# Recovering the Constitution of a Forgotten Founder: James Iredell, *Minge v. Gilmour*, and Popular Constitutional Authorship in the Early Republic

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A *Thesis* presented to the Graduate Faculty of the University of Virginia in Candidacy for the Degree of Master of Arts
Department of History
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May, 2020

# RECOVERING THE CONSTITUTION OF A FORGOTTEN FOUNDER

## JAMES IREDELL, *MINGE V. GILMOUR*, AND POPULAR CONSTITUTIONAL AUTHORSHIP IN THE EARLY REPUBLIC

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This paper is about the nature of constitutions, of the People, and of the relationship between the two.[1] That relationship is at the core of American political and constitutional theory, and far from being settled, it continues to form a crucial substrate in vibrant and vital debates in modern legal discourse. Everything from the legitimacy of the Electoral College[2] to the best understanding of the political question doctrine[3] to the proper methodology for interpreting the Constitution[4] relies on basic assumptions about how exactly the People can confer legitimacy on a government.

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* J.D., University of Virginia School of Law, 2020; M.A., University of Virginia, 2020. My thanks to Cynthia Nicoletti for reading and improving many previous drafts of this paper of highly varying quality. Thanks also to Charles Barzun, Jonathan Gienapp, Daniele Celano, Justin Aimonetti, Hanaa Khan, and Randi Flaherty, and the participants of the Virginia Law Faculty Workshop for helpful conversations and comments. And words fail to express my gratitude to Madeline Roth for her constant and loving support.

[1] Both of the potentially odd capitalization choices in this sentence are intentional and will be continued throughout this paper. I capitalize 'People' to orthographically signify the level of abstraction at which both I and my sources operate. This paper is in large part about a congeries of fictions centering on this one construct of "the People." *Cf.* EDMUND MORGAN, INVENTING THE PEOPLE 13–15 (1988) (discussing the word "fiction," its lack of a necessary negative connotation, and its unavoidable application to the idea of popular sovereignty). And so, in order to avoid the sense that I am discussing a group of discrete individuals, I will use a capital 'P.' Similarly, I will use a lowercase 'c' when referring to constitutions in general or in theory, including when in the singular and/or accompanied by the definite article. Only when I refer to a particular Constitution, usually either the U.S. Constitution or the North Carolina Constitution of 1776, will I use an uppercase 'C'.

[2] *Compare, e.g.*, Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on A Lasting Institution*, 29 FLA. ST. U. L. REV. 879, 908 (2001) *with* John O. McGinnis, *Popular Sovereignty and the Electoral College*, 29 FLA. ST. U. L. REV. 995, 998 (2001).

[3] The most vital modern challenge to judicial review—and thus a crucial underpinning of the political question doctrine—is Alexander Bickel's "counter-majoritarian difficulty," which, roughly, prioritizes the legitimacy of action by the "political branches" over that of the judiciary, which "is electorally irresponsible and has no earth to draw strength from." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1962); *see also* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 74–79 (1961); Rucho v. Common Cause, 139 S. Ct. 2484 (2019). On the other side are adherents of the view of Herbert Wechsler, who reject the inherent illegitimacy of judicial review and instead base judicial review in the very structure of the Constitution. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959); Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031 (1984–85).

[4] Many advocates of an originalist methodology claim popular sovereignty and the Constitution's supermajoritarian process of promulgation and amendment as a justification for originalism. *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis,* 93 VA. L. REV. 1437, 1440, 1444 (2007) (calling popular sovereignty "the most common and most influential justification for originalism" and arguing that "[a]s the

As live a controversy as the relationship between the Constitution and the People is today, the issue was only amplified in the early years of the United States. The last three decades of the eighteenth century in America were a time of great upheaval, witnessing not just the overthrow of an actual government but also of a *theory* of government.[5] The work of Bernard Bailyn, Gordon Wood, and others has painstakingly traced the slow, "[non]linear[, and] uneven"[6] mutation of the concept of a constitution from a mere description of a system of government into a fundamental law,[7] a set of principles "mark[ing] out the boundaries of governmental powers" and "confin[ing] the ordinary actions of government."[8] This externalization of the constitution was accompanied by a "transferal of sovereignty" from "legislative bodies to the people-at-large,"[9] reinvigorating a political and legal doctrine dating back at least to English revolutionaries of the 17th century.[10] Americans of the 1770s and '80s had, as Edmund Morgan vividly put it, "invent[ed] the people,"

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product of a more deeply democratic process, constitutional rules have earned the right to be treated as the will of the people and accordingly trump those laws passed through the ordinary political process."); Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J. L. & PUB. POL'Y 485 (2008) (summarizing but disagreeing with the claim that originalism is or should be justified by popular sovereignty).

[5] The literature on the constitutional developments of this time is truly massive, as evidenced by the extraordinarily useful and exhaustive bibliography in JONATHAN GIENAPP, THE SECOND CREATION 340–41 nn.5–7, 349–50 n.2 (2018) [hereinafter GIENAPP, SECOND CREATION]. I focus on Bernard Bailyn and Gordon Wood in the discussion that follows, but this vein of historiography dates back to Charles McIlwain, *see* CHARLES H. MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION (1923), and runs through Bailyn and Wood to modern scholars such as Jack P. Greene and John Philip Reid, to name only a couple. *See generally* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2011); JOHN PHILLIP REID, THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1986). For an essay which doubles as an historiography of this scholarship up to his time, *see* Stanley N. Katz, *The American Constitution: A Revolutionary Interpretation*, *in* BEYOND CONFEDERATION: THE ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 1 (Richard Beeman et al. eds., 1987).

[6] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 273 (1969).

[7] *E.g.*, CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 5 (1940) (discussing the "contrast between the new conception [of constitution] of the conscious formulation by the people of its fundamental law . . . and the older traditional view in which the word was applied only to the substantive principles to be deduced from a nation's actual institutions and their development."); WOOD, *supra* note 6, at 291 (describing this shift as "the development of the constitution as a fundamental law superior to ordinary legislative acts").

[8] BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 182 (1967); *see also id*. at 175–193; WOOD, *supra* note 6, at 259–305.

[9] WOOD, *supra* note 6, at 372, 383; *accord id.* at 599.

[10] *See* MORGAN, *supra* note 1, at 254–258 (connecting American conceptions of popular sovereignty of John Locke and to the Levellers of the English Civil War).

such that by 1790, Samuel Adams could tell his cousin John that the sovereignty of the people was a "political doctrine which I have never heard an American politician seriously deny."[11]

These two intellectual moves were undeniably linked: "Th[e] conception of the sovereignty of the people . . . clarified the peculiar American idea of a constitution," Gordon Wood writes.[12] And the basic contours of this link are relatively clear: a constitution was a "written delimitation of the grant of power made by the people to the government."[13] The People were thus the source of power, and the constitution their instrument. I refer to this general notion as "popular constitutional authorship," and even within this general acceptance of *some* form of popular constitutional authorship, there remained substantial room for uncertainty about *how* the People could speak through a constitution. The mere *existence* of a link between the fundamental constitution and the sovereign People does not necessarily determine the *nature* or the strength of that link.

This paper explores the particular—and peculiar—understanding of popular constitutional authorship of James Iredell. Iredell was an inaugural Justice of the United States Supreme Court and one of the great legal thinkers of his day,[14] his substantial contributions to American legal thought, however, have been overshadowed. In particular, this paper gets at Iredell's conception of popular constitutional authorship through a close analysis of an all-but-forgotten opinion he

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[11] Letter from Samuel Adams to John Adams (Nov. 20, 1790), *in* 6 WORKS OF JOHN ADAMS 420, 421 (Charles Francis Adams ed., 1856).

[12] WOOD, *supra* note 6, at 598; *accord, e.g.*, Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 290 (1997) ("The principle that all political power derived from the people became indispensable to the creation of republican governments through written constitutions. The centrality of popular sovereignty was the acknowledgement that the people provided the source of authority that made constitutions fundamental.").

[13] WOOD, *supra* note 6, at 601; *see also* MORGAN, *supra* note 1, at 260 ("[W]ritten constitution[s] w[ere] made supreme over legislation by pretending [them] to be the act of the sovereign people.").

[14] *See* William R. Casto, *There Were Great Men Before Agamemnon*, 62 VAND. L. REV. 371, 371–74 (2009); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 46–47 (1990) (attributing an influential articulation of the theory of judicial review to Iredell).

issued in 1798 while riding circuit in North Carolina: *Minge v. Gilmour*.[15] *Minge v. Gilmour* challenged the validity of North Carolina's retroactive abolition of the fee tail, claiming first that the law violated the text of the North Carolina Constitution and then that it was "contrary to natural justice" and therefore void.[16] Thus, in order to resolve the case, Iredell was forced to reckon with a series of thorny questions: Are judges empowered to invalidate unconstitutional laws? Are they likewise able to strike down laws which are constitutional but "contrary to natural justice"? And was the retroactive abolition *actually* contrary to natural justice?

These were important questions on their own in 1798. Judicial review—a practice which inherently pushes Americans' new understandings of fundamental law to their limit—was not yet well-established, to the point that Iredell felt the need to affirmatively justify why he was authorized to strike down unconstitutional laws. And the question of whether judges could invalidate laws they deemed "contrary to natural justice" split jurists of the time and has divided historians ever since.[17] *Minge v. Gilmour* is thus an invaluable asset for plumbing the theory of judicial review pre-*Marbury*, and, more particularly, for better understanding the status of natural

[15] Minge v. Gilmour, 17 F. Cas. 440 (C.C.D.N.C. 1798) (No. 9,631). To give a rough sense of the ignominy in which *Minge* has languished, Westlaw reports only 19 citing references; HeinOnline's Law Journal Library contains only 22 citations of the case, and JSTOR only 10. In very few of these articles is *Minge* discussed in any detail, and frequently the case is cited for propositions unrelated to constitutional thought or Justice Iredell. Furthermore, the case is entirely absent from multiple works which deal directly with its subject matter. *E.g.*, SNOWISS, *supra* note 14; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1177 (1987) [hereinafter Sherry, *Unwritten Constitution*].

[16] *Minge*, 17 F. Cas. at 443.

[17] *See infra* notes 155159 (discussing Justice James Wilson's view opposite that of Iredell); *compare* Sherry, *Unwritten Constitution*, *supra* note 15; Suzanna Sherry, *Natural Law in the States*, 61 U. CINCINNATI L. REV. 171 (1992); CALVIN R. MASSEY, SILENT RIGHTS: THE ORIGINAL MEANING OF THE NINTH AMENDMENT 26–53 (1995); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) (all arguing that there was a role for enforceable natural law in the Founding Period) *with* John F. Hart, *Human Law, Higher Law, and Property Rights: Judicial Review In The Federal Courts, 1789-1835*, 45 SAN DIEGO L. REV. 823, 839 (2008) [hereinafter, Hart, *Human Law*]; THOMAS B. MCAFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING (2000); Helen K. Michael, *The Role of Natural Law In Early American Constitutionalism*, 69 N.C. L. REV. 421 (1991) (all arguing the opposite).

law in the legal thought of the Early Republic. And the few times that *Minge v. Gilmour* has been discussed by scholars, it has usually been in these contexts.

But so far, *Minge v. Gilmour* has been an immensely undervalued resource for historians of this period. When it comes up at all, *Minge* has been used instrumentally at best, harvested for its most useful dicta or simply plopped into a string cite.[18] As I hope this project demonstrates, *Minge* deserves better. By taking *Minge* seriously and reading it as a coherent whole, I am able to delve deeper into the more fundamental conceptions undergirding Iredell's theory of judicial review and natural justice, not only providing a richer understanding of the opinion and of Justice Iredell but also connecting them both to broader currents of political, legal, and constitutional thought in the Early Republic.

Pervading each of Iredell's arguments about judicial review, the enforceability of natural law, and whether this particular act was consistent with natural justice is a particular—and particularly strong—understanding of the relationship between the sovereign People and the written constitution. Iredell repeatedly and clearly grounded his arguments on the idea that the constitution not only derived its power from the People but that the constitution spoke for the People *exclusively*. Indeed, the connection characterized not just his discussion of judicial review and the enforcement of fundamental law on the legislature—Iredell also deployed the written constitution in order to determine the content of natural justice. In short, whenever the People's input was relevant, the constitution would serve as their voice.

[18] *E.g.*, Michael, *supra* note 17; Hart, *Human Law*, *supra* note 17; Arthur Wilmarth, *Elusive Foundation: John Marshall, James Wilson, and The Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence In The New Federal Republic*, 72 GEO. WASH. L. REV. 113, 118–19 (2003). Even William Casto, who has fully recognized *Minge* as a useful but undervalued source in this period, confines his discussion of the case to its implications for Justice Iredell's theory of judicial review. *See* Casto, *Great Men*, *supra* note 14, at 394–97. This is not to impugn those scholars' efforts nor challenge their conclusions—I merely point out that analyzing only part of *Minge v. Gilmour* yields only part of its scholarly value.

At first glance, Iredell's understanding would seem to match up with a characterization of popular constitutional authorship put forth by many historians of this period, including most recently and most clearly by Jonathan Gienapp.[19] Gienapp argues that bound up with the development of American fundamental law and popular sovereignty was a shift towards defining legitimate government through "contingency, explicit consent, and concrete choice."[20] In particular, the growing belief that legitimate government required affirmative consent cashed out in the need for popular ratification in order for a constitution to *truly* speak for the People.[21] Popular constitutional authorship was to be based in real-world choices of real people; ratification was, Gienapp writes, "the logical fulfillment of remaking the foundations of a fundamental constitution."[22]

And indeed, Iredell conceived of the constitution as "spr[inging] from the *deliberate* voice of the people," going so far as to treat the North Carolina Constitution as a literal contract, capable of estopping its "parties" from gainsaying its determination of the welfare of the community and making them "liable to all its advantages and disadvantages."[23] Except that, in *Minge v. Gilmour*, Justice Iredell was perfectly content to aggressively enforce his strong version of popular constitutional authorship *without ratification*. North Carolina's 1776 Constitution had never been ratified but Iredell had no difficulty conceptualizing that document conclusively speaking for the

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[19] *See* GIENAPP, SECOND CREATION, *supra* note 5, at 36-40; Jonathan Gienapp, The Transformation of the American Constitution: Politics and Justification in Revolutionary America 108–48 (July, 2013) (unpublished Ph.D. dissertation, Johns Hopkins University) [hereinafter Gienapp, Transformation]. Gienapp's argument is framed in the way most directly implicated by my reading of *Minge*, but, as he recognizes, the building blocks of his analysis are common in the literature on constitutional thought in this period. *See* Gienapp, Transformation, *supra*, at 121 n.36, 130 n.58.

[20] GIENAPP, SECOND CREATION, *supra* note 5, at 37.

[21] *See, e.g.*, Gienapp, Transformation, *supra* note 19, at 121–35; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 96–108 (1996); *see also* WOOD, *supra* note 6, at 523–38; *see generally* Morgan, *supra* note 1, at 239–87.

[22] GIENAPP, SECOND CREATION, *supra* note 5, at 72.

[23] Minge v. Gilmour, 17 F. Cas. 440, 445 (C.C.D.N.C. 1798) (No. 9,631).

People. *Minge v. Gilmour* thus evinces not only an extraordinarily powerful understanding of the link between constitution and People but also an extraordinarily fictional one.

Thus, my recovery of *Minge v. Gilmour* from the brink of oblivion raises substantial questions for the narrative that denominates ratification as a *sine qua non* for legitimate constitution-making. Furthermore, Iredell's active deployment of a written constitution but with only *presumed*—rather than actual—consent has ramifications not only for our understanding of other historical dynamics but indeed on modern debates which likewise turn on the ways in which the People lend legitimacy to law and government.

