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# There Were Great Men Before Agamemnon

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> *vixere fortes ante Agamemnona multi;*
> *sed omnes illacrimabiles urgentur ignotique longa*
> *nocte, carent quia vate sacro.*
>
> —HORACE, ODE TO LOLLIUS 4.9[1]

[*] Paul Whitfield Horn Professor, Texas Tech University. This Essay replaces my tentative thoughts in *James Iredell and the Origins of Judicial Review*, 27 CONN. L. REV. 329 (1995). I wish to thank the participants in Vanderbilt University's Judicial Reputation Conference. I especially wish to thank Professors Mark Brandon, Bryan Camp, Rosemary Dillon, Scott Gerber, and Anthony Joseph for their thoughtful comments and assistance.

1. "Many brave men lived before Agamemnon; but all are oppressed by long night, unwept and unknown, because they lack a sacred bard." R.O.A.M. LYNE, HORACE: BEHIND THE PUBLIC POETRY 213 (1995). Iredell probably was familiar with these lines. He read and quoted Horace's odes. Don Higginbotham, *The Making of a Revolutionary*, *in* 1 THE PAPERS OF JAMES IREDELL xxxvii, xlvi (Don Higginbotham ed., 1976) [hereinafter IREDELL PAPERS]; Letter from James Iredell to Francis Iredell, Sr. (July 20, 1772), *in* 1 IREDELL PAPERS, *supra*, at 104, 107; Letter from James Iredell to Hanna Iredell (Nov. 18, 1780), *in* 2 IREDELL PAPERS, *supra*, at 194, 194.

## I. INTRODUCTION

John Marshall is the Agamemnon[2] of Supreme Court history. He is universally considered the Court's greatest Justice, and rightly so. But there were great Justices before Marshall.[3] One of those great Justices was James Iredell. No Justice in the Court's history has provided a more detailed or sophisticated explanation and justification of the doctrine of judicial review. Iredell needs a bard, and this Essay is my ode to his memory.

James Iredell was born and raised an Englishman.[4] His father was a merchant in Bristol who had fallen on hard times, but young Iredell had influential relatives who secured an appointment for him as a customs officer in North Carolina. In 1768, he arrived in Edenton, North Carolina, as a lonely seventeen-year-old.[5] His salary was paid to his parents while he subsisted on the nontax fees that he collected for incidental services. Fortunately, Iredell was befriended by Samuel Johnston,[6] under whom he studied law. When the Revolution came fewer than ten years later, Iredell had to choose between his mother country and the rebelling colonies. On the eve of the Revolution, his wealthy bachelor uncle in Jamaica warned him to "keep yourself perfectly neut[ral] in those disputes" and implied that Iredell would be disinherited if he failed to follow this avuncular advice.[7] Iredell, however, decided to forsake his prospective inheritance and to side with his new friends in North Carolina.[8] As the Revolution progressed, he held a number of law-related offices. He served his state as a judge

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2. If memory serves, I cribbed my title from Julius Goebel, but I cannot relocate it in his magisterial and soporific ANTECEDENTS AND BEGINNINGS TO 1801 (1971).

3. *See* Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 1, 1–21 (Scott Douglas Gerber ed., 1998) (discussing the general neglect the pre-Marshall Court has received).

4. For Iredell's career through the Revolution, see WILLIS WHICHARD, JUSTICE JAMES IREDELL 3–41 (2000); Higginbotham, *in* 1 IREDELL PAPERS, *supra* note 1, at xxxvii–xc.

5. WHICHARD, *supra* note 4, at xiv.

6. *Id.* Johnston was a wealthy and influential man whose uncle had been the colony's royal Governor and who subsequently served as Governor of and Senator from North Carolina. Iredell married Johnston's sister in 1773. For a semi-epistolary novel in which Mrs. Iredell is the title character, see NATALIE WEXLER, A MORE OBEDIENT WIFE: A NOVEL OF THE EARLY SUPREME COURT (2007); *see also* Natalie Wexler, *The Case for Love: Did the Friendship of an Early Supreme Court Justice and the Wife of a Colleague Ever Cross the Line of Propriety?*, AM. SCHOLAR, Summer 2006, at 80, 80–92 (speculating on a possible extramarital relationship between Iredell and Mrs. Hannah Wilson, wife of Iredell's colleague, Justice James Wilson).

7. Letter from Thomas Iredell to James Iredell (Jan. 8, 1775), *in* 1 IREDELL PAPERS, *supra* note 1, at 279, 280.

8. The uncle left his entire estate to Iredell's younger brother. Letter from Arthur Iredell to James Iredell (Nov. 17, 1783), *in* 2 IREDELL PAPERS, *supra* note 1, at 458, 458.

of the superior court and then as attorney general. Near the war's end, he entered private practice.[9]

By the time the Constitution was framed in 1787, Iredell was a proto-Federalist who believed in the need for a strong national government to deal with national issues. During the ratification process, he wrote a series of newspaper essays in support of the Constitution and was the proposed Constitution's leading advocate at the North Carolina ratification convention.[10] His public advocacy earned him a national reputation, and in 1789, President Washington rewarded him with an appointment to the Supreme Court.

The mature Justice Iredell was a consummate professional who crafted his judicial opinions to state clearly his chain of thought.[11] In one case, he explained, "I . . . endeavour to state my own principles . . . with so much clearness that whether my opinion be right or wrong, it may at least be understood what the opinion really is."[12] His work epitomized comprehensive analysis and exhaustive attention to detail. Of course, most of us have personally known and deeply respected attorneys and judges who have lived their professional lives by these rigorous standards. Iredell's intense professionalism made him an admirable attorney and a very good judge, but he was more than just admirably competent. He is entitled to the mantle of greatness because no Justice in the nation's history ever has equaled his full, detailed, and sophisticated explanation and justification of the doctrine of judicial review. On this immensely important issue, he is greater than John Marshall, our Agamemnon.[13]

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9. *See* WHICHARD, *supra* note 4, at 25–41 (discussing Iredell's activities during the American Revolution).

10. *Id.* at 25–86.

11. In legal writing, however, clarity does not always mean simple and straightforward. Lawyers and judges must frequently address complex problems, and a complete answer to a complex problem usually requires complex writing.

12. Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 92 (1795).

13. Two other Founders, Alexander Hamilton and James Wilson, presented thoughtful explanations of judicial review in the late 1780s and early 1790s. *See* THE FEDERALIST No. 78 (Alexander Hamilton) (discussing the manner of constituting the judiciary department of the proposed government); 1 JAMES WILSON, *Lecture on Law: Of Man, as a Member of a Confederation*, *in* THE WORKS OF JAMES WILSON 319, 329–30 (Robert G. McCloskey ed., 1967). These works so closely track Iredell's reasoning that one capable scholar has concluded that they were consciously based upon Iredell's earlier analysis. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 46 (1990). Neither Hamilton nor Wilson, however, grappled with the thinking of John Locke and the existing English model. *See infra* notes 44–51 and accompanying text. Nor did they offer Iredell's detailed and comprehensive analysis of the factors restraining judges' exercise of the power of judicial review. *See infra* notes 52–65 and accompanying text.

If James Iredell's explanation of judicial review is superior to John Marshall's, why has he languished in virtual obscurity? Why has he lain virtually unknown for a long night of two centuries? Some years ago, a survey of law school deans and professors of law, history, and political science ranked the abilities of all the Justices who had served on the Court. In this survey, Iredell was considered just "average."[14] People regard him as mediocre for many reasons. In part, perceived greatness is a simple function of nearness in time, and no one who knew him has been alive for 150 years.[15] Iredell died over two centuries ago. More significantly, our very understanding of what laws are and what courts do has changed radically over the last two centuries. The pre-Marshall Court does not conform to the current understanding of the Supreme Court's function under the Constitution. Finally, contemporary jurisprudential notions regarding the nature of law subtly, but significantly, distort our evaluation of his most significant writings.[16]

My ode to Iredell begins with brief sketches of the current understanding of the Supreme Court's role and the pragmatic jurisprudence of legal positivism that predominates in contemporary legal culture.[17] These present-day concepts distort modern observers' understanding of Iredell and his fellow Justices. Then, the Essay turns to James Iredell, the constitutional theorist. His greatest contribution was a powerful and fully elaborated theory of judicial review.[18] The Essay also explores his theory's implications for the judicial task of interpreting the Constitution. Finally, Iredell's

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14. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS app. A, at 412–13 (3d ed. 1992). Iredell has never been considered a "great" by authors attempting to rank judges. *See, e.g.*, Robert Bradley, *Selecting and Ranking Great Justices: Poll Results*, *in* LEADERS OF THE PACK: POLLS & CASE STUDIES OF GREAT SUPREME COURT JUSTICES 1, 1–22 (William D. Pederson & Norman W. Provizer eds., 2003) (recording the results of eight independent polls). But every poll lists Marshall as the greatest Justice. *Id.*

If Iredell had been a baseball player, he would not have made today's Hall of Fame. Experts have concluded that as a baseball player, Justice Iredell would have been most like Wilcy Moore. Oyez: U.S. Supreme Court Media, James Iredell, http://www.oyez.org/justices/james_iredell (follow "Wilcy Moore" hyperlink) (last visited Mar. 6, 2009). Moore pitched for the Boston Red Sox and the New York Yankees before World War II. Needless to say, the same experts concluded that John Marshall would have been Babe Ruth. Oyez: U.S. Supreme Court Media, John Marshall, http://www.oyez.org/justices/john_marshall (follow "Babe Ruth" hyperlink) (last visited Mar. 6, 2009).

15. Our Agamemnon (Marshall) is the exception that makes the rule. In the most recent composite poll, Justices Holmes and Cardozo are the earliest "greats." Bradley, *supra* note 14, at 12. Even among scholars, Justice Harlan I (again excepting Marshall) is the earliest "great." *Id.* at 10.

16. *See infra* notes 29–37 and accompanying text.

17. *See infra* notes 20–37 and accompanying text.

18. *See infra* notes 44–78 and accompanying text.

constitutional writings illustrate the extent to which our twenty-first century vision of the Supreme Court in contemporary society can distort our understanding of law and society in the early republic.[19] This anachronistic distortion is a running theme of my ode.

