James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto Law"

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ABSTRACT

Many commentators have questioned whether the interpretation of the term "ex post facto law" in Calder v. Bull*, which restricted that term to retroactive criminal laws, is historically accurate. Most prominently, over seventy years ago, Professor William Winslow Crosskey argued not only that this "criminal-only" reading of "ex post facto law" departed from the original understanding of the Constitution, but also that Justices Chase, Iredell, and Paterson adopted that erroneous interpretation in order to assist James Wilson, who by 1798 had fled from his creditors and needed retroactive bankruptcy protection. Drawing on new evidence related to legal disputes involving three land companies with which Wilson was associated, which eventually gave rise to* Hollingsworth v. Virginia*,* Fletcher v. Peck*, and* Johnson v. M'Intosh*, this Article contends that Crosskey was likely correct about the original meaning of "ex post facto law," but likely mistaken about the Justices' motivations in* Calder*. In fact, Wilson's land speculation, conflicts of interest, and aggressive pursuit of his companies' interests were probably a source of embarrassment to his fellow Justices. Nonetheless, there is a clear discrepancy between the narrow construal of "ex post facto law" in* Calder *and how that term was widely used in the founding era, which merits further investigation. A better historical understanding of these land disputes also raises new doubts about the reliability of the discussion of ex post facto laws in James Madison's* Notes of the Debates in the Federal Convention.

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INTRODUCTION

The Constitution forbids both the federal government and the states from making ex post facto laws.[1] In *Calder v. Bull*, three Justices of the U.S. Supreme Court—Samuel Chase, James Iredell, and William Paterson—adopted the position that the phrase "ex post facto law" as it is used in the Constitution is a legal term of art, which was meant to refer only to retroactive criminal laws.[2] Although their opinions on this point were arguably dicta, *Calder* has come to stand for this proposition, and a narrow or "criminal-only" interpretation of the ex post facto clauses is now generally settled law. Significant doubts have long persisted, however, about whether this interpretation is historically accurate.

James Wilson did not participate in *Calder v. Bull*—at least not in its decisive final stages. By the time *Calder* was argued before the Supreme Court in February of 1798, Wilson had left Pennsylvania and was running from his creditors. When the Justices finally issued their seriatim opinions on August 8, 1798, Wilson was holed up in a sweltering boarding room in Edenton, North Carolina, struggling to hang on to his life. He died less than two weeks later. Yet Wilson was familiar with the legal issues presented in *Calder*, including the meaning of

1. U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed); U.S. CONST. art. I, § 10 ("No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

2. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–92 (1798) (opinion of Chase, J.); *id.* at 396–97 (opinion of Paterson, J.); *id.* at 399–400 (opinion of Iredell, J.).

"ex post facto law." He was present in Philadelphia on February 7, 1797, when the Court first considered the case.[3] Around that time, in fact, he had written an angry letter to members of Congress on behalf of the Illinois-Wabash Company, warning them that any ex post facto law "affecting life, liberty or property" was unconstitutional and void.[4] Unlike the other Justices, Wilson also had first-hand knowledge of what transpired in Philadelphia when the ex post facto clauses were added to the Constitution.[5]

The fact that Wilson did not deliver an opinion in *Calder v. Bull* is one of the great missed opportunities in early American law. *Calder* has come to be known not only for its specific holding on ex post facto laws, but also as the first case in which two members of the Court—Chase and Iredell—engaged in an extended jurisprudential debate over the role of natural law, natural rights, and judicial review in legal interpretation. In the last few decades, *Calder* has become a staple of constitutional law casebooks for just this reason.[6] One of the most sophisticated legal theorists of his generation, Wilson undoubtedly would have relished the opportunity to engage in this debate, aspects of which he touches upon in his *Law Lectures*. Furthermore, there are reasons to think that Chase, Iredell, and Paterson were keenly aware of Wilson's absence on the bench when they decided *Calder*, and may have written their opinions with Wilson at least partly in mind.[7]

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3. 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789–1800, at 285 (Maeva Marcus, ed. 1985–2007) [hereinafter DHSC]. On a motion by Chauncey Goodrich, the Court decided to carry the case over to the next term. *Id.* No reason is apparent, but eight weeks earlier, Goodrich, a Congressman from Connecticut, wrote to Treasury Secretary Oliver Wolcott describing the distress in Philadelphia caused by the financial panic of 1796. "This place furnishes indication of great depravity; bankruptcies are frequently happening. Mr. Morris is greatly embarrassed. 'Tis said that Nicholson has fled to England; that Judge Wilson has been to gaol and is out on bail; but there are so many rumors I vouch for the credit of neither." NATALIE WEXLER, A MORE OBEDIENT WIFE: A NOVEL OF THE EARLY SUPREME COURT 276 (2006).

4. *See infra* notes 284–86 and accompanying text.

5. Wilson and Oliver Ellsworth, who also did not participate in the decision in *Calder v. Bull*, were the only members of that Court who were present at the Philadelphia Convention on August 22 when the prohibition on federal ex post facto laws was proposed and discussed. Ellsworth left the convention by August 27, however, hence he was not present for the discussion and vote on state ex post facto laws on August 28 and 29. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS]. Although Paterson played a significant role in the convention, he left Philadelphia sometime before August 21, returning in September in time to sign the final document. Thus, Paterson also was not present at the convention when the ex post facto clauses were discussed. *Id.* at 73, 589.

6. *See, e.g.*, RANDY BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 75–77 (2008); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 168–71 (2015); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 453–54 (2001). A more extended treatment of *Calder v. Bull*, which considers the case in the context of both the ex post facto clauses and due process principles, can be found in MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 1449–56 (2013).

7. *See, e.g.*, *Calder*, 3 U.S. (3 Dall.) at 393 (opinion of Chase, J.) (responding to an argument, which Wilson apparently made in a conference with the other Justices, that "the words, *ex post facto law*, have a precise and accurate meaning" known to lawyers and supported by English legal authorities, including Coke's Reports).

In 1947, Professor William Winslow Crosskey implied as much in an extraordinary article in *The University of Chicago Law Review*.[8] In the course of forcefully defending the view that the Constitution's ex post facto clauses were meant to apply to *all* retrospective laws, civil as well as criminal, Crosskey made the further claim that *Calder*'s contrary holding was knowingly made upon "flimsy grounds" in order to benefit Wilson, whose highly-leveraged land investments had recently come crashing down as his debts came due and his credit dried up.[9] On Crosskey's telling, Chase, Iredell, and Paterson decided to exclude retroactive civil legislation from the scope of the Constitution's ban on ex post facto laws out of a personal concern for Wilson, who, they hoped, might then be able to benefit from retroactive bankruptcy legislation pending in Congress that otherwise would be unconstitutional. *Calder* was a useful means to achieve this result. A "state probate case providently come from Connecticut,"[10] it would enable Wilson's fellow Justices to declare "that national bankruptcy relief for such men as their sick and unfortunate associate was not in violation of the Constitution he had helped to make."[11]

At first glance, Crosskey's claim about Wilson's indirect role in *Calder* seems outlandish. The idea that three Supreme Court Justices would deliberately decide a case in bad faith in order to enable one of their colleagues to benefit from bankruptcy protection under a pending federal bill is likely to strike many readers as bizarre and implausible. One problem with simply dismissing this surprising claim out of hand, however, is that, on the merits, Crosskey's argument about the original meaning of "ex post facto law" is extremely strong. There is, in fact, a mountain of evidence indicating that ex post facto laws were commonly understood at the founding to include both civil and criminal laws—and that Chase, Iredell, and Paterson were aware of this fact.[12] Although Crosskey did not realize the nature or extent of this connection, moreover, the extensive land speculation in which Wilson and other founders were deeply engaged *was* evidently at the heart of early controversies over ex post facto laws. In fact, protecting vested rights in western lands may have been one of the major reasons why the ex post facto clauses were added to the Constitution in the first place.[13] As a result, many genuine questions can be raised about what the Justices were up to in *Calder*, and what role, if any, Wilson's land speculations may have played in their opinions in that case.

To explore these questions, it is useful to begin by recalling Crosskey's original arguments about ex post facto laws before turning to Wilson's extensive

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8. William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947).

9. *Id*. at 560, 563.

10. *Id*. at 563.

11. *Id*.

12. *See infra* notes 19–28 and accompanying text. *See also* Parts II, III.

13. Crosskey's own explanation for the origin of these clauses relied on other more familiar reasons, such as the framers' antagonism toward tax relief laws, debtor relief laws, and pine barren laws. *See* Crosskey, *supra* note 8.

investments in undeveloped lands and considering how a better understanding of those speculative enterprises might shed light on Crosskey's principal claims. Crosskey was not the first person to argue that the Supreme Court misconstrued the meaning of "ex post facto law" in *Calder v. Bull*. In 1829, Justice William Johnson attached a long and detailed note to his opinion in *Satterlee v. Matthewson* in which he maintained that *Calder's* interpretation of ex post facto laws was profoundly mistaken.[14] Four years later, Joseph Story paid tribute to Johnson's research by acknowledging that "ex post facto laws, in a comprehensive sense, embrace all retrospective laws, whether they are of a civil or a criminal nature."[15] Story conceded that, in a case of first impression, Johnson's criticisms of *Calder* "would be entitled to grave consideration."[16] In 1836, a prominent Philadelphia attorney, Charles J. Ingersoll, argued that by "adopting Blackstone's erroneous [view]" that ex post facto laws are confined to criminal laws, American courts had "impaired, if not destroyed, an excellent conservative guard provided by the constitution, and, in fact, a principle of natural justice."[17] Finally, in 1921 Oliver P. Field wrote a short essay the *Michigan Law Review*, which reinforced many of Johnson's conclusions and anticipated Crosskey's arguments about how ex post facto laws were construed in the Virginia and North Carolina ratifying conventions.[18]

Despite these and other precedents, it was Crosskey's article and the book chapter into which it grew that renewed interest in the original understanding of "ex post facto law" and gave that topic new prominence. One reason was the sheer amount and quality of historical evidence Crosskey offered about how the phrase "ex post facto" was used during the founding era. Another was his arresting style and tone.

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14. *See* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 416, 681 (1829). Two years earlier, Johnson made a similar argument in *Ogden v. Saunders*. *See* 25 U.S. (12 Wheat.) 213, 286 (1827).

15. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 219–20 (5th ed. 1891) (1833).

16. *Id.*; *see also* Eastern Enterprises v. Apfel, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring) (relying in part on Story's *Commentaries* to suggest that the narrow interpretation of "ex post facto law" in *Calder v. Bull* was mistaken and should be reconsidered in an appropriate case).

17. STRICTURES ON THE LETTER OF CHARLES J. INGERSOLL, ESQ., TOUCHING THE RIGHT OF A LEGISLATURE TO REPEAL A CHARTER, WITH AN APPENDIX, CONTAINING THE LETTERS OF MR. INGERSOLL, OF MR. DALLAS, OF MR. FORWARD, AND OF MR. BIDDLE, IN ILLUSTRATION OF THE SUBJECTS DISCUSSED 61 (Baltimore, 1836). Ingersoll represented Pennsylvania in the U.S. House of Representatives from 1813 to 1815 and then again from 1841 to 1849. He also served as the U.S. Attorney for Pennsylvania from 1815 until 1829, when he was removed by President Andrew Jackson. His father, Jared Ingersoll, was a Pennsylvania delegate to the Continental Congress and the Constitutional Convention, who later became one of a small group of attorneys who dominated the Supreme Court bar during its first decades. Jared Ingersoll also served as Attorney General of Pennsylvania from 1791 to 1800 and from 1811 to 1816, and as the U.S. Attorney for Pennsylvania from 1800 to 1801. Crosskey's claim that "there hardly can be a doubt that . . . *Calder v. Bull* came to the profession, in 1798, as something of a surprise," *supra* note 8, at 558, seems best evaluated with reference to lawyers like Jared Ingersoll, along with other early leaders of the Supreme Court bar, such as Charles Lee, William Lewis, William Rawle, and William Tilghman. As I discuss below, there is substantial evidence which suggests that all these lawyers understood ex post facto laws to include retroactive civil laws. *See infra* notes 249–50, 304–12 and accompanying text.

18. Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315 (1921).

With respect to the former, Crosskey identified at least ten categories of evidence in support of his thesis that ex post facto laws were originally understood to include both civil and criminal matters: (1) early American newspapers;[19] (2) contemporaneous commentaries on the Constitution;[20] (3) eighteenth-century British treatises and cases;[21] (4) debates in the state ratifying conventions;[22] (5) debates in the First Congress;[23] (6) early state and federal case law;[24] (7) the Justices' opinions in *Calder v. Bull*;[25] (8) congressional proceedings relating to the first Bankruptcy Act of 1800;[26] (9) evidence of how the phrase "ex post facto" was understood in the decades after *Calder* was decided;[27] and (10) Justice

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19. Crosskey cited and in some cases quoted liberally from thirteen newspaper items published from 1783 to 1787. Based on my review of these sources, all of them do appear to use or presuppose a broad meaning of "ex post facto" laws. I have located six other newspaper items published from 1782 to 1787 that use the phrase "ex post facto." Four of them corroborate Crosskey's thesis, and the other two are indeterminate.

20. Crosskey relied on three commentaries in his 1947 article: (1) an item in *The [Boston] Massachusetts Centinel* on November 28, 1787 (which was reprinted in other newspapers); (2) James Madison's brief discussion of ex post facto laws in *The Federalist No. 44*; and (3) a letter from Roger Sherman and Oliver Ellsworth to the Governor of Connecticut, Samuel Huntington, dated September 26, 1787. In his 1953 book chapter, he added three more sources to this list. *See infra* note 40. By drawing on easily searchable databases, primarily the digital edition of *The Documentary History of the Ratification of the Constitution*, I have identified at least thirty-seven additional commentaries which use or discuss the phrase "ex post facto." Although a few of them appear to be inconclusive or equivocal, the vast majority of them appear to support Crosskey's thesis. None of the new ratification sources I have located squarely contradicts it.

21. Crosskey identified six eighteenth-century British treatises and one British case which, he claimed, either supported or were consistent with a broad construction of "ex post facto law": (1) GILES JACOB, LAW DICTIONARY (1739); (2) WILLIAM SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES (7th ed. 1820); (3) CHARLES FEARNE, AN ESSAY ON CONTINGENT REMAINDERS (8th ed. 1824) (1772); (4) POWELL, AN ESSAY UPON THE LEARNING OF DEVISES (1788); (5) 1 WILLIAM BLACKSTONE, COMMENTARIES *46; (6) RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 641 (1792); and (7) Wilkinson v. Meyer, 2 Ld. Raym. 1350, 1352 (1724). My preliminary review of these sources suggests that they, too, either support Crosskey's argument to varying degrees or are indeterminate.

22. Crosskey focused his attention on two state ratifying conventions: Virginia and North Carolina. His failure to discuss the New York ratifying convention was strongly criticized by Ernest J. Brown. *See infra* notes 47–48 and accompanying text.