Yet *Minge v. Gilmour* contains multitudes—its value to historians and legal scholars is not limited just to its peculiar understanding of popular constitutional authorship. For one, *Minge* bears a unique and valuable relationship with the far more famous Supreme Court case of *Calder v. Bull*,[24] a mainstay of constitutional law curricula which presented the Supreme Court with nearly the exact same question facing Justice Iredell in *Minge*. In addition to identifying this relationship, I show how the pendency of *Calder* shaped Iredell's opinion in *Minge*, and I argue that *Minge*'s fuller and more honest articulation of the same basic argument clarifies otherwise opaque language in *Calder*.

Furthermore, that fuller articulation enables me to advance a new interpretation of Iredell's rejection of judicial review on the basis of natural justice. Iredell distinguishes between two different kinds of possible limitations on the legislature: a limit on its *power* versus a limit on the *mode of exercise* of that power. For Iredell, consistency with natural justice is a characteristic of the mode of exercise of legislative power, and, given such a condition's absence in the Constitution, judges were not permitted to enforce the dictates of natural justice on the legislature.

[24] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

This recognition accentuates the importance of the popular provenance of the Constitution for Iredell, and it enables me to correct a common misinterpretation of *Minge's* sister opinion, *Calder v. Bull*.

Finally, the particular way in which Iredell deploys the written constitution in order to determine the content of "natural justice" connects Iredell to a school of thought termed the "well-regulated society" by William Novak. At the same time, however, *Minge* does not quite match up with Professor Novak's characterization of the philosophy, suggesting that what Novak characterizes as "interrelated components" of a unified legal discourse may be more accurately described as "a complex of normally concomitant but distinct elements."[25]

This paper proceeds in three main parts. Part I dives into the background of *Minge v. Gilmour*, uncovering the identities of the parties, relating the surprisingly complex and interesting history of their dispute, and situating *Minge v. Gilmour* in both its legal and historical context. Part I also draws out the particular factual and legal circumstances, including *Minge's* relationship with *Calder v. Bull* and the identity of the advocates in the case, that enabled Iredell to write the revealing opinion he did in *Minge*.

Parts II and III move to Iredell's opinion, explicating his arguments and identifying the centrality of the two fictions of popular sovereignty and popular constitutional authorship. Part II addresses Iredell's discussion of judicial review and of the judicial enforceability of "natural justice," drawing out the insight that the Iredell's theory of judicial review was fundamentally premised on the constitution's powerful connection to the sovereign People. Indeed, the Constitution not only served as the People's instrument for delegating power to a legislature, it also served that function exclusively, thereby foreclosing reliance on natural justice as the basis of

[25] *See* infra notes 230–233.

judicial review. Part II then analyzes *Calder v. Bull* in light of *Minge*, using *Minge's* clearer articulation of Iredell's core argument to clarify otherwise opaque or ambiguous language in *Calder*.

Part III finally addresses Iredell's discussion of the natural justice of North Carolina's abolition of the fee tail, notwithstanding his belief that he lacked power to invalidate the law on those grounds. Powerfully defending the justice of the law, Iredell once again deployed the written constitution as evidence of the voice of the People, this time in conjunction with his belief that individual rights are contingent on the welfare of the community. Because the People themselves had declared the fee tail to be contrary to the community's welfare in the Constitution, the legislature's remedial action could not be impeached on grounds of natural justice. Then, after demonstrating how Iredell's opinion in *Minge* evinces his particularly robust connection between the People and the constitution, I show how *Minge v. Gilmour* poses substantial problems for the necessity of ratification in the constitutional thought of the Early Republic.

## PART I — A THICK DESCRIPTION OF *MINGE V. GILMOUR*

In 1779, a Virginian named David Minge sold a tract of land near Halifax, North Carolina, to Charles Gilmour. At first glance, the transaction seems mundane, not worth a second glance. Instead, this transaction commenced a fascinating human story, bridging state lines and intersecting with important developments in the legal history of North Carolina. Part I-A conducts this legal archaeology, tracking down the parties to the case, tracing the history of their dispute, and situating the case in its legal and historical context. Part I-B then picks up where I-A leaves off: with the litigation in front of Justice Iredell. In particular, it draws out *Minge's* unique relationship with *Calder v. Bull*, demonstrating how the pendency of *Calder* shaped Justice Iredell's opinion in *Minge* and arguing that the particular circumstances of *Minge v. Gilmour* make it an invaluable resource for understanding Iredell's far more famous opinion in *Calder*.

### I-A: Minge Versus Gilmour: History of a Dispute

*Minge v. Gilmour* was, at its most elementary, a property dispute between John Minge, the plaintiff, and Charles Gilmour Jr., the defendant. Both men were the scions of wealthy and prominent families in their respective communities. The Minges hailed from Charles City County, Virginia, a lush area of the Tidewater just east of Richmond. Their sizable holdings in both land and slaves gave them substantial generational wealth[26]—I have found evidence of four generations of wealthy Minges in the area.[27] One of the Minges' neighbors and close family friends, Collier

[26] We lack census records for the Minges before 1810, but in 1810 John Minge is listed as owning 154 slaves. 1810 U.S. Census, Charles City County, Virginia [no city] (6 of 24). By 1830, the family as a whole reported 331 slaves on the census. 1830 U.S. Census, Charles City County, Virginia [no city] (25–26 of 34).

[27] *See* Harrison v. Harrison, 5 Va. (1 Call.) 419, 419–20 (Va. 1798) (reporting John Minge (the grandfather of the *Minge v. Gilmour* plaintiff ) as the purchaser of over a dozen slaves at auction in 1770); Field v. Harrison, Wythe 273 (Va. Ct. Ch. 1794) (noting that David Minge (the father of the *Gilmour* plaintiff) co-signed a loan for fifteen thousand pounds in 1778); Minge v. Gilmour, 2 N.C. (1 Hayw.) 279, 279 (N.C. 1796) (stating that David left his son John (the *Gilmour* plaintiff) "lands of eight to ten thousand pounds value" at least); 1830 U.S. Census, Charles City County, Virginia [no city] (25–26 of 34) (attesting the wealth of John's widow and children).

Harrison,[28] was a part-time North Carolinian,[29] and it was likely through this connection that Minge patriarch John Minge Sr., the grandfather of the eventual plaintiff, came into possession of a tract of land near Halifax, North Carolina, in 1760.[30]

The Minges' new connection to Halifax almost certainly also put them in contact with the Gilmour family. The three Gilmour brothers—William, John, and Charles Sr.—were among the richest and most well-connected members of the Halifax community.[31] In the 1790s, Gilmours are found doing everything from facilitating real estate transactions[32] to running the local tavern[33] to serving as the town's federal postmaster.[34]

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[28] *See* Harrison v. Harrison, 5 Va. (1 Call.) 419, 422 (Va. 1798) (suggesting that John Minge Sr. may have been a guardian figure for a young Collier Harrison); Field v. Harrison, Wythe 273 (Va. Ct. Ch. 1794) (listing Collier Harrison as the executor of *David* Minge's estate).

[29] *See* 1790 Census, Edgecombe, Halifax Cty, North Carolina (13 of 21) (listing Collier Harrison as a resident of a town near Halifax); NORTH CAROLINA JOURNAL, Dec. 5, 1792, at 3 (running an advertisement requesting the return of a "Note of Hand given by Mr. Collier Harrison to the subscriber, in May or June last, for between [eleven and twelve pounds]"). Although "colonial North Carolina was something of a backwater," Professor Laura Edwards has noted that, nonetheless, "the region's elite was thoroughly embedded in the networks of the Atlantic world." LAURA EDWARDS, THE PEOPLE AND THEIR PEACE 6, 15 (2009).

[30] For the approximate date of acquisition, *see* Minge v. Gilmour, 17 F. Cas. 440, 440 (C.C.D.N.C. 1798) (No. 9,631). We do not have evidence of the exact location of the land in question, but circumstantial evidence strongly suggests that the land was in the vicinity of Halifax, NC.

[31] 1790 U.S. Census, Halifax, Halifax Cty., North Carolina (6 of 24) (reporting that the three brothers combined owned over 100 slaves). The Gilmours also owned at least two plantations, one of which—called "New Hope"—was "well improved . . . with an elegant two-story dwelling-house and all other out-houses, necessary for the reception of a genteel family." *See* NORTH CAROLINA JOURNAL, January 30, 1793, at 3; *See also* NORTH CAROLINA JOURNAL, Dec. 5, 1792, at 3 (advertising the second plantation).

[32] It was not uncommon in the early 1790s for three or four of the twenty or so notices in the *North Carolina Journal* to mention a Gilmour, often William or Charles Jr. placing notices of real estate for sale. *E.g.*, NORTH CAROLINA JOURNAL, Dec. 5, 1792, at 3.

[33] *See* NORTH CAROLINA JOURNAL, Oct. 1, 1793, at 3 (running a notice asking "[a]ll persons indebted to the Tavern formerly kept by Jacob Johnson in this town, and latterly by Charles Gilmour, dec[eased] . . . to make immediate payment."). This tavern appears to have been an important site for public gatherings and auctions. *E.g.*, NORTH CAROLINA JOURNAL, Dec. 5, 1792, at 3.

[34] Charles Gilmour Jr. served as postmaster for a substantial portion of 1793. *See* NORTH CAROLINA JOURNAL, Jan. 30 1793, at 3; NORTH CAROLINA JOURNAL, Dec. 18, 1793, at 3 (listing Thaddeus Barnes as the postmaster of Halifax). Postmasters were federally appointed, so the fact that a Gilmour served in this position might indicate a certain degree of pull among North Carolina's political elite.

The story of *Minge v. Gilmour* itself begins in 1772 with the death of John Minge Sr.[35] In his will, he devised the Halifax land to his son David using an ancient and now-obscure form of landholding known as the fee tail.[36] Someone who inherited land "in fee tail"—like David Minge—became what the law called a "tenant in tail," and, as his title might suggest, he did not possess the entire bundle of sticks now associated with the word "ownership." Rather, the tenant in tail had the right to occupy and use the land during his life, but he had no power to control what happened to it after his death. Instead, the land automatically descended to an "heir in tail," whose identity was determined by the terms of the particular entail at issue.[37]

These two qualities of the fee tail—the tenant's limited interest and automatic descent to the heir in tail—combined when a tenant in tail "sold" entailed land. Because the tenant in tail could only convey the interest he possesses[38]—the right to occupy and use the land during his life—the interest acquired by a purchaser of entailed land expired upon the death of the *seller*. Pursuant to the terms of the entail, the land would then automatically descend to the heir in tail at the moment of the tenant in tail's death.

This scenario is precisely what happened in the case of David Minge and Charles Gilmour. John Minge Sr. created an entail on the Halifax land in his will, so when he died in 1772, his son

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[35] Minge v. Gilmour, 17 F. Cas. 440, 440 (C.C.D.N.C. 1798) (No. 9,631).

[36] *Cf*. C. Ray Keim, *Primogeniture and Entail in Colonial Virginia*, 25 WM. & MARY Q. 545, 562 (1968) (referring to John Minge's will as "leaving other lands in [fee tail] to his son David"); John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767, 782 n.59 (1988) [hereinafter Orth, *Fee Tail*] (noting Keim's reference to the Minge will). Creating an entail was just a matter of using certain words in the bequest. *See* Holly Brewer, *Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform*, 54 WM. & MARY Q. 307, 312–13 (1997).

[37] Most frequently, this was the oldest lineal male descendant of the original heir, a form of entail called "fee tail male." This variant is fertile ground for dramatic storylines involving a tenant in tail who produces only daughters, hence its anachronistic popularity in such works as Jane Austen's *Pride and Prejudice* or the television drama *Downton Abbey*. *See generally* JANE AUSTEN, PRIDE AND PREJUDICE (1813); J.B. Ruhl, *The Tale of the Fee Tail in Downton Abbey*, 68 VAND. L. REV. EN BANC 131 (2015).

[38] This principle is so important to property law that it is actually better known in the original Latin: *nemo dat quod non habet*, "no one gives what he does not have."

David inherited that land in fee tail.[39] David Minge was then the tenant in tail, and David's eldest son John Jr. became the heir in tail with an expectancy to inherit. Seven years later, in 1779, David Minge sold his interest in the land to Charles Gilmour Sr.,[40] perhaps in a transaction mediated by their mutual contact Collier Harrison. Gilmour's interest was thus bounded by *David Minge's* lifespan—when Minge died, Gilmour's interest would cease and the property would automatically descend to David's son John. Thus, when David Minge died in 1794,[41] John ended up with the Halifax land, right?

That's not quite how things worked out. Instead, the North Carolina General Assembly interrupted this orderly if complicated progression of events in 1784 by abolishing the fee tail entirely. This seemingly extreme act was neither shocking nor unique at this time. Revolutionaries in America and in France detested entails,[42] advancing multiple critiques of the fee tail: it was an aristocratic device,[43] a threat to American liberty,[44] a hindrance to economic development,[45] and/or

[39] *Minge*, 17 F. Cas. at 440.

[40] *Id*. Gilmour had at least one partner, William Hendric, who died some time before 1790. *See* 1790 U.S. Census, Halifax, Halifax Cty., North Carolina (6 of 24) (listing Charles Gilmour as "adm[inistrato]r of William Hendric").

[41] We can triangulate the date of David Minge's death from mentions in *Field v. Harrison*, Wythe 273 (1794), and *Dandridge v. Minge*, 25 Va. 397 (Va. 1826).

[42] *See* Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977).

[43] This was the key threat highlighted both by the North Carolina Assembly in the bill itself and by Iredell in Minge. *See* April 1784 N.C. Sess. Laws, c. 22, § 5 ("[E]ntails of estates tends [sic] only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic."); *infra* note 215 and accompanying text (discussing Iredell's characterization of the "numerous evils" of the fee tail).

[44] *E.g.*, JOEL BARLOW, THE POLITICAL WRITINGS OF JOEL BARLOW 30 (Mott and Lyon, 1796) ("[T]he simple destruction of . . . entailment and primogeniture, if you add to it the freedom of the press, will ensure the continuance of liberty in any country.")

[45] *E.g.*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (1827) ("[Entails] were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation. . . . When the laws allow a free circulation to property by the abolition of perpetuities, entailments, the claims of primogeniture, and all inequalities of descent, the operation of the steady laws of nature will of themselves preserve a proper equilibrium, and dissipate the mounds of property as fast as they accumulate.").

a threat to the morals of the youth.[46] For Thomas Jefferson, it was all of the above.[47] Unsurprisingly, then, the newly independent American states moved quickly to rid their law of "aristocratical devices" like the fee tail,[48] with many, including North Carolina, highlighting the problem of entails in their constitutions.[49]

Although general antipathy to the fee tail and the state Constitution's corresponding injunction certainly played a role in North Carolina's 1784 abolition, I have uncovered evidence that its *proximate* cause was none other than *this particular* transaction between David Minge and Charles Gilmour. On May 4, 1784, Charles Gilmour's neighbor, state senator Willie Jones, presented a bill in the North Carolina Senate to destroy, or "dock," "the entail of certain lands therein mentioned and vest[] the same in fee simple in Charles Gilmour, William Hendric, and Willie Jones, their heirs and assigns."[50] On the very next day, Representative William Hooper

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[46] *E.g.*, 4 HENRY HOME, LORD KAMES, SKETCHES OF THE HISTORY OF MAN, *in* ANDREAS RAHMATIAN, LORD KAMES: SELECTED WRITINGS 124–25 (2017) ("A man upon whom the family-estate is entailed without any power reserved to the father, is not commonly obsequious to advice, nor patiently submissive to the fatigues of education: he abandons himself to pleasure, and indulges his passions without control. In one word, there is no situation more subversive of morals, than that of a young man, bred up from infancy in the certainty of inheriting an opulent fortune.")

[47] *See* Acts of 1776, ch. 26 *in* COLLECTION OF ALL SUCH PUBLIC ACTS OF THE GENERAL ASSEMBLY 45 (Nicholson & Prentis, 1785) [hereinafter Virginia Abolition] ("[The fee tail] is contrary to good policy, tends to deceive fair traders who give a credit on the visible possession of such estates, discourages the holder thereof from taking care of and improving the same, and sometimes does injury to the morals of youth by rendering them independent of, and disobedient to, their parents."); John F. Hart, *"A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail*, 58 WASH. & LEE L. REV. 167, 175–77 (2001).

