist of.

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[17] Rostow, "The Democratic Character of Judicial Review," 195-196.

[18] Alexander Hamilton, "Federalist No. 78" (1788), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003), 466.

Hamilton writes in "Federalist No. 78":

> Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[19]

Despite the necessity of the judiciary, Hamilton viewed it is as the weakest branch of government. Thus, its independence was crucial not only to protect the people but to protect the judiciary itself.[20] Furthermore, Hamilton famously argues that the Court has "neither force nor will, merely judgment."[21] Although more will be said about this later, clearly, judgment was an essential aspect of judicial power for Hamilton.

Why the Independence of the Judiciary Does Not Undermine Popular Sovereignty

The independence of the judiciary that is so important for Hamilton and others comes about because the judges on the Court are appointed for life terms. For those that support this procedure, it is not necessary that the judges be elected by the people. Amendment procedures and mere time provide safeguards against a usurpation of the Constitution by judges.[22] Furthermore, arguments supporting judicial review often contend that the power of judicial review is limited in nature as a result of what the power actually allows the Court to do and by virtue of the fact that the Court can only make decisions on cases and controversies.[23] The Court cannot decide on any matter it wants to and it relies on the power of the executive to enforce its decisions.

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[19] Hamilton, "Federalist No. 78,"465.

[20] Ibid., 464-465.

[21] Ibid., 464.

[22] Rostow, "The Democratic Character of Judicial Review," 197.

[23] Rostow, "The Democratic Character of Judicial Review," 197; Hamilton, "Federalist No. 78," 464.

For Hamilton, it was not only the case that judges need not be elected, but that they should not be elected under any circumstances. This provision of the Constitution was necessary in its own right because there needs to be an elite class that is able to fully understand the law. Furthermore, this class will have such an appreciation for the law that the jurists who are members of the class will be able to put aside political considerations. There is nothing to guarantee that these individuals would be the ones elected by the people. Furthermore, having an elite class will prevent judges from exercising their own will because they have no reason to. These judges will consider the Constitution and merely judge. This is a result of their independence and because lifetime appointments will draw the best, most qualified individuals to the job.[24]

The Counter-Majoritarian Argument Against Judicial Review

As previously stated, debates over judicial review rest on the distinction made between popular sovereignty and judicial review and the contention that the two cannot be reconciled. Here, I present the arguments made by those who contend that judicial review undermines popular sovereignty.

How the Opposition Evaluates Judicial Review

Levy does well to sum up the attitude that should be taken when evaluating judicial review:

> More reflective commentators, however, seek to transcend their own immediate policy preferences and confront the basic and most perplexing questions which speak to the legitimacy of judicial review, its function and character in cases of constitutional law, and its harmony with democratic principles of government.[25]

[24] Hamilton, "Federalist No. 78," 469-471.

[25] Levy, "Judicial Review, History, and Democracy: An Introduction," 1.

It is the latter quality that many have used as grounds to challenge judicial review to a greater or lesser extent: its compatibility with democratic principles. Such an understanding highlights what could be labeled as the main problem with judicial review: its counter-majoritarian nature.[26]

The counter-majoritarian understanding of judicial review leads to the conclusion that the court ends up acting as a legislature. As such, the judiciary should not be the branch that determines if a law or action conforms to the constitution.[27] When doing so, the Courts implements government by judiciary. Here, Commager explains the counter-majoritarian nature of a judicial decision:

> How can it be said that the problem of judicial review is the problem of democracy? A moment's reflection on the nature of the institution will clarify the statement. The function—and effect—of judicial review is to give or deny judicial sanction to an act passed by a majority of a legislative body and approved by an executive. Every act adjudicated by the court has not only been ratified by a majority, but it has—in theory and we assume in fact—been subjected to the most anxious scrutiny as to its conformity with the constitution. In support of every act, therefore, is not only a majority vote for its wisdom but a majority vote for its constitutionality.[28]

In sum, individuals who make the case against judicial review argue that this power allows the Court to act as a legislature, undermining democratic principles. In the following sections, I outline why this makes the judiciary problematic.

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[26] Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics,* 16.

[27] Commager, "Judicial Review and Democracy," 419.

[28] Ibid., 418.

Qualifications of Justices

The first argument against the judiciary acting as a legislature is that there is nothing about the composition of the judiciary that makes judges inherently more qualified than the members of any other branch to make conclusions about the constitutionality of laws.[29] They are not more dispassionate or objective than the individuals who make up any other branch of the government. They are just as susceptible and likely to make decisions based on a variety of non-objective considerations as is a member of the legislature or the executive.[30] There is also no reason to believe that the Court will always make the correct decisions when it comes to matters of constitutionality.

Furthermore, there is no reason why the Court is more qualified to make decisions about constitutionality because of the structure of the judiciary. It may be the case that the power of the judiciary actually undermines appropriately exercised legislative power. In fact, some even go so far as to argue that there "have been very few instances where Congress has threatened the integrity of the constitutional system or the guarantees of the Bill of Rights" and that decisions by the Court have not changed the constitutional order because they have either been modified by amendments or overturned by later decisions.[31] This line of thinking essentially argues that the judiciary is unnecessary and perhaps even counterproductive to the democratic system.

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[29] Commager, "Judicial Review and Democracy," 420.

[30] Ibid., 421; Louis B. Boudin, "Government by Judiciary," *Political Science Quarterly* 26, no. 2 (1911): 264.

[31] Commager, "Judicial Review and Democracy," 422.

Policy Considerations

Another argument for the undemocratic nature of judicial review is that conclusions about certain "vague" provisions of the constitution, such as due process or equal protection, are not to be made on legal grounds, but on policy grounds. These provisions of the Constitution were meant to say nothing more than what they explicitly do and interpretation by the Court is unnecessary and inappropriate. Giving more extensive meaning to these provisions on legal grounds is contrary to how the provisions were intended to be interpreted and implemented.[32] When making determinations on legal grounds instead of policy grounds, the Court is apt to undermine the people and the decisions made by the legislature. It is wrong to believe that determinations made by the Court are inherently better than determinations by the legislature. Thus, there is no reason for verdicts made by the Court to universally govern. It is here the notion of judicial supremacy is labeled as judicial usurpation or even "judicial despotism."[33]

Furthermore, judicial review may diminish legislative power because it will have "a tendency to drive out justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows."[34] This is problematic because the legislature is the most representative branch. Requiring legislatures to act only with legality in mind is to undermine the sovereignty and the will of the people.

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[32] Ibid., 420; Boudin, "Government by Judiciary," 265.

[33] Boudin, "Government by Judiciary," 264.

[34] James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, no. 3 (1893): 156.

Making legal determinations is not the role of the judiciary or the legislature:

> [I]t is always to be remembered that the judicial question is a secondary one. The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border or reasonable legislative action…[35]

In sum, judicial review allows the judiciary to act as a legislature and to undermine the power of the legislature, the most democratic branch of government. Thus, judicial review is anti-democratic.

Violation of Popular Sovereignty

A third argument about the counter-majoritarian nature of judicial review is focused more explicitly on the power's incompatibility with popular sovereignty. These arguments begin by rejecting judicial supremacy for a number of reasons. First, some argue that at the time of the Founding, and perhaps in times since, the people did not favor the power of judicial review. Prior to the ratification of the Constitution, a few judges had attempted to exercise a power akin to judicial review and the "attempts aroused general indignation, and the judges were called to account for their conduct."[36] Similarly, it is argued there was little, if any, iterated support for such a power among the Framers or any evidence of an intention to create such a power.[37]

Furthermore, those who reject judicial supremacy say that the Constitution is an act of popular will and the people never intended to turn the responsibility of interpreting

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35 Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 148.