## II. TODAY'S LEGAL MILIEU

Today, we have a pluralistic country, and we tend to view political society in terms of conflicts of values and interests. Through this lens, the Supreme Court's greatness stems from its ability to resolve conflicts and impose its judgments upon others—particularly upon other branches of government. In my experiences, the modern paradigms of great Supreme Court decisions are *Marbury v. Madison* and *Brown v. Board of Education*.[20] In *Marbury*, the Court established its authority to use the power of judicial review to overturn political-branch decisions.[21] In *Brown*, the Court struck boldly at a national disgrace when state governments and the rest of the federal government were morally paralyzed.[22] In each of these cases, the Court was in conflict with powerful societal forces and firmly reiterated its constitutional role as a shield against abuses of governmental power. These were great cases because the Court was opposing governmental policy rather than supporting it.

The guiding principle of the early Supreme Court, however, was precisely to the contrary. The early Court sought to support the political branches of the new federal government, not to oppose them.[23] The new federal government was a political experiment whose success was not guaranteed. In this hazy political climate, judicial opposition to the new government might have been disastrous. The early Justices operated within a paradigm of support—not conflict.[24]

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19. *See infra* notes 104–12 and accompanying text.

20. WILLIAM CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 247 (1995).

21. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64 (5th ed. 2003).

22. *See* Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421–30 (1960) (refuting feeble arguments that segregation was not harmful or degrading). While state and local governments in the South imposed their despicable tenet of racism upon the citizenry, morally challenged southern senators used a variety of procedural tools to block efforts in Congress to remedy the nation's shame. *See* 2 ROBERT CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 89–105, 182–202 (2002).

23. CASTO, *supra* note 20, at 247–49.

24. *Id.*; William Casto, *Oliver Ellsworth*, 2 J. SUP. CT. HIST. 73, 88 (1996) (noting the inclination of Chief Justice Ellsworth to defend the actions of the Washington and Adams administrations).

The early Supreme Court's paradigm of support was significantly bolstered by a unique harmony of purpose and philosophy between the Court and the political branches that has never been repeated in the succeeding centuries.[25] Throughout the 1790s, two Federalists, Washington and John Adams, headed the executive branch, and all the Justices were Federalists. In fact, Washington picked all but two of the Justices.[26] Likewise, throughout the decade, Federalists always had at least working control of the Senate and sometimes a similar control of the House. While this effective control could not guarantee enactment of Federalist legislation, it was always sufficient to preclude legislation that the Federalists deemed unwise. Therefore, the Justices never found themselves in serious conflict with the political branches. The Court dutifully could accept and support the Federalist government's policies without a qualm.

The never-to-be-repeated, historical coincidence of thoroughgoing unity between the Court and the political branches barred the Court from achieving greatness under our modern paradigm of conflict. Today, the entire pre-Marshall Court usually is dismissed as a mediocre collection of reasonably competent jurists. Our modern vision of mediocrity is present in the survey that rated Iredell just "average."[27] None of his brethren were "great" or "near great," and none was a "failure." Ten were "average" and two were "below average." One scholar has dismissed the story of the pre-Marshall Court as comparable to "a play's opening moments with minor characters exchanging trivialities."[28]

A change from natural law to legal positivism has also subtly but powerfully influenced today's views of Justice Iredell. A legal positivist believes that laws come from government and do not exist unless they have been legislated by a governmental entity with lawmaking authority.[29] There may be significant theoretical objections to legal positivism;[30] nonetheless, American lawyers of the early

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25. CASTO, *supra* note 20, at 249.

26. President Adams appointed Bushrod Washington and Alfred Moore.

27. *See supra* note 14 and accompanying text.

28. Gerber, *supra* note 3, at 2 (quoting ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 30 (1960)).

29. *See* William Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 921–27 (1988) ("[T]he common law system is a system of positive laws set by the sovereign using the medium of judicial opinions. In other words, the judicial branch of government–like the legislative–performs a lawmaking function.").

30. For example, under legal positivism, a particular legal rule established by a proper lawmaking entity is the law without regard to whether the rule is desirable, undesirable, moral, or immoral. The problem of amorality is ably discussed in Andrei Marmor, *Exclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 104, 104–24

twenty-first century are predominantly positivists. This is not to say that most lawyers have ever given any serious thought to the jurisprudential question, "What is law?" Many have not. Nevertheless, legal positivism pervades our legal culture to such an extent that it is embraced routinely and unwittingly. At least American lawyers are positivist to the extent that they believe that the judicial process involves a highly specialized form of lawmaking.

Two centuries ago, there were no legal positivists in the United States. American lawyers were natural lawyers who believed that laws existed in nature without regard to the existence of government.[31] They believed that what we call "laws" are like the law of gravity. These laws exist without any need of government intervention. Natural laws are revealed to mankind through our ability to think rationally and through divine revelation. Our ancestors' natural law vision pictured judges as using their intellect to discern principles that existed in nature.

Today's American lawyers simply do not believe in natural law. We believe that judges make laws—that they legislate rules.[32] Our current faith[33] originated in innovative analyses of the common law,[34] but this revolutionary vision of judges exercising legislative jurisdiction is equally pertinent to statutory and constitutional interpretation. If the words of a written rule are subject to plausible, yet different interpretations, a judge must choose. Unlike with the legislative and executive branches, our traditions severely limit the judiciary's power to refuse to decide. Once a judge has selected a particular interpretation, the doctrine of precedent requires that the judge's opinion be followed in future cases. The judge has, in effect, supplemented or changed the words of the statute or constitution. In

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(Jules Coleman & Scott Shapiro eds., 2002). *But cf.* Kenneth Himma, *Inclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra*, at 125, 125–65 (explaining that the theory of inclusive positivism provides that there can be moral criteria of legal validity).

31. *See* Casto, *supra* note 29, at 913–14 (describing American attorneys' acceptance during the late eighteenth and early nineteenth centuries of William Blackstone's *Commentaries*, which explained that judges were "living oracles" of natural law ordained by God).

32. *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103–41 (1921) (describing the evolution from natural law to positive law, which conceives of the "judge as legislator").

33. The Founders' natural law faith was internally consistent and not subject to logical refutation just as today's predominant concept of legal positivism is not subject to logical refutation. Our journey from natural law to legal positivism involved a complex interaction of factors including the Civil War, Charles Darwin's theory, legal education, the failure of American states to adopt uniform principals of common law, and changing views regarding God's stewardship of human society. Casto, *supra* note 29, at 938–48.

34. *See id.* at 921–22, 962 n.99 (discussing John Austin and Jeremy Bentham).

my experience, this vision of judicial lawmaking is a fundamental paradigm that informs all lawyers' analyses and understandings of modern law.

In the early twenty-first century, lawyers who believe that courts legislate laws have properly elevated the U.S. Supreme Court's opinions to the pinnacle of judicial authority. No political power outside the Supreme Court trumps the Court's determination of an issue of constitutional law.[35] We have a deep thirst to understand the Court's actions because the Court is the final arbiter of most federal law and virtually all constitutional law. The Court's pronouncements are not necessarily wise, but the Justices have the final word. As Justice Jackson famously quipped, the Court's decisions are "not final because we are infallible, but we are infallible only because we are final."[36] By coincidence, most of Justice Iredell's writing on judicial review does not appear in his Supreme Court opinions.[37] Therefore, modern lawyers are inclined to ignore his ideas because they are not the law.

## III. IREDELL'S AND MARSHALL'S UNDERSTANDINGS OF JUDICIAL REVIEW

The story of John Marshall's opinion in *Marbury* has been told countless times[38] and need not be retold here. But Iredell's understanding of judicial review is worth explaining to demonstrate the self-evident superiority of his written analysis. The idea of judicial review did not spring full-grown from Iredell's forehead. North Carolina's governor recognized the importance of judicial review as early as 1781.[39] Iredell himself first alluded to the concept of judicial review two years later in instructions that he wrote to his county's representatives in the North Carolina legislature.[40]

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35. Rare episodes like the Eleventh and Sixteenth Amendments to the Constitution can be dismissed as exceptions that make the rule.

36. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

37. *See infra* notes 43, 49–81 and accompanying text.

38. *See* FALLON, *supra* note 21, at 63 n.1 (listing multiple sources which provide historical background and analysis of Marshall's opinion); *id.* at 4 n.A (Supp. 2008).

39. Thomas Burke, Questions and Propositions by the Governor (July 25, 1781), *reprinted in* Scott Gerber, *Unburied Treasure: Governor Thomas Burke and the Origins of Judicial Review*, 8 HISTORICALLY SPEAKING, July–Aug. 2007, at 29, 29–30.

40. James Iredell, Instructions to Chowan County Representatives (Sept. 1783), *in* 2 IREDELL PAPERS, *supra* note 1, at 446, 449 ("[A] truly independent [judiciary] . . . is a point of the utmost moment in a Republic where the Law is superior to any or all the Individuals, and the Constitution superior even to the Legislative, and of which the Judges are the guardians and protectors.").

Iredell embarked upon a sophisticated and detailed exploration of the matter in the late 1780s before the Superior Court of North Carolina in *Bayard v. Singleton*.[41] *Bayard* was an ejectment action to regain possession of property that had been confiscated and sold by the state during the Revolutionary War. In order to prevail, the plaintiff had to convince the court to declare unconstitutional a state statute calling for the dismissal of such suits. The court ruled eventually that the statute was indeed invalid because it violated the North Carolina Constitution's guarantee of trial by jury. The nature of Iredell's participation in *Bayard* is unclear,[42] but he argued forcefully in a published essay and a private letter that the court had the power to declare the statute void.[43] Iredell developed his theory of judicial review in the context of the North Carolina Constitution, but his theory is equally applicable to any other written constitution, including the U.S. Constitution.

### *A. The People's Sovereignty*

Like Iredell, John Marshall based judicial review on the people's sovereignty.[44] Because the Constitution came from the people,

41. 1 N.C. (Mart.) 42 (1787). The case's background is ably discussed in *Introduction*, *in* 3 IREDELL PAPERS, *supra* note 1, at xxv, xxxiv–xxxvii; *see also id.* at 299 n.2, 332–33 n.2.

42. In anticipation of the litigation, the defendant placed most of the state's able attorneys, including Iredell, on retainer. The official report says that Iredell represented the plaintiff, but the court dockets do not indicate this. *Introduction*, *in* 3 IREDELL PAPERS, *supra* note 1, at xxxv–xxxvi. Perhaps he appeared in an amicus capacity. WHICHARD, *supra* note 4, at 11–12.