[48] Minge v. Gilmour, 17 F. Cas. 440, 444 (C.C.D.N.C. 1798) (No. 9,631) ("aristocratical devices"); *see* STUART BANNER, AMERICAN PROPERTY 13–17 (2006); Katz, *supra* note 42, at 11; Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 32 (1927); *see also* Brewer, *supra* note 36, at 345 (emphasizing that the push against the fee tail was about wealth as well as principles).

[49] *See* N.C. CONST. OF 1776, Decl. of Rights § 23, Frame of Govt. § 44, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS 2788, 2792 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE, CONSTITUTIONS]; *see also* PA. CONST. OF 1776, § 37, *in* 5 THORPE, CONSTITUTIONS, *supra*, at 3090. Virginia abolished the entail in 1776 in a bill written by Thomas Jefferson, *see* Virginia Abolition, *supra* note 47, and New York followed suit in 1786, Acts of 1786, ch. 12 *in* 1 LAWS OF THE STATE OF NEW YORK 205 (Greenleaf, 1792) [hereinafter New York Abolition].

[50] North Carolina Senate Journal, 1784, 1st Session, at 14 (Early American Imprints, Series 1, no. 44578). Although the common law generally recognized other ways to circumvent the restrictions of the fee tail, North Carolina did not allow any of these mechanisms as applied to large estates. A private bill in the General Assembly was the only way for Gilmour to dock the entail on his land. *See* John V. Orth, *After the Revolution: Reform of the Law of Inheritance*, 10 LAW & HIST. REV. 33, 41 (1992). I have been able to neither find nor invent a satisfying explanation for Jones's appearance in this bill as one of the owners of the land. The extent of Jones's involvement in this transaction, perhaps as a silent partner in the 1779 purchase, seems doomed to remain a mystery.

signaled his intention to introduce a more general bill,[51] and the House tabled Jones's private bill on behalf of Gilmour the day after that.[52] The next week, Hooper introduced his bill to "regulate the descent of real estates [and] to do away [with] entails,"[53] and after two weeks of debate and amendments, Hooper's bill was enacted on June 3, 1784.[54] Jones's private bill on behalf of Charles Gilmour, then, seems to have reminded the General Assembly of the problem of entails,[55] and, rather than merely docking *one* entail, Jones's bill spurred William Hooper and other Assemblymen to resolve the problem more generally.

The terms of North Carolina's abolition of the fee tail were in one sense unexceptional and in another sense extraordinary. The Act provided that "any person seized or possessed of an estate in general or special tail . . . shall be held and deemed to be seized and possessed of the same in fee simple."[56] Having effected this wholesale docking of entails, the Act went on to provide that "all sales and conveyances made . . . since the first day of January [1777], by any tenant in tail . . . where such estate had been conveyed in fee simple, shall be good and effectual to bar any [heir-in-tail] from all claim . . . to such entailed estate against any purchaser."[57] Thus, the law declared not only that any *current* possessor (like Charles Gilmour) now held that land "fully and absolutely without any condition or limitation whatsoever"[58]—it also made extra clear that if a tenant in tail

[51] North Carolina House Journal, 1784, 1st Session, at 22 (Early American Imprints, Series 1, no. 44577).

[52] *Id.* at 25.

[53] *Id.* at 30.

[54] North Carolina Senate Journal, 1784, 1st Session, at 51.

[55] Being correlated with wealth, entails were likely relatively rare in North Carolina, which at this time was "something of a backwater," *see* EDWARDS, *supra* note 29, at 6. It is telling that this entail made its way to North Carolina via the will of a Tidewater Virginia planter. It is thus not far-fetched to suppose that entails were not at the front of the Assembly's mind.

[56] April 1784 N.C. Sess. Laws, c. 22, § 5.

[57] *Id*.

[58] *Id*.

had sold entailed land after 1776, then the seller's *heir* (here, John Minge) would have no claim whatsoever on that land.[59]

This second clause, however, is quite explicitly retroactive,[60] and retroactive legislation, particularly concerning property, had long been considered "a violation of fundamental principles."[61] The principle against retroactivity, James Kent held in a landmark opinion on the topic in 1811, "has become venerable for the antiquity and the universality of its sanction,"[62] an attitude continuing into the present day.[63] Perhaps attesting to this perception, North Carolina's fee tail abolition was the only act of its kind to so explicitly alter the legal import of past transactions.[64]

This unique and problematic characteristic of the 1784 Act created an opening for John Minge, the former heir in tail deprived of his expected inheritance by the Assembly's action. After his father died in 1794—when John would otherwise have become the new tenant in tail—he did

[59] It is not clear if this second provision is entirely necessary: the broad language of the first section could easily be read also to destroy the former heir in tail's claim. But states handled entails in a variety of different ways and accorded different rights to tenants and heirs, *see* JOHN SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 211–13 & nn.198–203 (1953)—I suspect that the Assembly was attempting to remove any ambiguity about the rights (or lack thereof) of an heir in tail. This specificity also supports the idea that the Act was written with one particular entail (Charles Gilmour's) in mind. *See* Orth, *Fee Tail*, *supra* note 36, at 781–82 (noting the provision's narrowness).

[60] All abolitions of existing fee tails are in some sense retroactive, *e.g.*, SCURLOCK, *supra* note 59, at 210–13, such that even the first clause of the North Carolina Act could be seen as a retroactive law. Conversely, depending on one's definition of "retroactive law," neither of these clauses are truly retroactive. For present purposes, however, I adopt the judgment not just of the leading scholar of the 1784 abolition, *see* Orth, *Fee Tail*, *supra* note 36, at 780, 782, but also of the litigants and judges in *Minge*, who all treat the second clause as a retroactive law.

[61] Dash v. Van Kleek, 7 Johns. 477, 501 (N.Y. 1811); *accord, e.g.*, Landgraf v. USI Film Products, 511 U.S. 244, 265–66 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."); *see generally* Elmer E. Smead, *The Rule Against Retroactive Legislation*, 20 MINN. L. REV. 775, 775–77 (1936).

[62] *Dash*, 7 Johns. at 503.

[63] *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 53 (1964) ("A retroactive law is a monstrosity. . . . To speak of governing today by rules that will be enacted tomorrow is to talk in blank prose."); Bowen v. Georgetown Univ. Hospital, 488 U.S. 2014, 208 (1988) ("Retroactivity is not favored in the law.").

[64] *See* Virginia Abolition, *supra* note 47; New York Abolition, *supra* note 49.

what any good American in the Early Republic would do: he went to court,[65] claiming that his title "is prima facie clear under a tenancy in tail . . . and as such [he is] entitled to enter."[66] The core of this claim was that the North Carolina's 1784 abolition—which, recall, had been enacted in part to foreclose this *exact* argument by this *exact* plaintiff—was unconstitutional. Minge grounded this argument in three different provisions of the North Carolina Constitution: the law violated his constitutional right to a jury trial; it contravened the Constitution's "law of the land" clause, a relative of the U.S. Constitution's Due Process Clause copied verbatim from Magna Carta; and it was an unconstitutional ex post facto law because of its retrospective operation.[67] In the alternative, Minge argued that the "act is contrary to natural justice, and therefore void."

Minge brought his suit in the Circuit Court for the District of North Carolina,[68] a federal court staffed by District Judge John Sitgreaves and at least one Justice of the U.S. Supreme Court. In between sittings of the Supreme Court in Philadelphia, the justices would "ride circuit" to hear cases in the circuit courts,[69] and in the summer of 1798, James Iredell was the circuit justice for the Southern Circuit, which included his home state of North Carolina. In this way, John Minge's challenge—the culmination of what began with a land transaction in 1779—found its way in front of Justice James Iredell in June 1798.

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[65] *Cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, ch. XVI (Henry Reeve, trans., 2009) ("Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate.").

[66] Minge v. Gilmour, 17 F. Cas. 440, 440 (C.C.D.N.C. 1798) (No. 9,631).

[67] *Id*. at 442–43.

[68] These courts were, unlike their modern namesakes, primarily trial courts, exercising original jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . [where] the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789 § 11, 1 Stat. 73, 78. As a Virginian suing a North Carolinian for a substantial amount of land, *see supra* note 27, Minge easily satisfied both requirements.

[69] *See* Judiciary Act of 1789 § 4, 1 Stat. 72, 75; *see generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003).

## Part I-B: *Minge v. Gilmour* and *Calder v. Bull*

James Iredell had a lot on his mind in the summer of 1798.[70] That past February, the Supreme Court had heard argument in *Calder v. Bull*,[71] which challenged the Connecticut state legislature's act ordering a new trial in a probate matter. When the probate court reversed itself in this second trial, Calder, who would have inherited had the legislature not intervened, appealed all the way to the U.S. Supreme Court, arguing that the legislature's order of a new trial constituted an "ex post facto law" and was thus invalid under Article I, section 10 of the Federal Constitution.[72] The case thus turned on whether "ex post facto law" referred only to retroactive *criminal* laws or to *all* retroactive laws.[73] In addition to this novel interpretive question, however, the Justices also pondered whether a legislative act which was not contrary to a constitution's *text* might still be void for violating non-textual principles like natural law or, as Justice Chase put it, "the great first principles of the social compact."[74]

Despite being argued in February, the decision in *Calder* was postponed until the Court's next session in August—in the meantime, the Justices dispersed to ride circuit. When Justice Iredell arrived in North Carolina for the June term of the Circuit Court, he found *Minge v. Gilmour*

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[70] Iredell was an English-born émigré, coming to North Carolina in 1760 and quickly developing close ties first with the North Carolina bar, then with the Patriots, and finally with Federalists in the 1780s. *See generally* WILLIS WHICHARD, JUSTICE JAMES IREDELL 3–88 (2000); Blackwell P. Robinson, *James Iredell, Sr.*, *in* 3 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, 253, 254 (William Powell ed., 1979). Iredell was one of the leading lights of the North Carolina bar, and after his state joined the Union in 1790, President Washington appointed him at age 38 to the Supreme Court. *See* Diary Entry of George Washington (Feb. 6, 1790), *in* 6 THE DIARIES OF GEORGE WASHINGTON 28 (Donald Jackson and Dorothy Twohig eds., 1979) ("I determined . . . to name Mr. Iredall [sic] of No. Carolina [to the Court]; because, in addition to the reputation he sustains for abilities, legal knowledge and respectability of character he is of a State of some importance in the Union that has given *No* character to a federal Office.").

[71] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[72] *Calder*, 3 U.S. at 386–87 (1798) (opinion of Chase, J.); *see* U.S. CONST., art. I, §10, cl. 3 (No State shall . . . pass any . . . ex post facto Law.").

[73] *E.g.*, *Calder*, 3 U.S. at 391 (opinion of Chase, J.).

[74] *See id.* at 388 (opinion of Chase, J.). I make the (seemingly safe) assumption that this question came out at oral argument instead of just in the Justices' eventual opinions.

waiting for him. And John Minge's timing, intentionally or not, was remarkable—his lawsuit mirrored *both* of the major questions at stake in the still-pending *Calder*: the meaning of the term "ex post facto" and the power of judges to invalidate statutes "contrary to natural justice."

*Minge*, however, offered a very different and far more favorable adjudicatory environment than *Calder*. The *Minge v. Gilmour* litigation was very nearly a family affair—the judges, attorneys, and even the parties were all personally interconnected, resulting in a cozy intellectual environment in which Iredell was comfortable airing his thoughts on a variety of questions (including some not strictly necessary to decide the case). Rather than sitting in Philadelphia for *Calder*, Iredell was practically at home for *Minge*; rather than writing for strangers and for the nation, in *Minge* Iredell was writing for himself and for his friends. *Minge v. Gilmour* was less a formal declaration by a mandarin of the law than a roundtable discussion.

The advocates in *Minge*—some of the finest in the state of North Carolina—were well-known to the judges. William R. Davie, representing his neighbor Charles Gilmour,[75] was Iredell's close friend and longtime confidante.[76] Davie was also the brother-in-law of District Judge John Sitgreaves, Iredell's colleague on the bench for *Minge*.[77] Judge Sitgreaves was also intimately familiar with the Gilmour family—he had even lived on one of their properties in Halifax at least in 1793 and perhaps for longer.[78] Indeed, given the Gilmours' proximity, both physical and social,

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[75] *See* 1790 Census, Halifax, Halifax Cty., North Carolina (5–6 of 24) (listing Davie and the Gilmour brothers on adjacent pages).

[76] WHICHARD, *supra* note 70, at 164–65. While serving as a delegate to the Constitutional Convention, Davie warned Iredell that "I shall trouble you frequently, and I shall expect your opinion without reserve." Letter from William R. Davie to James Iredell (May 30, 1787), *in* 3 PAPERS OF JAMES IREDELL 276, 276 (Donna Kelly & Lang Baradell ed. 2003) [hereinafter Papers]. Of particular interest is their collaboration in litigating *Bayard v. Singleton*, 1 N.C. 5, 8 (1787), one of the very first instances of judicial review in the new nation. *See* William Michael Treanor, *Judicial Review Before Marbury*, STAN. L. REV. 455, 478–80 (2005); WHICHARD, *supra* note 70, at 11–12. *Minge* was thus not the first time that Iredell and Davie had thought long and hard about the nature of judicial power and the implications of judicial review.

[77] Sitgreaves was married to the sister of Davie's wife. WHICHARD, *supra* note 70, at 193.

[78] *See* NORTH CAROLINA JOURNAL, Dec. 11, 1793, at 3 (announcing the auction of year-long lease of New Hope, "whereon the Hon. Judge Sitgreaves now lives."); *see also* Gertrude S. Carraway, *John Sitgreaves in* 6 DICTIONARY

to Davie, Judge Sitgreaves, and Iredell's acquaintance and sometime political rival Willie Jones, it is quite possible that Iredell himself was acquainted with the defendant in *Minge v. Gilmour*.

In addition, the advocates in the case were some of the most respected members of the North Carolina bar. Davie's co-counsel representing Gilmour, Blake Baker, was the attorney general of North Carolina,[79] and Minge's lead attorney was John Louis Taylor, who would soon be named a judge of the Superior Court before eventually serving as the inaugural Chief Justice of the North Carolina Supreme Court.[80] Davie himself was still on his way up in state politics: less than six months after he argued the case, he would be elected Governor of North Carolina.[81] Justice Iredell, still a leader of the bar,[82] almost surely must have known and respected each of them.

The result was a particularly cozy atmosphere in which Iredell would deliver his opinion. Indeed, the opinion itself evinces how at ease Iredell felt. After mentioning the "numerous authorities adduced" at the argument of *Calder v. Bull*, Iredell let slip that "[a] majority of the judges appeared to be convinced of [the resolution of the case], but upon the doubt of one the case was not decided."[83] Iredell thus openly discussed the likely outcome of a Supreme Court case *while it was still pending*, behavior which Iredell biographer (and former judge) Willis Whichard dryly notes "offends modern juridic sensitivities."[84] Even if the remark was not so out-of-bounds then

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OF NORTH CAROLINA BIOGRAPHY 353, 354 (William Powell, ed., 1994) (reporting that Sitgreaves relocated to Halifax in the 1790s).

[79] WHICHARD, *supra* note 70, at 193.

[80] *Id.*; John V. Orth, *Blackstone's Ghost: Law and Legal Education in North Carolina in* REINTERPRETING BLACKSTONE'S COMMENTARIES 126, 126 n.8 (Wilfrid Prest ed. 2014).

[81] *See* Blackwell P. Robinson, *William Richardson Davie*, *in* 3 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 29 (William Powell ed., 1979).

[82] *E.g.*, Letter from Hugh Williamson to George Washington (Sept. 19, 1789), *in* 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 58 (Dorothy Twohig ed., 1993) ("[Iredell] is in the first Practice as a Lawyer, his Abilities and learning are extensive and he seems generally to be measured as the Standard of Integrity . . . and I believe there is not a man in the State who does not think him entitled to any Degree of public Trust.").

[83] Minge v. Gilmour, 17 F. Cas. 440, 443 (C.C.D.N.C. 1798) (No. 9,631).