36 Ibid., 244.

37 Ibid., 248.

and implementing the Constitution over to judges.[38] Here, Larry Kramer makes the case for "popular constitutionalism."[39] In this form of constitutionalism, justices will make decisions with the "awareness that there is a higher authority out there with power to overturn their decisions." Put simply, justices will make decisions with the people in mind.[40] Arguments such as this (and such as the arguments for judicial restraint made by individuals such as Thayer) do not necessarily call for a rejection of judicial review, rather a rejection of judicial supremacy. In the conclusion to his book, Kramer writes:

> The Constitution leaves room for countless political responses to an over assertive Court: Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures…How ironic if the only way we can sustain this supposedly weakest branch is by making it the strongest one: letting it order the others about with impunity while forbidding them to resist and insisting that their only recourse is to wait for the Court's members to die or tire of the job.[41]

Put simply, the problem with judicial power as it is used by the Court today, is that it undermines the people's sovereignty.

The Paradox of Judicial Review

By now, it should be clear that judicial review is a contested power as a result of its paradoxical nature. Judicial review arises out of fact that sovereignty is left with the people and not institutionalized as it is in some governments, such as the English system. The problem is that when contrasting judicial review with popular sovereignty, its origins

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[38] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, New York: Oxford University Press, 2004), 7.

[39] Ibid., 8.

[40] Ibid., 253.

[41] Ibid., 249–250.

are wholly ignored. This results in other legal and theoretical justifications for judicial review. Furthermore, in attempting to justify the power of judicial review, scholars (as well as decisions by the Court) have altered its meaning as the Framers understood the power and its meaning as explicitly stated in *Marbury v. Madison.* In this thesis, I propose that the two sides of the issue need not be wholly opposed to one another. Put differently, judicial review can be compatible with popular sovereignty.

In the following chapters, I intend to evaluate the relationship between judicial review and popular sovereignty. In Chapter Two, I begin by outlining the thought of the Founder, legal thinker, and Supreme Court Justice James Wilson. Wilson continually emphasized the fact that the people could never alienate their sovereignty or invest it in an institution such as the judiciary. The importance of his thought and this contention seems to be forgotten in contemporary debates about judicial power. Thus, it is important to evaluate what sovereignty was for Wilson and to explore his assertion that there is a distinction between acts made by the sovereign people and acts made by the legislature. Because of his concern for sovereignty, not in spite of it, Wilson supported judicial review and the need for interpretation of law.

That being said, the question remains: what is the role of will and judgment in decisions made by the judiciary? Understanding the nature of judgment plays an essential role in answering this question. In Chapter Three, I evaluate the arguments of Wilson, Hamilton, and the Anti-Federalist Brutus regarding the nature of judgment.

In the concluding chapter, I return to the debates outlined here and explain what many have missed in their evaluation of judicial review. I make the case that the original debates and conceptions of judicial review should be the touchstone from which all

contemporary debates proceed, and that there is not a strict dichotomy between judicial review and popular sovereignty as so many have come to implicitly or explicitly argue exists.

CHAPTER TWO

James Wilson, Popular Sovereignty, and the Judiciary

In this chapter, I will evaluate James Wilson's thought on the nature of the judiciary and popular sovereignty. I begin by explaining Wilson's conception of popular sovereignty as the basis for government. Next, I argue that establishing separation of powers formed the basis for Wilson's conception of the American Constitution. Finally, I will discuss Wilson's views on the structure and power of the judiciary.

The People as the Supreme Authority

Understanding a system of government requires understanding where the authority and power of that government comes from. Put differently, understanding Wilson's conception of judicial power requires evaluating where he believes the power of the judiciary (or the government in general) originates. Historian Gordon Wood describes Wilson as one of the staunchest, if not the staunchest, supporter of ensuring that the people formed the sovereign base for the American constitutional system.[1] In his remarks at the Pennsylvania Convention to ratify the Constitution, Wilson states, "There necessarily exists in every government a power, from which there is no appeal; and which, for that reason, may be termed supreme, absolute, and uncontrollable."[2] For Wilson, this supreme authority was not the constitution, rather the people. The

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[1] Gordon Wood, *The Creation of the American Republic* (Chapel Hill, North Carolina: University of North Carolina Press, 1998), 212.

[2] James Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States" (1787), in *Collected Works of James Wilson,* ed. Kermit L. Hall and Mark David Hall (Indianapolis, Indiana: Liberty Fund, Inc., 2007), 190.

importance of the sovereignty of the people for Wilson cannot be easily overstated and is directly related to his conception of democracy.

Wilson defines democracy as "that government in which the people retain supreme power, and exercise it either collectively or by representation."[3] Although a seemingly simple definition of democracy, Wilson's words tell much about his views of the authority of the people. The authority of the people is directly related to the role that representation plays in American republicanism. Here, Madison relays Wilson's remarks at the Federal Convention:

> [Wilson] wished for vigor in the Government, but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The Government ought to possess not only 1st the force, but 2nd the mind or sense of the people at large…Representation is made necessary only because it is impossible for the people to act collectively.[4]

This understanding of representation is distinct from other Founders such as Madison and Hamilton. For Madison and Hamilton, representation was needed for more than logistic purposes. Representation was the means to solve the problem of faction.[5] For these Framers, it is not only the case that a direct democracy is impossible in a territory as vast as the United States, but that a direct democracy is undesirable because the effects of faction can only be cured by representation.[6] For Hamilton and Madison, representation seems to be an end in itself. Whereas for Wilson, it seems to be the means to protecting

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[3] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 235.

[4] James Madison, "Remarks of James Wilson in the Federal Convention" (1787), in *Collected Works of James Wilson,* ed. Kermit L. Hall and Mark David Hall (Indianapolis, Indiana: Liberty Fund, Inc., 2007), 90-91.

[5] James Madison, "Federalist No. 10" (1787), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003), 76.

[6] Ibid., 76.

the sovereignty of the people when a direct democracy is not logistically feasible. Furthermore, for Madison and Hamilton, representation allows government to:

> Refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may 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. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves…[7]

This conception of representation is different than saying representation is only necessary because the people would not be able to act collectively in operational or logistic terms.

For Wilson, it was not the case that the views of the people needed to be refined. In this way, Wilson's conception of popular sovereignty is more akin to Brutus's conception than it is to Madison's or Hamilton's views. For Brutus, the will of the sovereign is (or should be) the law of any government.[8] He also acknowledges that a direct democracy is impossible over a vast extent, making representation necessary.[9] This being the case, the role of the representative is to "know the minds of their constituents, and to be possessed of integrity to declare this mind."[10] For Wilson and Brutus, representatives are not to refine or "improve" the views of the people, rather to act as the medium by which the will of the people is implemented. This will is what the people conceive of as best, not what the representatives determine is best.

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[7] Madison, "Federalist No. 10," 76-77.

[8] Brutus, "Essay I" (1787), in *The Essential Antifederalist,* ed. William B. Allen, Gordon Lloyd, and Maggie Lloyd (Lanham,. Maryland: Rowman & Littlefield Publishers, Inc., 2002), 111.

[9] Ibid., 112.

[10] Ibid.

However, the question remains why it is the case that the people are supreme and not the constitution. Wilson finds the answer to this question in the fact that it is by the authority of the people that the constitution is ordained and established. Put simply, the constitution receives its authority from the people.[11] Thus, the supreme power resides with the people:

> The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures; so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess, over our constitution, control in act, as well as in right.[12]

Although Wilson has much to say about the formation of government and the social contract, it is important to note here that Wilson did not believe government was necessary for society to exist. The purpose of creating a government is not to create a society, but rather to protect natural rights and to promote the common good. Society preexists the Constitution and all law. Although government is not necessary for society to exist, it certainly makes society better. Wilson writes, "To protect and to improve social life, is, as we have seen, the end of government and law."[13]

Wilson's firm belief that the government's purpose was to make society better and not to form society is in part why he so fervently argued for a government based on popular sovereignty. The people always retain their sovereignty: this sovereignty cannot

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[11] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 193.