43. Iredell published his initial thoughts in a newspaper essay in 1786. James Iredell, *An Elector* (Aug. 17, 1786), *in* 3 IREDELL PAPERS, *supra* note 1, at 227, 227–31 [hereinafter *An Elector*]. After the court held that it could exercise the power of judicial review, Iredell's friend, Richard Spaight, who was at the Philadelphia Convention, wrote Iredell a letter criticizing the court's decision as an undesirable arrogation of judicial power. Letter from Richard Spaight to James Iredell (Aug. 12, 1787), *in* 3 IREDELL PAPERS, *supra* note 1, at 297, 297–99 [hereinafter Spaight Letter]. Iredell responded in a lengthy letter that repeated and elaborated upon his earlier newspaper essay. Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *in* 3 IREDELL PAPERS, *supra* note 1, at 307, 307–10 [hereinafter Iredell Letter]. Although Iredell wrote this letter to Spaight a year after he wrote his newspaper essay, the two writings are consistent with each other. For purposes of analysis, the two writings will be treated as a single, extended essay.

44. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803). For Marshall, Iredell, and their fellow Americans, the people's sovereignty was a matter of faith. The idea played a crucial role in justifying the Revolutionary War and figured significantly in the drafting and ratification of the Federal Constitution. *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE 55–262 (1988) (describing the new ideology required "to justify a government in which the authority of kings stood below that of the people or their representatives"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 chs. IX, XIII, XV (1969) (describing the important role of popular sovereignty in the founding of America, including the drafting of the Articles of Confederation, the adoption of the Bill of Rights, bicameralism, and other elements of the Constitution, and the development of a democratic republic). Who the people were and whether

legislative acts contrary to the Constitution are contrary to the people's will and therefore must give way. According to Marshall's opinion, it was as simple as that.[45] In fairness to Marshall, he did not present his rationale as a comprehensive discussion of judicial review. He noted that the question of whether courts may exercise the power of judicial review "is a question deeply interesting to the United States."[46] Nevertheless, he believed that the answer to the question is "happily, not of an intricacy proportioned to its interest."[47] He viewed the issue as resting on "principles . . . long and well established"[48] and therefore saw no need for extensive elaboration.

Like Marshall and all subsequent American attorneys who have considered the issue, Iredell believed written constitutions are fundamental in the sense that they create limited governments, including legislatures. Also like Marshall, Iredell's entire analysis rested upon the people's sovereignty. He believed that ultimate sovereignty resides not in the government or any of its branches, but in the people. In another context, he stated forthrightly that "the people are avowedly the fountain of all power."[49] The Revolutionary War was a dramatic instance of the people exercising their ultimate sovereignty, and Iredell was a direct participant in that process. This political belief was further strengthened by the practical experience of having seen the people exercise their sovereignty through adoption of written state constitutions during and after the war.

From the postulate of the people's sovereignty, Iredell drew the corollary that the will of the people as expressed in a constitution is superior to any legislative enactment. He explained:

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they really had the capacity of exercising their will were questions that presented serious problems of proof. MORGAN, *supra*. Moreover, the idea of the people's sovereignty should not be confused with popular sovereignty. In late eighteenth-century America, only one person in six could vote. FORREST MCDONALD, NOVUS ORDO SECLORUM 161–62 (1985). Nevertheless, the people's sovereignty was a fundamental postulate that the Founders accepted on faith.

45. *See Marbury*, 5 U.S. at 176–77 ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.").

46. *Id.* at 176.

47. *Id.*

48. *Id.*

49. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 11 (Jonathan Elliot ed., Burt Franklin Reprints 2d ed. 1974) (1845) [hereinafter ELLIOT'S DEBATES]; *accord* United States v. Mundell, 27 F. Cas. 23, 29–30 (C.C.D. Va. 1795) (No. 15,834) (Iredell, J.) ("[E]very legitimate act of government is in effect an act of the people themselves; it emanating from their authority either expressly or impliedly given.").

> The people have chosen to be governed under such and such principles. They have not chosen to be governed, or promised to submit upon any other; and the Assembly have no more right to obedience on other terms, than any different power on earth has a right to govern us; for we have as much agreed to be governed by the Turkish Divan as by our own General Assembly, otherwise than on the express terms prescribed.[50]

In other words, Iredell viewed the North Carolina Constitution as literally a "real, original contract between the people and their future Government."[51] It was not a theoretical social contract like the English Constitution. Moreover, the existence of a written constitution has significant implications for the judicial process. Iredell explained that a written constitution is not "a mere imaginary thing, about which ten thousand different opinions may be formed, & to which therefore the Judges cannot willfully blind themselves."[52]

Today, a common criticism of Marshall's opinion in *Marbury* is that he failed to explain why the judiciary's interpretation of the Constitution is to be preferred over that of the legislature.[53] Iredell fully anticipated this criticism and, unlike Marshall, presented a detailed justification for preferring judicial interpretations. He began with a purely political argument based upon visceral experience. In forming their constitution or original contract, the people were perfectly familiar with the idea of vesting the legislature with absolute, unreviewable powers. Iredell reminded his readers that this

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50. *An Elector*, *supra* note 43, at 228.

51. Iredell Letter, *supra* note 43, at 307. This metaphor and idea was by no means unique. *See, e.g.*, Commonwealth v. Caton, 8 Va. (4 Call) 5, 17 (1782) (describing the Constitution as "written record of that which the citizens of this state have adopted as their social compact"). *See generally* WOOD, *supra* note 44, ch. VII (describing the conception of a contract between the rulers and the colonists in early America and the influence of this image on the drafting of the Constitution). A year later Iredell noted an important refinement of his contract analogy. In the North Carolina ratification debates, he explained:

> A compact cannot be annulled but by the consent of both parties; therefore, unless the rulers are guilty of oppression, the people, on the principle of a compact, have no right to new-model their government. This is held to be the principle of some monarchical governments in Europe. Our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents; and the people, without their consent, may new-model their government whenever they think proper, not merely because it is oppressively exercised, but because they think another form will be more conducive to their welfare.

ELLIOT'S DEBATES, *supra* note 49, at 9; *see also Caton*, 8 Va. at 10–11 (stating that the power to pardon was taken from the executive in order "to enable the whole legislature to provide for the public safety"). For other statements of this refinement and its significance, see WOOD, *supra* note 44, at 600–02.

52. Iredell Letter, *supra* note 43, at 308–09; *see also id.* at 307.

53. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 2–14 (1967) (stating that the Constitution neither supports nor disavows Marshall's interpretation of judicial review).

was the model of the unwritten English Constitution and that they "had severely smarted under its effects."[54]

After this visceral political argument, Iredell turned to political theory. Iredell understood fully the "great argument . . . that though the Assembly have not a right to violate the constitution, yet if they in fact do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people." Unlike Marshall, Iredell directly confronted John Locke's idea that the legislative branch is the supreme branch of government and that the proper remedy for legislative abuse was for the people to dissolve the government.[55] Having just lived through a long, bloody, and economically catastrophic revolution, Iredell condemned resistance as a "dreadful expedient" and a "calamitous contingency."[56] Moreover, universal resistance would be feasible only in the face of "*universal [governmental] oppression*" and therefore would not protect effectively the rights of those in the minority.[57] He "indigna[ntly]" rejected out of hand the "humble" remedy of petition as quite contrary to the sovereign relationship between the people and the legislature. "[T]he remedy by petition implies a supposition, that the electors hold their rights by the *favour of their representatives*."[58]

Although the people had a theoretical power to check unconstitutional action by resistance or rebellion, Iredell understood that the people could always redress legislative abuse by elections. In 1776, when the North Carolina Constitution was being framed, Samuel Johnston, Iredell's brother-in-law, mentor, and friend, had written Iredell that "[t]he great difficulty in our way is how to establish a Check on the Representatives of the people."[59] Echoing Locke, Johnston concluded, "there can be no check on the Representatives of the People in a Democracy but the people themselves, and in order that the check may be the more effectual I

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54. *An Elector*, *supra* note 43, at 227; *see also* Iredell Letter, *supra* note 43, at 307.

55. *See* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT chs. XIII, XIX (J.W. Gough ed., rev. ed. 1948) ("In all cases whilst the government subsists, the legislative is the supreme power . . . . [A]nother way whereby governments are dissolved . . . is when the legislative or the prince, either of them, act contrary to their trust."). The English rule of legislative supremacy is clearly stated in WILLIAM BLACKSTONE, 2 COMMENTARIES *91; *see also id.* at *49, *157 (emphasizing that all other powers of the state must obey the legislature in order to uphold the constitution).

56. *An Elector*, *supra* note 43, at 229.

57. *Id.*

58. *Id.* at 228; *see also* Iredell Letter, *supra* note 43, at 307, 310.

59. Letter from Samuel Johnston to James Iredell (Apr. 20, 1776), *in* 1 IREDELL PAPERS, *supra* note 1, at 350, 350.

would have Annual elections."[60] A decade later, when Iredell penned his comprehensive analysis of judicial review, he concluded that the remedy of "a new election [is] of very little consequence."[61] Like universal resistance, the electoral remedy requires the concerted action of a majority of the citizenry. Iredell believed "every Citizen . . . should have a surer pledge for his constitutional Rights than the Wisdom and activity of any occasional Majority of his Fellow Citizens, who, if their own rights are in fact unmolested, may care very little for his."[62] Iredell's analysis of the electoral process identifies a structural deficiency in the voters' ability to correct a legislature's unconstitutional misconduct. The remedy of a new election is effective only when a majority of the electorate believes that the legislature is acting improperly, and the electorate is willing to cast correcting votes. Given this structural deficiency, judicial review is necessary to preserve the constitutional rights of those in the minority. Some have argued that judicial review was limited originally to a comparatively narrow range of situations in which an unconstitutional act impinges on the principle of separation of powers by impairing "the performance of essential functions."[63] Iredell's concern about protecting the constitutional rights of those in the minority supports a significantly broader scope of judicial review.

Although Iredell saw the judiciary as a protector of individuals' rights under a written constitution, he was well aware of the possibility that the judges might abuse their power. His friend, Richard Spaight, like many others, distrusted the judiciary. Spaight asked Iredell, "If [judges] possessed the power [of judicial review], what check or controul would there be to their proceedings?"[64] To reassure his friend, Iredell suggested several structural checks to judicial abuse.

First, judges are limited by the nature of the judicial process. Iredell denied emphatically "that the Judges are appointed Arbiters, & to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an Act is

60. *Id.* at 350–51; *accord* Spaight Letter, *supra* note 43, at 299.

61. Iredell Letter, *supra* note 43, at 310.

62. *Id.*; *see also* Burke, *supra* note 39 (finding that judicial review "protect[s] Individuals from the operation of Laws unconstitutional").