[84] WHICHARD, *supra* note 70, at 194.

as it would be today, it certainly demonstrates the comfort Iredell felt and the frankness of his opinion in *Minge.*

This comfort also both enabled and encouraged Iredell to stretch his opinion in *Minge* in order to explore all of the interesting questions the case posed, especially the ones it shared with *Calder v. Bull*. Both of those questions—the meaning of "ex post facto" and the judicial enforceability of natural justice—were not strictly necessary to decide *Minge v. Gilmour*. In the first place, *Minge v. Gilmour* had already been litigated start to finish in the North Carolina state court.[85] If any doctrine of *res judicata* existed in the 1790s, then *Minge* should never have come into federal court, but this prior litigation seems to have been conveniently forgotten by all involved. Then, Iredell acknowledged that one of Gilmour's narrower, procedural arguments "would be alone sufficient to entitle the defendants to our judgment.[86] But, because "it is more desirable to decide on the intrinsic merits of a title than merely on the form of bringing it before the court," Iredell "proceed[ed] to investigate the real merits of the defendant's title": Minge's constitutional challenges to the 1784 abolition.[87]

The coziness of his courtroom and the pendency of *Calder* not only shaped *which* questions he answered—they also determined *how* he answered them. After rejecting Minge's other two constitutional claims, Iredell embarked on a long and, I argue, unnecessary discussion of the

[85] *Minge v. Gilmour*, 2 N.C. (1 Hayw.) 279, 279 (N.C. 1796).

[86] Ironically, this was the same argument which had resolved the case in the state court litigation. Under North Carolina law, if a tenant in tail selling entailed land included in the sale a warranty of the title and then left an equal amount of "assets" to the heir in tail, the heir lost his "right of entry." *See* Orth, *Fee Tail*, *supra* note 36, at 776 n.32 (citing 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 117–18 (3d ed. 1923)). A right of entry could be enforced through an action of ejectment like the action brought by John Minge. *See Minge*, 17 F. Cas. at 440. In the absence of a right of entry, however, Minge would have had to use the writ of formedon, a much more cumbersome writ that had not been brought in the present litigation. Here, David Minge had both warranted the title to Gilmour and bequeathed a sufficient amount of assets to John. John therefore lost his right of entry—he was "barred by the warranty of his ancestor," 2 N.C. (1 Hayw.) at 279, and "driven to his formedon," *Minge*, 17 F. Cas. at 441.

[87] *Minge*, 17 F. Cas. at 442.

meaning of "ex post facto"—Iredell used his *Minge* opinion essentially as a dry run for *Calder v. Bull*.

Both cases turned on whether "ex post facto law" referred only to retroactive *criminal* laws or to *all* retroactive laws. But unlike the Federal Constitution's laconic prohibition (at issue in *Calder*),[88] North Carolina's analogous clause (at issue in *Minge*) answered this question nearly explicitly, singling out in its prefatory clause "retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal."[89] Rather than relying on this textual evidence in *Minge*, Justice Iredell instead fleshed out a lengthy, more abstract argument that a broad interpretation of "ex post facto" would imperil the government's ability to construct "light-houses" or "fortifications" and more generally hamper states' ability to appropriate private property for the public good. This exact argument—which borders on irrelevance in *Minge* due to the clarity of the relevant constitutional text—would reappear in *Calder v. Bull* nearly verbatim, down to the very same examples.[90] Iredell framed his opinion in *Minge* in such a way as to give himself a dress rehearsal for the opinion he would deliver two months later in *Calder*.

Iredell's discussion of judicial review and natural justice in *Minge* likewise bears the imprint of the both the pendency of *Calder* and his ease in the North Carolina courtroom. But unlike Iredell's ex post facto discussion in *Minge*, his discussion of judicial review is less a dry run and more of a working draft. Iredell's eventual opinion in *Calder* is organized differently from

[88] U.S. CONST., art. I, §10, cl. 3 ("No State shall . . . pass any . . . ex post facto Law."). Justice Chase accurately commented that the federal ex post facto clause "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Calder*, 3 U.S. at 390.

[89] *See* N.C. CONST. of 1776, Decl. of Rights § 24, *in* 5 THORPE, CONSTITUTIONS, *supra* note 49, at 2788 ("[R]etrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made.").

[90] For instance, both opinions discuss Iredell's concern that a broad interpretation of "ex post facto" would imperil the government's ability to construct "light-houses" or "fortifications." *Compare Minge,* 17 F. Cas. at 443 *with Calder*, 3 U.S. at 400.

his discussion in *Minge,* and it is substantially shorter. *Minge's* repetitiveness is gone, but so too are illuminating asides and alternative framings of the problem. These differences are to be expected—Iredell delivered *Calder* orally and, by his own admission, without having "had an opportunity to reduce [his] opinion to writing."[91] In a sense, we can thus see *Calder* as a poor man's *Minge*, an abbreviated oral recitation of an argument he had made more fully two months previously.[92] Even without this value judgment however, the two cases see Iredell articulate the same basic argument in two different settings over the course of two months.[93] Each setting has its particular effects on its respective opinion: *Calder* the Supreme Court opinion is perhaps more polished and more concise, but *Minge*—delivered in a cozy, amicable North Carolina courtroom—is more ample and more honest. This relationship enables students of *Calder* to learn a great deal from *Minge*, and in Part II, I will return to *Calder* and read it in light of *Minge's* fuller articulation of the same argument.

[91] *Calder*, 3 U.S. at 398.

[92] *See* Casto, *supra* note 14, at 396 (arguing that "Minge is the more important opinion" and calling Calder a "pallid Supreme Court summary" for many of the same reasons I identify here). While Professor Casto points out the advantages of *Minge* relative to *Calder*, I have undertaken not only to explain the *reason* for those advantages but also, in Part II, to show in a more precise way how we can read Minge's arguments into *Calder's* shorter, "pallid summary."

[93] I took very seriously the possibility that the case report of *Minge* was corrupted or even forged from an earlier report of *Calder*. *Minge* was not reported until 1813, at least a decade after Dallas's report of *Calder v. Bull* was published. I cannot conclusively rule out this possibility, but both the above analysis and Occam's Razor suggest that such an explanation is unlikely.

## PART II — "THE DELIBERATE VOICE OF THE PEOPLE": JUDICIAL REVIEW AND THE ENFORCEABILITY OF NATURAL JUSTICE

Let's recap: The year is 1798. John Minge is suing Charles Gilmour Jr., attempting to recover land his father had sold to Gilmour's father nearly twenty years previously in 1779. Minge is arguably entitled to the land under the terms of an entail, but the North Carolina General Assembly retroactively abolished entails in 1784, depriving Minge of any claim to the land. The lawsuit, *Minge v. Gilmour*, is in front of U.S. Supreme Court Justice James Iredell, who is riding circuit in the federal circuit court for his home state of North Carolina, and Justice Iredell has, perhaps disingenuously, disposed of the parties' more technical arguments in order to reach John Minge's constitutional challenges to the validity of the 1784 Act. Iredell first affirms that he is indeed empowered to strike down laws which violate the North Carolina Constitution, but he rejects each of Minge's arguments that *this* law violated the Constitution. In so doing, Iredell gave himself a dress rehearsal for his opinion in the very similar case of *Calder v. Bull*, then pending at the Supreme Court. Having run out of *textual* arguments, Minge's attorneys change tack, arguing "that [the 1784] act is contrary to natural justice, and therefore void."[94]

Such a claim—that judges could strike down a law on the basis of natural law—was a point of contention in the 1790s.[95] John Minge essentially asked Justice Iredell to take sides in a debate which had divided not just "respectable authorities"[96] but even members of his own Court.[97] But take sides Iredell did: "I can only consult my reason," he wrote, "and I confess I

[94] Minge v. Gilmour, 17 F. Cas. 440, 443 (C.C.D.N.C. 1798) (No. 9,631).

[95] *See supra* note 17.

[96] *Minge*, 17 F. Cas. at 443. In *Calder*, he less generously referred to advocates of this position as "speculative jurists." Calder v. Bull, 3 U.S. (3 Dall.) 386, 399.

[97] *See infra* note 153–159 and accompanying text.

think no court is authorized to say that an act is absolutely void merely because, in the opinion of the court, it is contrary to natural justice."[98]

This Part explores how and why Iredell reached this conclusion. Underlying both his defense of textual judicial review and his rejection of natural justice judicial review was Iredell's notion of popular constitutional authorship: the Constitution was a social contract which set the terms of the sovereign People's delegation of power to the government. From these two understandings flowed two conclusions, each as certain as the other: a judge *must* strike down statues which violated the constitutional delegation of power, but he must *not* invalidate a law on any other basis. Furthermore, that constitutional delegation was the *exclusive* source of limitations on the legislature. Unlike the Constitution, a standard like natural justice was not grounded in the exclusive sovereignty of the People; therefore it could not justify judicial review of legislative action. As such, the relief John Minge sought—the invalidation of the 1784 Act because it was "contrary to natural justice"—was out of the question.

## II-A: "A Supreme Law Unrepealable and Uncontrolable"

Justice Iredell's discussion of judicial review in *Minge* begins with an assertion of the basic principle of fundamental law: the legislature is "restricted by a superior power which must of course be obeyed."[99] But what gives *judges* the power to enforce this obedience? Iredell's answer used an analogy common among defenders of judicial review in the Early Republic: the analogy of implied repeal.

The phrase "implied repeal" refers to a problem familiar to Anglo-American judicial practice: what happens when two contradictory laws both apply to a given case? If the two laws

[98] *Minge*, 17 F. Cas. at 444.

[99] *Id.* at 443.

cannot be harmonized, the doctrine of implied repeal instructs the judge to give effect to the newer law. The theory goes that the legislature, which always has the power to repeal its previous actions, implicitly did so when it passed the more recent, contradictory law.[100] As Iredell somewhat clunkily put it in *Minge*: "As [when] there is a dispute whether one act of assembly is in force or another, the judges must decide this, and when the latter law is inconsistent with a former, say the latter is in force, because it has repealed the former, having authority to repeal it."[101] Resolving contradictory statutes and determining what law applies in a given case is, as Chief Justice Marshall would put it in *Marbury v. Madison,* "of the very essence of judicial duty."[102]

But if one of the two contradictory laws is a *constitution*, then this regular implied repeal calculus changes. A constitution, in contrast to an ordinary legislative act, is "a supreme law, paramount to all acts of assembly, and unrepealable by any."[103] The internal logic of implied repeal thus falls apart—the later law cannot have implicitly repealed the earlier law because the legislature lacks power in this case to change the earlier law, the constitution. Thus, when a constitution and a statute conflict, in order to perform his duty of "determin[ing] which of these conflicting rules governs the case,"[104] a judge "must say the [constitution] is in force and not the

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[100] *E.g.*, CALEB NELSON, STATUTORY INTERPRETATION 525–26 (2011). This practice even has its own Latin maxim: *leges posteriores, priores contrarias abrogant* ("later laws abrogate earlier, contrary ones"). The principles underlying implied repeals are so fundamental to Anglo-American judging that William Blackstone's ten basic "rules to be observed regarding the construction of statutes" includes two of them: "an old statute gives place to a new one" and "[a]cts of parliament derogatory from the power of subsequent parliaments bind not." *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 89–90 (1st ed. 1765); John V. Orth, *Blackstone's Rules of the Construction of Statutes in* BLACKSTONE AND HIS COMMENTARIES 79, 79–81 (Wilfrid Prest ed., 2008).

[101] *Minge*, 17 F. Cas. at 443.

[102] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Iredell also made this point but less pithily: "[W]hen an act is necessarily brought in judgment before [judges], they must unavoidably determine one way or another. If it is doubted whether a subsequent Law repeals a former one, in a case judicially in question, the judges must decide this . . . ." Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 3 PAPERS, *supra* note 76, at 307, 308 [hereinafter Spaight Letter].

[103] *Minge*, 17 F. Cas. at 443.

[104] *Marbury*, 5 U.S. at 177.

[statute], because the former is a supreme law unrepealable and uncontrolable by the authority which enacted the latter."[105] Ergo, judicial review.

This reasoning should seem familiar to students of American constitutional law. This is the precise logical progression underlying *Marbury v. Madison*,[106] and it likewise appears in nearly every other Founding-era defense of judicial review.[107] And Iredell treated it as nearly self-evident—after making this point, he moved on to the substance of John Minge's particular constitutional arguments, apparently satisfied that he had justified his power to invalidate unconstitutional laws. But this seemingly comprehensive justification has skipped a crucial step: *why* is the Constitution "unrepealable and uncontrolable by the [legislature]"?[108] The answer lay in Iredell's strong understanding of the connection between the People and the constitution.

"The people are avowedly the fountain of all power," Iredell told the North Carolina Ratification Convention in 1788,[109] and he firmly believed that "ultimate sovereignty reside[d] not in the government or any of its branches, but in the people."[110] As a consequence, "every government . . . exercises its trusts for the benefit of the people . . . . [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."[111]

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[105] *Minge*, 17 F. Cas. at 443; *accord* James Iredell, To the Public (Aug. 17, 1786), *in* 3 PAPERS, *supra* note 76, at 227, 227 [hereinafter Elector Letter].

[106] *Marbury*, 5 U.S. (1 Cranch) at 177–78.

[107] *See, e.g.*, James Wilson, *Lectures on Law*, *in* 1 WORKS OF JAMES WILSON 415–16 (James DeWitt Andrews ed., 1896); THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (George W. Carey & James McLellan eds., 2001); Kamper v. Hawkins, 3 Va. 20, 31–32 (1793) (opinion of Nelson, J.); *id.* at 38 (opinion of Roane, J.).

[108] *Minge,* 17 F. Cas. at 443.

[109] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 11 (Jonathan Elliot ed., 1891) [hereinafter ELLIOT'S DEBATES].

[110] Casto, *supra* note 14, at 380.

[111] United States v. Mundell, 27 F. Cas. 23, 29 (C.C.D. Va. 1795) (No. 15, 384); *accord* Casto, *supra* note 14, at 380 ("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.").

And the mechanism by which the People dole out this authority—by which they "invest the exercise of [sovereignty] in whom they please"[112]—was through a constitution.[113] Recognizing the "evil" of unchecked legislative power after their experience with a sovereign Parliament, Iredell observed that "it has been the policy [of Americans] . . . to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries."[114] For Iredell, a constitution served to "enumerate[] what [powers] we give up"—it was "a great power of attorney, under which no power can be exercised but what is expressly given."[115]

More specifically, it was a social contract. In a letter to Richard Dobbs Spaight, Iredell distinguished the fictional social compact of the British with the "real, original, Contract" that existed in America,[116] and he sounded a similar note in his 1787 letter "To the Public": "Other Governments have been established by chance, caprice, or mere brutal force. Ours, thank God, sprang from the deliberate voice of the people."[117] Iredell was not alone in thinking of post-independence state constitutions in this way: many of those constitutions used just these terms to describe themselves,[118] as did early judges asked to interpret and enforce those documents.[119]

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[112] WOOD, *supra* note 6, at 598.

[113] *See also* Van Horne's Lessee v. Dorrance, 28 F. Cas. 1012, 1014–15 (C.C.D. Pa. 1795) (No. 16,857) (jury instructions by Paterson, Circuit Justice) (declaring that a constitution is "the form of government, delineated by the mighty hand of the people").

[114] Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (opinion of Iredell, J.).

[115] 4 ELLIOT'S DEBATES, *supra* note 109, at 9, 11. *See also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 69 YALE L.J. 1425, 1434 (1987) (arguing, in part based from Iredell's use of this phrase, that judicial review drew on "an emerging body of agency law doctrine").

[116] Spaight Letter, *supra* note 102, at 307.

[117] Elector Letter, *supra* note 105, at 228.

[118] *See* PA. CONST. of 1776, *in* 5 THORPE, CONSTITUTIONS, *supra* note 49, at 3082; N.H. CONST. of 1776, *in* 4 THORPE, CONSTITUTIONS, *supra* note 49, at 2452 . *See generally* WOOD, *supra* note 6, at 127–32; Gienapp, Transformation, *supra* note 19, at 136–38.