[12] Ibid., 191.

[13] James Wilson, "Lectures on Law" (1790-1791), in *Collected Works of James Wilson,* ed. Mark David Hall and Kermit L. Hall (Indianapolis, Indiana: Liberty Fund, Inc., 2007), 452, 454, 479.

be taken or given away.[14] The people have original sovereignty and they delegate their power and right to rule to certain branches of government, in a certain manner, for a certain length of time.[15] It is not only that the people are the supreme authority; it is also that this power is *retained* by the people no matter what. Furthermore, since the constitution derives from the power of the people, if the people find a law to be unconstitutional, they are under no obligation to obey it.[16]

The implication of the people being the supreme authority is that "the people have a right to do what they please with regard to the government."[17] Before society is formed, individuals possess separate and independent powers and rights and when society is formed, it possesses jointly the aggregate of all of these powers and rights. Furthermore, a society (or state) has a will peculiar to itself.[18] The task of government is to protect these individual rights and to implement the peculiar will of the people.

As such, every unit of government is to represent the people to the greatest extent possible. Not only should the government as a whole be representative of the people, each branch and each component of that branch should be as well. This principle is exemplified in Wilson's firm stance that both houses of the legislature should be elected

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[14] Wilson, "Remark of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 212.

[15] Wilson, "Lectures on Law," 557.

[16] Ibid., 572.

[17] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 193.

[18] Wilson, "Lectures on Law," 556, 635.

directly by the people.[19] But this principle applies not only to the legislature: the executive and the judiciary are also to represent the people.

Wilson's contention that all three branches of government *can and should* represent the people to the greatest extent possible should not be taken as self-evident or universally accepted. For someone like Madison, it was simply the case that the legislative branch should be the most powerful in a representative government because it would be the most representative branch. In fact, Madison acknowledges the existence of legislative supremacy in representative republics when warning against the dangers of this condition.[20] This is not the case for Wilson. He felt each branch would represent the people through its own powers in different and distinct ways. Mark David Hall sums up Wilson's view on popular sovereignty well:

> He considered the people to be always sovereign; they merely delegate aspects of this sovereignty to institutions of government. The only way these institutions can be legitimate is if the people consent to them."[21]

In summation, Wilson viewed the people as the supreme authority in democracy. The sovereignty of the people is always wholly retained. Creating a government does not mean the people confer their sovereignty to the government; instead, they give the government derivative power to act on behalf of the people.

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[19] Madison, "Remarks of James Wilson in the Federal Convention," 82–83.

[20] James Madison, "Federalist No. 48" (1788), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003), 306.

[21] Mark David Hall, *The Political and Legal Philosophy of James Wilson 1742-1798* (Columbia, Missouri: University of Missouri Press, 1997), 102.

The Separation of Powers as the Basis of Government

Wilson's concern that each branch should represent the people to the greatest extent possible is tied up in his concern for establishing the separation of powers between the branches. Wilson took care to ensure that no one branch would become despotic or be able to act in such a way that the desires of the people would be obviated. Thus, for Wilson, the separation of powers should form the foundation for the Constitution. Along with this separation of powers, comes a system of checks and balances. Wilson writes:

> 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.[22]

As we will see, this understanding of the separation of powers and system of checks and balances has a significant impact on Wilson's desire to make the judiciary strong and to give it the power of judicial review.

Not only was Wilson concerned with delineating the powers of each branch, but also he supported motions to include language in the Constitution that prohibited one branch from exercising the powers of another branch so as to prevent the improper delegation of powers.[23] Again, this point is not one to be taken as inherent in the views of the Framers or as an obvious interpretation of the Constitution. Just as Wilson was particularly concerned with establishing and preserving the separation of powers, some at the Convention were particularly concerned with establishing and preserving a system of federalism. This is not to say that Wilson was not concerned about establishing a federal

[22] Wilson, "Lectures on Law," 707.

[23] Madison, "Remarks of James Wilson in the Federal Convention," 84.

system, but that he was more concerned about establishing a separation of powers than he was about state sovereignty. Put differently, Wilson had a particular attachment to the national government. He viewed the national government as the means by which the desires and happiness of the people would be most effectively granted. Madison writes that Wilson was "for raising the federal pyramid to a considerable altitude"[24] and that he supposed that the people "would be rather more attached to the national Government than to the State Government as being more important in itself, and more flattering to their pride."[25]

Wilson spent much of his time in the Pennsylvania Convention assuaging concerns about checks and balances and explaining the ways in which the branches would place checks on one another. This being said, for Wilson, a separation of powers and system of checks and balances did not require each branch to have different objects or goals. It required each branch to act separately on the same objects.[26] It was acceptable and preferable that judicial power be co-extensive with legislative and executive power.[27]

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[24] Madison, "Remarks of James Wilson in the Federal Convention," 82.

[25] Ibid., 91.

[26] Ibid., 121–122.

[27] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 226.

The Structure of the Judiciary

The role of the judiciary was very important for Wilson. He states "public happiness, personal liberty, and private property depend essentially upon the able and upright determinations of independent judges."[28] As such, Wilson supported a strong judiciary that would be extensive in its jurisdiction and in its power. One example of this is Wilson's argument that admiralty jurisdiction should be given entirely to the national government because its matters were not related to particular states but to controversies with foreigners. Additionally, the appellate jurisdiction of the Supreme Court should extend to matters of "fact as well as Common law and Civil law."[29]

Wilson also accepted the principle that a system of courts should resemble a pyramid and that a supreme tribunal was necessary to preserve a uniformity of decisions throughout the system as a whole.[30] This structure would mean a system of federal courts reminiscent of what we have today with a Supreme Court that was supreme in its nature.

In regards to the composition of the judiciary, Wilson fully believed that judges should be appointed by the executive. In fact, Wilson argued that a primary reason for a unitary Executive was so that judges may be appointed by a single, responsible person.[31] To allow the National Legislature to appoint judges would be to invite "intrigue, partiality, and concealment" into the process of judicial appointments.[32] This is a result

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[28] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 237.

[29] Ibid.

[30] Wilson, "Lectures on Law," 945.

[31] Madison, "Remarks of James Wilson in the Federal Convention," 119.

[32] Ibid., 89, 119, 154.

of the multiplicity of the legislature. This multiplicity allows members of the legislature to shift responsibility to others, something the president cannot do. Because the president cannot shift responsibility, the executive is more controlled by the people than the legislature is.

Wilson believed that the manner by which the appointer of judges comes to power determines the nature of the judiciary. The British system serves as an example: the executive power of Great Britain is not founded on representation; rather, it is hereditary and the hereditary executive appoints the judges. Therefore, judicial authority does not depend upon representation.[33] As mentioned in Chapter One, some argue that it is necessary for government officials to be elected if they are to be representative. However, for Wilson, it does not follow that because the judges are appointed by the president that they are not representative of the people. He puts it as such:

> Representation is the chain of communication between the people, and those to whom they have committed the exercise of the powers of government. This chain may consist of one or more link; but in all cases it should be sufficiently strong and discernable."[34]

It is not the case that appointment breaks this chain.