23. With respect to the First Congress, Crosskey drew attention primarily to the debate over James Madison's proposal to discriminate between primary and secondary holders of public securities, which was roundly criticized at the time on the grounds that any such law would be an ex post facto law. *See generally* 2 ANNALS OF CONGRESS 1196–1266 (February 11 to February 18, 1790).

24. Crosskey pointed to seven cases: (1) Turner v. Turner's Executrix, 8 Va. (4 Call) 234, 237 (1792); (2) Elliot's Executor v. Lyell, 7 Va. (3 Call) 268, 286 (1802); (3) Den v. Goldtrap, 1 N.J.L. 315, 319 (1795); (4) Taylor v. Reading (unreported New Jersey case mentioned in *State v. Parkhurst*); (5) State v. Parkhurst, 9 N.L.J. 427, 444 (1802); (6) Warder v. Bell, 1 Yeates 531, 532 (Pa. 1795) (argument of W. Rawle); and (7) Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795).

25. *See generally* Crosskey, *supra* note 8, at 558–60.

26. In particular, Crosskey pointed to the fact that Delaware Senator James A. Bayard opposed the Bankruptcy Act on the grounds that it violated the ex post facto clause of Article 1, Section 9. *See* Crosskey, *supra* note 8, at 562 (citing 9 ANNALS OF CONGRESS 2577–79 (1799)).

27. Crosskey relied on two pieces of evidence to illustrate how ex post facto laws continued to be understood even after the decision in *Calder*: (1) an opinion by Pennsylvania Supreme Court Justice Hugh Henry Brackenridge in Stodart v. Smith, 5 Binney 335 (Pa. 1812); and (2) an 1813 letter from Thomas

Johnson's criticisms of *Calder* in *Satterlee* and *Ogden v. Saunders*.[28] The combined effect of all of this evidence was powerful. Few if any readers would deny that Crosskey makes a strong *prima facie* case that the original meaning of "ex post facto law" encompassed retroactive civil laws.

Nevertheless, with only one exception, Crosskey did not consider *any* evidence related to the founding-era controversies over western lands with which Wilson was intimately involved—for example, the territorial and jurisdictional disputes involving the Indiana, Georgia, and Illinois-Wabash Land Companies, which eventually gave rise to *Hollingsworth v. Virginia*,[29] *Fletcher v. Peck*,[30] and *Johnson v. M'Intosh*,[31] respectively. The lone exception was Crosskey's discussion of *Vanhorne's Lessee v. Dorrance*,[32] a case growing out of an old border dispute between Pennsylvania and Connecticut over the Wyoming Valley lands in northeast Pennsylvania. Wilson served as the lead attorney for Pennsylvania in the 1782 Wyoming Valley litigation, the only case ever argued under the elaborate adjudication procedure outlined in Article IX of the Articles of Confederation. After forty-four days of proceedings in Trenton, New Jersey, held "in an atmosphere of acrimony which at times threatened bloodshed,"[33] Wilson won the case, thereby securing these lands for Pennsylvania—as well as his own titles to some of the lands at issue.[34] Years later, Wilson closely followed the proceedings in *Dorrance*, which was argued before Justice William Paterson in the United States Circuit Court for the District of Pennsylvania in April and May 1795.[35] In his 1797 letter to Congress on behalf of the Illinois-Wabash Company, Wilson quoted extensively from Paterson's grand jury charge in *Dorrance*.[36] In fact, it seems likely that he or other land company speculators may have arranged

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Jefferson to Isaac M'Pherson. In the course of my research, I have discovered many similar examples. *See, e.g.*, Letter from Thomas Jefferson to John Moody (Oct. 26, 1808), in FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/99-01-02-8953 [https://perma.cc/TYU5-PVAK].

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

29. 3 U.S. (3 Dall.) 78 (1798).

30. 10 U.S. (6 Cranch) 87 (1810).

31. 21 U.S. (8 Wheat.) 543 (1823).

32. 2 U.S. (2 Dall.) 304 (1795).

33. *See* GEOFFREY SEED, JAMES WILSON: SCOTTISH INTELLECTUAL AND AMERICAN STATESMEN 185 (1978).

34. *Id.* A fascinating record of Wilson's arguments in this case, which includes references to Blackstone, Grotius, Rutherford, Pufendorf, Vattel, and other authorities, was compiled at the time by Cyrus Griffin and was later published in *The Papers of Thomas Jefferson*. *See The Connecticut-Pennsylvania Territorial Dispute*, *in* 6 THE PAPERS OF THOMAS JEFFERSON 474–507, 488–492 (Julian P. Boyd ed., 1950) [hereinafter PTJ]. The same volume also includes a detailed account of the arguments given in the case by another founder, William Samuel Johnson, on behalf of Connecticut. *Id.* An abbreviated form of Wilson's argument was also published in the *Connecticut Courant* on January 25, 1785. *See* 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS 192 n.207 (1971). The *Connecticut Courant* account of these proceedings flips the order of presentation, printing Johnson's argument first, and adds caustic commentary critical of Wilson's argument. *See Proceedings of the Court at Trenton in the Controversy between Connecticut and Pennsylvania*, CONN. COURANT & WKLY. INTELLIGENCER, Jan. 25, 1785, at 1.

35. 8 DHSC, *supra* note 3, at 477.

36. *See infra* notes 283–85 and accompanying text.

for Justice Paterson's opinion to be published as a pamphlet in Philadelphia in 1796. Although Crosskey leaned heavily on *Dorrance*, which implicitly endorsed a broad meaning of "ex post facto law,"[37] he did not draw attention to any of these links to Wilson in his discussion of that case. Instead, Crosskey merely used *Dorrance* to bolster his claim that Paterson was engaged in a peculiar form of backsliding when he joined Justices Chase and Iredell in narrowing the scope of the Constitution's ban on ex post facto laws in *Calder*.[38]

In his 1953 two-volume treatise, *Politics and the Constitution in the History of the United States*, Crosskey revised his 1947 article on the ex post facto clauses, adding new sources and new arguments related to the second, sixth, seventh, and tenth categories of evidence listed above.[39] For example, he identified three more commentaries on the Constitution that supported his broad reading of ex post facto laws.[40] He also identified seven new state cases from the 1780s and 1790s in which the phrase "ex post facto" was given a broad interpretation, including four from Maryland, two from Pennsylvania, and one from South Carolina.[41] Nevertheless, the basic database from which Crosskey drew his argument remained largely the same. For the second time in six years, Crosskey made Wilson's pressing need for retroactive bankruptcy protection the centerpiece of his explanation for why Justices Chase, Iredell, and Paterson elected to narrow the scope of "ex post facto law" in *Calder*.[42] In fact, he gave this explanation more prominence by adding a new subtitle to his essay: "A Chapter of Judicial Statesmanship from the Eighteenth Century"[43]—apparently meant to imply that *Calder* was more an exercise in strategic "statecraft" than sound jurisprudence.

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37. *See Dorrance*, 2 U.S. at 319–20.

38. *See* Crosskey, *supra* note 8, at 557–60.

39. *See* WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 324–51 (1953).

40. The three new sources were: (1) "An Old State Soldier" in *The [Richmond] Virginia Independent Chronicle* on March 19, 1788; (2) "Civis" in *The [Charleston] Columbian Herald* on February 4, 1788; and (3) Oration by David Ramsay in *The [Charleston] Columbian Herald* on June 5, 1788.

41. Crosskey's seven new cases were: (1) Helm's Lessee v. Howard, 2 H. & McH. 57, 96 (Md. 1784); (2) Donaldson v. Harvey, 3 H. & McH. 12, 17 (Md. 1790); (3) McFadon's Executor v. Martin, 3 H. & McH. 153, 166 (Md. 1793); (4) Dunlop v. Funk, 3 H. & McH. 318, 319 (Md. 1793); (5) Ross's Executionors v. Rittenhouse, 1 Yeates 443, 453 (Pa. 1795) (argument of W. Lewis); (6) Lessee of Joy v. Cossart, 1 Yeates 50, 54 (Pa. 1791); and (7) Osborne v. Huger, 1 S.C.L. (1 Bay) 179 (1791). Collectively, Caleb Nelson, Nathan Chapman and Michael McConnell, and Evan Zoldan have identified fifteen additional cases from this period which appear to presuppose or rely upon a broad conception of ex post facto laws. *See generally* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012); Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WISC. L. REV. 727 (2015). In my own search for additional evidence, I have located one colonial case, one British case, and four American cases, none of which Crosskey or other commentators appear to have considered in this context. All told, then, there appear to be approximately three dozen founding era cases which contradict the claim made by Justices Chase, Iredell, and Paterson in *Calder v. Bull* that the phrase "ex post facto law" was understood at the time to be a technical term limited to retroactive criminal laws. Although falling outside the scope of this Article, these striking findings merit further investigation.

42. CROSSKEY, *supra* note 39, at 348–49.

43. *Id*. at 324.

Once again, however, Crosskey neglected to consider whether Wilson's activities as a land speculator might shed a direct light on the original meaning and scope of "ex post facto law." In effect, Wilson remained a passive third-party beneficiary of the sensational story Crosskey told about Chase, Iredell, and Paterson. The idea that Wilson might have played an active role in shaping how these Justices and other members of the founding generation conceived of ex post facto laws does not seem to have crossed his mind.

After an initial wave of largely enthusiastic reviews,[44] Crosskey's treatise was sharply criticized by a number of influential scholars, including Irving Brant, Ernest J. Brown, Julius Goebel, Jr., and Henry M. Hart, Jr.[45] Only two of these reviewers ventured to say anything of substance about Crosskey's discussion of ex post facto laws, however, and none of them addressed his peculiar explanation of *Calder* involving Wilson's pressing need for bankruptcy protection. Brant primarily took issue with Crosskey's interpretation of James Madison's *Notes of the Debates in the Federal Convention* and his intimation that Madison and Edmund Randolph deliberately misrepresented the meaning of the ex post facto clauses at the Virginia ratifying convention.[46] Brown chastised Crosskey for neglecting to discuss the fact that the New York ratifying convention had adopted a resolution affirming that the ban on ex post facto laws "extends only to Laws concerning Crimes."[47] Brown asked: "How can he omit this from a statement which purports to give a complete history down to the decision in *Calder v. Bull*?"[48] Apart from these objections, none of Crosskey's critics challenged his thesis about ex post facto laws or his explanation of *Calder* involving Wilson. In fact, while noting that Crosskey's argument was "characteristically tendentious," Brown conceded that he "does make a better case [about ex post facto laws] than many others."[49]

In a short chapter draft found among his papers upon his death and published posthumously in *The University of Chicago Law Review*, Crosskey added more fuel to the fire by making a series of explosive allegations about Madison's *Notes* in connection with the ex post facto and contract clauses.[50] Crosskey argued that Madison's records for August 22, 28, and 29 (when the ex post facto and

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44. *See, e.g.*, Charles E. Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24 (1953); Arthur L. Corbin, Book Review, 62 YALE L.J. 1137 (1953); Edward Dumbauld, Book Review, 11 WM. & MARY Q. 104 (1954); Walton H. Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79 (1953); Robert G. McCloskey, Book Review, 47 AM. POL. SCI. REV. 1152 (1953).

45. *See* Irving Brant, *Mr. Crosskey and Mr. Madison*, 54 COLUM. L. REV. 443 (1954); Ernest J. Brown, Book Review, 67 HARV. L. REV. 1439 (1954); Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450; Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954).

46. *See* Brant, *supra* note 45, at 447–49.

47. Brown, *supra* note 45, at 1455 (quoting 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 194 (1894)).

48. *Id.*

49. *Id.*

50. *See* William Winslow Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248 (1968). It is unclear whether the title of this article was selected by Crosskey, but that seems likely, given his pattern

contracts clauses were discussed) and September 12–15 (when the contracts clause was discussed and changes to the Committee of Style report were considered) were inaccurate and unreliable. More pointedly, Crosskey argued that a remark about Blackstone's understanding of ex post facto laws that Madison attributes to John Dickinson on August 29 was probably "a later Madisonian fabrication."[51] He also suggested that Madison may have deliberately misrepresented the precise form in which John Rutledge moved to prohibit the states from passing any ex post facto laws on August 28, thereby seeking to establish the distinction Madison favored between "retrospective laws" and "ex post facto laws."[52] Finally, Crosskey suggested that Madison may have suppressed the fact that George Mason moved unsuccessfully to add the word "previous" after "obligation of" in the contracts clause on September 14 or September 15, thereby seeking to reinforce Madison's own "retrospective-only" interpretation of the contracts clause, along with his "criminal-only" interpretation of the ex post facto clauses.[53] Despite the fact that Wilson plays a prominent role in standard convention histories of the ex post facto and contract clauses,[54] and despite the fact that Wilson has long been considered a likely author of the contracts clause,[55]

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of harsh rhetoric about Madison. The article may have been drafted at least partly as a response to the criticisms of Crosskey made by Irving Brant. *Cf.* Brant, *supra* note 45, at 447–49.

51. Crosskey, *supra* note 50, at 252.

52. *Id.* at 249–50. Madison's *Notes* indicate that Rutledge formulated his motion on August 28 in terms of a ban on "retrospective laws," even though, Madison acknowledged, "the printed Journal [said] 'ex post facto.'" 2 FARRAND'S RECORDS, *supra* note 5, at 440. Marginal notes kept by George Washington and David Brearly corroborate the Journal's rendition, however, suggesting that Madison's version was inaccurate. *Id.* at 440 n.19; *cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (opinion of Chase, J.) (drawing a distinction between ex post facto laws and retrospective laws, and maintaining that only the former are prohibited).

53. For a record of Mason's motion, see *Mason's Memorandum Notes on Proposed Changes in the Committee of Style Report*, *in* 3 THE PAPERS OF GEORGE MASON 983, 984 (Robert A. Rutland ed., 1970) [hereinafter PGM]. In the same list of proposed changes, Mason included striking out the bans on ex post facto laws in Article I, Section 9 and Article I, Section 10, respectively. Mason records that both of these motions were refused. *Id.* at 983–84.

54. According to Madison's *Notes*, Wilson participated in the debates about these clauses on four separate occasions, more than any other delegate. *See* 2 FARRAND'S RECORDS, *supra* note 5, at 376 ("Mr. Wilson was against inserting anything in the Constitution as to ex post facto laws. It will bring reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."); *id.* ("Mr. Wilson. If these prohibitions in the State Constitutions have no effect, it will be useless to insert them in this Constitution. Besides, both sides will agree to the principle and will differ as to its application."); *id.* at 440 (observing that "Mr. Wilson was in favor of Mr. King's motion" concerning the contracts clause); *id.* (observing that Wilson responded to Mason's objections to the contracts clause by stating: "The answer to these objections is that *retrospective* interferences only are to be prohibited.").

55. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, at 151 (1819) ("The tradition is that Mr. Justice Wilson, who was a member of the Convention, and a Scottish lawyer, and learned in the civil law, was the author of this phrase."); JOHN M. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES, 206, 214–28, especially 216 (1879) ("The peculiar phraseology of the 'obligation' clause has for many years been ascribed to Judge Wilson"); Margaret C. Klingelsmith, *James Wilson*, in 1 GREAT AMERICAN LAWYERS 183 (William Draper Lewis ed., 1907) ("[Wilson] is the reputed author of the 'obligations clause,' which is supposed to have its origin in the Roman law."); S.G. FISHER, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES 263–64

Crosskey largely ignored Wilson in his account of what transpired at the convention with respect to these clauses. Crosskey did make two passing references to Wilson,[56] but his primary focus lay with other delegates, such as Madison, Dickinson, and Mason.

Crosskey's accusations about the integrity of Madison's *Notes*, which were not limited to these clauses, were vigorously disputed and allegedly put to rest by James Hutson, among others.[57] However, in her award-winning book, *Madison's Hand*, Professor Mary Sarah Bilder makes a powerful case that *all* of Madison's notes from August 22 to September 17 were likely revised sometime after the fall of 1789 or the spring of 1790.[58] The precise timing of these revisions may be unknowable, yet it has tantalizing implications for constitutional historians. One pertinent reason is that Madison relied on a narrow or "criminal-only" reading of "ex post facto law" on two widely-publicized occasions in June 1788[59] and February 1790,[60] thus giving him an apparent motive to recast what actually transpired in the summer of 1787. Particularly in light of Professor Bilder's discoveries, one might reasonably wonder whether these subsequent events shaped Madison's recollection of what occurred at the Philadelphia convention.[61]

(1904); GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 154–58 (1912); WARREN B. HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION 36–38, 47, 89, 116 (1919); BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 11–12 (1938); *James Wilson*, *in* 15 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 425 (B.A. Konkle ed., 1934).

56. *See* Crosskey, *supra* note 50, at 248 (noting that Wilson supported King's motion on August 28); *id.* at 249 (noting that Wilson "pointed out that 'the answer to [the] objections [being urged was] that *retrospective* interferences only [were] to be prohibited.").

57. *See, e.g.*, JAMES H. HUTSON, SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONSTITUTION of 1787, at xx–xxvi (1987); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 24–35 (1986); James H. Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 411 (1987).

58. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015). For two of many important reviews of this seminal book, see Jonathan Gienapp, *Notes on the State of the Constitution*, 74 WM. & MARY Q. 145 (2017); Jack N. Rakove, *A Biography of Madison's Notes of Debates*, 31 CONST. COMMENT. 317 (2016).

59. *See* Crosskey, *supra* note 8, at 547–51 (recounting the representations about ex post facto laws made by Madison and Randolph at the Virginia convention); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 473, 477–81 (Jonathan Elliot ed., 1827) (statements of Madison and Randolph at the convention concerning ex post facto laws). The entire proceedings of the Virginia convention, including the discussions of ex post facto laws, were recorded by David Robertson and published in 1788. *See* DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA (Petersburg, Hunter and Prentis 1788).

60. *See* February 18, 1790, *in* 2 ANNALS OF CONGRESS 1266 (Statement of Representative Madison) (responding to constitutional criticisms of his proposal to discriminate between primary and secondary holders of public securities by arguing that "*ex post facto* laws relate to criminal, not civil cases").

61. Although she is careful to avoid making ungrounded accusations, Professor Bilder rightly maintains that these sections of Madison's *Notes*, in particular, should be used with extreme caution. *See* BILDER, *supra* note 58, at 141 (observing that Madison's notes from August 22 to September 17 are "particularly unreliable"). Nevertheless, it remains true that judges and other commentators have often relied uncritically on Madison's *Notes* to ascertain the original understanding of constitutional provisions, including the ex post facto and contracts clauses. In 1854, for example, the Supreme Court leaned heavily on Madison's account of what transpired on August 29 to prove that ex post facto laws were exclusively criminal, thereby distancing itself from Johnson's 1829 opinion in *Satterlee*. *See*

Collectively, all of the foregoing observations raise a number of intriguing questions. For example: Were Crosskey's claims about the original meaning of "ex post facto law" correct? Did Chase, Iredell, and Paterson decide *Calder* in bad faith in order to assist Wilson? Did Madison misrepresent what happened when the ex post facto clauses were discussed at the Philadelphia convention? If so, then are the remarks Madison attributes to Wilson and other delegates in these debates inaccurate and unreliable? What role did the ex post facto clauses play in Wilson's understanding of natural jurisprudence and the constitutional protection of property and contract rights? Finally, what might a fresh look at this old controversy about the meaning of a technical-sounding Latin phrase in the Constitution teach us about the theory and practice of constitutional originalism?

This Article does not attempt to answer all of these and similar questions. Instead, it seeks to make progress on some of them by examining Wilson's career as a real estate lawyer and land speculator, particularly his activities on behalf of the Indiana, Illinois-Wabash, and Georgia Land Companies. The Article's primary contention is that a close look at the legal disputes in which these companies were involved sheds new light on the original understanding of the ex post facto clauses and lends support to the claims made by Johnson, Ingersoll, Crosskey, and other commentators that the interpretation of "ex post facto law" in *Calder v. Bull* seems questionable. Insofar as these conclusions are valid, they raise a host of challenging interpretive problems about Wilson, Madison, *Calder*, originalism, ex post facto laws, and a variety of related topics. With few exceptions, constitutional scholars have largely ignored the link between early American land companies and ex post facto laws. Furthermore, no study of the period has sought to tie these topics together with Wilson. By bringing these diverse literatures into contact with one another and considering them in light of fresh historical evidence about the original meaning of the ex post facto clauses, this Article seeks to break new ground. Yet it necessarily is only a first step toward a complete understanding of these matters, which requires careful consideration of more topics, evidence, and historical context than can be adequately addressed here.

The remainder of the Article is divided into four parts. Part I summarizes some of the most significant historical background for understanding these questions, including but not limited to Wilson's speculation in western lands, the competing territorial claims made by Virginia and its "landless" mid-Atlantic neighbors, the resulting jurisdictional controversies which consequently delayed ratification of the Articles of Confederation, and the eventual creation of a national domain in the territories ceded by Virginia to the United States. Part II then examines a set

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Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 463 (1854); Hutson, *Creation*, *supra* note 57, at 3–4. More recently, many scholars have followed suit. *See*, *e.g.*, WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787, at 170–72, 182–86 (1899); CHARLES WARREN, THE MAKING OF THE CONSTITUTION 501–03, 553–57 (1928); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 278–81 (1988); Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 517–22 (2003); Nelson, *supra* note 41, at 578–88.

of little-known documentary records connected to these events, which suggests that the interpretation of "ex post facto law" presupposed by Wilson and other founders differed sharply from the narrow construction of that phrase defended by Madison and reinforced by Justices Chase, Iredell, and Paterson in *Calder v. Bull*. These historical records include *Plain Facts*, a 1781 pamphlet outlining the Indiana Company's claims against Virginia; the 1795 act of the Georgia legislature authorizing the sale of Yazoo lands to the Georgia Land Company; and a 1797 Memorial and letter written by Wilson to members of Congress on behalf of the Illinois-Wabash Company, seeking to gain recognition of the company's land claims. Part III turns to a short discussion of *Hollingsworth v. Virginia*, a case which also plainly reveals that ex post facto laws were widely understood at the time to encompass retroactive civil laws. Finally, a brief conclusion summarizes the main points of the Article, draws some tentative lessons, and identifies questions for future research.

I. SOME HISTORICAL BACKGROUND

To appreciate the new evidence of the historical meaning of "ex post facto law" presented in this Article, one must place these documentary records in their proper context. In this Part, I seek to lay the necessary groundwork for this endeavor by providing a summary of Wilson's land speculation and his links to the Illinois-Wabash, Indiana, and Georgia Land Companies; the competing claims to western lands made by Virginia and its landless neighbors; the jurisdictional controversies which held up ratification of the Articles of Confederation; and the series of memorials Wilson and other land company agents submitted to Virginia between 1776 and 1779 and then to Congress between 1780 and 1788. Although previous scholarship has traced the impact of these controversies on the origins of the American republic, no prior investigation has focused attention on Wilson or the specific issue of ex post facto laws.

A. Wilson's Investments in Western Lands

By any measure, Wilson's speculative investments in western lands were extraordinarily extensive.[62] In the first place, he was a shareholder and the primary legal architect of the Illinois-Wabash Company, one of the most significant land ventures in eighteenth-century America. Other prominent founding-era figures who were either shareholders of this company or attorneys who actively represented shareholders included Charles Carroll, Samuel Chase, Tench Coxe, Silas Deane, Lord Dunmore, Thomas Fitzsimmons, Thomas Johnson, Gouverneur Morris, Robert Morris, William Paca, George Ross, and Daniel St. Thomas

62. *See generally* CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798, at 159–68 (1956); JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 15–82 (2007). In this section, I generally follow and expand upon my discussion of Wilson's investment activities in a previous article. *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1110–12 (2014).

Jenifer.[63] Collectively, this influential group included five men who signed the Declaration of Independence (Carroll, Chase, R. Morris, Ross, and Wilson); five men who signed the Constitution (Fitzsimmons, Jenifer, G. Morris, R. Morris, and Wilson); three Supreme Court Justices (Chase, Johnson, and Wilson); and two Governors (Dunmore and Johnson). Incredibly, the company claimed rights to roughly thirty million acres in present-day Ohio, Indiana, and Illinois, of which Wilson's personal share has been estimated between 600,000 and 1 million acres.[64] As historians have documented, these vast territorial claims were a major factor in the political controversies that held up the ratification of the Articles of Confederation until 1781 and delayed the creation of the national domain until 1784.[65] The company's claims to these tracts of land wound their way through the Virginia legislature, Congress, and the courts for decades, until they these claims were finally decided against the company in the landmark case of *Johnson v. M'Intosh*.[66] Wilson served as the president and chief legal officer of the company from around 1779 until his death in 1798.[67]

Wilson also served as a legal advisor and was a shareholder of the Indiana Company, another of the period's most important land companies.[68] The Indiana Company claimed title to 1,800,000 acres of land in present day West Virginia under a deed given to Sir William Johnson by the Six Nations at the Treaty of

63. *See* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 211 (1940) (listing Wilson, Carroll, Chase, Johnson, Morris, Paca, and Smith); THOMAS PERKINS ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION 116–22 (1937) (listing founders and shareholders of the company); Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27 (1936) (same); Merrill Jensen, *The Creation of the National Domain, 1781–1784*, 26 MISS. VALLEY HIST. REV. 323, 324–27 (1939) (listing Chase, Johnson, Morris, and Wilson). The available records of the Illinois and Wabash Companies include two lists of shareholders, one dated May 4, 1781, and the other likely created in the early 1790s. The former lists forty-five shareholders, their ownership shares, and their attorneys. The latter also lists forty-five shareholders (although the two lists are slightly different), but no other information. These records, which were uncovered by Professor Lindsay Robertson, can be found on a website hosted by the University of Oklahoma Law Library. *See* Illinois and Wabash Land Companies, https://digital.libraries.ou.edu/law/ [https://perma.cc/ZYA5-WHTF].

64. For background and figures, see LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005); SMITH, *supra* note 62; WITT, *supra* note 62.

65. *See generally* ABERNETHY, *supra* note 63; JENSEN, *supra* note 63; ROBERTSON, *supra* note 64; 5 DHSC, *supra* note 3; PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787 (1983).

66. 21 U.S. (8 Wheat.) 543 (1823). *See generally* ROBERTSON, *supra* note 64 (chronicling the history of the Illinois-Wabash claims and their resolution in *Johnson v. M'Intosh*).

67. *See* SMITH, *supra* note 62, at 159–68; Jensen, *Creation*, *supra* note 63, at 327. The company was formed in 1778 by the merger of two independent land companies, the Illinois Company and the Wabash Company. It held titles to choice parcels located at the forks of the Illinois, Mississippi, Missouri, Ohio, and Wabash rivers. *See* ROBERTSON, *supra* note 64, at 14–23. Memorials and other primary sources sometimes refer to the company in the singular ("Company") and sometimes in the plural ("Companies"). I follow suit here, varying my usage depending on the context.

68. *See* 5 DHSC, *supra* note 3, at 282 n.50 (documenting that Wilson owned 300 shares in the company, as confirmed by a 1781 list of shareholders).

Fort Stanwix.[69] Other influential proprietors of this company included Tench Coxe, William Temple Franklin, Joseph Galloway, William Grayson, George Morgan, Robert Morris, Thomas Paine, George Read, William Trent, and Samuel and Thomas Wharton. In addition, at various times over the course of three decades, the company's most prominent attorneys, affiants, and political supporters included Benjamin Franklin, Benjamin Harrison, Patrick Henry, William Lewis, James Mercer, Edmund Pendleton, Edmund Randolph, and William Rawle.[70]

Like the Illinois-Wabash claims, the property interests the Indiana Company sought to have recognized were a major source of disagreement in the period leading up to the constitutional convention and the ensuing decade. After several unsuccessful appeals to the Virginia legislature in the late 1770s, both companies turned to the Continental Congress to vindicate their claims. Anticipating the theory later made famous by Justice Sutherland in *United States v. Curtiss-Wright Export Corp*., both companies argued that the United States, not Virginia, had jurisdiction over their claims, because sovereign authority over these territories had passed directly from Great Britain to the United States. Wilson probably had a hand in framing these arguments, which he later refined and amplified in his 1785 essay, *Considerations on the Bank of North America*.[71] Shortly after the Constitution was ratified, shareholders of the Indiana Company announced their intention to pursue their claims in a federal court, and in 1792 the company sued Virginia in the Supreme Court of the United States.[72] The ensuing litigation, *Hollingsworth v. Virginia*, was one of the key cases, along with *Chisholm v. Georgia*, which led to the adoption of the Eleventh Amendment.[73]

Wilson was also the largest individual shareholder of the Georgia Company, one of four land syndicates to which much of present-day Alabama and Mississippi was sold by the State of Georgia in 1795 in the so-called "Great

69. *Id*. at 274.

70. *See generally* ABERNETHY, *supra* note 63; GEORGE E. LEWIS, THE INDIANA COMPANY, 1763–1798: A STUDY IN EIGHTEENTH CENTURY FRONTIER LAND SPECULATION AND BUSINESS VENTURE (1941).

71. Although Justice Sutherland does not quote Wilson in *Curtiss-Wright*, he does so in his book from which much of his *Curtiss-Wright* opinion is derived. *See* GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 39 (1919) (discussing Wilson and quoting five paragraphs from Wilson's essay on the Bank of North America). As Sutherland emphasizes, the theory of collective sovereignty over national lands also can be found in Chief Justice Jay's opinion in *Chisholm*. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (Opinion of Jay, C.J.) ("The Revolution, or rather the Declaration of Independence, found the people already united for general purposes . . . . From the Crown of Great Britain, the sovereignty of their country passed to the people of it, and it was then not an uncommon opinion that the unappropriated lands, which belonged to that Crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people . . . .").