[119] *See* Pendleton's Account of the Case of the Prisoners, *in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 417 (David John Mays ed., 1967); Kamper v. Hawkins, 3 Va. 20, 57 (1793) (opinion of Tyler, J.); *id.* at 47 (opinion of Henry, J.); *see also* Treanor, *supra* note 76, at 489–96 (*Case of the Prisoners*), 513–17 (*Kamper v. Hawkins*). In her study of judicial review in this period, Sylvia Snowiss observed that American fundamental law in this period partook of "a concreteness and reality" which stemmed from "[t]he experience of having disavowed completely the

Conceiving of the constitution as a social compact *among* the people to *create* government—as opposed to an agreement *between* the people *and* the government[120]—meant that the People were in the driver's seat when it came to the powers of and limitations on government. "The people, without [the government's] consent," Iredell told the North Carolina Ratifying Convention in 1788, "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."[121] In Iredell's case, this was not just abstract—in 1795, he had to *apply* this theory in a concrete case. *U.S. v. Mundell* asked Iredell, sitting as a Circuit Justice, to determine what legal effect, if any, common law rules or English statutes had after the enactment of the 1776 Virginia Constitution.[122] Although he rejected the idea that the establishment of a new constitution *automatically* "abolishes all laws, and throws the people into a state of nature,"[123] Iredell

existing government and of having self-consciously adopted a totally new set of institutions." SNOWISS, *supra* note 14 at 27.

[120] 4 ELLIOT'S DEBATES, *supra* note 109, at 9 ("In other countries, where the origin of government is obscure, and its formation different from ours, government may be deemed a contract between the rulers and the people. . . . Our government is founded on much nobler principles."); *see also* WOOD, *supra* note 6, at 283 ("Only a social agreement *among the people*. . . seemed to make sense of [Americans'] rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all the institutions of government." (emphasis added)). Iredell's 1787 letter to Richard Dobbs Spaight seems to contradict this framing: Iredell refers to the constitution as a "Contract between the People and their future government." Spaight Letter, *supra* note 102, at 307. This letter is then flatly inconsistent not just with Iredell's comments at the Ratifying Convention but also with *Minge v. Gilmour*. *See Minge*, 17 F. Cas. at 445 (describing landholders as "partak[ing] equally of the benefits of the constitution with others who were parties to it."). At the very least, then, Iredell seems to have changed his mind on this point sometime between his letter to Spaight and the Ratifying Convention and his mind stayed changed thereafter. I consider it more likely, however, that this is merely infelicitous wording in this one letter.

[121] 4 ELLIOT'S DEBATES, *supra* note 109, at 9. *See also* Letter from Samuel Adams to John Adams, *supra* note 11, at 421 ("Is not the *whole* sovereignty, my friend, essentially in the people? . . . Is it not the uncontrollable, essential right of the people to amend and alter, or annul their constitution and frame a new one, whenever they shall think it will better promote their own welfare and happiness to do it?"); WOOD, *supra* note 6, at 530–31 (relating James Wilson's similar argument).

[122] United States v. Mundell, 27 F. Cas. 23, 29 (C.C.D. Va. 1795) (No. 15, 384).

[123] *Mundell*, 27 F. Cas. at 29. Even this denial, however, centered on the ultimate sovereignty of the people. Iredell denied that the People had *ever* not possessed sovereign power over their government. "[A]ll laws of every kind are derived mediately or immediately from the authority of the people themselves," Iredell wrote, and "they [do not] hold any rights as mere appendages of particular persons in power." *Id.* As such, throwing off the authority of that "particular person" did not truly create a state of nature in the sense of abolishing a previous sovereignty: it was just an example of the people "choos[ing] a new mode, in which new laws are to be made and all law properly enforced." *Id*.

nevertheless held that "when the people of this state, by their representatives, declared their former government dissolved, and established a new constitution . . . a new law was introduced and the old one changed [to the extent the old one was inconsistent with the new system]."[124] The creation of a new constitution was an exercise of the People's Lockean "constituent power"[125] to "new-model their government"—in so doing, they had complete freedom to remake the legal landscape in the polity, including by delegating as much or as little power as they wished.

The legislature, then, was but a "Creature of the Constitution," and its power was governed entirely by that document's delegation of powers.[126] "The people have chosen to be governed under such and such principles," Iredell wrote pseudonymously in a letter addressed "To the Public": "They have not chosen to be governed, or promised to submit upon any other."[127] As a consequence, any statute passed *outside* the bounds of the terms of that delegation, i.e. promulgated *without* the sanction of the People, would be "totally void as being passed without authority."[128]

The key question in determining the validity of a law was thus "authority": did the constitution delegate to the legislature power to pass the law at issue? The question," Iredell told the North Carolina Ratifying Convention in 1788, "will always be whether Congress has

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[124] *Id*.

[125] *E.g.*, Morgan, *supra* note 1, at 81, 254–56.

[126] Elector Letter, *supra* note 105, at 228. *See also* Letter from Samuel Adams to John Adams, *supra* note 11, at 421 ("[The people] adopted [the constitution]; and, conformably to it, they delegate the exercise of the powers of government to particular persons . . . .").

[127] Elector Letter, *supra* note 105, at 228.

[128] Minge v. Gilmour, 17 F. Cas. 440, 443 (C.C.D.N.C. 1798) (No. 9,631). Iredell so fully believed that act not authorized by the constitutional grant of power was void that he thought a Bill of Rights was superfluous and even dangerous. "Of what use," he asked the North Carolina Ratifying Convention, "can a bill of rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?" 4 ELLIOT'S DEBATES, *supra* note 109, at 11. James Wilson utilized a nearly identical argument in his famous 1787 Speech at the Statehouse Yard. S*ee* MORGAN, *supra* note 1, at 282–83; WOOD, *supra* note 6, at 539–40.

exceeded its authority. If it has not exceeded it, we must obey, otherwise not."[129] And if the legislature was found to have acted *ultra vires*, then the "courts must certainly declare [the act] to be void, because passed without any authority whatever."[130] This understanding of judicial review as the simple enforcement of the People's limitations on government placed a premium on a *textual* delegation of power. Iredell consequently gloried in the fact that American constitutions were, unlike in Britain, not "mere imaginary thing[s]"[131] and were instead "document[s] to which all may have recourse, and to which therefore the judges cannot willfully blind themselves."[132] The explicit textuality of a constitution offered certainty that the judge who invalidated a legislative act was clothed in the power of the People rather than exercising his own will.[133] Text, for both Iredell and later for John Marshall, was the "crucial link between popular sovereignty . . . and the power of judicial review."[134]

We are now able to plug the logical gap in our original implied repeal analogy.[135] The constitution is a "supreme law unrepealable and uncontrollable" because it derives immediately from the sovereign People as their explicit social contract. The act of a mere "creature of the Constitution" like the legislature cannot overrule that which gives it the power to act in the first

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[129] 4 ELLIOT'S DEBATES, *supra* note 109, at 9.

[130] *Minge*, 17 F. Cas. at 444.

[131] Spaight Letter, *supra* note 102, at 308.

[132] *Id*. *See also* SNOWISS, *supra* note 14, at 31 ("The existence of explicit, publicly verifiable limits on each of the branches introduced the powerful idea that it was now for the first time, possible to identify with certitude a legislative act that, in its violation of fundamental law, was on its face void, or not law.").

[133] *See* Casto, *supra* note 14, at 386 ("[When a constitutional challenge] involves unclear cases in which judges give an ambiguous constitutional provision a good-faith judicial construction. . . . judicial review turns on judicial discretion rather than the ministerial implementation of the people's will. . . . Consistent with his theory, [Iredell] renounced judicial review in these cases."); *cf*. THE FEDERALIST NO. 78, *supra* note 107107, at 402 (distinguishing between "force [and] will," which the judiciary does not possess, and "judgment," which it does possess); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 132–41 (2008) (discussing seventeenth- and eighteenth-century English norms distinguishing between judges "exercis[ing] discretion in the sense of wisdom or judgment when discerning the law of the land" and "exercis[ing] their own discretion—in the sense of their will, power, or choice").

[134] Wilmarth, *supra* note 18, at 118–19.

[135] *See supra* notes 99–105 and accompanying text.

place, just as an agent cannot bind its principal in derogation of its "power of attorney." Any act of the legislature contrary to the constitution is thus done without power and is therefore void.[136] Judicial review, for Iredell, was thus "not an usurped or a discretionary Power, but one inevitably resulting from the constitution of their Office."[137] It was, he said, "unavoidable."[138] As Edmund Morgan put it in his study of Anglo-American popular sovereignty, "[t]he doctrine of judicial review . . . was inescapable once a written constitution was made supreme over legislation by pretending it to be the act of the sovereign people."[139]

## II-B: The "Very Loose Terms" of Natural Justice Review

This view of a constitution as a social compact delegating authority to the legislature had a second conclusion as "unavoidable" as the first. Just as a judge must strike down an unconstitutional law "passed totally without authority," he also must *uphold* a law passed *within* the legislature's authority. So long as the legislature had "exercised an authority confided to them, [then] their act is legal," Iredell wrote in *Minge*.[140] The nature of the constitution as a limited delegation of power meant "that whatever is done, by virtue of that authority, is legal without any new authority or power."[141]

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[136] As Alexander Hamilton put it in Federalist 78, "judicial review . . . only supposes that the power of the people is superior to both; and that where the will of the legislature declared in statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former." THE FEDERALIST NO. 78, *supra* note 107, at 404; *accord* Van Horne's Lessee v. Dorrance, 28 F. Cas. 1012, 1014-15 (C.C.D. Pa. 1795) (No. 16,857) (jury instructions by Paterson, Circuit Justice) ("[The Constitution] contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature.").

[137] Elector Letter, *supra* note 105, at 230

[138] Spaight Letter, *supra* note 102, at 308.

[139] MORGAN, *supra* note 1, at 260.

[140] *Minge*, 17 F. Cas. at 444.

[141] 4 ELLIOT'S DEBATES, *supra* note 109, at 9.

For Iredell, the key distinction was between a limit on the legislature's *power* and a limit on the *mode of exercise* of that power.[142] In *Minge*, Iredell tellingly analogized the legislature's power to a court's jurisdiction: if a legislature acted within its constitutional powers, "[its] act is legal in the same manner as a judgment given by this court would be, in a case confessedly within its jurisdiction, however erroneous the principles may be on which the court decided."[143] If the People had wanted to regulate the mode of exercise of that delegated power—say, by conditioning the legislature's authority on their acts being consistent with natural justice—then, Iredell argued, "this restriction would have been inserted, together with others."[144] But because the People had *not* imposed such a condition, Iredell understood them to have "necessarily . . . left [the legislature] to their own discretion" with a "trust" to legislate responsibly. "[I]f they abuse their trust in the *execution* of an acknowledged power, they are indeed responsible, in the only way in which a legislature can be responsible": elections.[145] Policing the mode of exercise of legislative power was a function the People reserved for themselves in their electoral capacity, imposing only outer boundaries in the written constitution.[146] Because the Constitution failed to condition the validity

[142] This distinction is largely semantic, and depending on how one frames the issue, a limit on a mode of exercise can easily be conceived of as a limitation on power and vice versa. However, it is a distinction that Iredell draws quite clearly—whether or not it is a coherent way to theorize judicial review, it seems clearly to be the way Iredell did.

[143] *Minge*, 17 F. Cas. at 444. *cf*. HAMBURGER, *supra* note 133, at 190–91 (arguing that English law distinguished between judicial acts which were "erroneous" but valid and others that were "void," with the dividing line being jurisdiction: "[o]utside their jurisdiction . . . judges did not really act as judges, and their acts could therefore be held unlawful" (internal quotations omitted)).

[144] *Id*.

[145] *Id*. (emphasis added)

[146] A modern instance of this form of argument might help clarify this point. In 2013, the U.S. Supreme Court, like Justice Iredell here, noted that "[a] court's power to decide a case is independent of whether its decision is correct," such that a "jurisdictionally proper but substantively incorrect judicial decision is not *ultra vires*." City of Arlington, Tex. v. FCC, 569 U.S. 290, 297 (2013). This contrasts with the situation of administrative agencies—"[b]oth their power to act and *how* they are to act is authoritative prescribed by Congress." *Id*. Not only does the FDA lack *power* to regulate the payment of taxes, for example, its actions even when administering the food and drug laws may not be "arbitrary and capricious." *See* Administrative Procedure Act, 5 U.S.C. § 706. This kind of limit on the mode of exercising delegated power is precisely the kind of limit which Iredell found to be *absent* from the People's delegation of power to the legislature.

of a statute on that statute's consistency with natural justice, such considerations did not fall within the judge's domain of determining whether or not a law was passed "with authority."

With this in mind, we can properly understand Iredell's most direct attack on natural justice as a basis for judicial review. "The words 'against natural justice' are very loose terms, upon which very wise and upright members of the legislature and judges might differ in opinion," Iredell remarked. "If they did [differ]," he continued, "whose opinion is properly to be regarded—those to whom the authority of passing such an act is given, or a court to whom no authority, in this respect, necessarily results?"[147]

This passage can easily be read as an objection to natural justice's indefiniteness or its failure to provide adequate guidance to the reviewing court,[148] but this would be a misinterpretation of Iredell's (admittedly cryptic) language. If Iredell's objection was to the *inherent* amorphousness of natural law, then he would naturally think that there could *never* be a time when natural justice could serve as the basis for judicial review. But *Minge v. Gilmour* clearly rejects such an absolute position. Rather, Iredell is entirely open to the possibility that the constitution *could* have conditioned the legislature's power on their acts being consistent with natural justice—such a limitation would "leave it to the courts, in all instances, to say whether an act was agreeable to natural justice or not."[149] Had the Constitution said this, a judge would be obligated to enforce it to the best of his ability. Furthermore, he openly avers that judges do and should take natural justice principles into account when *interpreting* statutes, "it being most probable that, by such

[147] *Minge*, 17 F. Cas. at 444.

[148] *See* WHICHARD, *supra* note 70, at 194 ("The amorphous nature of natural law concerned Iredell [in *Minge*]."). This was indeed a critique levelled at natural law: English thinker and avowed legal positivist Jeremy Bentham once quipped that "the most prompt and perhaps the most usual translation of the phrase 'contrary to reason,' is 'contrary to what I like.'" Quoted in DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 230 (1999). My point here is that this does not capture the entirely of *Iredell's* objection.

[149] *Minge*, 17 F. Cas. at 444.

construction, the true design of the legislature will be pursued."[150] Iredell's point is not that natural justice is inherently incompatible with the judge's function—it is that policing consistency with natural justice is not a duty given to him under *this* Constitution. It is instead a judgment "confided to [the legislature] by the people"—the right to make that judgment went hand in hand with the "authority of passing such an act."

This was not a universal opinion in the Early Republic.[151] Many "respectable authorities" held that law or principles grounded elsewhere than in the People could restrain the legislature's power,[152] including Iredell's close friend James Wilson.[153] A leading delegate at the Constitutional Convention, an influential voice advocating for ratification, and one of Iredell's colleagues on the U.S. Supreme Court, Wilson also was "the only leading framer to leave behind an extensive patristic contribution to early American legal theory": his *Lectures on Law*, delivered at the University of Pennsylvania from 1790 to 1792.[154] Wilson's discussion of judicial review in the *Lectures* makes for a particularly interesting contrast with *Minge*: Wilson followed exactly the same chain of logical reasoning as Iredell, only to reach the opposite conclusion.

Wilson, like Iredell, began his justification of judicial review with the concept of implied repeal: "what is to be done," he asked, if "two contradictory laws . . . flow likewise from different sources, one superior to the other . . . ?"[155] The answer was clear: the judge must obey the superior

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[150] *Id*.

[151] *Cf. supra* note 17 (providing a sampling of the historical literature exploring this question).

[152] *Minge*, 17 F. Cas. at 443.