Finally, as to the independence of the judiciary, like Hamilton and others, Wilson found sufficient protection in the Constitution. The fact that the salaries of judges would be continued from session to session of the legislature and cannot be diminished was important for Wilson. Also important was the fact that judges would hold office during

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[33] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 183.

[34] Ibid.

good behavior (meaning they were not subject to reelection).[35] Furthermore, Wilson argued that the legislature would not impeach a justice for undertaking his or her duty and declaring an act void.[36] Each of these provisions was important to ensuring that justices would be able to act independently of other branches and from shifts in popular opinion.

The Power of the Judiciary

Having evaluated Wilson's views on the structure and composition of the judicial branch, I now turn to Wilson's views on judicial power. Wilson saw judicial power not only as an explanatory one, but one that would actively make judgments about the rightness and wrongness of laws. Wilson explicitly defended judicial power as distinct from executive power and defined judicial authority as such:

> The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties.[37]

The task of the judiciary is not only to give justice, but also to give satisfaction and to inspire confidence. The administration of these tasks would be good and impartial as a result of the independent nature of the judiciary.

Wilson's teachings clearly support a power of judicial review in some form. It is the role of the judges to consider a law's principles and if the principles are found incompatible with the Constitution, it is their *duty* to refuse to apply the law to the case

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[35] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 204, 237.

[36] Ibid., 234.

[37] Wilson, "Lectures on Law," 703.

before the Court. Put differently, the judiciary will "refuse to enact the sanction of judicial authority" in cases where a law's principles are incompatible with the Constitution.[38] Wilson not only argued for the right of the Court to strike down laws based on their unconstitutionality, but also based on their adherence to natural law.

Conceptually, judicial review was an inherent aspect of judicial power for Wilson. But how did Wilson want this power to be exercised? In the Constitutional Convention, Wilson strongly supported a measure that would give an absolute review over the legislature jointly to the executive and judiciary (the Council of Revision mentioned in Chapter One). For Wilson, the combined, although distinct, powers of the executive and judiciary were necessary to balance the power of the legislature.[39] It was not enough to simply give judges the power to explain the laws. Madison's accounts of Wilson's views on this matter and the Council of Revision and are worth quoting at length:

> The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.[40]

The power of the judiciary described by Wilson at this point in the Convention is more than judicial review as we know it today. It is not only the role of the judiciary to judge

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[38] Wilson, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States," 204.

[39] Madison, "Remarks of James Wilson in the Federal Convention," 89, 91, 121.

[40] Ibid., 121.

laws based on their constitutionality, but also to judge laws based on their wisdom, justice, and impact. The question remains whether or not Wilson would support this vision of the judiciary even without the Council of Revision. Put differently, on what basis should judges in the form of the judiciary we have make their judgments? It is this question I return to in Chapter Three.

For now it suffices to say that although Wilson certainly believed the "expository" function of the Court was important, he did not seem to believe it to be sufficient to allow the judiciary to fully fulfill its role. Furthermore, Wilson's support of measures that would give the national legislature the ability to veto state laws indicates Wilson's contention that the power of the judiciary is not always sufficient to ensure that laws passed by the states are constitutional. Thus, Wilson supported the legislative veto of state laws on the grounds that "the firmness of Judges is not of itself sufficient. Something further is required. It will be better to prevent the passage of an improper law than to declare it void when passed."[41] Wilson, like Hamilton, fears for the power of the judiciary, because for both, the judiciary is weak (in part because of its independence).

Whatever powers the judiciary might have, it would never be enough to infringe on the rights of individuals nor the ability of states to deal with local judicial matters. In his "State House Yard Speech," Wilson answers the objection that the proposed Constitution will abolish trial by jury in civil cases. He argues that the Constitution does not speak on this matter because it is a local one and the line of discrimination of when a civil case should be resolved by a trial by jury was too difficult.[42] Furthermore, Wilson

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41 Madison, "Remarks of James Wilson in the Federal Convention," 154.

42 James Wilson, "James Wilson's State House Yard Speech" (1787), in *Collected Works of James Wilson*, ed. Kermit L. Hall and Mark David Hall (Indianapolis, Indiana: Liberty Fund, Inc., 2007), 173.

states “no danger could possibly ensue, since the proceedings of the Supreme Court, are to be regulated by the Congress, which is a faithful representation of the people…” is of note.[43] This is another example of the way in which the government would be able to represent the views of the people.

Contemporary critics of the judiciary make arguments that the Court is too independent in the sense that it is strong and has extensive power. However, if we are to accept Wilson’s conception of the judiciary, the Court, even today, is much weaker and dependent than we think it is. Wilson’s assertion that the Court will be regulated by Congress raises an important question: is the judiciary safe because it will make good judgments or must it make good judgments in order to be safe?

It is important to note that however powerful Wilson desired the judiciary to be, it was only to be powerful with regard to judicial power: “Every prudent and cautious judge will…remember, that his duty and his business is, not to make the law, but to interpret and apply it.”[44] It is the task of the judiciary to determine if laws are compatible specifically with the Constitution and more generally with the will of the people. The main question about such a power is if a power of judicial review like this one can be compatible with the popular sovereignty Wilson was unwilling to compromise. Put differently, is it the case that judicial review requires the people to hand over their sovereignty or is it the case that judicial review is the way in which the sovereignty of the people is exercised? This question will form the basis for Chapter Four.

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[43] Wilson, “James Wilson’s State House Yard Speech,” 173.

[44] James Wilson, “Lectures on Law,” 953; see 706.

The Tension in Wilson's Argument

Despite the nuance and uniqueness of the arguments made by Wilson, certain questions and tensions remain. How can the judiciary represent the people when the people are not the ones selecting judges? How can judges that can only rarely be removed and who have life tenure have a chain of communication with the people? On what basis should judges make their judgments? What is the institutional place for the judiciary: is it safe because it will make good judgments or must it make good judgments in order to be safe? Is it the case that judicial review requires the people to hand over their sovereignty or is it the case that judicial review is the way in which the sovereignty of the people is exercised?

These questions point to the dichotomy between judicial review and popular sovereignty discussed in Chapter One. Wilson is well aware of the tension between these two notions, but he does not appear to argue that the two notions are incompatible. Thus, the main tension in Wilson's thought on the judiciary is how to reconcile his fervent belief in popular sovereignty with his arguments for a powerful judiciary.

The answer to these questions can be found in Wilson's view of what aspect of the people are being represented by judges. By representing the judgments of the people made in the Constitution, the will of the people is being represented as well. For Wilson, it was not the case that judges would represent the will of the people in the explicit sense; however, the judges would represent the considered will of the people, or the Constitution. Wilson's views on the relationship between will and judgment do much to answer these questions and explain the coherence of his argument for a judicial power

with a broad jurisdiction and how this power is compatible with Wilson's democratic view of popular sovereignty. The relationship between will and judgment is the question I take up in the next chapter. Then, in the final chapter, I will use this evaluation to answer some of the questions raised by Wilson's argument.

CHAPTER THREE

The Nature of Will and Judgment

As we have seen in the previous chapters, contemporary debates about judicial review often ignore the importance of judgment, resulting in a false dichotomy between judicial review and popular sovereignty. For James Wilson, there is nothing more important than the sovereignty of the people. Thus, one might expect him to come down on the side against judicial review. But as was stated in Chapter Two, this is not the case. This raises the question of why James Wilson is able to fervently support popular sovereignty and a strong, powerful judiciary. I propose that the answer can be found in Wilson's nuanced understanding of the nature of will and judgment.