72. 5 DHSC, *supra* note 3, at 281–82. Wilson was listed as a shareholder of the Indiana Company in the first "Bill in Equity" prepared by William Lewis and William Rawle sometime before August 11, 1792. In an amended bill, however, his name is stricken. *See id*. at 299–300, 312.

73. *See generally id*. at 274–351.

Yazoo Lands Sale."[74] The Yazoo land companies were also owned and controlled by many prominent Americans, including two U.S. Senators (James Gunn of Georgia and Robert Morris of Pennsylvania); two U.S. Congressmen (Thomas Carnes of Georgia and Robert Goodloe Harper of South Carolina); two federal judges (Wilson and Nathanial Pendleton, the U.S. District Judge for the District of Georgia); and one territorial governor (William Blount of Tennessee).[75] The series of events leading up to the notorious sale of these lands began in 1789, when the Georgia legislature granted sixteen million acres of the state's western territories to a group of out-of-state speculators, led by Patrick Henry. That venture soon collapsed, however, when the Georgia legislature retroactively directed the state treasurer to accept only gold and silver in payment for the land, "a stipulation the speculators were unable to meet."[76] In 1795, Georgia enacted a new law granting thirty-five million acres to four new companies, including the Georgia Company, in which Wilson had invested $25,000 in exchange for a claim to 75,000 acres.[77] Later, Wilson may have purchased the rights to another 1,000,000 acres of Yazoo land.[78] Controversy over the first sale erupted almost immediately, however, with pointed allegations of corruption and bribery—including some directed at Wilson.[79] In response, Georgia retroactively rescinded the grants in 1796, an act which itself generated significant controversy and, eventually, litigation. The Yazoo grants and their subsequent repeal remained deeply divisive issues in American politics until 1810, when the Supreme Court finally upheld the validity of the grants in *Fletcher v. Peck*.[80]

The list of other land companies, banks, and business ventures with which Wilson was associated as an owner, attorney, or advisor is long and varied. A partial list of these enterprises includes the Cannan Company, Delaware Works, the Great Dismal Swamp Company, the Holland Company, and the Vandalia Company, along with a large number of investments Wilson held in his own right.[81] Wilson was a principal shareholder of the Canaan Company, a joint venture with William Bingham that Wilson helped to establish with the aim of purchasing land on the Susquehanna River in southern New York. Wilson managed the company's legal and business affairs throughout the 1780s, efforts that ultimately led to the creation of the city of Binghamton.[82] Together with his brother-in-law, Mark Bird, Wilson was also was a principal of Delaware Works, a large

74. *See* CHARLES F. HOBSON, THE GREAT YAZOO LANDS SALE: THE CASE OF FLETCHER V. PECK (2016); C. PETER MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK (1966).

75. *See* MCGRATH, *supra* note 74, at 5–6.

76. *Id*. at 5.

77. 5 DHSC, *supra* note 3, at 505.

78. *Id*.

79. *See infra* notes 262–63 and accompanying text.

80. 10 U.S. (6 Cranch) 87 (1810).

81. *See* SEED, *supra* note 33, at 160–77; SMITH, *supra* note 62, at 159–68; WITT, *supra* note 62, at 29–31.

82. SMITH, *supra* note 62, at 161–62.

manufacturing enterprise that owned several mills, forges, and furnaces on land adjacent to the Delaware River. The two men planned to build the company into one of the country's largest nail manufacturers.[83] According to legal historian John Witt, over the course of his career, Wilson also purchased "unsettled lands throughout the northeastern and central parts of Pennsylvania, through the state's Wyoming Valley and Schuylkill and Susquehanna Counties . . . hundreds of thousands of acres along the south side of the Ohio River . . . [and] 56,000 acres in Virginia."[84] "By the end of his career as a speculator," Professor Witt observes, "Wilson's land empire stretched from upstate New York west, in to the Allegheny Mountains of Pennsylvania, to as far south as Georgia and North Carolina."[85] Charles Page Smith adds that "Acre by acre, Wilson's Pennsylvania lands became among the most valuable in America . . . including 21,000 acres in the great Schuylkill coal field. In the mid-nineteenth century, Wilson's lands became once more the object of intense speculation. Eleven thousand acres were sold in 1871 for $3,000,000."[86]

In addition to purchasing rights to undeveloped lands, Wilson also invested in banks, manufacturers, insurance companies, and maritime ventures. One of the original investors in the Insurance Company of North America,[87] Wilson also was the part-owner of two trading vessels: the *Peggy and Nancy*, which traveled to the West Indies, and the *United States*, which attempted unsuccessfully to reach China.[88] More prominently, Wilson was actively involved in the design, operation and management of the Bank of North America, the nation's first national bank. Wilson was one of the bank's first subscribers and directors, and he likely had a major hand in drafting the bank's articles of incorporation. Wilson also became one of the bank's largest debtors, borrowing large sums of money from the bank to finance his land purchases. Finally, Wilson also was intimately involved with the bank's predecessor, the Bank of Pennsylvania.[89] In 1780, he drafted the bank's corporate charter and purchased 5000 pounds of stock in it.[90]

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83. *Id*.

84. WITT, *supra* note 62, at 30.

85. *Id*.

86. SMITH, *supra* note 62, at 402 n.11.

87. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 147 (1913).

88. SEED, *supra* note 33, at 176; FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 57–59 (1958).

89. SEED, *supra* note 33.

90. MCDONALD, *supra* note 88, at 57. On July 5, 1780, Wilson and his partners published a "Plan for the Bank of Pennsylvania" in the *Pennsylvania Gazette*. A draft of the plan in Wilson's handwriting, dated June 25, can be found in the Wilson Papers at the Historical Society of Pennsylvania. As I discuss elsewhere, the draft includes language that anticipates the Necessary and Proper Clause that Wilson later composed while serving on the Committee of Detail. *See* Mikhail, *supra* note 62, at 1112.

B. Virginia, the Middle Colonies, the Continental Congress, and Fort Pitt

It is easy to criticize Wilson for his "reckless speculation" that "verged on mania."[91] As Merrill Jensen observed over eighty years ago, however, two simple but fundamental facts must be kept firmly in mind to place founders like Wilson in their proper context—and to grasp how the aggressive responses to the speculative activities of these men by Virginia, Georgia, and other states generated persistent disputes over ex post facto laws. The first is that land speculation—the real estate investments of "[m]onied individuals and companies, who will buy to sell again,"[92] as Alexander Hamilton put it in a 1790 report to Congress—was "the major get-rich-quick activity"[93] of the period, in which virtually all of the founders were engaged. The second is that the founders were not similarly situated in this common enterprise of buying and selling. As Jensen emphasized, many of the thirteen colonies, "particularly the middle group, Pennsylvania, Maryland, Delaware, and New Jersey . . . had definite western boundaries within which the opportunities for speculation were relatively limited."[94] The residents of these middle colonies were thus at a major disadvantage as compared with the residents of Virginia, North Carolina, Georgia, and other states which claimed ownership of vast, undeveloped western lands. Unlike their counterparts in Pennsylvania and Maryland, for example, Virginians "were able to secure huge slices of land at no particular personal sacrifice" and "received vast grants of land in the West, quite certain that it all lay within the bounds of Virginia, and even more certain that Pennsylvania and Maryland speculators would never receive like favors from the Virginia government."[95] The coordinated efforts of men like Wilson, Chase, Benjamin Franklin, Robert Morris, and other prominent politicians, merchants, and investors from the "landless states" to create and support private land companies, to purchase or otherwise obtain lands directly from Native Americans, to promote strong doctrines of property and contract rights that all states must respect, and to vest ultimate jurisdictional control over western lands in national rather than state institutions, must be viewed against this background.

Under the authority of its 1609 colonial charter, Virginia claimed jurisdiction over an enormous territory, stretching from the Atlantic Ocean to beyond the Mississippi River and including present-day Kentucky, West Virginia, Ohio, Indiana, and Illinois (see Figure 1, reproducing a 1755 map published in London by John Mitchell). Even before the Unites States declared independence in 1776, however, the Indiana and Vandalia Companies, affiliated with Franklin, and the Illinois and Wabash Companies, soon to be united under Wilson's leadership,

91. WITT, *supra* note 62, at 30–31.

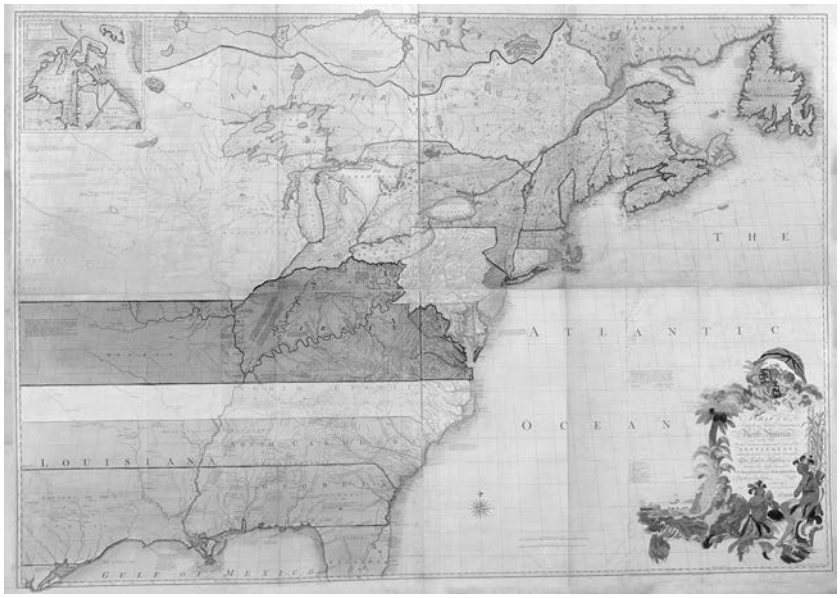
92. Alexander Hamilton, Report on Vacant Lands, 20 July 1790, *in* 6 THE PAPERS OF ALEXANDER HAMILTON 502, 502 (Harold C. Syrett ed., 1962) [hereinafter PAH].

93. Jensen, *Cession*, *supra* note 63, at 28.

94. *Id.*

95. *Id.*

FIGURE 1. A Map of the British and French Dominions in North America (1755)



had also claimed rights to large parcels of unsettled lands in this vast region based on direct grants and purchases from Native Americans. A series of dramatic events triggered by the American Revolution, including disputes related to the drafting of the first state constitutions and the Articles of Confederation, reflected a fundamental tension between competing visions of the future development of the United States. Control over western lands was the critical issue hanging over all of these developments.[96]

From the moment he arrived at the Second Continental Congress, Wilson was actively involved in these controversies, which persisted for the next several decades. Many of his contributions to these formative debates about the nature of the union, sovereignty, and national identity reflect the unusual mix of convictions that would help to define his entire career, including a strong commitment to both implied national powers and individual property and contract rights, a core belief in popular sovereignty, and a preference for federal control over western lands.[97]

96. *See, e.g.*, JENSEN, *supra* note 63, at 150–60.

97. *See*, *e.g.*, *id.* at 168 (observing that "during the writing of the Articles of Confederation, [Wilson] made repeated efforts to give Congress powers which would make it superior to the states . . . Congress, he said, did not represent the states, but the people of the United States"); *id.* at 173 (relating that Wilson objected to a meeting of New England states on the ground that "since continental business was involved, the approval of Congress was required"); *id.* at 175 (recounting that Wilson led the opposition to Thomas Burke's proposal to add a reserved powers clause to the Articles of Confederation).

Wilson entered Second Continental Congress in May 1775, where he first came into contact with many leaders of the American Revolution, including John and Sam Adams, John Hancock, John Jay, Benjamin Harrison, Peyton Randolph, Patrick Henry, and George Washington. At the time, he was generally seen as John Dickinson's protégé, as reflected in the famous description of him sent by John Adams to his wife, Abigail: "There is a young Gentleman from Pennsylvania whose name is Wilson, whose Fortitude, Rectitude, and Abilities, too, greatly outshine his Master's."[98] Once in Congress, Wilson served on a dizzying array of committees: one to arrange for printing two million dollars in paper currency to help supply the Continental Army;[99] another to determine the disposal of maritime prizes captured from an enemy with whom the colonies were not officially at war;[100] a third to prepare an address to the inhabitants of the Colonies in February 1776;[101] and so on.

One area where Wilson soon began to play a prominent role was in the formation and execution of Congress' Indian policy. Together with New Yorkers James Duane, Philip Schuyler, and Philip Livingston, and Virginian Patrick Henry, Wilson was one of five original members of a committee appointed to determine what steps should be taken "for securing and preserving the friendship of the Indian Nations," a body which later became the permanent Committee on Indian Affairs.[102] On July 12, 1775, this committee recommended that Congress divide the colonies into three departments—Northern, Middle, and Southern—and appoint eleven commissioners to supervise Indian relations in these areas, five in the heavily threatened North, and three each for the Middle and Southern departments. These commissioners were to be given the "power to treat with the Indians in their respective departments, in the name, and on behalf of the united colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking part in the present commotions."[103] Along with Franklin and Henry, Wilson was chosen to be Indian Commissioner for the Middle Department. When Franklin and Henry declined to serve, they were replaced by Lewis Morris of New York and Thomas Walker of Virginia. Led by Wilson, this group subsequently negotiated an important peace treaty with the western Indian tribes at Fort Pitt in late October 1775. The Fort Pitt treaty secured peace for the western frontier and enabled Congress to focus attention more directly on the conflict with Great Britain.[104]

Two events at Fort Pitt foreshadowed the intense conflicts over western lands that would occupy Wilson for the remainder of his career. First, the Indiana Company took advantage of this gathering to hold a meeting of its shareholders

98. SMITH, *supra* note 62, at 67.
99. *Id*.
100. *Id*. at 73.
101. *Id*. at 75.
102. *Id*. at 67.
103. *Id*. at 67–68.
104. *Id*. at 68–72.

to chart a new course for the company, which had been coordinating its activities under the umbrella of a larger joint venture, The Grand Ohio or Walpole Company, for several years.[105] Nine of the twenty-two Indiana proprietors met at Fort Pitt for several days beginning on September 21, 1775. They decided to move forward with surveying and more carefully defining the company's 1768 land grant, along with opening a land office to issue warrants and begin selling tracts of land.[106] These and other company activities eventually generated intense opposition by the state of Virginia.