63. ROBERT CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 101 (1989); *see also* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 561–62 (2005) (asserting that the level of scrutiny applied in judicial review depended upon the type of statute involved and whether the statute violated the separation of powers).

64. Spaight Letter, *supra* note 43, at 298. *See generally* WOOD, *supra* note 44, at 301–05 (describing the ambivalent attitudes of early Americans toward judicial discretion and the fear that the power of judicial review would place judges above the representatives of the people).

necessarily brought in Judgment before them, they must, unavoidably, determine one way or another."[65] This idea is readily recognizable as a nascent version of the "case or controversy" limitation that has come to play such a prominent role under the U.S. Constitution.[66]

Iredell proceeded to adduce several other factors that would control judicial abuse. He began by noting that "it is the interest of every Man ambitious of public distinction to make himself pleasing to the People[, and] it is in no Man's interest, certainly to make himself *odious* to the people by giving unnecessary and wanton offence."[67] Moreover, under the North Carolina Constitution—unlike the subsequent Federal Constitution—the judges' salaries were subject to legislative reduction. Iredell believed that this power of the purse likely would "prevent a wanton abuse of [judicial] power."[68] Iredell also noted that the legislature might remove judges from office.[69] Nevertheless, he believed that legislative control over salaries was, on balance, undesirable. Foreshadowing the Federal Constitution's establishment of a more complete judicial independence, he cautioned that North Carolina's legislative control over judicial salaries "may in some instances produce an actual bias the other way, which, in my humble opinion, is the great danger to be apprehended."[70] In other words, Iredell understood that the power over judicial salaries could be used to control judicial abuse, but he thought that the greater danger was that the legislature might use the power to exert an improper influence on the judiciary.

Finally, Iredell offered a pragmatic—even cynical—argument. In any event, "if the Judges should be disposed to abuse their power . . . they have means enough of doing so" merely by misconstruing the meaning of legislative acts. Therefore, denying judges the power of judicial review would not restrain them effectively because they could still misconstrue statutes.[71] He explained "*those Acts may be wilfully misconstrued as well as the constitution.*"[72]

Notwithstanding these restraints upon judicial abuse, Iredell admitted that the power of judicial review "is indeed alarming," because under the North Carolina Constitution there was no court of appeals to review the state's primary trial court. Iredell concluded, "I

65. Iredell Letter, *supra* note 43, at 308.

66. U.S. CONST. art. III, § 2.

67. Iredell Letter, *supra* note 43, at 309.

68. *An Elector*, *supra* note 43, at 230; *accord* Iredell Letter, *supra* note 43, at 310.

69. *An Elector*, *supra* note 43, at 230; *accord* Iredell Letter, *supra* note 43, at 309.

70. *An Elector*, *supra* note 43, at 230.

71. *Id.* at 230.

72. *Id.*; *accord* Iredell Letter, *supra* note 43, at 309.

don't think any Country can be safe without some Court of Appeal that has no original jurisdiction at all, since Men are commonly careful enough to correct the Errors of others, though seldom sufficiently watchful of their own, especially if they have no check upon them."[73] This much-desired improvement was also more or less realized under the Federal Constitution.[74]

Iredell was a sophisticated attorney who understood fully that judges were capable of misconstruing the Constitution and thus substituting their judicial will for the will of the people. He divided this problem of judicial misconstruction into two general categories: The judges might willfully and knowingly reject the Constitution's clear meaning, or the judges might be forced to construe an ambiguous constitutional provision that had no clear meaning.[75] In either case a declaration that a statute was unconstitutional could not be described as the simple enforcement of the people's will. Iredell was troubled by the possibility of abuse and, as noted above, adduced several factors that would constrain abuse.[76] He also believed that objections that judges might abuse their power "if applicable at all, will reach all judicial power whatever."[77] Moreover, "*when once you establish the necessary existence of any power*, the argument as to abuse ceases to destroy its validity."[78] Iredell simply was unwilling to renounce judicial review because an occasional aberrant judge might abuse the power willfully.

### *B. Iredell's Theory and the Proper Construction of the Constitution*

Iredell's theory of judicial review only worked because the people's sovereign and constitutional will was memorialized in a written constitution. Without a written constitution for guidance, a judge's opinion on constitutional principles would not be based directly on the people's will. To repeat, "the Constitution [was] not . . . a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse."[79] Under Iredell's theory, judicial review was a ministerial power. The judges read the Constitution and give effect to its self-evident

73. Iredell Letter, *supra* note 43, at 310.
74. U.S. CONST. art. III, § 1.
75. *See An Elector*, *supra* note 43, at 230; Iredell Letter, *supra* note 43, 309–10.
76. *See supra* notes 64–72 and accompanying text.
77. Iredell Letter, *supra* note 43, at 308.
78. *Id.*
79. *Id.* at 308–09.

meaning.[80] Today, the most troubling aspect of judicial review involves unclear cases in which judges give an ambiguous constitutional provision a good-faith judicial construction. In these cases, judicial review turns on judicial discretion rather than the ministerial implementation of the people's will. Iredell anticipated this modern criticism. Consistent with his theory, he renounced judicial review in these cases. "In all doubtful cases, to be sure," he wrote, "[legislation] ought to be supported; it should be unconstitutional beyond dispute before it is pronounced such."[81]

Throughout the 1790s, Justice Iredell and his fellow Justices frequently reiterated the idea that the power of judicial review should be exercised only when the statute in question was "unconstitutional beyond dispute."[82] Absent this rule of construction, the people's-

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80. Marshall also noted the fact that the Constitution was written but did not explain the epistemological significance of a written constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

81. Iredell Letter, *supra* note 43, at 310. James Thayer famously reiterated this interpretive corollary a hundred years later in *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) ("[The Court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one."). He did not, however, base the corollary on the people's sovereignty. Instead, he adduced the rule using a common law methodology based more upon the doctrine of precedent.

Given Iredell's analysis and the fact that it was generally accepted by his contemporaries, modern efforts to divine the Founding Generation's view of "judicial supremacy" are anachronistic. *See, e.g.*, David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 279–82 (1992) (detailing briefly the evolution of judicial supremacy); G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 VA. L. REV. 1463, 1467–84 (2003) (exploring successive understandings of *Marbury* and how those understandings have varied with the courts' views on the relationship between actors in the American constitutional order); *see also* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 76–79 (1986). Under Iredell's analysis, a Supreme Court decision was binding upon coordinate branches of government and, indeed, the entire nation. But the authoritativeness of the Court's pronouncements was based upon the people's directives rather than judicial supremacy. If a statute was unconstitutional beyond a doubt, its self-evident unconstitutionality was clear to everyone. Professor Gerald Leonard argues oddly that Iredell did not actually believe in the doubtful-case limitation and simply included it in his private letter to reassure an unsophisticated layman. Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review*, 81 CHI.-KENT L. REV. 867, 880–81 (2006). Professor Leonard apparently did not know that Iredell reiterated the doubtful-case corollary in judicial opinions. *See infra* note 82. At least Professor Leonard does not mention these cases. Nor does he mention Iredell's opinions in *Minge v. Gilmour* and *Calder v. Bull* in which Iredell was concerned that, except in a clear case, there is no reason to prefer a judicial interpretation over a legislative interpretation of fundamental law. *See infra* notes 114–29 and accompanying text.

82. For Iredell's ideas, see Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring) (requiring a "clear and urgent case" to declare a statute void); Minge v. Gilmour, 17 F. Cas. 440, 442 (C.C.D.N.C. 1798) (No. 9631) (stating that the statute would be void if "plainly unwarranted"); *see also* United States v. Villato, 2 U.S. (2 Dall.) 370, 373 (C.C.D. Pa. 1797) (finding that the statute's unconstitutionality was "plain"); Treanor, *supra* note 63, at 527–30 (discussing *United States v. Villato*). For the other Justices, see Cooper v. Telfair, 4 U.S. (4 Dall.)

sovereignty rationale for judicial review would collapse. As long as the judges were simply enforcing the clear intent of the people, the conflict was between the legislature and the people. If, however, the Constitution were unclear, the conflict was between the legislature's interpretation of the Constitution and the judiciary's interpretation. In an unclear case, the Lockean vision of legislative supremacy[83] should prevail. Justice Iredell believed that when the basis for judicial review is ambiguous, the legislature is "possessed of an equal right of opinion."[84]

Although Iredell's doubtful-case corollary limited the scope of judicial review significantly, the corollary did not forbid review. Because Iredell premised judicial review on the people's sovereignty, he necessarily paid particular attention to the Constitution's text as the best evidence of the people's sovereign will. He did not, however, engage in simplistic, plain-meaning analyses. His interpretations were nuanced and thoughtful. He typically sought to mesh the evident purpose of a constitutional provision with its text. His careful parsing led him on at least two occasions to decide that specific legislative acts were unconstitutional.[85]

Iredell delivered his most comprehensive opinion declaring an act of Congress unconstitutional in *United States v. Ravara*,[86] a

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14, 18 (1800) (Washington, J., concurring) ("The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated."); *id.* at 19 (Paterson, J., concurring) ("[T]o authorize this Court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication."); *Calder*, 3 U.S. at 395 (Chase, J.) ("[I]f I ever exercise the jurisdiction I will not decide any law to be void, but in a very clear case."); Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796) (Chase, J.) (noting that, if he had the power to declare a statute void, he would exercise it only in a "very clear case"); United States v. Ravara, 2 U.S. (2 Dall.) 297, 298 (C.C.D. Pa. 1793) (Wilson, J.).

83. *See supra* note 55 and accompanying text.

84. *Calder*, 3 U.S. at 399 (Iredell, J., concurring); *see also Minge*, 17 F. Cas. at 444 (noting that natural justice did not provide sufficient authority for a judge to overturn an act by the legislature). *Minge* is discussed in more detail *infra* notes 117–36 and accompanying text.

85. One such occasion arose in *Ravara*. For a detailed discussion of *Ravara*, see *infra* text accompanying notes 86–97. When Congress directed the Justices while riding circuit to determine the eligibility of claimants for Revolutionary War pensions, Iredell and his brethren refused. *See* CASTO, *supra* note 20, at 175–78. In a letter to President Washington, Iredell explained that the Act was unconstitutional. Letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), *in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 284, 284–88 (Maeva Marcus ed., 1998) [hereinafter DOCUMENTARY HISTORY].