Alexander Hamilton famously makes the argument in "Federalist No. 78" that the judiciary is the least dangerous branch of government because it has "neither force nor will, but merely judgment."[1] Although Hamilton's statement is often used in defense of the weak nature of the court and to allay the fears of an overreaching judiciary, here again we see an instance of a commonly held belief about the judiciary that cannot be taken for granted. Elsewhere, others, namely Brutus, have argued that the separation of will and judgment that Hamilton proposes is not possible. Hamilton's assertion is telling about his views on the nature of judgment. Contending that the courts exercise merely judgment necessarily rests upon the assumption that one's will can be wholly separated from the act of judgment. Put in broad terms, different conceptions of the faculties of human nature

[1] Alexander Hamilton, "Federalist No. 78" (1788), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003), 464.

may lead to different conclusions about the nature of the judgments made by judges and courts.

This fact leads James Wilson to conclude that understanding (or at least attempting to understand) human nature is vitally important because all other sciences have a relation to the knowledge of human nature. Understanding the science or art of jurisprudence and law requires an evaluation of human nature:

> In every art and in every disquisition, the powers of the mind are the instruments, which we employ; the more fully we understand their nature and their use, the more skillfully and the more successfully we shall apply them. In the sublimest arts, the mind is not only the instrument, but the subject also of our operations and inquiries. An accurate and distinct knowledge of [man's] nature and powers, will undoubtedly diffuse much light and splendor over the science of law. In truth, law can never attain either the extent or the elevation of science, unless it be raised upon the science of man.[2]

For Wilson, an evaluation of human nature is not only important in itself but is the foundation upon which the science of law is built.

In this chapter, I will evaluate the conception of will and judgment from the perspective of Hamilton, Brutus, and Wilson. As will be seen, the views on will and judgment proposed by Hamilton and Brutus are somewhat incoherent and incomplete. Thus, it is Wilson's more nuanced view of judgment that can provide answers to many of the questions raised by these two views and those questions raised in the previous chapters. In my final chapter, I will use the conclusions drawn in this chapter to evaluate the way in which the nature of judgment affects the representative nature of the judiciary and the nature of American judicial power.

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[2] James Wilson, "Lectures on Law" (1790-1791), in *Collected Works of James Wilson,* ed. Mark David Hall and Kermit L. Hall (Indianapolis, Indiana: Liberty Fund, Inc., 2007), 585.

The rest of this chapter continues as follows: I begin with a discussion of Hamilton's and Brutus's views on the nature of judgment. Then, I discuss Wilson's views on human nature and the operations of the active mind. Finally, I evaluate the assertions of Hamilton and Brutus in light of Wilson's thought.

Hamilton on Judgment

Hamilton's argument that the "judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them"[3] forms the basis of his defense of the extraordinary feature of Article III of the Constitution that accords federal judges life tenure "during good behavior."[4] This is because the judiciary has no influence over the sword or the purse and can take "no active resolution."[5] Thus, the judiciary has neither "force nor will, merely judgment."[6] From this argument stem arguments for the necessity of the independence of the court and previously discussed arguments concerning judicial review.

Hamilton's assertions, although potentially valid, raise the question of whether or not judgment can truly be separated from force and will. Based upon this passage, it seems that for Hamilton the answer is yes. In fact, the distinction of these functions (will and judgment) is the foundation of Hamilton's separation of powers doctrine. The institutional arrangement of each of the three branches of government ensures that each

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[3] Hamilton, "Federalist No. 78," 464.

[4] Ibid.

[5] Ibid.

[6] Ibid.

exercises the correct power and ensures that the best exercise of these powers is achieved.[7] In other words, the fact that each branch is structured the way it is ensures that its power remains its own. For example, the fact that the executive power is vested in one man and that Congress is bicameral ensures that executive power is not stolen by Congress.[8] In the case of the judiciary, the institutional features of life terms and appointment instead of election ensure that judges can exercise only judgment. Put differently, as a result of the arrangement of the judiciary, judges need only exercise judgment because they do not have to consider the will of the people in order to keep their jobs.

Related to the question of whether or not will can be separated from judgment is a brief discussion of Hamilton's views on human nature. The question is not only *can* will and judgment be separated, but will judges *actually* separate the two notions. If a judge can separate his own will from the judgment he is making, is he inclined to do so? In certain instances, Hamilton seems to indicate that the answer is yes. Not only will the executive appoint the best individuals to the courts**,** but the permanency of the judicial office will ensure that the best individuals will be attracted to the job and fixed salaries will ensure that a judge's will is not affected by his means of subsistence. Furthermore, the Court will be bound by strict rules and precedents.[9] As stated in the previous

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[7] Hamilton, "Federalist No. 78," 464-465.

[8] Alexander Hamilton, "Federalist No. 70" (1788), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003).

[9] Alexander Hamilton, "Federalist No. 76" (1788), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003), 456; Alexander Hamilton, "Federalist No. 79" (1788), in *The Federalist Papers,* ed. Clinton Rossiter (New York, New York: Signet Classics, 2003), 471; Hamilton, "Federalist No. 78," 470.

paragraph, because the justices are independent from the other branches, they need not worry about exercising functions other than judgment.

These assertions must be considered in conjunction with Hamilton's belief in the "ordinary depravity of human nature."[10] As a result of this fact, it becomes even more important for Hamilton that the best candidates be attracted to judicial positions. It is possible to choose the rare individual who combines the qualities necessary for judgment: a person who will have the integrity and character to exercise judicial power in the appropriate way. Once again, life tenure is a way to promote judgment separate from will because it gives the executive room to choose the best individuals to be judges since life tenure ensures these individuals will want this job.[11]

However, interestingly, in an introduction to the Federalist Papers, Hamilton notes that even men coming to the wrong conclusion about the appropriate form of government for the American people may have good intentions and that their opinions may be errors based on jealousies and fears. He writes:

> So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy…we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists.[12]

The question thus becomes why it is the case that judges will not be susceptible to these same tendencies as Hamilton's opponents? Here it may be the case that the judgment of

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[10] Hamilton, "Federalist No. 78," 470.

[11] Ibid.

[12] Alexander Hamilton, "Federalist No. 1" (1787), in *The Federalist Papers*, ed. Clinton Rossiter (New York, New York: Signet Classic, 2003), 28.

the opponents is merely wrong, will aside. Or it may be the case that the will of Hamilton's opponents differs from his own, and thus, their judgments differ as well.

The view outlined here raises a serious incoherency. For Hamilton, it seems that separating will from judgment requires freedom to decide without considering personal interests, such as job security or ambition. The paradox is that Hamilton solves this problem with incentives based on personal interest, namely the prestige associated with a judgeship and the life tenure of the members of the Court. The fact that incentives are necessary to attract individuals to the bench and to induce judges to exercise only judgment indicates that members of the judiciary are subject to external influences, even though, for Hamilton, they will be the individuals of the best character. This is also problematic because the incentives used to attract the best individuals to judicial service ensure that these individuals do not have to separate their will from judgment. Hamilton places a great deal of faith in the fact that because the best individuals will be attracted, they will put personal interests and opinions aside, but provides no check to ensure this happens once judges are in office.

Brutus on the American Judiciary

Just as Hamilton is sure that the structure of the judiciary will ensure that judges only exercise judgment, Brutus is certain that the structure of the judiciary will ensure that judges do more than judge and exercise their own will. For Brutus, the judicial power proposed by the Constitution was far too extensive and would lead to a total subversion of the state judiciaries and potentially the other two branches of the national

government.[13] Brutus argues that it is not the case that the Court is bound by precedent or fixed rules, as Hamilton says. Thus, Brutus frames the decisions of the Court not in terms of judgment, but in terms of opinions that have the weight of law.[14]

Furthermore, the judiciary, as a result of its independence, will be inclined to extend its power. Here, one can see at least part of Brutus's conception of human nature:

> Every body of men invested with office are tenacious of power. They feel interested, and hence it has become a kind of maxim to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights.[15]

Not only will the judiciary be inclined to extend its power, there is nothing to suggest that its power is "merely judgment" to begin with. The independence of American judges means they are subjected to no higher power. They are able to make decisions based on any sense of the law and Constitution that they desire to implement.[16] Unlike in the British system, there is no tribunal to correct the errors of the court.[17] There is nothing to stop judges from exercising their will alongside their judgment and no reason for them not to want to do so, even if they could.