Second, Wilson's own activities at Fort Pitt became the focus of suspicion by prominent Virginians. On September 13, 1775, Thomas Walker and three other Virginians who were present at Fort Pitt wrote a letter to Thomas Jefferson, alleging that "a certain eminent Gentleman" who has "greatly interested himself in this affair" was taking the opportunity to promote the interests of Pennsylvania in its long-standing border dispute with Virginia.[107] Walker warned Jefferson that Wilson was advocating a greater role for Congress in settling this dispute.[108] The following year, Edmund Pendleton sent a similar criticism of Wilson's activities at Fort Pitt to the Virginia Delegates in Congress.[109] Pendleton informed them: "You should be on your guard as to one of your brethren in Congress who was an Indian Commissioner last Summer at Fort Pitt, who stands charged by all the Gentlemen then present of directing every Speech and treaty with the Indians to the particular emolument of Pensylva.; and [doing] many things unworthy [of] his Public Character."[110]

Neither Walker nor Pendleton elaborated on these unflattering charges, so it is difficult to evaluate them. Nevertheless, several facts seem worth highlighting. First, Walker himself served at Fort Pitt in a dual capacity as a member of two delegations, one from Congress and the other from Virginia.[111] In fact, Jefferson referred to Walker as "a Spy" he had sent to the Fort Pitt gathering,[112] suggesting that Walker's criticism of Wilson may have been an unusually exquisite case of the pot calling the kettle black. Furthermore, Walker was the most important figure in Virginia on Indian affairs.[113] He had served as Virginia's agent at the Treaty of Fort Stanwix, and in that capacity he had given his sanction to the deed

105. For an introduction to The Grand Ohio Company, see SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES 113–22 (1939). For more extensive analysis of this company and its relationship to the Indiana Company, see ABERNETHY, *supra* note 63, at 40–58; 2 CLARENCE W. ALVORD, THE MISSISSIPPI VALLEY IN BRITISH POLITICS: A STUDY OF THE TRADE, LAND SPECULATION, AND EXPERIMENTS IN IMPERIALISM CULMINATING IN THE AMERICAN REVOLUTION 119–77 (1916).

106. ABERNETHY, *supra* note 63, at 142–48; LEWIS, *supra* note 70, at 164–66 (1941).

107. Letter from Thomas Walker and Others to Thomas Jefferson (Sept. 13, 1775), *in* 1 PTJ, *supra* note 34, at 244–245.

108. *Id*.

109. Letter from Edmund Pendleton to the Virginia Delegates in Congress (July 15, 1776), *in* 1 PTJ, *supra* note 34, at 462–65.

110. *Id*. at 464-465.

111. *See* ABERNETHY, *supra* note 63, at 141.

112. *Id*.; *see also* Letter from Thomas Walker and Others, *supra* note 107, at 245 (editorial note).

113. ABERNETHY, *supra* note 63, at 68.

given by the Six Nations to the Indiana Company.[114] For obvious reasons, then, Walker and the other Virginians who encountered Wilson and the Indiana Company at Fort Pitt may have felt threatened by what they saw unfolding there. Quite possibly taken aback by Wilson's effectiveness in countering their own efforts "of directing every Speech and treaty with the Indians to the particular emolument" of Virginia, they may have responded to these events by spreading defamatory allegations about him. Without more information, particularly an understanding of Wilson's side of the story, what actually happened at Fort Pitt in September 1775 seems difficult to discern.

What does seem clear is that after the Fort Pitt conference, Wilson continued to play an influential role in the formation of Indian policy, including serving on key committees concerned with Indian affairs. Indeed, Wilson's role in this area was so significant that, according to Charles Page Smith, "he was until his departure from Congress in 1777 the most active and influential single delegate in laying down the general outline that governed the relations of Congress with the border tribes."[115] During this period, Wilson emerged as a prominent skeptic of Virginia's charter claims. He also became a leading champion in Congress of implied national powers, rarely missing an opportunity to strengthen congressional control over the war effort, Indian affairs, public finance, and western lands.[116]

C. The Articles of Confederation and Disputes over Western Lands

On June 8, 1787, Wilson addressed the constitutional convention on the importance of vesting the national government with adequate powers. In doing so, he recalled how the process of drafting the Articles of Confederation had begun on a sound footing, but then had succumbed to the partiality of the individual states:

> Among the first sentiments expressed in the first Cong[ress] was that Virg[inia] is no more. That Mass[achusetts] is no more, that P[ennsylvania] is no more & c. We are now one nation of brethren. We must bury all local interests & distinctions. This language continued for some time. The tables at length began to turn. No sooner were the State Gov[ernments] formed than their jealousy and ambition began to display themselves. Each endeavored to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the Articles of Confederation thro[ugh] Congress & compare the first & last draught of it. To correct its vices is the business of this convention.[117]

114. *Id*. at 59, 70.
115. *Id*. at 72.
116. *See supra* note 97 and accompanying text.
117. 1 FARRAND'S RECORDS, *supra* note 5, at 166–67.

Wilson did not explain how each state "endeavored to cut a slice from the common loaf" as soon as state governments began to be formed. Or, if he did, we have no record of this explanation. Nevertheless, Virginia's insistence on retaining control over its vast western territories, rather than considering these lands to be a shared national domain, was almost surely one of the primary examples he had in mind.

A brief recap of some of the most relevant events of this period helps supply the basic context Wilson likely took for granted when he addressed the convention in this fashion in the summer of 1787. On April 15, 1776, the *Pennsylvania Packet* carried a notice announcing that the Indiana Company would soon begin selling, out of its Pittsburgh office, western lands that Virginia also claimed as its own.[118] Two weeks later, a similar advertisement appeared in the *Pennsylvania Gazette*.[119] These notices prompted Richard Henry Lee and other Virginia delegates to Congress to confront the Indiana proprietors and quickly led to the adoption of two critical measures by Virginia. First, on June 24, the historic "Fifth Virginia Convention," which was meeting to draft a new constitution, passed a resolution declaring "that no purchase of lands within the chartered limits of Virginia shall be made, under any pretence [sic] whatever, from any Indian Tribe or Nation, without the approbation of the Virginia Legislature."[120] Second, this frontal attack on land speculators' freedom of contract was followed by a similar provision of the 1776 Virginia Constitution, which was adopted on June 29. The provision appeared at the end of a key paragraph, which relinquished Virginia's claim to territories claimed by Maryland, Pennsylvania, North Carolina, and South Carolina, but reaffirmed the state's remaining boundaries along the lines established by its 1609 charter. The full text of this paragraph read:

> The territories contained within the Charters erecting the Colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potowmack and Pohomoke, with the property of Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon. *The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of king James the first, in the year one thousand six hundred and nine*, and by the publick treaty of peace between the courts of Great Britain and France in the year one thousand seven hundred and sixty three; unless by act of <this> legislature, one or more territories shall hereafter be laid off, and governments established westward of the Allegheny

118. 1 PGM, *supra* note 53, at 273.
119. *Id.*
120. *Id.* at 313.

> mountains. *And no purchase<s> of land shall be made of the Indian natives but on behalf of the publick, by authority of the General Assembly*.[121]

Virginia's aggressive assertion of its "South Sea" boundaries and its right to prevent purchases of Indian lands in its new constitution ran contrary to the thrust of the first draft of the Articles of Confederation, which Benjamin Franklin had presented in Congress on July 25, 1775. Franklin's draft authorized Congress to settle "all Disputes and Differences between Colony and Colony about Limits or any other cause if such should arise; and [create] new Colonies when proper."[122] In addition, it gave Congress exclusive authority to ascertain the boundaries and make future purchases of Indian lands. Finally, although it prohibited any private persons from "hereafter" buying Indian lands, Franklin's proposal implicitly exempted grants or purchases already made—including those of the Indiana, Illinois, and Vandalia Companies, with which he and other speculators were affiliated.[123]

Franklin's basic approach to these issues was reaffirmed by the second draft of the Articles of Confederation, prepared by John Dickinson and presented to Congress on July 12, 1776. With respect to western lands, the key provisions of the Dickinson Draft were Articles XIV, XV, and XVIII. Collectively, these articles gave Congress the power to define state boundaries, set up new governments in western territories, and settle disputes over competing land claims.[124]

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121. *Id*. at 308–09 (emphasis added).

122. 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 196 (Worthington Chauncey Ford ed., 1906) [hereinafter JCC] (Art. V).

123. *Id*. at 198 (Art. XI).

124. Jensen, *Cession*, *supra* note 63, at 32. Article XIV of the Dickinson Draft read in full:

> A perpetual Alliance, offensive and defensive, is to be entered into by the United States assembled as soon as may be, with the Six Nations, and all other neighbouring Nations of Indians; their Limits to be ascertained, their Lands to be secured to them, and not encroached on; no Purchases of Lands, hereafter to be made of the Indians by Colonies or private Persons before the Limits are ascertained, to be valid: All Purchases of Lands not included within those Limits, where ascertained, to be made by Contracts between the United States assembled, or by Persons for that Purpose authorized by them, and the great Councils of the Indians, for the general Benefit of all the United States.

5 JCC, *supra* note 122, at 549. Article XV read in full:

> When the Boundaries of any Colony shall be ascertained by Agreement, or in the Manner herein after directed, all the other Colonies shall guarantee to such Colony the full and peaceable Possession of, and the free and entire Jurisdiction in and over the Territory included within such Boundaries.

Id. Finally, Article XVIII provided in pertinent part that:

> The United States assembled shall have the sole and exclusive Right and Power of . . . Settling all Disputes and Differences now subsisting, or that hereafter may arise between two or more Colonies concerning Boundaries, Jurisdictions, or any other Cause whatever . . . Regulating the Indian Trade, and managing all Indian Affairs with the Indians—Limiting the Bounds of those Colonies, which by Charter or Proclamation, or under any Pretence, are said to extend to the South Sea, and ascertaining the Bounds of any other Colony that appear to be indeterminate—Assigning Territories for new Colonies, either in Lands to be thus separated from Colonies and hereafter to be purchased or obtained from them—Disposing of all such Lands for the general Benefit of all the

The language of these articles was controversial, however, as well as "equivocal and indefinite,"[125] as John Adams recalled in his diary. As a result, Dickinson's proposals triggered intense debates in Congress for several days, in which Wilson, Chase, and Jefferson all played principal roles.

When Article XIV came up for discussion on July 25, Jefferson vigorously defended Virginia's territorial claims against what he perceived to be unjustified interference by Congress. "The Limits of the Southern Colonies are fixed," he insisted, and he proposed an amendment clarifying that "all Purchases of Lands, not within the Boundaries of any Colony shall be made by Congress," thereby implying, in line with the new Virginia Constitution, that other purchases within those boundaries were off limits.[126] Jefferson also maintained that Virginia and other colonies would "limit themselves" to reasonable boundaries.[127] Chase and Wilson, two future shareholders of the Illinois and Wabash Companies, responded to Jefferson on behalf of the landless states, presumably with the companies' interests also in mind. Chase candidly admitted that the Dickinson Draft intended to restrict the boundaries of the larger states. "No colony has a right to go to the South Sea," he said. "They never had—they can't have. It would not be safe to the rest. It would be destructive to her Sisters, and to herself."[128] Wilson likewise argued that Virginia's claims were "extravagant" and founded on misconceptions:

> Every Gentleman has heard much of claims to the South Sea. They are extravagant. The grants were made upon mistakes. They were ignorant of the Geography. They thought the South Sea within one hundred miles of the Atlantic Ocean. It was not conceived that they extended three thousand miles. Ld. Camden considers the claims to the South Sea, as what never can be reduced to practice. Pennsylvania has no right to interfere in those claims. But she has a right to say, that she will not confederate unless those claims are cut off. I wish the Colonies themselves would cut off those claims . . . .[129]

Wilson may have assumed this warning would convince Virginia to curtail its extensive charter claims, but if so, he was mistaken. When the debate on the Dickinson Draft resumed on August 2, Jefferson and Benjamin Harrison responded aggressively to Wilson and Chase after the latter reiterated his opposition to Virginia's claims. "How came Maryland by its Land, but by its Charter?" Harrison asked. "By its Charter Virginia owns to the South Sea. Gentlemen shall

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> United Colonies—Ascertaining Boundaries to such new Colonies, within which Forms of Government are to be established on the Principles of Liberty . . . .

Id. at 550–51.

125. John Adams, Notes on Debates in the Continental Congress, *in* 6 JCC, *supra* note 122, at 1076 (July 25, 1776).

126. *Id*. at 1076.

127. *Id*. at 1077.

128. *Id*. at 1076–77.

129. *Id*. at 1077.

not pare away the Colony of Virginia."[130] Jefferson echoed the same theme, warning Chase that if he continued to press the matter, Virginia might have to reconsider its older rights to lands also claimed by Maryland, which Virginia had recently relinquished. Like Harrison, Jefferson stood firmly in "protest . . . [against] the Right of Congress to decide, upon the Right of Virginia."[131]

Shortly thereafter, Chase returned to Annapolis to serve as a delegate to the Maryland constitutional convention, where he helped draft its first constitution and bill of rights—including the state's ban on ex post facto laws to which he would appeal two decades later in *Calder v. Bull*.[132] Together with Maryland Governor Thomas Johnson, Charles Carroll, and other delegates affiliated with the Illinois and Wabash Companies, Chase also helped push through a resolution critical of Virginia's jurisdictional claims. On October 30, 1776, the Maryland convention went into a committee of the whole to discuss Virginia's territorial ambitions. Swiftly and unanimously, the committee agreed to a series of resolves contesting Virginia's claims. The most significant of these resolutions declared pointedly:

> that the very extensive claim of the state of Virginia to the back lands hath no foundation in justice, and that if the same or any like claim is admitted, the freedom of the smaller states and the liberties of America may be thereby greatly endangered; this convention being firmly persuaded, that if the dominion over those lands should be established by the blood and treasure of the United States, such lands ought to be considered as a common stock, to be parceled out at proper times into convenient, free and independent governments.[133]

From this point forward, Maryland took the lead in refusing to confederate with the rest of the states until Virginia abandoned its charter claims, a position Delaware, New Jersey, and Pennsylvania also adopted and advanced to varying degrees.[134] On January 6, 1779, for example, Maryland submitted a declaration to Congress in which it maintained that it would not sign the Articles of Confederation unless the western territories were ceded to the United States and all purchases made by individuals before the Revolutionary War were validated.[135] The latter proviso angered George Mason, who was keenly aware of the

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130. *Id.* at 1082–83.

131. *Id.* at 1083. A similar debate unfolded on commercial relations with the Indian tribes. Wilson argued that only the United States should be vested with control of Indian commerce, whether inside or outside of state boundaries. Georgia was willing to shift this authority to Congress, but Virginia stood opposed to this idea and wanted the states to retain control of Indian affairs within their own boundaries. Ultimately, Virginia prevailed, and an amendment reflecting its view was adopted. JENSEN, *supra* note 63, at 155.

132. *See generally* PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS IN 1774, 1775, AND 1776 (Baltimore, James Lucas & E.K. Deaver 1836).

133. *Id.* at 293.

134. *See* JENSEN, *supra* note 63.