[153] Sadly, Justice Wilson died right around the time *Calder* was decided, so historians have not had the benefit of a direct dialogue between the two men on this question. For Iredell's friendship with Wilson, *see* WHICHARD, *supra* note 70, at 266–69; Hampton L. Carson, *James Wilson and James Iredell: A Parallel and a Contrast*, 7 ABA JOURNAL 123 (1921).

[154] Stephen A. Conrad, *James Wilson's "Assimilation of The Common-Law Mind"*, 84 NW. U. L. REV. 186, 194 (1989).

[155] Wilson, *supra* note 107, at 414.

law.[156] Wilson then applied this logic to the Federal Constitution to justify (what we see as) traditional judicial review,[157] but not before he applied the same logic to a body of law grounded not in the People but in God. "The parliament," Wilson wrote, "may, unquestionably, be controlled by natural or revealed law, proceeding from *divine* authority. . . . Is not this superior authority binding upon the courts of justice?"[158] Wilson thus did not distinguish between these two kinds of "superior authority"—the Constitution was merely "another control, beside that arising from natural and revealed law."[159]

For Iredell, however, the ability to limit the legislature was intimately tied to the ability to create it—unconstitutionality, as conceived of in *Minge*, was less the imposition of an external limit but an absence of delegated power. The legislature derived no power from God, therefore God had no ability to limit its powers. Through his association between the power of creation and the power of limitation, Iredell was able to distinguish the two "superior powers" which Wilson thought were interchangeable. The People, as the *exclusive* source of political power, were thus also the only entity capable of limiting that power—fundamental law was exclusively the product of the People.

And not only are the People the exclusive fundamental lawgivers, their social compact is also the *exclusive* way in which they speak. When Iredell looked for an indication that the People had conditioned the legislature's exercise of the power on consistency of natural justice, he looked only to the Constitution, treating the absence of such a limitation in that document as conclusive

[156] *Id.* at 414–15.

[157] *Id.* at 416 (arguing that when "the supreme power of the United States has given one rule" and "a subordinate power in the United States has given a contradictory rule," "the latter is void, and has no operation").

[158] *Id.* at 415.

[159] *Id.*

proof as to the "inten[t]" of its author.[160] The statement 'the People did not impose this condition on the legislature in the Constitution' is not logically equivalent to the statement 'this condition has not been imposed on the legislature' unless one assumes both that the People are the only valid source of limitations on the legislature *and* that the Constitution is the only means by which they impose those limitations.

Thus, we see how Justice Iredell's entire theory of judicial review, both his defense of the practice based on the Constitution and his rejection of it based on natural justice, is fundamentally premised on the nature of the Constitution as the product of the People. As the delegation of an exclusive sovereign, the Constitution not only binds the legislature, its particular limitations also impose an obligation on the judge to strike down a law exceeding the legislature's power. And just as its restrictions on power must be respected, so too must its grants: acting consistently with natural justice was a discretion vested in the legislature *by the People*, which they themselves would police via elections. Inherent in this argument is not just the exclusive power of the People to give fundamental law but also the exclusivity of the Constitution as the People's voice. Iredell's notion of popular constitutional authorship, as evidenced in this section of *Minge*, is then quite strong.

## II-C: *Calder* in Light of *Minge*

Before moving away from Iredell's discussion of judicial review, it is worth returning to *Calder v. Bull*, Minge v. Gilmour's far more famous cousin presenting nearly identical substantive questions.[161] I showed in Part I that *Minge* presented the exact same questions as

[160] Minge v. Gilmour, 17 F. Cas. 440, 444 (C.C.D.N.C. 1798) (No. 9,631) ("[I]t may surely be inferred that if, in addition to other restrictions on the legislative power, such a restriction as that in question was intended, so as to leave it to the courts, in all instances, to say whether an act was agreeable to natural justice or not, this restriction would have been inserted, together with others.").

[161] *See supra* notes 71–72.

*Calder* but resulted in a fuller and more frank articulation of the same basic argument.[162] Having now parsed Iredell's argument in *Minge*, we can utilize *Minge* like the legend of a map, allowing us to understand the meaning of *Calder*'s otherwise inscrutable symbols and, like a map, helping ensure that we are not led astray in our interpretation of *Calder*'s sometimes opaque language.

There are two main points on which Justice Iredell's opinion in *Minge* helps to clarify the dynamics underlying his later opinion in *Calder v. Bull*: why unconstitutional laws are void and the precise nature of the problem with natural justice. First, why exactly are laws violating the constitution invalid? We know from *Minge* that the answer lies with the nature of the Constitution as a delegation of power. In contrast to *Calder*, *Minge* spells this out with particularity: "the constitution . . . say[s] that the legislature shall have authority in certain cases, but shall not have in others . . . ."[163] Thus, if a legislature attempts to act outside the terms of the constitution's delegation, then its act is "totally void *as being passed without authority*."[164] Iredell's collapsing of conditionality and authority paves the way for the theory of judicial review, but that key move is only adverted to, rather than spelled out, in *Calder*.

Iredell stated up front in *Calder* that the intent behind written constitutions was to "define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries."[165] And then, only after stating his conclusion that "if any act . . . violates those constitutional provisions it is unquestionably void,"[166] did he describe the Constitution as

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[162] William Casto is more blunt, calling *Calder* a "pallid Supreme Court summary" of *Minge*. Casto, *supra* note 14, at 396.

[163] *Minge*, 17 F. Cas. at 444.

[164] *Id.* Two-thirds of the way through his discussion in *Calder*, Iredell does refer to an unconstitutional act as "transgressing the bounds of that authority," gesturing to the function of the constitution as a grant of authority.

[165] Calder v. Bull, 3 U.S. (3 Dall.) at 399.

[166] *Id.*

delineating the "boundaries of that authority [delegated to them]."[167] *Calder* then ends with the conclusory statement that, if they transgress those boundaries, "they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act." The bones of Iredell's argument are clearly there, but the meat is provided by *Minge*, whose clear statement that voidness is equivalent to "passed without authority" and whose overt description of the Constitution as parceling out the People's sovereign power clarifies what otherwise might read as a series of disjointed and conclusory assertions.[168]

Second, *Calder* entirely submerges Iredell's crucial distinction between limits on *power* and limits on the mode of *exercising* that that power. Instead, *Calder* largely restates the ultimate conclusion that natural justice is an improper basis for judicial review. "[I]f a law is "within the general scope of [the legislature's] constitutional power," Iredell wrote in *Calder*, "the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice . . . ." Iredell continued: "If the legislature pursue the authority delegated to them their acts are valid. . . . [T]hey exercise a discretion vested in them by the people . . . ."[169] We thus see the *hints* of the distinction, including Iredell's use of the key words "authority" and "exercise" as well as his point that the legislature enjoys a discretion "vested in them by the people." But it is in *Minge*, not *Calder*, that the precise nature of this argument comes out through, for instance, Iredell's analogy to a court's jurisdiction.[170]

Furthermore, *Minge* repeatedly indicates that the question is not one of the essential unfitness of natural justice for judicial examination but of the nature of the People's delegation of

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[167] *Id.*

[168] This is especially true because *Calder* entirely omits the implied repeal analogy, which as we saw above, is a crucial element in concluding that it is *judges* who must hold unconstitutional laws void.

[169] *Calder*, 3 U.S. at 399.

[170] *See Minge*, 17 F. Cas. at 444; *supra* note 143.

power. The question that immediately follows this point in *Minge*—"[W]hose opinion is properly to be regarded—those to whom the authority of passing such an act is given, or a court to whom no authority, in this respect, necessarily results?"[171]—makes clear that Iredell's objection is based in the proper division of power between court and legislature rather than in the inherent amorphousness of natural law. Indeed, Iredell expressed openness to the possibility that a constitution *could* vest the responsibility to police natural justice with the courts without any hint that doing so would somehow be incompatible with a judge's role. Instead, Iredell's argument, present in both opinions but made most clearly in *Minge*, is that *this* Constitution had not vested that responsibility with the courts.[172]

Unfortunately, the absence of this additional context renders *Calder*'s central statement of its rationale very susceptible to misinterpretation:

> The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[173]

The true nature of Iredell's objection is faintly discernible in this passage, like a distant star visible only with a telescope and if you know where to look. We see it flicker in *Calder*'s parenthetical describing the legislature as "(possessing an equal right of opinion [as judges])," and perhaps it twinkles in Iredell's use of the adjective "properly" in the phrase "all that the Court could *properly* say." [174]

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[171] *Minge*, 17 F. Cas. at 444.

[172] *See supra* notes 146–150.

[173] *Calder*, 3 U.S. at 399.

[174] *Id*.

In the absence of *Minge*'s telescope, however, this comment has been misread to be about the importance of the Constitution's textuality. Sylvia Snowiss, who fails to even cite *Minge* despite discussing both Iredell and *Calder* at length, characterizes the *Calder* opinion as being primarily concerned with a written constitution's "marked and settled boundaries" in contrast to natural justice's "[un]fixed standard."[175] *Calder*, in Snowiss's reading, becomes an opinion fundamentally about textuality rather than about the power of the People, a reading which confuses a subsidiary point for the primary argument. Although text was undoubtedly important for Iredell,[176] his conclusion in *Calder* stems not from a view that only *textual* constitutions form a sufficient basis of judicial review but that only *popular* constitutions do so. And *this* Constitution dealt only with the legislature's authority, not the manner of its exercise. Instead, it "vested [discretion] in the legislature." Thus, "a law [] within the general scope of [the legislature's] constitutional power" must be upheld, and the legislature will be "responsible [to the people] for the faithful discharge of their trust."[177]

Between Justice Iredell's status as an influential early theorist of judicial review in the Early Republic[178] and the fame of his exchange with Justice Chase in *Calder v. Bull*,[179] it is crucially important to take advantage of *Minge v. Gilmour*'s insight not only on Iredell but on his opinion in *Calder*. Indeed, the absence of *Minge v Gilmour* from scholarly study of judicial review has led to continued confusion not only about the details of Iredell's thought but even his top-line

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[175] *See* SNOWISS, *supra* note 14, at 70–71. *See also* Orth, *Blackstone's Rules*, *supra* note 100, at 86 & n.31 (citing this passage of Iredell's opinion in *Calder* for "a precocious statement of the need for a textual basis for constitutional decision-making").

[176] *See supra* notes 131–134.

[177] *Calder*, 3 U.S. at 399.

[178] *See* SNOWISS, *supra* note 14, at 46–47; Casto, *supra* note 14, at 371–74.

[179] SNOWISS, *supra* note 14, at 70; *see also* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914) (using *Calder* as the basis for his discussion of theories of judicial review and vested rights).

conclusion. Iredell has in fact been claimed by advocates of both sides in the scholarly debate[180] over whether or not the Founders understood natural law to be enforceable by the courts.[181] *Minge v. Gilmour*, not cited by the leading article claiming Iredell "viewed a written constitution as supplementing natural law rather than as replacing it,"[182] should put to rest the idea that Iredell was willing to strike down laws on the basis of natural justice. Not only did he say so explicitly,[183] but the strong form of popular constitutional authorship which undergirded Iredell's theory of judicial review was antithetical to any source of fundamental law other than the People. The People were the exclusive sovereign, and the constitution their exclusive means of speaking.

[180] *See supra* note 17.

[181] *Compare* Sherry, *supra* note 15, at 1143 (arguing that Iredell "viewed a written constitution as supplementing natural law rather than as replacing it with a single instrument") *with* Michael, *supra* note 17, at 449–52 (disagreeing).

[182] Sherry, *supra* note 15, at 1143.

[183] *Minge*, 17 F. Cas. at 444 ("I confess I think no court is authorized to say that an act is absolutely void merely because, in the opinion of the court, it is contrary to natural justice.").

## PART III — WELFARE OF THE "PEOPLE": WRITTEN CONSTITUTIONS AND NATURAL JUSTICE

Having concluded his argument that he lacked the power to strike down laws on the basis of natural justice, Justice Iredell immediately proceeded to consider the question anyway: "Admitting, however, that this is a ground upon which a court has authority to decide, I am of opinion that this act is not contrary to the principles of natural justice."[184] And he spent the next twelve hundred words explaining why North Carolina's retroactive abolition of the fee tail did not, in fact, contravene natural justice. Rather than defend the abolition by recourse to first principles or philosophical treatises, however, Iredell instead turned to the text of the North Carolina Constitution.

Frankly, this is weird. It would have been more normal, both in our time and in Iredell's, to answer a question about natural law with reference to first principles or philosophical treatises rather than to positive law.[185] Indeed, whereas positivist judges of the Early Republic like John Marshall were known to "pack the Constitution's language with principles derived from extraconstitutional sources,"[186] *Minge v. Gilmour* seems to reverse this gradient of influence. By turning to the text of a written constitution to determine natural justice, Iredell was in effect packing *natural justice* with *constitutional* meaning.

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[184] Minge v. Gilmour, 17 F. Cas. 440, 444 (C.C.D.N.C. 1798) (No. 9,631).

[185] For a contemporary example of a more theoretical approach to this question, see *Dash v. Van Kleek*, 7 Johns. 477 (N.Y. 1811), in which then-Chief Justice James Kent cited an extensive catalog of treatises condemning retroactive laws and relied on "well-settled axioms" such as "the union of these two powers [to make and to construe a law] is tyranny," *id.* at 508. For a more modern example, Stephen Munzer's approach to the question of "when retroactive legislation is justifiable" in 1980 examined considerations like justified expectations, the nature and importance of the "rule of law," and approximations of "utility." *See* Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 427–35 (expectations), 439 (rule of law), 453–61 (utility).

[186] G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 680 (1992); *see also* SNOWISS, *supra* note 14, at 69 (arguing that judicial review in the Early Republic "merged text and principle").

This Part explains how Justice Iredell accomplished this perplexing philosophical somersault: the same strong belief in the constitution's connection to the People which had undergirded Iredell's theory of judicial review. Iredell believed that individual rights were contingent on the needs of the community—their scope depended on the definition of the people's welfare, or *salus populi.* And Iredell further saw this "community" as equivalent to the "People" at work in his discussion of judicial review; the same "populi" whose welfare determined the scope of individual rights was also the "People" whose "deliberate voice" delegated legal power to the legislature. And wherever the People go, so too does the constitution: because Iredell conceived of the People as being relevant for more than just fundamental law, so too was the written constitution. Iredell's strong, unshakeable belief in popular constitutional authorship enabled a written constitution to also define the terms natural justice.

## III-A: Justice Iredell and the Well-Regulated Society

None of Iredell's extensive discussion of the natural justice of the fee tail abolition was necessary to the outcome of the case, and, in the abstract, defending the justice of a retroactive law affecting interests in property was a nearly insuperable task given the contempt in which such retroactive legislation was held.[187] But John Minge's arguments offended Iredell, evincing a fundamental misunderstood not just the law but the very nature of property in society. And sitting a courtroom filled with friends, Iredell stretched his opinion once again and attacked Minge's position head-on.

For years, Iredell had been irritated by people who "from injudicious notions of liberty, sp[oke] of the rights of each individual as if he subsisted in a state of nature unconnected with any

[187] *See supra* notes 61–63.

other mortal in the universe."[188] Instead, Iredell believed that no man is an island—everyone owed obligations to his community.[189] Three years before deciding *Minge*, Iredell had written in *Talbot v. Jansen* that, for every right an individual possessed, he was also "under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member."[190] Indeed, Iredell biographer Willis Whichard has written that Iredell's discussion of this question in *Minge* constituted "an articulate reflection of [Iredell's] motivating life force"—the philosophy he expounded was an "abiding belief . . . [which] influenced his entire existence."[191]

This "abiding belief" "motivate[ed]" many other legal thinkers of the Early Republic: Iredell's comments in both *Talbot* and then in *Minge* map on nearly perfectly to a legal discourse William Novak has termed "the well-regulated society."[192] The core of the well-regulated society was the conviction that men were inherently social creatures. James Wilson, Iredell's friend and colleague on the Supreme Court as well as one of the most eloquent proponents of the well-regulated society philosophy, declared in his *Lectures on Law* that man was "designat[ed] for

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[188] *Minge*, 17 F. Cas. at 445.