However, this conception of judicial power is problematic because Brutus provides no coherent argument as to why the independence of judges is unnecessary in the American system. Brutus's contention that individuals will always attempt to extend

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[13] Brutus, "Essay XI" (1788), in *The Essential Antifederalist*, ed. William B. Allen, Gordon Lloyd, and Margie Lloyd (Lanham, Maryland: Rowman & Littlefield, 2002), 187–188.

[14] Ibid., 188.

[15] Ibid., 189.

[16] Brutus, "Essay XV" (1788) in *The Essential Antifederalist*, ed. William B Allen, Gordon Lloyd, and Margie Lloyd (Lanham, Maryland: Rowman & Littlefield, 2002), 197–199.

[17] Ibid., 197.

the prerogatives of their office is potentially at odds with his insistence that there is no need for the kind of independence accorded to British judges. In the case of Britain, the independence of the judiciary was necessary to prevent the hereditary monarch from extending his prerogative. Without hereditary offices in the American system, there is no need for the independence of the judiciary to act as a counterweight to the executive.[18] The question becomes, if Brutus is sure that offices will attempt to extend their power beyond the desirable realm, is it not just as necessary to have an independent judiciary to check executive power even when the office is not hereditary? In fact, it may be the case that it is more necessary because the elimination of the hereditary element of executive power may compel individuals to extend their power to an even greater extent.

In sum, by reducing judgment to will, Brutus argues that the judiciary will be dangerous because it will be essentially making law, rather than interpreting law. This is inconsistent with his argument that judicial review as a check on the other branches is unnecessary because the offices of the other branches are not hereditary when considering his view of humans that individuals will always attempt to extend their power.

Wilson on the Active Mind

Although the conception of will and judgment portrayed by Hamilton and Brutus has characterized many of the debates over the judiciary since the time of the Founding, both are incoherent in their own right. Each relies on a conception of human nature that either makes the complete separation of will and judgment a necessity (but also an impossibility) or the complete reduction of judgment to will a necessity (once again,

[18] Brutus, "Essay XV," 196-197.

impossible as conceived by the argument). Wilson is thus particularly important because he provides a middle path between these two conceptions.

As mentioned at the outset of this chapter, different conceptions of human nature may lead to different conclusions about the nature of the judgments made by judges and courts. Here, I attempt to outline the way Wilson conceptualized human nature and the human mind. His nuanced and distinct conception is what allows him to provide a viable alternative understanding of the nature of will and judgment.

Wilson viewed knowledge of human nature not only as important but as difficult to obtain. He has much to say about man as an individual and firmly argued that human nature is not simple, rather it is complicated and variable.[19] This being said, Wilson sought to use "observation and experience" to attempt to understand the philosophy of the human mind.[20] The instrument of this observation and experience, and the only way to have any notion of the human mind, is reflection.[21] Through this reflection, one can see the many operations of the mind. Wilson argues that although the mind is one active principle, its operations are distinct, each with its own end.[22] The operations of the mind that Wilson discusses are sensation or perception of the external sense, consciousness or the internal senses, memory, belief, conception, judgment, testimony, knowledge, common sense, and reasoning. Here a brief definition of the operations of external sense, internal sense, memory, belief, and conception suffices. After providing the definitions of

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[19] Wilson, "Lectures on Law," 588.

[20] Ibid., 585-586.

[21] Ibid., 585–586.

[22] Ibid., 590.

these operations, I will discuss in detail the operations of judgment, testimony, knowledge, common sense, and reasoning.

The external senses give us information about our surroundings and consciousness (or the internal senses) gives information of what passes within us. All other operations are taken in by consciousness when they are present in the mind. Put simply, "consciousness takes knowledge of everything that passes within the mind."[23] External and internal sense only apply to the present; thus, memory is the operation that gives us knowledge of things from the past. Belief is that operation by which we believe we see or saw, feel or felt, know or knew something. This is juxtaposed to the operation of conception by which we apprehend something without belief or judgment and without reference to its existence.[24]

Reason broadly conceived contains the operations of judgment and reasoning.[25] Judgment is "every determination of the mind concerning what is true or what is false."[26] The object of judgment is truth and falsehood. It is employed upon the materials of perception and knowledge. It proceeds from evidence and is accompanied by belief.[27] Thus, memory is important for judgment because it provides the materials for judgment to select, adjust, and arrange.[28] Judgments can be intuitive or discursive. Put differently,

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[23] Wilson, "Lectures on Law," 594-598.

[24] Ibid.

[25] Ibid., 600.

[26] Ibid., 599-600

[27] Ibid..

[28] Ibid., 597.

they can be based on self-evident truths (the judgments of nature) or on truths obtained from demonstration or other forms of reasoning.[29]

Judgment need not necessarily be expressed and one's judgment may be contrary to what he does express. Thus, judgment and testimony are not the same thing. Testimony, for Wilson, seems to be the act of expression, be it of a judgment or something else. Although testimony is not judgment, the operations of knowledge and common sense are species of judgment. Knowledge is not separate from judgment because there cannot be knowledge if there is no judgment.[30]

Wilson's conception of common sense is particularly important to his understanding of human nature and the operations of the human mind. Common sense is related to judgment because sense always implies judgment. Common sense is nothing more than the judgment that is to be expected from men of common understanding.[31]

For Wilson, the common sense is a "moral sense." Common sense is important because before men can argue and discuss, they must agree on the principles derived from common sense. Wilson writes:

> If the same unanimity concerning first principles could be introduced into the other sciences, as in those of mathematicks and natural philosophy; this might be considered as a new era in the progress of human reason.[32]

This indicates that Wilson does not take it for granted that all men will recognize all first principles at all times. Rather, that they have the ability to do so.

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[29] Wilson, "Lectures on Law," 599.

[30] Ibid., 594-598.

[31] Ibid.

[32] Ibid., 619.

The operation of reasoning is closely connected with the operation of judgment. Reasoning is "strictly the process, by which we pass from one judgment to another, which is the consequence of it."[33] Reasoning, or true reasoning, must proceed without interruption from link to link. Reasoning can be divided into two kinds (similar to the two kinds of evidence): that which is demonstrative and necessarily true and that which is probable to a greater or lesser degree.[34] Ultimately, reason is rooted in the principles derived by common sense:

> The science of morals, as well as other sciences, is founded on truths that cannot be discovered or proved by reasoning. Reason is confined to the investigation of unknown truths by the means of such as are known. We cannot, therefore, begin to reason, till we are furnished, otherwise than by reason, with some truths, on which we can found our arguments.[35]

Thus, reasoning should not be taken as the "highest" operation of the mind as many have argued. It is the common or moral sense of man that provides first principles from which all discussion should be based. That being said, reason is important because it assists the moral sense and extends the moral sense.[36]

Although more will be said later about what is to be gained from Wilson's discussion of the differing operations of the mind in light of the question posed at the beginning of this chapter, as is likely evident by the discussion of the operations, the distinctness of each operation cannot be taken too far. The operations of the mind are not unmixed.

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[33] Wilson, "Lectures on Law," 600.

[34] Ibid.

[35] Ibid., 508.

[36] Ibid., 511.