135. *See* 13 JCC, *supra* note 122, at 29–30.

fact that Johnson and other Maryland politicians were affiliated with the Illinois and Wabash Companies. "Do you observe the care Governor Johnston [sic] . . . has taken to save this Indian purchase?" Mason wrote to Richard Henry Lee, who was then serving as a Virginia delegate to Congress.[136] Notably, Mason had taken the leading role in drafting Virginia's bill of rights, including a qualified prohibition on retroactive criminal punishments, which later served as a template for other state bans on ex post facto laws and foreshadowed Mason's objections to the Constitution's ex post facto clauses in 1787.[137] Apparently, it did not occur to Mason that an existing contract could not simply be retroactively invalidated, as he successfully lobbied the State of Virginia to do later that year.[138]

A number of other events contributed to the chronology to which Wilson referred in his convention speech on June 8, 1787. For one thing, the provisions of the Dickinson Draft offensive to Virginia's charter claims were eventually struck and replaced with others more favorable to Virginia and the other landed states, including an amendment proposed by Richard Henry Lee, which provided that "no State shall be deprived of territory for the benefit of the United States."[139] More significant was the proposal made by Thomas Burke of North Carolina to add a reserved powers clause to the Articles of Confederation. Writing to North Carolina Governor Richard Caswell in February 1777, Burke warned that "Pennsylvania, Maryland, Jersey and some others are exceedingly jealous of the states whose bounds to the westward are yet ascertained."[140] He added: "I believe they will endeavor by degrees to make the authority of Congress very extensive, and when it shall be fully established and acknowledged, to make such a party in it as will pass resolves injurious to those states who claim to the South Seas."[141] Nine days later, Burke wrote in his diary about another debate he and Wilson had over congressional power. Because desertion from the Continental Army was a matter of common concern, Wilson argued that Congress possessed the implied power to authorize state agents to prevent it—an argument Burke vigorously opposed.[142]

136. 2 PGM, *supra* note 53, at 498; *see also* JENSEN, *supra* note 63, at 38; ROBERTSON, *supra* note 64, at 17.

137. *See generally* 1 PGM, *supra* note 53, at 274–91.

138. *See infra* notes 159–63 and accompanying text.

139. JENSEN, *supra* note 63, at 32–33.

140. Letter from Thomas Burke to the Governor of North Carolina (Feb. 16, 1777), *in* 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 257 (Edmund C. Burnett ed., 1923) [hereinafter LMCC].

141. *Id.*

142. *Id.* at 275–81.

Along with a palpable concern over federal interference with slavery,[143] considerations like these led Burke to propose amending the Dickinson Draft with the language that ultimately became Article II of the Articles of Confederation: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[144] According to Burke's account of the ensuing debate (the only record we have of these proceedings), Wilson and Richard Henry Lee led the opposition to his proposal, which triggered two days of discussion. Their efforts failed, however, and the amendment was eventually adopted by a lopsided margin.[145] Article II would go on to become the heart of Virginia's defense against perceived encroachments in Congress by out-of-state land companies. A revealing illustration can be found in a September 1781 letter Mason wrote to Jefferson. Blasting land company agents for claiming an implied power in Congress to exercise jurisdiction over Virginia's western territories, Mason wrote:

> You have, no doubt, been informed of the factious, illegal & dangerous schemes now in Contemplation in Congress, for dismembering the Commonwealth of Virginia, & erecting a new State or States to the Westward of the Alleghany Mountains. This power, directly contrary to the Articles of Confederation, is assumed upon the Doctrine now industriously propagated "that the late Revolution has transferred the Sovereignty formerly possessed by Great Britain, to the United States, that is to the American Congress" A Doctrine which, if not immediately arrested in its progress, will be productive of every Evil; and the Revolution, instead of securing, as was intended, our Rights & Libert[ies], will only change the Name & place of Residence of our Tyrants. This that Congress who drew the Articles of Union were sensible of & have provided against it, by expressly declaring in Article the 2d that "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation *expressly delegated* to the United States, in Congress assembled."[146]

By contrast, Article II became a recurring source of frustration for Wilson and other land company speculators, who frequently lobbied Congress to exercise implied powers as a means of vindicating their claims to disputed lands. Among other things, this crucial federalism provision also was the main obstacle Wilson had to confront to explain why the Confederation Congress could legitimately charter the Bank of North America, even though a power to incorporate a bank

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143. *Id*. at 278.

144. ARTICLES OF CONFEDERATION OF 1781, art. II.

145. 2 LMCC, *supra* note 140, at 346. According to Burke, the vote on his proposal was eleven to one, with New Hampshire divided and only Virginia voting against it. *Id*. Virginia's vote and Lee's opposition seem puzzling in light of the repeated reliance on Article II and its assertion of reserved powers by Mason, Jefferson, and other leading Virginia politicians over the next decade.

146. 2 PGM, *supra* note 53, at 697 (emphasis original).

was not expressly delegated. As a result, Article II became a catalyst for some of Wilson's most creative political thinking during this period.[147] Tellingly, Randolph later referred to it as one of "the rocks on which the [Confederation] . . . split."[148] All of these developments set the stage for Wilson's determined efforts to expand national power at the constitutional convention, while also enhancing protections of property and contract rights.

D. Land Company Memorials and the Creation of the National Domain

The final piece of background necessary to appreciate the new evidence of the original understanding of ex post facto laws presented in this Article concerns the series of land company memorials submitted to Virginia and Congress from 1776 to 1788, along with the sequence of events leading to the establishment of a national domain in what became the Northwest Territories. In this section, I briefly review these developments, highlighting the most salient events for our purposes.

Once Congress reached an impasse over the Articles of Confederation in the summer of 1776, the Indiana and Illinois-Wabash Companies had little choice but to seek vindication of their rights directly from Virginia. On September 20, 1776, the shareholders of the Indiana Company met in Philadelphia and agreed to petition Virginia to recognize its claims.[149] The company submitted its first such petition to the Virginia House of Delegates eleven days later, but the House ignored it.[150] The company filed similar petitions on June 3, 1777, and December 10, 1778.[151] On each occasion, the company expressed concern that Virginia had questioned its claims and sought Virginia's recognition of its deed from the Six Nations. On December 26, 1778, the Illinois-Wabash Company submitted a similar memorial to the Virginia legislature, seeking implicit recognition of the purchase the company had made from the Piankashaw Indians in 1775.[152] At the end of that year, the House of Delegates finally responded to these petitions by announcing that it would entertain both companies' claims at its May 1779

147. *See*, *e.g.*, THE COLLECTED WORKS OF JAMES WILSON 65–66 (Kermit L. Hall & Mark David Hall eds., 2007) ("It is true, that, by the second article of the confederation, 'each state retains . . . every power, jurisdiction, and right, which is not, by the confederation, expressly delegated to the United States in congress assembled' . . . . [Yet, although] the United States in congress assembled derive *from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does thence follow, that the United States in congress have no other powers, jurisdiction, or rights, than those delegated by the particular states. The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately, but resulting from the union as a whole"); *id*. at 66 (identifying "[t]he purchase, the sale, the defence, and the government of lands and countries, not within any state" to be among the implied powers of the United States).

148. Letter from Edmund Randolph to James Madison (Feb. 29, 1788) *in* 10 THE PAPERS OF JAMES MADISON 543 (Robert A. Rutland & William M.E. Rachal eds., 1975) [hereinafter PJM].

149. LEWIS, *supra* note 70, at 206.

150. *Id*. at 206–07.

151. *Id*. at 210–15.

152. ROBERTSON, *supra* note 64, at 15 and 187, n. 29.

session, inviting them, and all other parties with similar claims, to appear before the assembly at that time.[153]

In June 1779, William Trent presented the Indiana Company's case to a joint session of the Virginia legislature. Notably, he was assisted by Edmund Randolph, who had been hired by the company to provide it with legal counsel.[154] Around this time, Wilson became active in the Illinois and Wabash Companies, so he also may have attended this hearing.[155] In any event, the evidence suggests that an agent of the Illinois and Wabash Companies was present at this fateful gathering, as were agents of the Ohio Company of Virginia and the Transylvania Company.[156]

The hearing did not go well for the companies. According to George Lewis' account of these proceedings, Trent "attacked the Virginia act of 1776, which had the effect of invalidating private land claims based on Indian grants within the state, as *ex post facto*. This measure, he argued, had confiscated the legal title of the Indiana Company to the land granted to it in 1768."[157] Nevertheless, George Mason responded to Trent on behalf of Virginia, arguing *inter alia* that the lands in dispute had been purchased by Virginia from the Six Nations in 1744 at the Treaty of Lancaster and that, in any case, the Indiana Company did not record their deed properly.[158] After both sides were heard, the Virginia legislature sided with Mason and voted to reject the company's claims.

On June 9, the Virginia House of Delegates adopted three resolutions, likely drafted by Mason himself, which were squarely "aimed to destroy the [companies'] claims to the land in question."[159] Among other things, the House of Delegates declared that: (i) Virginia had the exclusive right of preemption of all lands within its territory; (ii) "no person or persons whatsoever have, or ever had, a right to purchase any lands in Virginia from any Indian nation" without its express approval; (iii) all previous purchases by the King of Great Britain had inured solely for the benefit of Virginia; and (iv) the deed given to the Indiana proprietors by the Six Nations at the Treaty of Fort Stanwix—"as well as all other [such] deeds which have been or shall be made" in the future—were "utterly void, and of no effect."[160] Victorious on all of the key points at issue, Mason transported these resolutions to the Senate, which affirmed them on June 12.[161] Finally, both chambers of the Virginia legislature codified these resolves in a separate statute adopted on June 17. Styled "An Act for Declaring and Asserting the Rights of this Commonwealth Concerning Purchasing Land from Indian

153. LEWIS, *supra* note 70, at 214–15; 5 DHSC, *supra* note 3, at 277.
154. LEWIS, *supra* note 70, at 217.
155. *See infra* notes 164–71 and accompanying text.
156. LEWIS, *supra* note 70, at 216.
157. *Id*. at 216–17.
158. *Id*. at 217.
159. *Id*. at 220.
160. 2 PGM, *supra* note 53, at 512–13; *see also* 5 DHSC, *supra* note 3, at 277.
161. LEWIS, *supra* note 70, at 220–21.

Natives," the statute did not single out the Indiana Company by name. Instead, it stated in general terms that "all Sales and Deeds which have been or shall be made" by any Indians for lands within the charter boundaries of Virginia "are hereby declared utterly void and of no Effect."[162] As a direct result of all of these proceedings, then, both the Indiana Company and the Illinois-Wabash Company were denied recognition of their claims. As far as Virginia was concerned, their deeds and contracts were invalid.[163]

Was Wilson affiliated with the Illinois-Wabash Company at this time? If so, did he draft the company's 1778 petition or argue its case before the Virginia legislature? The answers are not entirely clear. Charles Page Smith says that Wilson became associated with the company "before the war was over"[164] and indicates that he took over as president of the reorganized company in 1780, after the death of his friend and former president, George Ross.[165] Smith cites no evidence for these claims, however. Instead, after calculating how many shares of the company Wilson controlled, he attaches a note two paragraphs later, which merely states that "A list of stockholders is in the Wilson Papers" at the Historical Society of Pennsylvania (HSP).[166] Professor Eric Kades is more informative, claiming that Wilson was "the central figure in the United Company's efforts by 1779."[167] Professor Kades maintains that "the Illinois Company and the Wabash Company merged on March 13, 1779" and that "Wilson became chairman of the newly founded company on August 20, 1779."[168] In support of these propositions, Professor Kades cites two pages from a collection of "Minutes of the United Illinois & Wabash Land Companies" held by the HSP.[169] Professor Kades does not clarify whether Wilson was an owner of or otherwise affiliated with the Company before he became chairman on August 20, 1779. Nevertheless, he concludes that Wilson and William Murray drafted a constitution and Articles of Union for the company, which was adopted on April 29, 1780.[170] Finally, Professor Lindsay Robertson provides a different account of some of these same details. According to Professor Robertson, the Illinois and Wabash Companies were already united by December 26, 1778, when they presented their joint petition to the Virginia Governor, council, and

162. 2 PGM, *supra* note 53, at 519.

163. *See, e.g.*, LEWIS, *supra* note 70, at 220–22; *see also* ROBERTSON, *supra* note 64, at 15–16.

164. SMITH, *supra* note 62, at 160.

165. *Id.* Ross was one of the Pennsylvania signers of the Declaration of Independence.

166. *Id.* at 402 n.2.

167. Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PENN. L. REV. 1065, 1084 (2000).

168. *Id.* Kades adds that Robert Morris "bought a share of the United Company on October 2, 1779, for 8000 pounds." *Id.* at 1084 n.66. Elsewhere, Kades observes that in 1792, John Nicholson, a noted Pennsylvania land speculator, paid $500 for a share of the Illinois-Wabash Company, which suggests that the expected value of a share of the company had plummeted between 1779 and 1792. *See* Eric Kades, *The Great Case of Johnson v. M'Intosh*, 19 Law & HIST. REV. 67, 88 (2001).

169. *Id.* at 88 nn. 66 & 68 (citing pages 46 and 19, respectively, of these Minutes).

170. *Id.* at 86.

assembly.[171] If this is correct, then Wilson may in fact have begun directing the companies before their land purchases were declared "utterly void, and of no effect" by the State of Virginia.

Whatever the precise sequence of events, it seems all but certain that Wilson and the other Illinois-Wabash shareholders would have resented Virginia's legislation on account of its retroactive character. Naturally, they now turned their attention to Congress to vindicate their rights. Between 1780 and 1788, Wilson drafted at least three memorials to Congress seeking recognition of the Illinois-Wabash Company's land claims.[172] The first of these was submitted on September 26, 1780, but there is no record of its having been acted upon.[173] Shortly thereafter, in the first formal act that eventually resulted in the establishment of the Northwest Territories, Virginia ceded to the United States all of its claims to the territories on the northwest side of the Ohio River.[174] In the course of doing so, however, Virginia attached specific conditions designed to undercut the Illinois-Wabash Company's claims, including a retroactive provision stating "that all purchases and deeds from any Indian or Indians, or from any Indian nation or nations, for any lands within any part of the said territory" which have been made to private persons, shall be "deemed and declared absolutely void and of no effect."[175]

Meanwhile, the Maryland legislature, which until then had steadfastly refused to ratify the Articles of Confederation, finally relented under pressure from the French government and directed its congressional delegation to sign the document in January 1781.[176] In response to these events, Wilson quickly submitted a second memorial to Congress on behalf of the Illinois-Wabash Company on March 12, 1781. Wilson's memorial called on Congress to refuse Virginia's cession with the retroactive conditions it had attached and, instead, to recognize the company's land claims.[177] The Indiana and Vandalia companies also submitted similar memorials to Congress around the same time. In an important victory for the land companies, Congress agreed with Wilson's first request and refused to

171. ROBERTSON, *supra* note 64, at 15.

172. *See* Kades, *supra* note 167, at 1085.

173. 18 JCC, *supra* note 122, at 862. The Journals of the Continental Congress contain an entry on this date which states: "A petition of William E. Godfrey and a memorial of the united Illinois and Wabash land companies, were read." Although the evidence is unclear, it seems likely that this memorial may have been "The Articles of Union, and Constitution for the Government &c. of the Illinois and Ouabache Land Companies," dated April 29, 1780, which the company presented to Congress along with the deeds of the companies' purchases. The Articles of Union are reproduced in *The Illinois-Wabash Land Company Manuscript*, edited by C.W. Alvord and privately printed in 1925. A substantial extract of this manuscript can be found in LIVERMORE, *supra* note 105, at 305–08. *See also* LEWIS, *supra* note 70, at 235.