86. 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793). For an excellent discussion of the case, see John Gordan III, United States v. Ravara*: "Presumptuous Evidence," "Too Many Lawyers," and a Federal Common Law Crime*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 106, 106 (Maeva Marcus ed., 1992). There are three versions of the court's decision in *Ravara*. Iredell prepared a typically comprehensive written opinion that he delivered in court. James Iredell, Handwritten Copy of *Ravara* Opinion (1793) (unpublished manuscript,

criminal prosecution against the Genoese consul in Philadelphia. Although the Constitution vests the Supreme Court with an original or trial jurisdiction in cases "affecting diplomats," the U.S. Attorney commenced the prosecution in a federal circuit court.[87] Counsel for the defendant contended that the Constitution made the Supreme Court's original jurisdiction exclusive. Iredell's fellow judges in the case, Justice Wilson and District Judge Peters, held that the jurisdictional Act did not violate the Constitution. They believed "that tho' an Act of Congress plainly contrary to the Constitution was void, yet no such construction should be given in a doubtful case."[88]

Iredell dissented. He believed that the prosecution in a lower court was clearly unconstitutional. In seeking the Constitution's meaning, he began with the purpose of the provision in question.[89] Iredell believed that the Court was given original jurisdiction rather than appellate jurisdiction over diplomat and state-as-party cases "on account of their superior importance to the peace & welfare of the Union."[90] In cases involving diplomats,

> The laws of Nations . . . are not so decided as to be clear of any cavil and difficulty and there is perhaps no subject upon which a Foreign War might be more likely to arise than

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on file with the Vanderbilt Law Review and the Charles E. Johnson Papers, North Carolina State Archives) [hereinafter Iredell's *Ravara* Opinion]. Iredell's *Ravara* Opinion is reprinted *infra* app. A. In addition, he later jotted down from memory the gist of his dissenting opinion and Justice Wilson's majority opinion. James Iredell, Recollection of the Opinions in *Ravara* (1973) (unpublished manuscript, on file with the Vanderbilt Law Review and the McDougal Papers, Historical Society of New York) [hereinafter Iredell's Recollection]. Iredell's Recollection is reprinted *infra* app. B. Dallas's official report of the case is simply Dallas's sketchy recollection of what the judges said and is quite inadequate. Only an inveterate legal positivist would prefer Dallas's vague hearsay recollection to Iredell's comprehensive manuscript that by historical happenstance has never been published.

87. The Constitution provides for original Supreme Court jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls." U.S. CONST. art III, § 2, cl. 1. For the distinction between ambassadors and ministers, see WILLIAM CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 3–4 (2007). Under the law of nations, ambassadors and ministers are entitled to more respect and protection than are consuls, and Iredell was aware of this distinction. Iredell's *Ravara* Opinion, *supra* note 86. He believed that consuls were at least entitled to special legal protection or "respect" when acting under their sovereign's commission and "for public purposes by their [sovereign's] authority." *Id.* Article III of the Constitution does not distinguish between ambassadors and consuls in granting the Supreme Court original jurisdiction over cases involving either type of officer.

88. Iredell's Recollection, *supra* note 86; *accord Ravara*, 2 U.S. at 298–99.

89. Iredell's *Ravara* Opinion, *supra* note 86; *accord Ravara*, 2 U.S. at 298–99. Dallas's report of Iredell's opinion is written in the first person, but it is only a cursory two-sentence summary of Iredell's seven-page opinion.

90. Iredell's *Ravara* Opinion, *supra* note 86.

> in cases not only of a flagrant injustice to [a minister, consul, or ambassador] but even of a supposed injury when one was not really intended.[91]

Even in a case in which there was no violation of international law, but a minister nevertheless supposed he had suffered an injury, a trial by the nation's highest court might avoid misunderstandings.

Iredell then took up the question of whether concurrent jurisdiction in the lower federal courts was consistent with the Constitution's evident purpose. He believed that the main problem with concurrent jurisdiction was forum shopping. There was no problem in cases where a diplomat was the plaintiff and chose to file a complaint in the lower court.[92] On the other hand, in cases like *Ravara* in which the diplomat is a defendant, the diplomat is deprived of "any security arising from the Jurisdiction expressly given to the Supreme Court."[93]

Although trial-court errors usually are correctable through the appellate process, Iredell pointed out that the words of the Constitution evidently preclude Supreme Court appellate jurisdiction over diplomat cases. He found that the Constitution expressly gives the Court original jurisdiction over diplomat cases and, in the next sentence, gives the Court appellate jurisdiction "[i]n all the other cases." Thus, the word "other" excludes diplomat cases from Article III's express allocation of appellate jurisdiction. Maybe the express allocation of appellate jurisdiction allows an implicit appellate authority over diplomat cases? Iredell, however, could not "imagine" that having taken "pains" to provide an express original jurisdiction, the Framers would have left appellate jurisdiction to implication.[94] Thus, in Iredell's mind, the statute was unconstitutional.[95]

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91. *Id.* In addition to diplomat cases, the Constitution vests the Supreme Court with original jurisdiction over "Cases . . . in which a State shall be a Party." U.S. CONST. art. III, § 2. In state-as-party cases, he noted that "everyone must be sensible of the importance of avoiding any just subject of complaint, as nothing could be more calamitous than a misunderstanding between the United States and one of the members of the Union." *Id.*

92. *Id.*

93. *Id.*

94. *Id.*:

> Nor can anyone imagine when so much pains were taken to select these mighty cases (for such taking them all together they truly are) as proper objects of original jurisdiction in the Supreme Court that if it was intended to allow of a *concurrent* Power, either an appeal would be excluded (provision for which under certain limitations, is made in all other cases) or at least that they be worthy of any mention in the Constitution.

95. Dean William Treanor has suggested that Iredell did not follow the unconstitutional-beyond-dispute corollary in *Ravara*. Treanor, *supra* note 63, at 539–40. To the contrary, however, Iredell constructed a constitutional box in *Ravara* that he could not exit without declaring the statute unconstitutional as applied in *Ravara*. In particular, if the Constitution actually

Two years later, when Iredell recollected his opinion in *Ravara*, he suggested another strategy for dealing with apparently unconstitutional legislation. The statute in *Ravara* gave the lower courts general jurisdiction over all federal criminal prosecutions without specifically mentioning diplomat cases. The Act did not grant the lower courts an "express Jurisdiction" over diplomat cases.[96] After reiterating his textual analysis, he concluded that "no one could imagine that Congress, tho' they might in the hurry of business inadvertently make a provision inconsistent with the Constitution, deliberately meant to transgress it."[97] Thus, there was no real conflict between the Constitution and the Judiciary Act if the Act's general language was construed as not extending to diplomat cases. In *Chisholm v. Georgia*,[98] Iredell explicitly used this strategy of statutory interpretation. He explained, "it is of extreme moment that no Judge should rashly commit himself upon important questions [of constitutional law], which it is unnecessary for him to decide."[99] He then construed the act in question so as to avoid the constitutional problem.[100]

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precludes appeals to the Supreme Court in diplomat cases, a concurrent jurisdiction in the lower federal courts is clearly impermissible.

About a hundred years later, the Supreme Court adopted the majority opinions in *Ravara* without addressing the problem of appeals. *See* Bors v. Preston, 111 U.S. 252, 257 (1884) (discussing the *Ravara* opinion); Ames v. Kansas, 111 U.S. 449, 465–66 (1884) (same). In *Cohens v. Virginia*, the Court held that its original jurisdiction over state-a-party cases does not bar appellate jurisdiction over state courts in a state-a-party case originally tried in state court. 19 U.S. (6 Wheat.) 264, 392–406 (1821). The *Cohens* rationale may solve the appellate problem in diplomat cases. *See* Gittings v. Crawford, 10 F. Cas. 447, 450 (C.C.D. Md. 1838) (No. 5465) (holding that the Supreme Court could exercise both original and appellate jurisdiction over diplomat cases and citing *Cohens* for support).

96. Iredell's Recollection, *supra* note 86.

97. *Id.*

98. 2 U.S. (2 Dall.) 419 (1793). For an in-depth discussion of *Chisholm*, see CASTO, *supra* note 20, at 188–97.

99. *Chisholm*, 2 U.S. at 449.

100. Iredell's strategy of statutory interpretation in *Chisholm* is ably presented in John Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255 (1994). In administering the Invalid Pensioner's Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, 243–45, Iredell adopted an improbable statutory interpretation that enabled him to give effect to otherwise unconstitutional legislation. *See* CASTO, *supra* note 20, at 175–78, 252; *see also supra* note 85. Under the Act, the federal circuit courts, staffed in part by circuit-riding Justices, determined veterans' eligibility for pensions subject to review by the Secretary of War. In a series of advisory opinions, the Justices decided that the Constitution did not permit a cabinet officer to exercise appellate power over judicial proceedings. Notwithstanding the Act's plain meaning, most of the Justices interpreted the Act as offering the Justices a nonjudicial office that they were free to accept in addition to their judicial office. Iredell frankly admitted, "It must be confessed, that this is not an obvious construction." James Iredell, Reasons for Acting as a Commissioner on the Invalid Act (Sept. 26, 1792), *in* 6 DOCUMENTARY HISTORY, *supra* note 85, at 288, 288.

Marshall did not mention the doubtful-case corollary in *Marbury*, but in my opinion, Marshall probably agreed with this crucial limitation to judicial review when he wrote his opinion. Certainly, his brethren who joined with him believed in the corollary.[101] Moreover, all the specific examples that Marshall provided in *Marbury* met the doubtful-case requirement that legislation must be unconstitutional beyond dispute to overturn it.[102] His rationale of the people's sovereignty is very difficult to square with a more freewheeling approach to judicial review. In at least one subsequent opinion, Marshall espoused the doubtful-case corollary.[103]

### *C. Explaining* Marbury*'s Preeminence*

Notwithstanding Marshall's abbreviated and question-begging rationale, most people today view his *Marbury* opinion as one of the most—perhaps, the most—important Supreme Court decisions in history.[104] The reasons for *Marbury*'s modern apotheosis relate in part to the rise of legal positivism. Supreme Court decisions are the law of the land, and the individual opinions of Justices expressed outside of Supreme Court litigation are not. Iredell's theory of judicial review was not expressed in a Supreme Court opinion.[105] Regardless of the

101. *See supra* note 88 and accompanying text.