The operations are:

> various, connected, and complicated: [the mind's] perceptions are mixed, compounded, and decompounded, by habits, associations, and abstractions: its powers both of action and perception, on account of either of a diversity in their objects, or in their manner of operating, are considered as separate and distinct faculties.[37]

This conception of the operations of the mind leads Wilson to conclude that it would be a mistake to accept the argument "that in operations ascribed to the will, there was not employment of the understanding; and that in those ascribed to the understanding there was no exertion of the will."[38] Will has some part in acts of understanding as does understanding in acts of will. Put simply, there are no pure acts of will or pure acts of understanding. Actions can only be classified by the faculty that takes the largest part in the action.[39]

Related to this notion is Wilson's argument that every free action has two components: a moral one and a physical one. The moral component is will. Will determines the action. The physical component is power. Power carries the action into execution. This free action is accompanied by moral liberty.[40] This assertion should be evaluated in light of Wilson's conception of human nature. Hall characterizes Wilson's views on human nature as such: "men are naturally sociable, generally benevolent, and through proper education and laws can progress towards perfection."[41] Such a

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[37] Wilson, "Lectures on Law," 589.

[38] Ibid., 587-588.

[39] Ibid., 587–588.

[40] Ibid., 601.

[41] Mark David Hall, *The Political and Legal Philosophy of James Wilson 1742-1798* (Columbia, Missouri: University of Missouri Press, 1997), 80.

characterization of Wilson's views indicates a more positive view on human nature than many possess. However, Wilson's conception of action as free means that although man is guided by his moral sense, he may very well get it wrong.

Before moving on to the final section of this chapter, there is one more reason Wilson sees understanding human nature as important. Laws should be agreeable to the nature of those they are applicable to and should be aimed towards the perfection of this nature. Thus, it is important to study and know human nature so as to make laws appropriate to it and so that laws will be able to improve it.[42]

Mere Judgment Through a Wilsonian Lens

There are many perspectives from which to evaluate the truth or reality of Hamilton's and Brutus's conceptions of judgment. One such lens may be through a discussion of the merits of judicial restraint and judicial activism. Judicial activism would be more akin to a justice exercising will and judgment and judicial restraint would be similar to a justice using judgment alone. Although more will be said about the nature of judgment and its relation to the representativeness of the American judiciary in the final chapter, here I stick to an evaluation of the question at hand through a Wilsonian lens.

I begin this section with a discussion of Wilson's statement that every free action has two components: a moral one and a physical one. The question here is where does the act of judgment fall? Is it the case that one wills affirmation or denial of a principle or law (be it because of the moral sense or something else) and that this will is expressed in the power of judgment? Or is judgment the moral action and based on something other

[42] Wilson, "Lectures on Law," 587.

than will and is put in place something else (perhaps testimony)? Although I acknowledge that these are not the only ways to conceive of the issue at hand, if the former conception is true, it seems that Hamilton is incorrect in his assertion that will can be separated from judgment. However, if the latter is true, something other than will (the moral sense) forms the basis for judgment.

The question of will aside, Wilson's belief in the "moral sense" indicates a belief, or perhaps faith, in the ability of judges to make the appropriate decisions. Judges have at their disposal the first principles necessary to make moral decisions. And although this may not happen in every instance, and may even become more likely as time goes on, the possibility is ever present. Such a conception of judgment and the moral sense is consistent with Hamilton's optimism in the judiciary's ability to make wise decisions. If judgments are inevitably guided by this moral sense, it's certainly not the case that the judgments of the court are only mere opinion as Brutus concludes.

This understanding of judgment is consistent with democratic legitimacy. As noted in Chapter Two, Wilson thinks that the people's will can be equated with what is right. In other words, the people's will as a measure of law is not simply will. It tends to be consistent with moral or natural law because will and judgment are not wholly separable. The people judge what is right (and are likely to do so due to their tendency towards good) and this becomes their will. Thus, when exercising judgment and enforcing this will, judges enforce the will and the judgment of the people who are sovereign. The reason the judiciary is necessary to implement this will and judgment is that even if the people know what is good, they may not know how to achieve the good.

The judiciary works to find this "mechanism" uncorrupted from the political realities of the legislative branch.

However, it seems there is a potential caveat to this "optimism." What is the likelihood of judges actually being influenced by the moral sense? Said another way, when acting freely are judges more inclined to use the will of the moral sense to exercise the act of judgment or are they more inclined to act wrongly or immorally for personal, political, or other reasons?

Here it is relevant to return to Wilson's discussion of reasoning. As previously noted, there are two types of reasoning: demonstrative and probable. The latter can be based upon multiple sources of evidence: human testimony, the opinion of professional judges on the matter, and that form of evidence by which we "recognise the identity of the same thing, and the diversity of different things."[43] What is particularly important when it comes to these forms of probable evidence is the fact that it requires discernment, expertise, and may be different in different men.[44] This potentially indicates that it may not be the case that the moral sense is exhibited in the same way for all men. It does not, however, preclude the possibility that all judges would come to the correct judgment in a particular case.

Also relevant to this discussion is Wilson's assertion that self-examination and reflection on the faculties of thought cannot be made unless the passions and imagination are set aside. For Wilson, this can only be the case in the strongest of minds.[45] Although

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[43] Wilson, "Lectures on Law," 601.

[44] Ibid.

[45] Ibid., 586.

here Wilson is discussing self-examination, it is not a stretch to see that Wilson is concerned about the possibility of passions and imagination influencing the decisions and judgments of individuals. In fact, this is why reason is important. If will has something to do with individual passions and imaginations, this may indicate that will can be separated from judgment, but that it is difficult in many cases. This explains why it is necessary to have judges who are unelected and separate from politics. If the will of the people is the moral sense, in particular disputes, only the strongest of minds can actually enact what will really is—the good.

Finally, I return to Wilson's assertion that understanding human nature is important for making human law. Although it is not the case that the judicial branch is "making law," there is a certain sense in which their understanding of human nature should compel their decisions to continue to perfect this nature. If a decision is going to make men worse, it is probably not the correct decision. This is consistent with Wilson's conception of judicial review presented in the previous chapter. All this leads to the realization that through the viewpoint of Wilson, it may not matter if the court is exercising merely judgment or some combination of judgment and will, so long as the Court is coming to the correct and moral decision.

The paradox here is that the reciprocal involvement of will and judgment presents a problem: the judgment of judges will include aspects of will. Judges will absolutely be making law. At the same time, the reciprocal involvement has provided its own solution because at the end of the day the Court will be making the correct decisions because they will be acting to implement what is good for the people in a more complete way than the people themselves were able to determine.

CHAPTER FOUR

The Re-Reconciliation of Judicial Review and Popular Sovereignty

"The extension of the theory and practice of representation through all the different departments of the state is another very important acquisition made, by the Americans, in the science of jurisprudence and government. To the ancients, this theory and practice seem to have been altogether unknown. To this moment, the representation of the people is not the sole principle of any government in Europe."[1] –James Wilson

Here, James Wilson points out the uniqueness of the American system of government: each of its branches is representative. He goes on to explain how no other judiciary, particularly the British courts, can be seen as representative. As noted in Chapter One, some of the most important questions about judicial power are how, why, and to what extent is the judicial review consistent with American republicanism. Also, has the development of the judiciary in America been consistent with democratic principles or has its path deviated along the way?

In this concluding chapter, I argue that Wilson is right to point out the difference between the American system and other democratic governments. It is because of judicial review that the American judiciary is able to represent the people and protect popular sovereignty. Simply put, judicial review is consistent with American republicanism. However, viewing judicial review as representative of the people requires eliminating the false dichotomy drawn between judicial review and popular sovereignty. This can be done by returning to a traditional definition of judicial review, focusing on its true origins, and incorporating the nuanced thought of James Wilson.