174. Jensen, *Cession*, *supra* note 63, at 47.

175. *Id.*

176. *Id.*; *see also generally* St. George L. Sioussat, *The Chevalier de la Luzerne and the Ratification of the Articles of Confederation by Maryland, 1780–1781: With Accompanying Documents*, 60 PENN. MAG. HIST. & BIOGRAPHY 391 (1936).

177. 19 JCC, *supra* note 122, at 253.

accept Virginia's cession unless Virginia abandoned its insistence that Congress must declare all previous land purchases in the region void. Nevertheless, in a more significant and particularized blow to the Illinois-Wabash Company, the committee to whom the company's petition was referred found the Illinois-Wabash deed deficient and recommended denying Wilson's second request outright.[178]

The precise details of Wilson's 1781 memorial are somewhat murky. In the first place, no complete manuscript of the memorial appears to exist. Nevertheless, according to an *Account of Company Proceedings* published by William Young in 1796, Wilson's petition recognized "the jurisdiction and sovereignty of the United States, and declar[ed] that the Company are ready to submit to, and perform every duty, which can be required of good citizens, in the management and improvement of their property according to the laws of the land."[179] In addition, according to another *Account of Company Proceedings* printed by William Duane in 1803, the 1781 pleading also maintained

> that the country within the bounds of the grants from the Indians was amply sufficient for the establishment and settlement of a new State; that the company, acknowledging (as they ought) the sovereignty of the United States, offer to cede to them on equitable and liberal terms, a considerable proportion of the said territory, by which a complete title to the same (under the native Lords of the soil) will be vested in the United States, which may be made use of by Congress, for the most important purposes.[180]

On November 3, 1781, the five-member congressional committee to which Wilson's memorial was referred issued its report. Among other things, the report refused the Illinois-Wabash Company's prayer to recognize its titles on five grounds: (i) the Illinois-Wabash land purchases were made without license from the government or other public authority; (ii) the purchases were made without public treaty or other proper act of notoriety; (iii) one of the company deeds contained only descriptions of territorial lines and did not touch on any tangible property; (iv) no notice of the purchases was given to the United States Agent for Indian Affairs at Fort Pitt; and (v) the Six Nations also claimed the same lands in

178. Jensen, *Cession*, *supra* note 63, at 32; ROBERTSON, *supra* note 64, at 21.

179. *See* AN ACCOUNT OF THE PROCEEDINGS OF THE ILLINOIS AND OUABACHE LAND COMPANIES, IN PURSUANCE OF THEIR PURCHASES MADE OF THE INDEPENDENT NATIVES, JULY 5TH, 1773, AND 18TH OCTOBER, 1775 (Philadelphia, William Young 1796). The pages of this manuscript are not numbered; the quoted language can be found on the sixth page of text after the title page.

180. *See* AN ACCOUNT OF THE PROCEEDINGS OF THE ILLINOIS AND OUABACHE LAND COMPANIES, IN PURSUANCE OF THEIR PURCHASES MADE OF THE INDEPENDENT NATIVES, JULY 5TH, 1773, AND 18TH OCTOBER, 1775, at 8–9 (Philadelphia, William Duane 1803). Note that if the descriptions given in the text are accurate, then it appears that the strategy Robertson attributes to the adoption of a new purchase policy by the United States on May 25, 1785, may already have been formulated by Wilson several years earlier. *See infra* notes 184–86 and accompanying text.

opposition to Indian tribes conveying the deeds in question.[181] The committee further resolved that the authority to treat with the Indian nations should be vested solely in the Congress and that no persons should be permitted to purchase lands from the Indians outside of the boundaries of their respective states.[182] Finally, the committee laid out conditions under which Congress might allow for the creation of new states in the western territories in the future.[183]

For the Illinois-Wabash Company, these events were a dramatic setback. Nevertheless, the company's fortunes were revived by another development that occurred after Virginia's second cession of its western territories, this time without any retroactive conditions, was finally accepted by the United States in 1784.[184] Because the United States not only had to maintain jurisdiction over western lands but also had to own legal title to those lands before selling any of them to retire the national debt, and because no other means to secure this title seemed practical, Congress announced a new land policy on May 20, 1785. According to this policy, Congress would sell only those lands to which title had been *purchased* by the United States.[185] As Professor Robertson explains, this new policy restored to the company some of the leverage it had lost in 1781, when Maryland had ratified the Articles of Confederation and the committee had returned its unfavorable report:

> The reason was simple: congressional commitment to purchase title *to* Indian lands did not necessarily mean that Congress would feel obliged to purchase such title *from Indians*. If the Piankashaw and Illinois Nations did not dispute the Companies' title and the price was right, Congress might agree to purchase title to the lands acquired in 1773 and 1775 from the speculators. Even if the Indians did protest, the Companies and Congress might strike a deal if the Companies offered better terms.[186]

Wilson had outlined the basic logic of this transaction when he referred to granting the Illinois-Wabash lands "on equitable and liberal terms" to the United States in his 1781 memorial. The prospect was indeed a favorable one, for it would enable the Illinois-Wabash speculators to profit handsomely from the company's original purchases in 1773 and 1775, while also relinquishing their claims, with all of their risks and uncertainties, to the United States. For precisely the same reason, any such transaction presumably would have been resented by Mason, Madison, and other Virginians, who had long resisted what they perceived to be the dishonorable efforts of "land Jobbers" seeking to exploit the

181. 22 JCC, *supra* note 122, at 230.
182. *Id.* at 231.
183. *Id.*
184. ROBERSTON, *supra* note 64, at 19.
185. *Id.*
186. *Id.*

Illinois and Wabash territories for personal gain.[187]

On May 2, 1788, Wilson pursued this creative quid-pro-quo strategy in a new memorial—his third—to Congress on behalf of the Illinois-Wabash Company. According to the *Journals of the Continental Congress*, the memorial asserted "the claims of the said companies, suggesting a mode for obtaining information touching on the fairness of their purchases and representing their willingness in case they should be found to be well founded to cede to the US a great proportion thereof."[188] On May 5, this memorial was referred to a committee comprised of William Irvine, Abraham Clark, Nathan Dane, Stephen Mix Mitchell, and Edward Carrington.[189] After Carrington sent a June 17 request to Wilson for any supplemental materials he wished to have considered, a letter which apparently went unanswered, the committee reported back on June 27 in a manner that was quite favorable to Wilson and his company. The committee's report first recounted the basic facts of the company's land purchases in 1773 and 1775. The report then observed that the memorial

> further represents that if the said purchases upon a full enquiry appear to have been fairly made with the Indians and Valuable Considerations paid, the same will prevent the necessity and expence of a second purchase of the same Lands by the United States, in which Case the companys wish not to retain the whole of the said purchased Tract, but think themselves entitled to at least a part thereof as Compensation for the money they have expended, the pains they have taken, and the time they have employed in this business.[190]

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187. *See, e.g.*, *The Remonstrance of the General Assembly of Virginia to the Delegates of the United American States in Congress Assembled*, *in* 2 PGM *supra* note 53, at 596 (deploring the efforts of the Illinois-Wabash speculators to convert "a great part of the value of the unappropriated Lands . . . to private purposes"); Letter from James Madison to Edmund Randolph (Sept. 8, 1783), *in* 7 PJM, *supra* note 148, at 308 ("land Jobbers"). Madison also objected to land speculation in the Illinois-Wabash region in a letter to Jefferson written on the eve of the constitutional convention:

> The Government of the settlements on the Illinois & Wabash is a subject very perplexing in itself; and rendered more so by our ignorance of many circumstances on which a right judgment depends. The inhabitants at those places, claim protection agst. the savages, and some provision for both criminal and Civil justice. It appears also that land jobbers are among them who are likely to multiply litigations among individuals, and by collusive purchases of spurious titles, to defraud the United States.

Letter from James Madison to Thomas Jefferson (Apr. 23, 1787), *in* 9 PJM, *supra* note 148, at 399–400.

188. 34 JCC, *supra* note 122, at 133.

189. *Id*. at 133, 270. *See also* 8 LMCC, *supra* note 140, at 753 (documenting the members of the committee, along with a June 17 letter Carrington sent to Wilson).

190. 34 JCC, *supra* note 122, at 270. In subsequent memorials, the company made this suggestion more specific, offering to cede the entire territory it claimed to the United States in exchange for a 25% kick back to the company. A formal government recognition of the validity of the company's title to one quarter of its original claim that would have resulted from any such transaction would have been extremely advantageous to the company. If the transaction were completed as envisioned, the company would finally possess unquestionable title to approximately 7.5 million acres of valuable western lands.

Finally, the committee concluded that reasonable compensation in the form of land grants should be given to the companies, explaining that

> although the purchases above mentioned do not Appear to have been made at a general treaty with the Indians, or under legal Authority with all the formalities customary to give validity to such a transaction; and however improper it may be in general to countenance private purchases from the Indians, yet, considering all the Circumstances attending the purchases in question, in Case the same upon full investigation shall Appear to have been fairly conducted, and that on Account thereof the United States will be ultimately benefited by an exemption from the expence of purchasing the same Lands, your Committee are of the Opinion a reasonable Compensation in Land should be made to the said Companies.[191]

The Committee's report was read on June 27. On July 1, 1788, Congress decided to postpone a vote on the report and its recommendations.[192] As a result, no action was taken on the report. Nevertheless, a number of intriguing questions can be asked about Wilson's memorial and how it was received and acted upon.

The most curious feature of the 1788 memorial may be its timing. Wilson submitted the memorial to Congress on May 2, just one week after Maryland became the seventh state to ratify the Constitution and the first major Southern state to do so. Maryland held its convention from April 21 to April 26 and adopted the Constitution by a wide margin of 63-11. Wilson presumably followed these developments closely. The proprietors of the Illinois-Wabash Company included many prominent merchants, businessmen, and politicians from Maryland, including several who were active participants at the Maryland convention, so the timing seems curious from that vantage point. Furthermore, it seems worthwhile to consider what Wilson hoped to accomplish by submitting a new memorial to a Congress that was, by then, quite likely on its way out. Did he feel confident at this point that the Constitution would be adopted by the required nine state ratifying conventions? Did he want to take one final bite at the apple with the old Congress before a new one took its place? Was he trying to lay the groundwork for a petition to the new national legislature by getting the old Congress on record as supporting the company's claims? The answers are unclear.

The timing of the committee's actions also raises interesting questions. The committee was composed on May 5, but it did not deliver its report until June 27. By that time, three more ratifying conventions—South Carolina, New Hampshire, and Virginia—had adopted the Constitution, bringing the total number that had done so to ten. It seems likely, therefore, that when it recommended that a "reasonable compensation" should be paid to the Illinois-Wabash Company, the committee that considered Wilson's 1788 memorial was aware

191. *Id.* at 270–71.
192. *Id.* at 270, 276.

that the Constitution had been formally adopted and would soon go into effect. Likewise, Congress presumably was aware of these facts when it voted on July 1 to postpone consideration of the committee's report. By then, it may also have been aware that Virginia had also ratified the Constitution on June 25. It seems plausible to assume that at that point Congress saw no need to decide the question and to put in motion a new train of events—involving, among others, the Governor of the Western Territory and the Superintendent of Indian Affairs—if a new legislature would soon be seated that might prefer a different approach. On the other hand, one might speculate that a "lame duck" Congress would have had different incentives, including resolving longstanding land disputes and initiating further proceedings toward that end, while it still had the chance. Again, these issues are not clear.

What does seem evident is that the vote on the committee's June 27 report, which was postponed on July 1, was never taken up. The documentary records generated by the Continental Congress contain a receipt dated March 22, 1790 and signed by Wilson: "Rec'd March 22d 1790 of Roger Alden the Memorial of M James Wilson on behalf of the Land Companies of Illinois and Wabash Companies & of the Papers which were originally enclosed. The Memorial was Read in Congress May 2d 1788."[193] No other record of Wilson's 1788 Memorial or its reception by Congress appears to exist.

II. WILSON'S UNDERSTANDING OF EX POST FACTO LAWS

In Part I, I described Wilson's investments in western lands, along with the main controversies between Virginia and her neighbors—and various independent land companies—that held up ratification of the Articles of Confederation and the creation of the national domain. I also outlined the series of memorials Wilson and other land company agents submitted to Virginia and Congress seeking recognition of their claims. Having laid this foundation, I turn now more directly to Wilson's understanding of ex post facto laws. Wilson uses the phrase "ex post facto" only once in his *Law Lectures*.[194] The language and context of this isolated reference are somewhat equivocal, but they seem to indicate that Wilson thought all ex post facto laws were illegitimate, whether or not they involved criminal matters.[195] Apart from his recorded remarks at the constitutional convention on August 22, 1787, the only other appearance of the phrase

193. X PAPERS OF THE CONTINENTAL CONGRESS, 1774–1789, at 703 (1788).

194. *See* COLLECTED WORKS OF JAMES WILSON, *supra* note 147, at 470 ("If a simple resolution cannot have the force of law before it is promulgated; we may certainly hazard the position—that it cannot have the force of law, before it be made: in other words, that *ex post facto* instruments, claiming the title and character of laws, are imposters"). This statement is perfectly general and appears to refer to all retroactive laws, not merely retroactive criminal laws.

195. *Id.* Wilson illustrates the point of the passage quoted in footnote 194 by referring to a retroactive criminal punishment imposed on the Earl of Strafford, but there is nothing he says in connection with that illustration that entails that ex post facto laws are limited to criminal laws. Furthermore, he concludes his discussion of the Earl of Strafford a manner which suggests that ex post facto laws can be civil as well as criminal: "In criminal jurisprudence, a Janus statute, with one face

"ex post facto" in Wilson's *Collected Works*—a brief statement he makes in *Henfield's Case*—likewise fails to clarify whether Wilson believes that ex post facto laws are limited to criminal laws.[196] Because these familiar sources are inconclusive, a deeper investigation is required.

This Part takes some preliminary steps in this direction by exploring in more detail how objections to ex post facto laws were advanced by the land companies with which Wilson was affiliated. Specifically, I examine how a persistent concern with retroactive civil legislation factored into the legal arguments of the Indiana, Georgia, and Illinois-Wabash Companies. I begin by discussing *Plain Facts*, a fiery pamphlet laying out the Indiana Company's claims against Virginia, which Wilson apparently helped to distribute and may have had a hand in drafting. Turning next to the Yazoo affair, I explain how certain aspects of this controversy, too, suggest that Wilson and other founders had a broad understanding of ex post facto laws. Finally, I discuss a virtually unknown, but highly revealing, letter that Wilson sent to Congress on behalf of the Illinois-Wabash Company in February 1797, on the heels of another unsuccessful memorial. In this letter, Wilson echoed Paterson's remark in *Dorrance* that "the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable."[197] He also endorsed a broad conception of ex post facto laws, declaring that "any ex post facto act of a legislature, impairing the right of contracts, or affecting life, liberty, or property" would be void.[198] Because of its heavy-handedness, Wilson's letter was probably a major source of embarrassment to his fellow Justices, who by this time were keenly aware of how the ex post facto clauses were being used as a weapon by various land companies in thorny disputes over western lands. If this is correct, then these facts may help to explain the path that Chase, Iredell, and Paterson elected to take in *Calder v. Bull*, construing the clauses narrowly and limiting them to retroactive criminal laws.