[189] *Cf.* JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS 108 (Ann Arbor Paperbacks 1959) (1624) ("No man is an island, entire of itself; every man is a piece of the continent, a part of the main."); *but cf.* SIMON & GARFUNKEL, *I Am a Rock*, *on* SOUNDS OF SILENCE (Columbia Records, 1966) ("Hiding in my room, safe within my womb/I touch no one and no one touches me/I am a rock; I am an island.").

[190] *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 162 (1795). The facts of *Talbot* scarcely resemble those of *Minge*, further indicating the importance of these principles to Iredell. *Talbot* was a prize case raising questions at the intersection of international maritime law and American neutrality in the European wars of the 1790s. The case turned in part on the validity of William Talbot's French privateering commission, on which the legality of his seizure of Jansen's vessel depended. Only French citizens could hold those commissions, and Talbot had been born in America. The Court thus had to grapple with whether Talbot possessed the right to "expatriate" and become a French citizen despite his American birth. *See id.* at 158–59, 161–62 (opinion of Iredell, J.). Iredell rejected Talbot's argument that expatriation was "a natural unalienable right in each individual . . . [which] must be left to every man's will and pleasure," in part because the duties which every citizen owes to his community naturally imposed limits on his right "to go off, when, and in what manner, he pleases." *Id*. at 162–64.

[191] WHICHARD, *supra* note 70, at 195.

[192] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA (1997). Even Novak's appellation for this philosophy has a corollary in *Minge*: at one point Iredell refers to the "benefits of a well-constituted society." *Minge*, 17 F. Cas. at 445.

society."[193] And just as Justice Iredell ridiculed the idea that any individual "subsist[s] in a state of nature unconnected with any other mortal in the universe" in *Minge*,[194] Wilson rejected the "narrow and hideous representation" that "society is not natural, but is only adventitious to us."[195]

Accordingly, the rights of any given individual could not be separated from considerations of the rest of community.[196] In particular, when "private and public interests in some degree interfere with each other . . . is it not unavoidable, and agreeable to the very principle on which all governments are formed," Iredell asked in *Minge*, "that the former should yield to the latter?"[197] As Iredell had written in *Talbot v. Jansen*, "if in any government, principles of patriotism and public good ought to predominate over mere private inclination, surely they ought to do so in a Republic . . . ."[198]

This view is embodied in the Latin maxim *salus populi suprema lex esto*: "the welfare of the people shall be the highest law."[199] For well-regulated society theorists, one of the prime doctrinal manifestations of the principle that the public good superseded private rights was nuisance law.[200] In his *Commentaries on American Law*, James Kent described the logic of nuisance this way: "[T]hough property be thus protected . . . the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to

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[193] WILSON, *supra* note 107, at 261.

[194] *Minge*, 17 F. Cas. at 445.

[195] WILSON, *supra* note 107, at 258.

[196] *See* NOVAK, *supra* note 192, at 34 ("The rights of man are relative to his social nature, and the rights of the individual exist, in a coincidence only with the rights of the whole . . . .") (quoting NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT 66 (1833)).

[197] *Minge*, 17 F. Cas. at 445.

[198] *Talbot*, 3 U.S. (3 Dall.) at 163.

[199] *See* NOVAK, *supra* note 192, at 46–47. This principle is so important to Professor Novak's understanding of the well-regulated society that he borrowed it for the name of his book: *The People's Welfare.*

[200] *See id.* 60–62.

the injury or annoyance of others, or of the public."[201] And so, "unwholesome trades, slaughter houses, [and] operations offensive to the senses . . . may be interdicted by law."[202] As Charles Goodrich put it, governments were charged with "the bounden duty . . . to advance the safety, happiness, and prosperity of its people . . . by any and every act of legislation which it may deem to be conducive to these ends."[203]

The welfare of the community did not, however, merely demand sacrifice without offering compensation. Regulations in the public interest, the Supreme Judicial Court of Maine explained in 1835, might "sometimes occasion an inconvenience to an individual, but he has a compensation, in participating in the general advantage."[204] The man "who operates for the good of the whole," according to James Wilson, "pursues, in truth, and at the same time, his own felicity."[205] As Iredell put it in *Minge*, "[the] benefits from a well-constituted society [are] more than an ample compensation for any accidental sacrifice which the public interest may occasionally require of a subordinate private advantage to a superior public good."[206]

But the well-regulated society was not just a doctrine of ethics, preaching the gospel of socially-contingent rights. Rather, "law was the cornerstone of the well-regulated society," and "not just any law." Well-regulated society thinkers saw society's reciprocal network of rights and obligations as being "calibrated" by the common law,[207] which they conceived of as being based

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[201] 2 KENT, *supra* note 45, at 276.

[202] *Id*.

[203] CHARLES B. GOODRICH, THE SCIENCE OF GOVERNMENT 149 (1853). Farah Peterson's recent study of James Kent's treatment of statutes as Chancellor of New York illustrates how this *salus populi* mindset affected even statutory interpretation. *Cf.* Farah Peterson, *Interpretation as Statecraft*, 77 MD. L. REV. 712, 735–48 (2018) (discussing Chancellor James Kent's approach to statutes authorizing takings of private property, in which he strictly construed grants for private purposes but was quite liberal when public-facing projects, such as the Erie Canal, were at stake).

[204] Wadleigh v. Gilman, 12 Me. 403, 405 (Me. 1835).

[205] Wilson, *supra* note 107, at 270.

[206] Minge v. Gilmour, 17 F. Cas. 440, 445 (C.C.D.N.C. 1798) (No. 9,631).

[207] NOVAK, *supra* note 192, at 36.

in custom and having received the presumed input and consent of generations. "[E]very lovely feature [of the common law] beam[ed] consent,"[208] James Wilson said, because it was "produced, extended, translated, adopted, and moulded by practice."[209] The well-regulated society view that custom was "the most salutary principle of obedience to human laws"[210] led adherents of the philosophy to "contest[] the novelty and exaggerated significance of constitutions."[211] Society's needs and individuals' duties were shaped and effectuated not by the "timeless, external truths of . . . Sovereign[] or Text,"[212] but by the common law, America's "*gravior lex*."[213]

Yet it is at this point that Justice Iredell's perspective diverges from the well-regulated society mentality as described by Professor Novak. Whereas well-regulated society theorists understood *salus populi* and its related values to be "interrelated" with their effectuation through a customary common law,[214] Iredell understood those ethical principles independently from the common law. Indeed, for Iredell, they substituted cleanly for the dictates of natural justice, an external set of ethical tenets rather than an element of a legal discourse defined in part by worship of the common law. Rather than determining the content of the *salus populi* by reference to custom, Iredell looked to the written constitution, the "Text" they so disdained.

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[208] Wilson, *supra* note 107, at 183.

[209] *Id.* at 445.

[210] *Id.* at 179.

[211] NOVAK, *supra* note 192, at 37–38.

[212] *See id.*

[213] Wilson, *supra* note 107, at 460. "Weightier law" is my best translation for "*gravior lex*," but it fails to convey the full connotation of the word *gravior*. For an inkling of the word's fuller meaning, see CHARLTON T. LEWIS & CHARLES SHORT, A NEW LATIN DICTIONARY 828 (1879) (defining *gravis*, the root form of *gravior*, to mean "weighty, important, grave; with respect to character, of weight or authority, eminent, venerable, great")

[214] *See* NOVAK, *supra* note 192, at 26 (listing "a relative and relational theory of individual rights" alongside "a pragmatic historical methodology enshrined in dynamic, pre-Enlightenment conception of the rule of the common law" as two of the "four interrelated components of this legal persuasion.").

## III-B: "Text"-ing Justice

We can see how Iredell combined his disentangled well-regulated society tenets with the text of the North Carolina Constitution by returning to John Minge. Minge argued that the deprivation of his expectancy in the Gilmour land violated natural justice, but, according to Iredell's view of socially-contingent property rights, individuals have an obligation to sacrifice in service of a greater good. So, if the destruction of Minge's expectancy was an "accidental sacrifice . . . of a subordinate private advantage to a superior public good," there was nothing unjust about it—indeed, Minge would be remunerated through his "participation in the general advantage." This, then, required a definition of the "superior public good," and rather than turn to abstract philosophy or to the common law, Iredell turned to the written constitution.

Indeed, the very first thing Iredell did was to "recollect" the fee tail's "numerous evils both public and private," concluding that "well might [the fee tail] excite the jealousy and precaution of the representatives of the people of this state, assembled to establish a republican form of government, founded on the basis of political equality for all citizens."[215] He then related verbatim the two provisions of the North Carolina Constitution touching on entails. First, the document's Declaration of Rights declared that perpetuities—a category including but not limited to entails—were "contrary to the genius of a free state and ought not to be allowed."[216] Then, later in the "Frame of Government," the Constitution explicitly directed "[t]hat the future Legislature of this State shall regulate entails, in such a manner as to prevent perpetuities."[217]

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[215] Some scholars, apparently having only glanced at Minge, rely on this brief discussion to argue that Minge can be boiled down to Iredell's own personal hatred of the fee tail. *E.g.*, Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 446 n.54 ("[Results in favor of retroactive fee tail limitations] reflect[] an animus against an incipient landed gentry along English lines."). Needless to say, I disagree—this Part is can serve as a rebuttal of such a simplistic reading of the case.

[216] N.C. CONST. OF 1776, Decl. of Rights § 23, *in* THORPE, CONSTITUTIONS, *supra* note 49, at 2788.

[217] *See Minge,* 17 F. Cas. at 444; *accord* 5 THORPE, CONSTITUTIONS, *supra* note 49, at 2788, 2792.

Interpreted through the lens of the well-regulated society, this amounted to declaring the fee tail a public nuisance. Indeed, Iredell understood the Constitution to presuppose that the fee tail was continuously harming the community, like the socio-political equivalent of a slaughterhouse, spewing noxious fumes and polluting the body politic.[218] Thus, the deprivation Minge suffered was really a sacrifice made in order to rid the polity of that nuisance. His loss, therefore, was no different than the deprivation suffered by Kent's slaughterhouse operator—both were simply called on to make an accidental sacrifice to the *salus populi*.

Thus, Iredell was able to justify Minge's deprivation through the application of positive law. After abstracting the well-regulated society's philosophical principles out of their common law context, Iredell was able to join those principles with the dictates of the written constitution, a temporally localized document produced by a discrete and reified People. He was able to pack *constitutional* meaning into *natural justice*.

That same conception of the People and of constitutions was at work in Iredell's defense of the retroactivity of the 1784 abolition.[219] Rather than weasel around this characterization of the law,[220] Iredell embraced it head on. The fact that it was the Constitution which contained these declarations meant that it was not truly the legislature who was responsible for the retroactive abolition—it was the People.

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[218] *See Minge*, 17 F. Cas. at 445 (referring to the possibility of "intermediate evils . . . accru[ing]" and "evils . . . happen[ing] in the mean time" before the legislature could "defeat[] any mischief which a delay contrary to the intent of the constitution had occasioned")

[219] *Cf. supra* notes 61–63.

[220] As I noted above, the 1784 abolition could be construed as not actually having had retroactive effect at all. *See supra* note 60. Even within that characterization, Iredell could have argued that the abolition did not impair any "vested right" of Minge's, the approach later North Carolina courts took to the law. *E.g.*, Springs v. Scott, 44 S.E. 116, 120 (1903) (holding that the "bare expectancy" of an heir in tail "is not such a vested right as will be protected by the constitutional provision"). Or he could have pointed out that the retroactive provision "merely generalized and made automatic the potential that had always existed as to large estates in tail: to bar the entail by act of the General Assembly." *See* Orth, *Fee Tail*, *supra* note 36, at 781.

Iredell conveyed this point in a few different ways, cycling between different metaphors all trying to convey the same central point. First, he argued that, because they were acting pursuant to a direct command of the Constitution, "the legislature had the authority of the convention as to this object devolved on them" and that the 1784 abolition "should have the same effect as if the provisions in it had formed part of the constitution itself."[221] This argument likely proves too much if taken literally,[222] but it is a powerful illustration of Iredell's intuition that the Constitution, not the legislative act, was the relevant document. Later, Iredell indicated that the "the true intent and meaning of the constitution" had essentially created an entitlement to an entail-free polity. The legislature, then, was not "at liberty to withhold [the benefits]" of this constitutional entitlement.[223] Finally, Iredell settled on an analogy to the law of trusts: "Upon a great scale the legislature may be considered as trustees, the people as the persons for whose benefit the trust was created."[224] And the terms of this fiduciary relationship included the obligation that the trustee protect the beneficiary from the "numerous evils both public and private" of the fee tail.

Each of these attempted explanations is a different way of stating that the true actor behind the retroactive abolition was not the legislature but the People, operating through the Constitution. Because the legislature was acting according to constitutional direction rather than of their own will, they were not only empowered but obligated to effectuate that direction. Continuing with his trustee analogy, Iredell asked "[o]ught [the people], therefore, to suffer any injury by any delay in the execution of the trust? They certainly ought not, if it were in the power of the trustees to prevent

[221] *Minge*, 17 F. Cas. at 444.

[222] For instance, I doubt that Iredell would have argued that a legislative act passed pursuant to constitutional direction could not have been repealed, and I feel confident that, if such an act contravened a different part of the Constitution, Iredell would have been willing to subject it to judicial review.

[223] *Minge*, 17 F. Cas. at 445.

[224] *Id.*

it."[225] As such, the Assembly was required to "consider whether the evils which had happened in the mean time (if any had happened) required a retrospective remedy in order to defeat any mischief which a delay contrary to the intent of the constitution had occasioned."[226] If so, they "not only had authority, but it was their duty to provide it" in order "to give the constitution its full effect"[227] and "guard against any intermediate evils . . . which had accrued contrary to the true intent and meaning of the constitution, . . . the benefits of which they were entitled to . . . ."[228] Clearly, the Assembly had concluded that such a retroactive remedy was necessary—"their decision, of course, must be submitted to."[229]

By refocusing attention away from the legislature and onto the People's constitutional command, Iredell essentially portrayed the legislature as an agent. The decision to act retroactively was, at most, a discretionary decision already authorized by the People and, at the least, scarcely attributable to the legislature at all. What mattered was not just a judgment that entails were dangerous to the community—it mattered *who* made that determination: the People.

**III-C: Broader Implications**

Thus, we see that popular constitutional authorship solves the puzzle of how Justice Iredell was able to define the terms of natural justice using the terms of positive law. Justice Iredell had such an unshakeable faith in the Constitution's ability to speak for the People that that document was able not only to define fundamental law but shape natural justice itself. Both of those concepts ran through the People: Iredell understood the "*populi*" whose welfare determined the scope of individual rights to be the *same* "People" whose "deliberate voice" delegated legal power to the

[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*

legislature. As the exclusive mouthpiece for the people in all of their aspects, then, the Constitution would conclusively define the people's welfare—and with it the dictates of natural justice—just as it conclusively determined limits on the Assembly's legislative power.

But the result is a course of reasoning which runs directly counter to the approach William Novak describes under the heading the "well-regulated society." Part III-A clearly establishes that Iredell shared a great kinship with the well-regulated society's view of individuals in society—*Minge v. Gilmour* is a pitch-perfect articulation of each of the ethical tenets which characterize the philosophy. But at the same time, Iredell just as clearly did not "contest the novelty . . . of constitutions" or claim that their importance was "exaggerated."[230] And he decidedly decoupled those ethical tenets from their definition and effectuation via the common law, instead both defining and deploying the salus populi by reference to a "Text" deriving its authority from a discrete, reified People rather than a generationally diffuse People acting through custom. *Minge v. Gilmour* thus raises substantial questions for Professor Novak's definition of the well-regulated society: how closely "interrelated" were these two "components" if James Iredell was able to, in effect, pick and choose between them?[231]

In H.L.A. Hart's terminology, Novak seems to have described a "standard case [which] is in fact a complex of normally concomitant but distinct elements."[232] *Minge v. Gilmour* thus becomes the "case open to challenge," in which "one or more of [the standard elements] may be lacking." And, as Hart points out, the benefit of the "borderline aspect" of such cases is to "force

[230] NOVAK, *supra* note 192, at 37. Recall Iredell's breathless enthusiasm about American constitution-making in his public letter "To the Public," in which he wrote: "The instance was new in the Annals of Mankind. No People had ever before deliberately met for so great a purpose. Other governments have been established by chance, caprice, or mere brutal force. Ours, thank god, sprang from the deliberate voice of the People." *See* Elector Letter, *supra* note 105, at 228.