102. *Cf.* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 103 (2004) (describing the Marshall Court's practice of overturning only the most blatantly unconstitutional laws, which included situations like the one proffered in *Marbury*). Thus, a tax on the export of cotton contrary to the Constitution's specific prohibition of taxes "on Articles exported from any State," U.S. CONST. art. I, § 9, cl. 5, would be subject to judicial review. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803). Likewise, if Congress passed a criminal law contrary to the Constitution's Ex Post Facto Clause, U.S. CONST. art. I, § 9, cl. 3, a court should dismiss prosecutions under the unconstitutional act. *Marbury*, 5 U.S. at 179. Finally, if Congress tried to dispense with the Constitution's "two Witnesses" rule in treason cases, the courts should not yield to Congress. *Id.*

103. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810).

104. The numerous law review symposia marking the two hundredth anniversary of the case demonstrate its place in American history. *E.g.*, Symposium, *Judging Judicial Review:* Marbury *in the Modern Era*, 101 MICH. L. REV. 2557 (2003); Symposium, *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of* Marbury v. Madison, 38 WAKE FOREST L. REV. 313 (2003); Symposium, Marbury *and Its Legacy: A Symposium to Mark the 200th Anniversary of* Marbury v. Madison, 72 GEO. WASH. L. REV. 1 (2003); Symposium, Marbury *at 200: A Bicentennial Celebration of* Marbury v. Madison *as History*, 20 CONST. COMMENT. 205 (2003); Symposium, Marbury v. Madison*: 200 Years of Judicial Review in America*, 71 TENN. L. REV. 217 (2004); Symposium, Marbury v. Madison*: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003); Symposium, Marbury v. Madison *and Judicial Review: Legitimacy, Tyranny and Democracy*, 37 J. MARSHALL L. REV. 317 (2004).

105. Nor were Hamilton's and Wilson's theories expressed. *See supra* note 13.

merits or persuasiveness of Marshall's treatment of judicial review, it is undeservedly preferred over Iredell's.[106]

Marshall's rationale was not particularly strong. Nor was it original. The power of judicial review already had been expressly endorsed by most of the other Justices.[107] *Marbury*, however, is the first case in which the Court issued a majority opinion addressing judicial review.[108]

Ironically, the *Marbury* opinion's most glaring weakness has facilitated its modern preeminence. The most common criticism of Marshall's opinion is that he failed to explain why the Court's reading of the Constitution should be preferred over the legislature's presumably contrary reading.[109] He almost certainly had a powerful explanation. Like the other Justices, he presumably agreed with the doubtful-case corollary.[110] Therefore, the conflict in judicial review cases was not between the legislative and judicial branches; it was the people versus the legislature with the courts acting as the people's ministerial agent. Marshall, however, did not happen to state this powerful analysis in *Marbury*.

Marshall's silence regarding the doubtful-case corollary has come to be quite significant. Starting in the late nineteenth century, advocates of an expansive doctrine of judicial review began relying upon *Marbury* to support their anachronistic vision of judicial power.[111] The idea that judicial review is not available in doubtful cases is quite inconsistent with the modern understanding of judicial review. In the late eighteenth century, jurists plausibly could claim to know the people's will as expressed in the Constitution because they

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106. In addition, later generations have found it convenient to invoke *Marbury* in support of particular political philosophies. *See* Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375 (2003) (describing how jurists and legal scholars have invoked *Marbury* to support various arguments in favor of an expansive doctrine of judicial review since the late nineteenth century); Gerber, *supra* note 3, at 7–9 (noting that various political movements have found a hero in John Marshall and have praised him "for his famous decisions"). Marshall's failure to mention the interpretive corollary of "unconstitutional beyond dispute," *see supra* notes 101–03 and accompanying text, has greatly facilitated these later adoptions.

107. *See* CASTO, *supra* note 20, at 214–22 (describing the Justices' acceptance of the power of judicial review).

108. In *Ware* v. *Hylton*, the Court overturned a state statute as contrary to a treaty of the United States. 3 U.S. (3 Dall.) 199, 285 (1796). Today most would view the case as a straightforward application of the Supremacy Clause, but a majority of the Court did not clearly embrace that understanding. *See* Treanor, *supra* note 63, at 549–54 (discussing the individual opinions of the Justices in *Ware*).

109. *See supra* note 53 and accompanying text.

110. *See supra* notes 101–03 and accompanying text.

111. *See* Douglas, *supra* note 106, at 413 (explaining that *Marbury* has been used by various Justices to expand the power of judicial review).

personally had observed and participated in framing the Constitution. Two centuries later, the people's will is not so obvious, and this kind of analysis has morphed into Framers' intent arguments that are notoriously slippery. In addition, today's Court routinely exercises judicial review on the basis of ambiguous constitutional provisions without regard to original intent. Marshall's failure to mention the doubtful-case corollary has made it possible to suggest that he did not subscribe to this corollary.[112]

Once more the hidden hand of legal positivism distorts our view of *Marbury*. Although the other Justices, and probably Marshall as well, subscribed to the corollary, this limitation of judicial review was not recited in *Marbury*, and therefore it is not the law. The consequence is that as a matter of modern legal analysis, *Marbury* can be used as precedent for a broad-ranging power of judicial review. It does not matter whether Marshall and his brethren agreed with such a precedent. Whatever they may have thought in private or said in previous opinions, the jurisprudence of legal positivism dictates that the principle does not become constitutional law unless it is uttered in a Supreme Court majority opinion.

### *D. Extraconstitutional Principles*

Some have argued that the early Justices believed that the power of judicial review could be used to enforce principles of natural justice not codified in the Constitution.[113] One of the leading pieces of evidence used to support this notion is Justice Chase's dictum in *Calder v. Bull*, in which he appears to suggest that a court might resort to extraconstitutional natural law principles as a basis for declaring a law void.[114] Iredell vigorously disputed the suggestion in his own opinion in *Calder*.[115]

Iredell's thoughts on resorting to extraconstitutional principles of natural justice provide another case study of the unfortunate influence of legal positivism on our understanding of the Founders. In

112. *See* SNOWISS, *supra* note 13, at 122–23, 130–32, 152–53, 173–74 (citing specific cases where Marshall chose not to rely on the doubtful-case corollary to determine the constitutionality of a statute).

113. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844–49 (1978) (acknowledging the development of unwritten constitutional law, and questioning whether it should be considered a legitimate part of adjudication); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1145–46 (1987) (explaining that late eighteenth-century Justices saw the Constitution as a supplement to the natural law, rather than a replacement of it).

114. 3 U.S. (3 Dall.) 386, 388–89 (1798).

115. *Id.* at 398–400.

the summer of 1798, Iredell delivered opinions in two separate cases on this specific issue. After *Calder* was argued in February of that year, the Justices postponed their decision on the case.[116] A few months later while Iredell was riding circuit in June, he delivered a fully elaborated opinion on the same issue in *Minge v. Gilmour*.[117] Iredell did not deliver his *Calder* opinion until the Supreme Court reconvened in August.

In the circuit court opinion in *Minge*, Justice Iredell rejected the argument that judicial review could be premised upon principles of natural justice. So long as a legislature acts within the limits written into the Constitution, he determined that a court may not declare a statute void.[118] While the legislature might act unjustly, there is no judicial remedy so long as the legislature acted within the limits of the North Carolina Constitution.[119] The legislature exercises "a trust confided to them by the people . . . and it is to be presumed they will have a due regard to justice in all their conduct."[120] Irresponsible legislators would be held "responsible, in the only way in which a legislature can be responsible [i.e., through the election process]."[121]

Iredell also advanced an important policy reason for refusing to base judicial review on extraconstitutional principles of natural justice. He found the concept of natural justice fraught with ambiguity: "The words 'against natural justice' are very loose terms, upon which very wise and upright members of the legislature and judges might differ . . . ."[122] In such a case, the conflict would be between the legislature's opinion and the judge's opinion, and Iredell believed that judicial review would be inappropriate.[123] A few months later in *Calder*, he presented the same argument.[124]

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116. 8 DOCUMENTARY HISTORY, *supra* note 85, at 93.

117. 17 F. Cas. 440, 443–44 (C.C.N.C. 1798) (No. 9631).

118. *Id.* at 444.

119. *Id.*

120. *Id.*

121. *Id.*; *see supra* notes 59–63 and accompanying text.

122. *Minge*, 17 F. Cas at 444.

123. Notwithstanding Iredell's clear rejection in *Minge* and *Calder* of natural justice as a basis of judicial review, a passage in his 1787 letter seems at first glance to be contrary to *Calder*. *See* Sherry, *supra* note 113, at 1143 (noting the discrepancy between this passage and Iredell's judicial opinions). In the letter, Iredell wrote:

> Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be), and any act passed, *not inconsistent with natural justice* (for that curb is avowed by the judges even in England), would have been binding on the people.

Iredell Letter, *supra* note 43, at 307.

This reading is at best problematic. The sentence's introductory prepositional phrase makes it clear that he was not addressing the issue of judicial review in states like North Carolina that

Iredell's opinion in *Calder* is incomplete. He did not explain why the legislature's understanding of natural justice should be preferred over the judiciary's. But he did in *Minge*, his circuit court opinion. He believed that the Constitution's limits upon the legislature carried a negative inference:

> The [C]onstitution, by saying that the legislature shall have authority in certain cases, but shall not have in others, as plainly declares everything valid done in pursuance of the first provision, as everything void that is done in contradiction of the last.[125]

Moreover, he linked this negative inference to the people's sovereign authority. He "inferred" that having placed specific limitations on the legislature, if the people wished to confer a general authority upon the courts to resort to natural justice, "this restriction would have been inserted, together with others."[126]

In *Minge*, Iredell also introduced a nuanced understanding of natural justice that he did not mention in *Calder*. Although he did not believe that courts may use principles of natural justice to void a statute, he did believe that a judge should use those very same principles to interpret a statute. Courts should construe a statute "as consistently with their notions of natural justice . . . as the words and context will admit."[127] He advanced this as a purely interpretive tactic on the quite reasonable assumption that "the true design of the legislature" would be to pursue natural justice.[128] Of course, "if the [statutory] words are too plain to admit of more than one construction," this tactic could not be used.[129]

One might ask why natural justice principles are more appropriate in statutory construction than in constitutional construction. While Iredell did not address this distinction in *Minge* or *Calder*, in *Ravara* he noted that judicial misconstructions of statutes may be corrected by Congress, but amending the Constitution is a

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have an "express" or written Constitution. Given the introductory phrase, reading the sentence as endorsing judicial review based directly on natural justice requires the slender word "even" to do some heavy lifting. More significantly, Iredell wrote in the same letter that the existence of a written Constitution made the existence of specific constitutional limits clear and eliminated the problem of vague unwritten rights "about which ten thousand different opinions may be formed." *Id.* at 308–09. This very problem of ambiguity was his central objection to resort to natural justice in *Minge* and *Calder*. Finally, the vagueness of natural justice is quite inconsistent with the corollary of "unconstitutional beyond dispute" that he stated in his 1787 letter and elsewhere.