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[1] James Wilson, "Lectures on Law" (1790-1791), in *Collected Works of James Wilson,* ed. Mark David Hall and Kermit L. Hall (Indianapolis, Indiana: Liberty Fund, Inc., 2007), 721.

What Judicial Review Should Be

In Chapter One, I noted that there can be many different ways to define judicial review. Here, I return to these definitions and differing conceptions of judicial review and argue that these contemporary debates have missed something important by ignoring the origins of judicial review and by failing to bring the role judgment plays to the forefront of judicial power.

The Origins of Judicial Review

As stated in Chapter One, judicial review can be traced to the sovereignty of the people and the system of separation of powers that the people used their sovereignty to establish. Contemporary debates about judicial review have failed to take this factor into account. There are two possible explanations for this. The first is that some may view judicial review as an institutional power instead of a power of the people. This is problematic because there is no institution in the American government that is invested with the right to exercise power. Rather, the power is invested within people who use institutions to exercise their power. The second reason that debates may miss the origins of judicial review is more benign. It may be the case that because judicial review is not anywhere explicitly granted, jurists have felt the necessity to justify the Court's ability to exercise the power.

Either way, the result has been legal and theoretical justifications for judicial review. Although there is truth to be found in the justifications outlined in Chapter One, they often change and redefine what judicial review is, perhaps without even realizing it. If judicial review is a power granted as a result of popular sovereignty, the only way it can undermine the people is when the role of judgment is obviated.

Bringing Judgment to the Forefront

Not only is it important to specifically define what sort of power judicial review should be, but also it is important to return to the emphasis that the Framers placed on judgment. Although it does not seem that Hamilton was correct in his assertion that will can be wholly separated from judgment, he is correct in asserting that judgment is the most important aspect of judicial power.

Although judgment and will cannot be wholly separated, understanding judgment as Wilson does fixes the problems presented at the outset of this thesis. When using Wilson's conception of judgment and judicial review outlined in Chapters 2 and 3, judges are able to judge a situation, determine what the will of the people is as expressed in the constitution, and then decide what will best allow this will to come to fruition. In a sense, this view combines the views of Justice Kennedy and Justice Scalia. Justices consider the original will of the people while keeping in mind that this will may not be perfected and that the people may not have been able to determine the means to get to the end goal. Thus, the judges are able to make their own determinations about how to bring about the will of the people in a more complete sense. Perhaps this is a more appropriate conception of what Justice Kennedy labels "reasoned judgment."

Here, Hamilton's assertion that the best individuals will be attracted to judgeships gains a new importance. These individuals will be of the highest character and will be able to fulfill the task of judgment and exercise judicial review as Wilson conceived of it. This conception of judgment means that the will of the people or the will of the judges do not replace the role of judgment. Over time, the judiciary has become less representative of the people because it has failed to emphasize the role of judgment and emphasized will

alone: the will of the people or the will of the judges. The judiciary has been subjected to political and policy litmus tests through the nomination and confirmation process. One need only look to the politicization of confirmation hearings of Supreme Court Justice nominees to see attempts by Congress to restore the will of the people. This politicization becomes even clearer when comparing the ease with which most lower judicial appointments are concerned. Obviating this role for the will of justices or the perceived will of the people as the justices see it has done much to undermine the representative nature of the judiciary. However, all is not lost. By returning to the conception of judgment outlined here, the Court will be able to restore its representative nature.

Questions that Remain

As has been stated throughout this chapter, the judiciary is a representative branch, one that the people would be severely undermined without. The two sides of the issue as presented in Chapter One, judicial review and popular sovereignty, were reconciled by Wilson by emphasizing the role of judgment. Contemporary legal scholars can re-reconcile (so to speak) the two issues by thinking in a Wilsonian mindset.

Although it is clear that Wilson sees this as true, in Chapter Two, I raised a number of questions about the tension in Wilson's argument. Here, I evaluate each in turn.

Safety of the Judiciary

The first question to be evaluated is the question of whether or not the judiciary is safe because it will make good judgments or if it must make good judgments in order to

be safe? Perhaps it is the case that the options are not mutually exclusive. As stated when discussing the role of judgment, the Court is in a position to make good judgments, the judgments that are the best for the people. This ensures its safety and institutional position. That being said, for Wilson and Chief Justice Marshall, there is nothing to preclude the legislature from considering fundamental law and the moral sense of the people. Thus, if for whatever reason the judiciary gets it wrong and begins to take on a non-democratic character, the legislature can use its power to check the judiciary and perhaps steer it back to an exercise of power more akin to Wilson's conception.

The Judges Connection with the People

The second set of questions to be answered are how judges can represent the people when they are unelected and how life tenure relates to the chain of communication with the people. If one is to take Wilson at his word that the chain of communication is not interrupted by appointment, the issue resolves itself. However, even if this is not taken at face value, it is not necessary or desirable for the Court to be an elected branch.

Because judicial power is distinct from legislative power, it is necessary that their modes of "election" be different. Furthermore, having a judiciary that is made up of appointees allows the branch to do something the legislature is not always in a place to do. Although there is nothing to prevent the legislature from considering the original will or moral sense of the people (and perhaps they should do so), political considerations may prevent this from happening in many instances. The legislature may be in a better place to consider the immediate concerns of the people. Although Wilson would argue that the legislature should still work to make the people and society better, it is the judiciary that is able to consider this moral sense and the perfection of the will of the

people without contemporary considerations. Not only does this provide a distinct mode of perfecting the will of the people, it is important that the judiciary be able to do so.

Returning to the question of the independence of the judges, one can see that without appointment and life tenure, the judiciary may be forced to take on a character that is no longer distinctly judicial. Returning to Chapter One, Hamilton is right in his assertion that it is necessary and desirable to have judges appointed and to hold life tenure. This does not break the communication with the people, it provides a link that is distinctly different than the link between the executive and the people and the legislature and the people.

The Final Question: Popular Sovereignty

Although I have stated many times that judicial review can be reconciled with popular sovereignty, it is worth one more mention. The analysis of judgment provided throughout this thesis and the answers to the questions preceding this one are what allow the reconciliation of popular sovereignty and judicial review. James Wilson is unique in his fervent support for popular sovereignty and his fervent support for a strong judicial power. Contemporary thinking has done his legacy and jurisprudence as a whole a disservice by not examining more closely the relationship Wilson so adamantly supports.

Concluding Remarks

In the opening paragraphs of this thesis, I discuss the views of two of the most prominent Justices in American history as they decided one of the most controversial, influential cases of our time. And although it is beyond the scope of this thesis to say what decision the justices would have made had they conceived of judicial review as I outlined in this chapter, following a conception of judicial review as outlined in this chapter would have allowed any Court, as well as any justice, to ensure that its decision was compatible with popular sovereignty, not because it was simply giving the public what it wanted but because it was evaluating the moral sense of the people as outlined in the Constitution.

This assertion brings one last issue to discuss: the fact that protecting popular sovereignty through judicial review may not necessarily mean that decisions by the Court reflect the contemporary will of the people. By contemporary will, I mean those opinions that a majority of Americans seems to hold about one issue or another. In fact, by putting public opinion considerations aside, the Court is able to protect the sovereignty of the people.

In conclusion, returning to the thought of the Framers, particularly of James Wilson, allows judicial review to be the most important power of the judiciary in a sense that many contemporary debates have missed. By bringing judgment back to the forefront of judicial review, the Court is best able to exercise its power and able to protect the sovereignty of the people.

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