[231] *See* NOVAK, *supra* note 192, at 26.

[232] H.L.A. HART, THE CONCEPT OF LAW 4 (2d ed. 1994).

us to reflect on, and make explicit, our conception of the composition of the standard case."[233] This is, in a sense, one of the main goals of this project: to challenge, complicate, and hopefully improve our understanding of "the composition of the standard case" of constitutional and legal thought in this period

Iredell's approach is also jarring. Instead of a network of reciprocal rights and obligations calibrated by custom and molded over time, Iredell's use of a written constitution to define natural justice implies that justice itself could be "new-model[ed]" in exactly the same avulsive manner in which a new constitution could redefine law in the polity.[234] Iredell justified this implication, as well as the justice of any individual deprivation suffered thereby, with a very literal interpretation of the social contract. North Carolina landholders "partake equally of the benefits of the constitution with others who were parties to it," Iredell wrote, "and consequently [they are] liable to all its advantages and disadvantages."[235] This written constitution, both in its guise as fundamental law and component of natural justice, derived its legitimacy, it seems, from consent. Having thus become "parties to" the Constitution, landowners were essentially estopped from questioning its definition of the *salus populi* or from claiming that their sacrifice violated natural justice. Indeed, through all of *Minge*, Iredell's argument implicitly had been premised on the idea that the Constitution spoke for the People because of their active participation and consent.[236]

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[233] *Id*.

[234] *See supra* note 120.

[235] Minge v. Gilmour, 17 F. Cas. 440, 445 (C.C.D.N.C. 1798) (No. 9,631). Eagle-eyed readers might recall that John Minge was not actually a North Carolinian, meaning that this logic did not even really cover him. Iredell noticed this problem as well: "Persons who are not resident in the state, but as citizens of other states are permitted to hold lands in it, though in some respects differently circumstanced, cannot expect to hold their titles upon a different footing from citizens themselves . . . ." *Id*.

[236] *See* Elector Letter, *supra* note 105, at 228 ("No People had ever before *deliberately* met for so great a purpose. Other governments have been established by chance, caprice, or mere brutal force. Ours, thank god, sprang from the *deliberate* voice of the People." (emphases added)).

Iredell's emphasis on identifiable, consent-based constitutional authorship lines up with a shift in the late eighteenth century, described by historians like Jonathan Gienapp, Gordon Wood, and Edmund Morgan, towards defining legitimate government in terms of "explicit consent and concrete choice."[237] But this new focus on choice and active consent was not just abstract—it cashed out in procedural requirements for making a legitimate constitution: drafting by a specially-elected convention[238] and ratification by the people.[239] Gienapp writes that "privileging drafting and ratifying conventions" was a clear manifestation of Americans' "emphatic[]" association of "the fundamentality of constitutions [with] identifiable authorship."[240] By 1787, Jack Rakove writes, "the authority of a constitution depended on the mode of its adoption."[241]

James Madison, for one, "clearly believed that the authority of a constitution depended on the form of its promulgation" and that ratification "promised to render a constitution legally superior to ordinary acts of government."[242] At the Federal Convention, Madison even implied that the Articles of Confederation had not been a constitution, properly understood, because they had been "founded on the Legislatures only" rather than "on the people,"[243] an argument which Jonathan Gienapp notes "underscored the importance of popular ratification in American constitutional thought."[244] The requirement of ratification was intimately bound up not just with

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[237] GIENAPP, SECOND CREATION, *supra* note 5, at 37; *see also* Gienapp, Transformation, *supra* note 19, at 121–35; *see generally* MORGAN, *supra* note 1, at 239–87; WOOD, *supra* note 6, at 162–96, 306–43.

[238] MORGAN, *supra* note 1, at 256–57; Gienapp, Transformation, *supra* note 19, at 140–45; RAKOVE, *supra* note 21, at 94–99.

[239] *See, e.g.*, Gienapp, Transformation, *supra* note 19, at 121–35; RAKOVE, *supra* note 21, at 96–108; *see also* WOOD, *supra* note 6, at 523–38; *see generally* MORGAN, *supra* note 1, at 239–87.

[240] GIENAPP, SECOND CREATION, *supra* note 5, 38–39.

[241] RAKOVE, *supra* note 21, at 98; *see also* WOOD, *supra* note 6, at 532–35; Gienapp, Transformation, *supra* note 19, at 144 ("America's fundamental law was inextricably connected to a specific method of approval, one that located political will in a precise moment.").

[242] RAKOVE, *supra* note 21, at 101; *accord* GIENAPP, SECOND CREATION, *supra* note 5, at 8 (stating that it was "ratification [that] had assured" the Federal Constitution's "status as the final arbiter of all political dispute.").

[243] *See* GIENAPP, SECOND CREATION, *supra* note 5, at 71–72.

[244] *Id*. at 72.

the importance of affirmative consent but indeed with the entire American notion of fundamental constitutional law: popular ratification was, Gienapp writes, "the logical fulfillment of remaking the foundations of a fundamental constitution."[245]

So when had the landholders of North Carolina consented? When had they expressed their "deliberate voice" regarding the Constitution's delegation of power and become consenting "parties" to the Constitution's definition of the *salus populi*? They hadn't, at least not according to the procedures Gienapp, Rakove, and others consider *sine qua non*'s for constitutional authorship. The North Carolina Constitution of 1776 was enacted essentially "like an ordinary law,"[246] and it had not been ratified by the People.[247] The document purported to be little else—it listed its authors as "the representatives of the freemen of North-Carolina, chosen and assembled in Congress, for the express purpose of framing a Constitution, under the authority of the people."[248] Iredell also explicitly indicated that he was aware of this, referring in *Minge* to the

[245] *Id*.

[246] WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 79–80 (trans. Rita & Robert Kimber, 2001). It is ambiguous whether or not the body that wrote the 1776 North Carolina Constitution can be considered a "constitutional convention" or if it was merely a session of the provincial assembly. In a footnote to his reproduction of the document, Francis Thorpe reports that the "Congress" which wrote this Constitution was "elected and chosen for that particular purpose," THORPE, CONSTITUTIONS, *supra* note 49, at 2787 n.a, but Professor Adams characterizes the body as a normal provincial congress, though one which was elected with the understanding that those representatives "would not only pass laws but would also draft a constitution." ADAMS, *supra*, at 79. Robert Loyal Ganyard offers a similar mixed diagnosis: "[T]he fourth congress had provided that a new congress be held in November, 1776, which was to function also as a constitutional convention. . . . The council took pains to stress . . . that the delegates would be responsible not only for making laws, but for framing a constitution which would be in future 'the Corner Stone of all Law' [in the state]." Robert Loyal Ganyard, North Carolina During The American Revolution: The First Phase, 1774-1777 at 375 (1963) (unpublished Ph.D. diss., Duke University).

[247] THORPE, CONSTITUTIONS, *supra* note 49, at 2787 n.a. This was actually par for the course in the first wave of American constitution-making. No constitution written in 1776 was ratified by the people, and many were promulgated by legislatures rather than purpose-built conventions. *See, e.g.*, MORGAN, *supra* note 1, at 256–57 ("[State legislatures] tried to give special popular sanction to their constitution making, if only by claiming in a preamble that they were empowered by the people and that the constitution they produced was to be supreme as an expression of the will of the people."); Gienapp, Transformation, *supra* note 19, at 140–45; RAKOVE, *supra* note 21, at 94–99.

[248] *See supra* note 246 for discussion of how to characterize this body.

author of the Constitution as "the convention who framed the constitution of this state"[249] and "the representatives of the people of this state."[250]

Thus, despite consistently articulating and even enforcing a view of the North Carolina Constitution as the "deliberate" act of a discrete, consenting People, in *Minge v. Gilmour* Justice Iredell was content to treat the Constitution *as if* it had been the "choice[] of specific people at a concrete moment in time"[251] without *actually* conditioning its "authority . . . on its mode of adoption."[252] Iredell simply did not see a problem with the fact that the North Carolina Constitution had not been ratified.[253] The fiction alone was sufficient for him, without any indicia of the affirmative consent which Gienapp tells us was the "first and foremost" consideration in assessing the "legitimacy of government."[254]

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[249] Minge v. Gilmour, 17 F. Cas. 440, 444 (C.C.D.N.C. 1798) (No. 9,631).

[250] *Id*. *Cf*. Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (referring to the "American *states* . . . fram[ing] their state constitutions" but to the "*people* of the United States . . . fram[ing] the Federal Constitution" (emphases added)). Given Iredell's stature among Patriots and then in the new state government, however, *see generally* WHICHARD, *supra* note 70, at 19–41, we could safely assume he was familiar with the promulgation of the state's Constitution even if we did not have these textual indications.

[251] GIENAPP, SECOND CREATION, *supra* note 5, at 39.

[252] RAKOVE, *supra* note 21, at 98.

[253] To be clear, I am not imposing a clear statement rule on Iredell, requiring that he specifically discuss ratification or else be deemed to oppose. Given the absolute nature of the claims about ratification made by historians like Gienapp and Rakove, Iredell's silence itself is telling. If the ability of the constitution to speak for the People really did depend on the "mode of its promulgation," then the 1776 Constitution's lack of ratification would need to be addressed before Iredell could justify deploying it in the aggressive way he does. Thus, simply by not mentioning that lack of ratification, Iredell's opinion in *Minge* calls into question how essential ratification was to this generation's understanding of popular constitutional authorship.

[254] Gienapp, Transformation, *supra* note 19, at 132. It is worth mentioning that a belief in popular sovereignty and an emphasis on affirmative popular consent rarely translated into sanguine surrender to the will of the people. Professor Rakove notes that Federalists in 1787 fretted that they had unleashed an uncontrollable monster by insisting on popular ratification, *see* RAKOVE, *supra* note 21, at 107–08, and the Founders' distrust of majoritarian government is well known, including as manifested in the intentionally un-democratic design of the Federal Constitution. *See, e.g.*, MERRILL JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 46–50 (2d ed. 1979); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 40 (2005) ("The framers of the federal Constitution tried to balance the imperatives of popular sovereignty against the fear of excessive democracy."); *see also* DONALD LUTZ, POPULAR CONSENT AND POPULAR CONTROL 21–22 (1980). Iredell seems to have shared in this apprehension about majoritarian government. *See* Elector Letter, *supra* note 105, at 228; Spaight Letter, *supra* note 102, at 307. Perhaps, then, *everyone* was fictionalizing the People to an extent—Iredell just took that fiction further than most.

In *Minge v. Gilmour*, we see a key legal thinker of the Early Republic deploy an extremely powerful Constitution, capable of authoritatively and exclusively declaring not only fundamental law but also the terms of natural justice. Yet this Constitution possessed only a casual relationship with the kind of explicit consent many historians have asserted was indispensable to American fundamental law. My reading of *Minge v. Gilmour* thus casts doubt on the common narrative of a uniform and universal embrace of the necessity of ratification as a prerequisite for a constitution to speak for the People. In *Minge*, the North Carolina Constitution did just fine without it.

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What can we learn from this realization that the People's connection to their exclusive mouthpiece was based not on consent but on a fiction?

Iredell's strong but fictional understanding of popular constitutional authorship embeds the potential for elitism and the papering over of the lived experience of law in local communities. The vision of the Constitution deployed in *Minge*—working avulsive change to both law and justice without paying much heed to popular choice—is reminiscent of Edmund Morgan's profoundly cynical view of American popular sovereignty in his vividly titled book *Inventing the People*. Having imported ideas of the People's "constituent power" from Locke and other revolutionaries of 17th century England,[255] American elites, according to Morgan, deployed popular sovereignty for decidedly anti-popular ends. "Though it originated as a tool of opposition to government," Morgan writes, "[the sovereignty of the people] could be used to subdue the unthinking many to the thoughtful few [and] to curb the local prejudice of representatives."[256] Morgan contends that the behavior of state legislatures in the 1780s, frequently identified as both

[255] *See* MORGAN, *supra* note 1, at 254–56.

[256] *Id.* at 255.

an impetus for and shaper of the Federal Constitution,[257] also led to a more aggressive deployment of popular sovereignty ideology in order, "in the name of the people, to set limits on the action of the people's representatives."[258]

Relatedly, my reading of *Minge* intersects with the work of Laura Edwards, who has documented the centralization of law North Carolina during the Early Republic, a process in which James Iredell was significant player.[259] Centralization, Edwards argues, erased the importance of "localized law," which "recognize[d] multiple sources and sites of legal authority, including customary arrangements as practiced, on the ground, in local communities."[260] By theoretically elevating a central, unified, and fictional People to the position of supreme positivist lawgiver, Iredell paved the way for the erasure of the variety of local law and papered over the lived experience of law and rights in local communities. And by "inventing" a definite People at the state level whose legal authority was bound up in in written documents, the theory at work in *Minge* implicitly supported the idea that "Law" was what was handed down in writing by a state-level institution.[261] Iredell's understanding not only foreclosed the judicial enforceability of natural justice—it evinces a more broadly positivist approach to law which undermines both the divine basis of natural law as well as the customary basis of "localized law."

To be clear, I do not claim that Iredell shaped or applied his vision of popular constitutional authorship with some malicious purpose of disenfranchising ordinary North Carolinians or aggrandizing power to himself—indeed, I doubt that Iredell would even be aware of the dynamic

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[257] *E.g.*, WILENTZ, *supra* note 254, at 31–32 (2005); Woody Holton, *Did Democracy Cause the Recession that Led to the Constitution?* 91 J. AM. HIST. 442, 443–44 (2005).

[258] MORGAN, *supra* note 1, at 255.

[259] EDWARDS, *supra* note 29, at 30, 37, 45–47.

[260] *Id*. at 4.

[261] *See id.* at 13 ("[P]itt[ing] 'the state' against 'the local' presumed a conceptual framework that posits a single, controlling view of law as the only viable option.").

I have identified.[262] Rather, the notion of a sovereign People speaking only through a written instrument which lacks any form of actual consent embeds within it the theoretical justification for precisely the kind of intentional actions both Morgan and Edwards postulate.

But the relationship between the People, however defined, and the Constitution is not merely a matter for historical analysis. Rather, the core questions raised by *Minge v. Gilmour*—what is the nature of the Constitution? how should it relate to "We the People" in whose name it purports to speak? what kind of input is necessary for a document or indeed a government to legitimately speak for the community?—continue to form the substrate of a range of vibrant and vital debates in American politics and law.[263] In many ways, we are still wrestling with the uncertainty which characterized constitutional thought after the "remaking [of] the foundations of fundamental law" in the 1770s and 80s.[264] And whether we look to the Early Republic out of curiosity, respect, or a sense of obligation, perhaps the ultimate takeaway is one of historical humility. *Minge v. Gilmour* reminds us that the legal thought of the Early Republic—a period so frequently essentialized to the point of fiction if not falsity—was not homogenous, absolute, nor entirely definite. And Justice Iredell's failure to take popular consent seriously likewise reminds us that even Founding Fathers sometimes failed to live up to our, and perhaps even their own, ideals. The existence of men like James Iredell and of cases like *Minge v. Gilmour* demands that we continue to question our assumptions and to persevere in the historical endeavor.

[262] This is, after all, the risk of retrospective analysis: although we in the present are able to see (with 20/20 vision, we might say) how different ideas, concepts, and traditions combined in a given historical action, we frequently end up describing a phenomenon foreign to the historical actor's subjective experience.

[263] *See supra* notes 2–4.

[264] Gienapp, Second Creation, *supra* note 5, at 72.