124. 3 U.S. (3 Dall.) 386, 399 (1798).

125. *Minge*, 17 F. Cas. at 444.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

more difficult task.[130] Presumably, Iredell would have found that principles of natural justice could inform constitutional interpretation, but only if the constitutional provision were ambiguous and the existing principle of natural justice were indisputable. Given Iredell's overarching faith in the legitimacy of the people's sovereignty, it would have been inconceivable that the people would not want a clearly established principle of natural justice to be enforced.[131] This interpretative strategy keyed to the people's will, however, would work only when the principle of natural justice is clearly established.

When scholars discuss Iredell's trenchant criticism of the resort to natural justice, they emphasize his *Calder* opinion. Scholars typically ignore *Minge* or relegate it to a footnote.[132] This treatment is backward. *Minge* is the more important opinion, and *Calder* should be relegated to a "*see also*" footnote. Iredell himself undoubtedly preferred his *Minge* opinion. He stated expressly that his circuit court opinion was informed by the oral argument in *Calder*,[133] and his lower court opinion was significantly more detailed and nuanced than his *Calder* opinion.[134] Indeed, Iredell stated in *Calder* that he was speaking off the cuff, as it were, because "I have not had an opportunity to reduce my opinion to writing."[135]

The perverse influence of legal positivism's hidden hand is the only explanation for preferring the *Calder* opinion over the *Minge* opinion. The opinions were written two months apart and were significantly based on the same oral argument. One is more detailed and nuanced than the other, and the author confessed that he delivered his less detailed opinion off the top of his head. Indeed, his Supreme Court opinion is essentially an incomplete summary of the more detailed opinion that he had delivered just two months earlier. The only conceivable reason for preferring the summary over the

130. Iredell's *Ravara* Opinion, *supra* note 86.

131. For example, Blackstone posits a case in which parliament passes a statute empowering a person to "try as well his own causes as those of other persons." WILLIAM BLACKSTONE, 1 COMMENTARIES *91. Blackstone believed that courts lack power to disregard such a patently unreasonable act, but Iredell's theory of judicial review provides a different solution. The U.S. Constitution does not have a limitation that deals directly with this specific problem, but the Fifth Amendment's Due Process Clause might be invoked. Although the scope of the clause is patently unclear, Iredell might have resorted to undisputed principles of natural justice to construe the clause as barring the statute.

132. *See, e.g.*, KRAMER, *supra* note 102, at 42 (providing a thorough analysis of *Calder* without any mention of *Minge*); SNOWISS, *supra* note 13, at 70–71 (same). I must confess that I have not been entirely innocent. *See* CASTO, *supra* note 20, at 229–30 (mentioning *Minge* in a discussion of *Calder*, but only in a footnote).

133. *Minge*, 17 F. Cas. at 443.

134. *See supra* text accompanying notes 125–29.

135. 3 U.S. (3 Dall.) 386, 398 (1798).

original is that it was uttered coincidentally to decide an appeal in the Supreme Court.[136] In today's culture of legal positivism, the preferment of the partial summary may make sense in the context of arguing what the law of judicial review should be in the twenty-first century. In contrast, someone seeking to understand law and society in the late eighteenth century surely should prefer the more complete lower court opinion to its pallid Supreme Court summary.

## IV. CONCLUSION

Iredell's analysis and justification of judicial review is comprehensive and powerful. Like Marshall and others of the founding generation, Iredell saw judicial review as giving effect to the people's sovereign will. Unlike Marshall, Iredell directly confronted the difficult question of why the judiciary's interpretation of constitutional law is to be preferred over the legislature's. Given John Locke's influential idea of legislative supremacy, this question has to be answered. Iredell pointed out that the principle of majority rule creates a structural impediment to the legislative enforcement of constitutional rights held by those in the minority. He also explained in detail a number of constraints upon judicial abuse of the power of judicial review.

Finally, Iredell explicitly grappled with the difficult problem of enforcing constitutional rights that are ambiguous or unclear. This was a particularly difficult problem under the unwritten English Constitution, but Iredell explained that with a written constitution, the people's will in respect of some constitutional rights is unclear. In these clear cases, the judiciary acts as the people's ministerial agent in overturning legislation. In contrast, doubtful cases involving unclear or ambiguous constitutional rights do not involve the simple, ministerial enforcement of the people's will. In such cases, Iredell believed that the courts should acquiesce in the legislature's decision.

Today, some two hundred years later, Iredell's thoughtful analysis has lost some of its original value. The fault, however, lies not in Iredell's logic, but in the changed circumstances of American political society. Today, the judiciary occasionally reviews the constitutionality of executive action. Because Iredell never addressed judicial review in this context, we do not know what his thoughts were

136. Similarly, Iredell's careful analysis in a lower court opinion of the Rules of Decision Act has been virtually ignored. Michael G. Collins, *Justice Iredell, Choice of Law, and the Constitution–A Neglected Encounter*, 23 CONST. COMMENT. 163, 165 (2006). If by coincidence he had written precisely the same opinion in a Supreme Court case, the opinion probably would be famous.

on this issue.[137] Insofar as his thoughts on judicial review of legislation are concerned, the passage of two centuries has seriously impeded our current ability to understand the will of the people when they created the original Constitution. Iredell was a member of the founding generation. We are not. We cannot know the people's will as his generation could. Today, most issues of constitutional law that reach the Supreme Court are ambiguous and would not warrant judicial review under Iredell's analysis. We simply have a more flexible doctrine of judicial review today. Therefore, his analysis is anachronistic.

To a degree, the measure of a Justice's greatness is not in the person, but in the eyes of the beholder. We do not see the greatness of Iredell's analysis because his theory does not comport with the twenty-first-century practice of judicial review. Nevertheless, he offered the most comprehensive analysis and justification of judicial review ever penned by a Supreme Court Justice. Moreover, some of his insights are timeless. In particular, his insight regarding the impact of the majority rule upon those in the minority is as powerful today as it was over two centuries ago.

## APPENDIX A

### *James Iredell's Opinion in* United States v. Ravara[138]

The Question on which I am now to deliver my opinion is a question of extreme magnitude, as everyone that affects the Constitution must be. I could have wished for more time to consider of the subject, but the nature of the case forbids it. If I am in an error, it is a consolation to me that in this instance, it can do no injury, as the opinion of the other judges, for whose superior judgment I have the most respectful deference, is different from mine.

The Question is, whether this court hath Jurisdiction in the case of a Prosecution against a Consul.

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137. Presumably, Iredell would have reviewed a clearly unconstitutional executive action, but we do not know whether he would have used the doubtful-case corollary in reviewing the executive action.

138. Iredell's *Ravara* Opinion, *supra* note 86. The Charles E. Johnson Papers contain many of Iredell's manuscript opinions. Iredell labeled this particular manuscript "Copy of an opinion given by me in the Circuit Court of Pennsylvania upon an Indictment against Ravara the Genoese Consul." I thank Professor Anthony Joseph for helping me with some of Iredell's more inscrutable scrawls.

I am of the opinion that it has not; the reasons of which opinion; I will now offer as clearly as I can.

It is admitted, and is clear, that the act of Congress hath not given this court Jurisdiction in this case in express words, and that if under the Constitution, Cases of this description are alone determinable in the Supreme Court we have no claim to exercise any Jurisdiction at all.

The great Question therefore to be decided is, whether under the Constitution, Cases of this kind are or are not alone confined to the Jurisdiction of the Supreme Court.

The material words of the Constitution to be considered are, from the 2nd Sect. of the 3d Article and the two final paragraphs of the second Section (here repeat them).

The Constitution hath therefore provided these things.

1. That there shall be established different courts, viz.

Supreme Court

Inferior Courts

2. It hath directed all those cases to which the Judicial Power in one or other of these courts shall extend.

3. It hath expressly defined the Jurisdiction of the Supreme Court. It hath not defined, otherwise than by Implication any part of the power of the Inferior Courts, but left them to be provided for in the discretion of Congress.

In another part of the Constitution among the general enumerated powers of is this in particular, viz., "To constitute tribunals inferior to the Supreme Court."

4. It hath selected particular cases, viz: "all cases affecting Ambassadors, or other public ministers, and consuls, and those in which a State shall be Party" for the original Jurisdiction of the Supreme Court. It hath provided for no appellate Jurisdiction in such cases.

In enquiring into the proper construction of the Constitution in this particular, I will first enquire

(1) What were the probable reasons which induced the framers of the Constitution to declare expressly that the Supreme Court should have original Jurisdiction in the special cases mentioned?

2. Whether these reasons, if the genuine ones, will admit of a construction that will allow of a concurrent jurisdiction circumstanced as that concurrent jurisdiction must be.

3. Whether the words in the Constitution; will admit of the construction that the Jurisdiction of the Supreme Court shall be exclusive, if the reasons of the authority require it.

1. I can imagine no reasons why in this particular, Cases were expressly mentioned as peculiarly cognizable by the Supreme Court, but on account of their superior importance to the peace & welfare of the Union, Ambassadors and other public Ministers have an extraordinary sanctity of character, as representing the sovereigns who delegate their authority to them. Consuls, tho' not the Representatives of their sovereigns, are entitled to their particular protection as acting under their commission and respected for public purposes by their authority. The laws of Nations concerning any of them are not so decided as to be clear of all cavil and difficulty and there is perhaps no subject upon which a Foreign War might be more likely to arise than in cases not only of a flagrant injustice to either but even of a supposed injury when one was not really intended. In cases in which a state should be a party, everyone must be sensible of the importance of avoiding any just subject of complaint, as nothing could be more calamitous than a misunderstanding between the United States and one of the members of the Union. To secure the Union as much as possible against any danger arising from such inherent objects of contention, I imagine was the great purpose of the provision of the Constitution in question.

2. It appears to me that purpose cannot be answered upon the supposition of a concurrent Power as contended for in this case. If such a concurrent Power exists, none of the Persons who are the object of it has any security arising from the Jurisdiction expressly given to the Supreme Court unless in cases where he himself can prefer an original complaint in which cases, according to this doctrine, he may have an option. But if any Person contrary to the Law of Nations, sues him or a Prosecution not properly supportable is commenced against him in any Inferior Court, he has no means of obtaining redress from the Supreme Court unless the Supreme Court has an appellate jurisdiction in such cases. Such an appellate jurisdiction is certainly not provided for in the Constitution and I think it is implicitly excluded, for when after enumerating the particular instance as belonging to an original Jurisdiction in the Supreme Court, it adds "In all the other cases beforementioned, the Supreme court shall have appellate jurisdiction." I think it is the same thing as if it had said, "In all cases, except cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be Party." If these words had been used, I presume no one would have contended that any appellate Jurisdiction was allowable in the excepted cases, and if (as I am of opinion) the words used mean in fact the very same thing they must receive the same construction. Nor can anyone imagine when so much pains were taken to select these mighty cases (for such taking

them altogether they truly are) as proper objects of original jurisdiction in the Supreme Court that if it was intended to allow of a *concurrent* Power, either an appeal would be excluded (provision for which under certain limitations, is made in all other cases) or at least that they be worthy of any mention in the Constitution. When it must be clearly seen, that any proceedings in courts against Diplomatic or Consular Characters are more naturally subjects of jealousy, than any in which they may be original Complainants. There might be reason for leaving appeals discretionary, and liable to limitations in other instances, because the value of a subject in dispute might in many cases not admit of an appeal as without oppression. But in cases of this nature, the sensibility of national honour would not be excited by any consideration as a large or small Sum or any minutae of computation in point of value at all but by the supposition of the Law of Nations having been violated in the person of a protected character and therefore it is probable I conceive that if the Supreme Court was thought proper to be selected as the court of express original jurisdiction, an appellate Jurisdiction in such cases would likewise have been given to it. Those who framed the Constitution had themselves considered a concurrent authority of this nature could under their own Constitution have been vested in any other Court.

3. These Considerations satisfy me that the framers of the Constitution must have intended the authority in question to have been exclusive, and consequently, that it must receive that construction unless they were so unfortunate as to express their meaning (if this really was such) in contradictory or insufficient terms. It is contended, the matter would have been out of all doubt if the word "*exclusive*" had been used. I presume it would, and I may say as to all Instruments whatever if words were used that admitted of no possible doubt a great part of the business of the Profession would be cut up by the roots. But it very often happens that in drawing up an Instrument of writing Doubts that afterwards occur to ingenious Minds never do to those who are employed in preparing it. This want of the utmost possible perspicuity may more naturally be expected in the framing of the Constitution of Government about which the minds of all good Men must naturally be so agitated that less minute exactness as to words, is in a manner unavoidable. A fine Writer somewhere observes. "It is the nature of all greatness not to be exact." The observation may as well apply to the greatest political object in which the mind of Men can be engaged as to any other. The Soul is too occupied with the vast Ideas in contemplation to be capable of weighing every possible objection that may occur to the meaning of every word that is used. For which reason the spirit of such an

instrument as much if not more to be regarded than that of any other where the words are not in express repugnance to it. I think that cannot be alleged of the words in question. It is not suggested that the words "original jurisdiction" *necessarily* mean *Exclusive Jurisdiction*, but that they may mean it if the context requires that construction. No reasons occur to me why the words are not capable of such a construction, if circumstanced. If by original, was necessarily meant original, and not exclusive. There are many superfluous words used in the Judicial Act of Congress. But it is evident that where they meant to guard against an exclusive Jurisdiction, they *constantly* say *original* but not *exclusive*—as if they supposed, without the lettering the former might itself imply *exclusive*. It is certain indeed that there are instances where it cannot be intended to mean exclusive. Such was the instance given at the Bar in regard to the courts of this State of a Superior Jurisdiction that was altogether appellate when there were Inferior courts of original Jurisdiction: The Legislature thought proper to say the former should have appeal Jurisdiction: they were silent as to the Inferior Courts. Nothing could be more clear than that this alone did not take away the Jurisdiction of the Inferior Courts, *because a Law in being cannot be understood to be repealed but by express words or an evident repugnancy*. There were neither in this case for tho' the word "original" may sometimes mean *exclusive*, when the nature of the case requires it, it does not necessarily mean so, and it was evident no such consequence was intended to follow in this case, otherwise the Legislature knowing the previous Jurisdiction possessed would have either actually repealed the former law in that particular or used words sufficiently expressive of their intention in that respect. But I must presume, that in framing a Constitution anew with respect to Courts which are to be created, and must derive their whole authority from the words of that Constitution the word "original" may well be understood *prima facie* to mean "exclusive" because in that case those who frame the Constitution know no other courts can be established under it but according to the sanction the Constitution itself gives and I believe it is an inevitable rule that no Implication shall control that which is express. [Here two and a half lines are crossed out by Justice Iredell.] The Power contended for must be shown to be granted: and is not to be assumed as a matter of course (under words of doubtful implication) unless *forbid*, a doctrine that would lead to lengths of a more dangerous nature and which appears to me to be utterly contrary to the genius of the excellent Constitution we are contemplating.

There was one observation made by Mr. Rawle the force of which I very sensibly feel. That was, that the Congress in the 9th Sec.

of the Judicial Act have made a provision in the case of Consuls as if cases of this description were not by the Constitution confined to the Supreme Court. No man can reverence any opinion of that most respectable Body more than I do and it is probable that their opinion is right because it is this day to be sanctioned not only by the authority of a Judicial decision, but by Individual opinions of far greater weight than mine. But as I am necessarily obliged, even by a reference by Congress [illegible] the very section that concerns the question before us, to give my construction of the Constitution, I must do it as it appears to my own understanding; however imperfect & defective that may unfortunately be. Among the many [unexampled?] blessings we enjoy there is unavoidably one alloy forever mixed with them. The more free a government is, the more complicated in many particulars must its laws be in order to guard against every possible avenue of tort. In the vast variety of cases which must arise under them new questions will frequently occur and differences of opinion will of course take place whatever laudable pains may be taken to prevent it. Happily for us, no case of that kind; not even of the highest Importance is without a remedy. If any difficulty arises upon the Constitution itself, a regular & peaceable amendment of it may take place. If it seems in any act of Legislation, the Remedy is still more easy. In the meantime that discussion such differences give rise to may serve more & more to enlighten the human mind on the subject of the noblest of all [illegible], that by which Public Order can be reconciled with Individual Liberty, and Law be the successful Administrator of public & of private Justice.

## APPENDIX B

### *Iredell's Recollection of the Opinions in* United States v. Ravara[139]

In the Constitution of the United States, is the following article:

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. *In all the other cases* before mentioned, the Supreme Court shall have appellate Jurisdiction, both

139. Iredell's Recollection, *supra* note 86. The manuscript is mislabeled "Memoranda by John Jay." The manuscript, however, clearly describes the preliminary jurisdictional issue decided by Iredell, Wilson, and Peters in *United States v. Ravara*, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793). Chief Justice Jay was on the Court the next year when the case finally went to trial. *Id.* at 299 n.1.

as to Law and fact, with such exceptions, and under such regulations as the Congress shall make.

In the Judicial Act of the United States (Chapter 20th of the first Session of the first Congress) are the following clauses (part of the 13th Section):

That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its Citizens; and except also between a State and Citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction and shall have exclusively all such jurisdiction of suits or proceedings against Ambassadors, or other public ministers, or their Domestics, or Domestic Servants, as a court of Law can have or exercise consistently with the Law of Nations, and original, but not exclusive jurisdiction of all suits brought by Ambassadors, or other public ministers, of which a Consul or Vice-Consul, shall be a party. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several States, in the cases herein after specially provided for.

In the Circuit Court of the United States in Pennsylvania, there held before the Judges Wilson, Peters, and myself, Ravara the Genoese Consul was indicted for a misdemeanor in sending threatening letters. He was named Consul in the Indictment. (If I recollect right.)

His Counsel moved to quash it, alleging that it's being a case *affecting a Consul*, it was one of those of which the Supreme Court had sole Jurisdiction, according to the above clause in the Constitution.

After argument at the Bar, and time taken to consider Judge Wilson and Judge Peters were of opinion that the Indictment was sustainable in the Circuit Court. I was of opinion, that it exclusively belonged to the Supreme Court. The motion was, of course, rejected; but the trial was postponed, and what afterwards became of the prosecution, I know not.

I have no memorandums of the case at present by me, and therefore cannot particularly assign the reasons on either side. But I think the principal reasons assigned by Judge Wilson and Judge Peters was that under the Act of Congress it did not appear that a case of this kind was excluded from the Circuit Court, but rather the contrary; that tho' an Act of Congress plainly contrary to the Constitution was void, yet no such construction should be given in a doubtful case; and that in this case, the Constitution, tho' it said "the Supreme Court should have *original* jurisdiction," yet not having said it should be also *exclusive,* it was not necessary to give such an interpretation to it. I think these were substantially the reasons.

My reasons (so well as I recollect them) were to the following effect.

1. That the Constitution, having particularly designated the cases to which the Judicial Power of the United States should extend, thought proper to select some of those cases as proper for the cognizance of the Supreme Court, which cases, I presumed, were particularly selected became such more than others were more likely to endanger the peace of the Union, and therefore, it was thought best to confide in all such instances in the highest Court of Jurisdiction alone.

2. That when the Constitution says "In *all* cases &c. the Supreme Court *shall* have original jurisdiction," it seems, in common reason, to amount to the same thing as saying that jurisdiction shall be *exclusive*, when there are no other general words in the Constitution giving any Jurisdiction at all in such cases to any other court, in which case alone, it is conceived, the addition of the word "exclusive" was material.

3. That the Constitution took care, not only that the Supreme Court should have *original* jurisdiction in those particular cases, but a general *appellate* Jurisdiction in *all other cases*, subject only to express restrictions which might be contemplated with attention and care and as the words "*in all* other cases" must mean the same thing as if it had said "except *in the* above cases," it follows, (if the construction contended against be right) that the Constitution intended, not only to allow a concurrent Jurisdiction in those selected cases with some other Court, but that there should be an appeal from a decision on any such case by another court, tho' they be consciously provided one in every other, thus taking less care of cases which they purposely selected as the highest subjects of jurisdiction than of any of the most trifling and unimportant nature.

4. That the Act of Congress had not given express Jurisdiction to the Circuit Court in this instance; but if they had, and either in this instance or any other had made a provision inconsistent with the Constitution the latter *as the* Supreme law, must necessarily control the former, altho' no one could imagine that Congress, tho' they might in the hurry of business inadvertently make a provision inconsistent with the Constitution, deliberately meant to transgress it.

J. I.

New York, April 21st 1795

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