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looking backward, and another looking forward, is a monster indeed." *Id.* at 471. This statement implies that there are, or at least can be, "Janus statutes" in contexts other than criminal jurisprudence.

196. *Henfield's Case* involved the prosecution of an American, Gideon Henfield, for violating the law of nations and principles of American neutrality—even though his acts were not prohibited by any federal statute. In his charge to the petit jury, Wilson directly confronted the retroactivity problem in the following passage:

> It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an *ex post facto* law, but a law that was in existence long before Gideon Henfield existed.

Id. at 368. Although this use of "ex post facto law" takes place in a criminal context, there is nothing in Wilson's statement or the rest of his jury charge to indicate that he believed ex post facto laws were restricted to criminal matters.

197. *See infra* notes 283–85 and accompanying text.

198. *Id.*

A. The Indiana Company and "Plain Facts"

Let us begin by taking a closer look at the legal arguments of the Indiana Company. The gravamen of the complaint lodged against the State of Virginia by the Indiana Company proprietors was that, in its 1776 constitution and subsequent legislative enactments, Virginia had passed a series of ex post facto laws that violated their property rights by declaring their land titles to be void.[199] It was for this reason that Samuel Wharton,[200] in a fiery 1781 pamphlet, *Plain Facts*,[201] used the phrase "ex post facto law" on at least nine occasions—including seven times in the course of ten incendiary pages of verbal onslaught directed against George Mason and the Virginia assembly[202]—to describe what Randolph later described as Virginia's "legislative violence" against the Indiana Company.[203] Like another influential land company pamphlet, Thomas Paine's *Public Good*,[204] Wharton's pamphlet was widely distributed at the time. John Dickinson, Benjamin Franklin, Thomas Jefferson, Arthur Lee, James Madison, George Mason, Edmund Randolph, Edmund Pendleton, Jonathan Trumbell, and Oliver Wolcott are among the many founders who owned or possessed copies of it.[205] Significantly, Wilson and Tench Coxe were given 300 shares of the Indiana

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199. *See*, *e.g.*, JENSEN, *supra* note 63, at 206 (observing that "In March, 1777, George Morgan sent a memorial for the Indiana Company [to the Virginia Assembly] protesting that the resolution of the convention was an *ex post facto* action and a violation of the rights of private property"); LEWIS, *supra* note 70, at 216 (observing that in a hearing before the Virginia assembly in May 1779, William Trent "attacked the Virginia act of 1776, which had the effect of invalidating private land claims based on Indian grants within the state, as *ex post facto*").

200. Along with George Morgan and William Trent, Samuel Wharton was one of the main proprietors of the Indiana Company. He served as a delegate to the Continental Congress from Delaware from 1782 to 1783, aggressively advancing the company's interests there. In the course of doing so, he raised the ire of Arthur Lee, James Madison, and other Virginians. *See generally* ABERNETHY, *supra* note 63; LEWIS, *supra* note 70; *see also, e.g.*, Letter from Arthur Lee to Samuel Adams (Apr. 21, 1782), *in* 6 LMCC, *supra* note 140, at 331 (criticizing Wharton's lobbying efforts on behalf of the Indiana Company). Together with Benjamin Franklin, Wharton submitted the "Passy Memorial" to Congress on behalf of the Vandalia Company (with which he was also associated) on February 26, 1780. *See* Memorial to Congress (Feb. 26, 1780), *in* 31 THE PAPERS OF BENJAMIN FRANKLIN, 1779–1780, at 525–48 (Barbara B. Oberg ed., 1995).

201. SAMUEL WARTON, PLAIN FACTS: BEING AN EXAMINATION INTO THE RIGHTS OF THE INDIAN NATIONS OF AMERICA, TO THEIR RESPECTIVE COUNTRIES; AND A VINDICATION OF THE GRANT FROM THE SIX UNITED NATIONS OF INDIANS, TO THE PROPRIETORS OF INDIANA, AGAINST THE DECISION OF THE LEGISLATURE OF VIRGINIA; TOGETHER WITH AUTHENTIC DOCUMENTS PROVING THAT THE TERRITORY, WESTWARD OF THE ALLEGANY MOUNTAIN, NEVER BELONGED TO VIRGINIA, &C. (Philadelphia, R. Aitken 1781). *See also* Figure 2.

202. *Id*. at 107–17; *see also id*. at 136, 139.

203. *See* Letter from Randolph to Madison, *supra* note 148.

204. *See* THOMAS PAINE, PUBLIC GOOD, BEING AN EXAMINATION INTO THE CLAIM OF VIRGINIA TO THE VACANT WESTERN TERRITORY, AND OF THE RIGHT OF THE UNITED STATES TO THE SAME (Philadelphia, John Dunlap 1780).

205. For Franklin, see Liste des Livres de Mr. Franklin, 31 December 1781 – 8 January 1782, *in* 36 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 200, at 339–43. For Lee and Mason, see 2 PGM, *supra* note 53, at 721–22, 741, 752. For Madison and Jefferson, see Letter from James Madison to Thomas Jefferson (Apr. 16, 1782), *in* 6 PTJ, *supra* note 34, at 176–77. For Wolcott and Trumbell, see Letter from Oliver Wolcott to Jonathan Trumbull, Gov. of Connecticut (Dec. 19, 1781), *in* 6 LMCC, *supra* note 140, at 282, 282–83. For Pendleton, see *infra* note 209 and accompanying text. For Randolph, see *infra* notes

Company shortly after *Plain Facts* appeared, suggesting one or both of them may have had a hand in composing it.[206] Wilson also apparently helped to arrange for the Illinois-Wabash Company to purchase and distribute 200 copies of the pamphlet in the summer of 1781.[207] At Jefferson's request, Madison secured copies of *Plain Facts* for Jefferson in the spring of 1781.[208] Madison also corresponded with Pendleton about *Plain Facts*, and he expressed his grave concerns about both pamphlets in a 1782 letter to Jefferson.[209]

Why was Wilson eager to disseminate *Plain Facts* and why were Madison and other Virginians so troubled by it? To answer this question and to fully grasp the likely impact of this explosive pamphlet on those who encountered it, including the members of Congress to whom it probably was distributed,[210] one must read the pamphlet in its entirety. Here a few excerpts must suffice.

224–28 and accompanying text. For the reference to Dickinson, I am grateful to Professor Jane Calvert, Director and Chief Editor of the John Dickinson Writings Project, who has confirmed to me in correspondence that Dickinson owned a copy of *Plain Facts*, which was given to him by Samuel Wharton. *See* Letter from Jane Calvert (Dec. 7, 2017) (on file with Author).

206. According to the Indiana Company's "Bill in Equity" in *Grayson v. Virginia*, Wilson was deeded 300 shares of the company on December 27, 1781. In addition, Tench Coxe (along with George Morgan) was deeded 300 shares of the company on April 25, 1782. *See* 5 DHSC, *supra* note 3, at 299, 312. One or both of these transactions may have been compensation for services rendered in connection with *Plain Facts*. One reason for drawing this inference is that Thomas Paine was also deeded 300 shares of the company on March 28, 1782. *Id.* at 312. According to George Lewis, this transaction amounted to compensation for the services Paine had rendered in writing *Public Good*. *See* LEWIS, *supra* note 70, at 241–42. In this context, it seems worth noting that all three transactions are described in the Bill in Equity submitted in *Grayson* in a manner unlike the method by which shares were acquired by other shareholders, such as William Grayson (and his heirs) and Levi Hollingsworth. Wilson, Coxe, and Paine were given their shares directly "by virtue of a deed executed in pursuance of a resolution of the Indiana Company," whereas the shares owned by Grayson and Hollingsworth were "originally held by William Trent." *Id.* Hence, the latter seem to have purchased their shares on a secondary market, whereas the former appear to have been given their shares directly as compensation for services rendered.

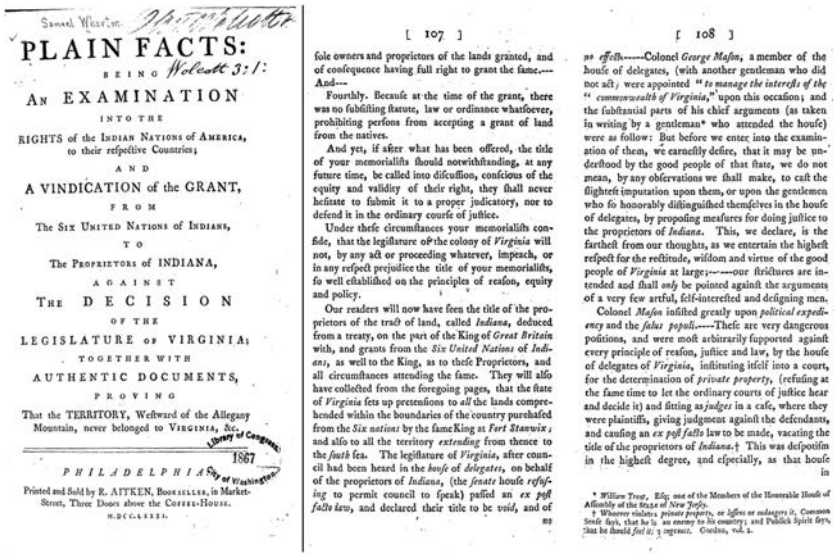
207. According to the documentary records of the Illinois and Wabash Company held at the University of Oklahoma Law Library, Wilson, Coxe, and four other members of the company, controlling 23 shares among them, held a meeting at the City Tavern in Philadelphia on March 26, 1781 to receive a report of a committee that had been previously appointed to determine how much each member of the company should pay to a fund for corporate expenses. After failing to generate a quorum on June 25, a second meeting was held on July 2, at which Wilson was also present. In that July 2 meeting, William Murray informed the assembled group that he had purchased 200 copies of "the pamphlet" on behalf of the company, and the shareholders who were present, including Wilson, voted for the company to fund the purchase on a per–share basis. They also resolved that the company's agents should seek to convey to the United States the Company's "Right and Title under the Indian Deeds" if the United States agreed to re-convey to the Company one-fourth of their original claims. *See* Minutes, March 26, 1781 and July 2, 1781, https://digital.libraries.ou.edu/IWLC/docs/m1781-03-26.pdf [https://perma.cc/L8Q9-4V7G].

208. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Apr. 3, 1781), *in* 3 PJM, *supra* note 148, at 45–48.

209. *See, e.g.*, Letter from Edmund Pendleton to James Madison (May 28, 1781), 3 PJM, *supra* note 148, at 136–39; Letter from James Madison to Thomas Jefferson (Apr. 16, 1782), *in* 6 PTJ, *supra* note 34, at 176–77.

210. Although I have not uncovered direct evidence of this connection, it seems likely that Wharton or William Murray distributed copies of *Plain Facts* to members of Congress, perhaps using some of the two hundred copies Murray purchased in 1781 for this purpose. *See supra* note 207 and accompanying

FIGURE 2. Title Page and Excerpts from *Plain Facts* by Samuel Wharton (1781)



Samuel Wharton

PLAIN FACTS:

BEING

AN EXAMINATION

INTO THE

RIGHTS of the INDIAN NATIONS of AMERICA, to their reſpective Countries;

AND

A VINDICATION of the GRANT,

FROM

The SIX UNITED NATIONS of INDIANS,

TO

The PROPRIETORS of INDIANA,

AGAINST

THE DECISION

OF THE

LEGISLATURE of VIRGINIA;

TOGETHER WITH

AUTHENTIC DOCUMENTS,

PROVING

That the TERRITORY, Weſtward of the Allegany Mountain, never belonged to VIRGINIA, &c.

Library of Congress

1867

PHILADELPHIA City of Washington

Printed and Sold by R. AITKEN, Bookſeller, in Market-Street, Three Doors above the Coffee-House.

M.DCC.LXXXI.

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ſole owners and proprietors of the lands granted, and of conſequence having full right to grant the ſame.—And—

Fourthly. Becauſe at the time of the grant, there was no ſubſiſting ſtatute, law or ordinance whatſoever, prohibiting perſons from accepting a grant of land from the natives.

And yet, if after what has been offered, the title of your memorialiſts ſhould notwithſtanding, at any future time, be called into diſcuſſion, conſcious of the equity and validity of their right, they ſhall never heſitate to ſubmit it to a proper judicatory, nor to defend it in the ordinary courſe of juſtice.

Under theſe circumſtances your memorialiſts confide, that the legiſlature of the colony of *Virginia* will not, by any act or proceeding whatever, impeach, or in any reſpect prejudice the title of your memorialiſts, ſo well eſtabliſhed on the principles of reaſon, equity and policy.

Our readers will now have ſeen the title of the proprietors of the tract of land, called *Indiana*, deduced from a treaty, on the part of the King of *Great Britain* with, and grants from the *Six United Nations* of *Indians*, as well to the King, as to theſe Proprietors, and all circumſtances attending the ſame. They will alſo have collected from the foregoing pages, that the ſtate of *Virginia* ſets up pretenſions to *all* the lands comprehended within the boundaries of the country purchaſed from the *Six nations* by the ſame King at *Fort Stanwix*; and alſo to all the territory *extending* from thence to the *ſouth ſea*. The legiſlature of *Virginia*, after council had been heard in the *houſe of delegates*, on behalf of the proprietors of *Indiana*, (the *ſenate* houſe *refuſing* to permit council to ſpeak) paſſed an *ex poſt facto law*, and declared their title to be *void*, and of

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no effect——Colonel *George Maſon*, a member of the houſe of delegates, (with another gentleman who did not act) were appointed "*to manage the intereſts of the* "*commonwealth of Virginia*," upon this occaſion; and the ſubſtantial parts of his chief arguments (as taken in writing by a gentleman* who attended the houſe) were as follow: But before we enter into the examination of them, we earneſtly deſire, that it may be underſtood by the good people of that ſtate, we do not mean, by any obſervations we ſhall make, to caſt the ſlighteſt imputation upon them, or upon the gentlemen who ſo honorably diſtinguiſhed themſelves in the houſe of delegates, by propoſing meaſures for doing juſtice to the proprietors of *Indiana*. This, we declare, is the fartheſt from our thoughts, as we entertain the higheſt reſpect for the rectitude, wiſdom and virtue of the good people of *Virginia* at large;——our ſtrictures are intended and ſhall *only* be pointed againſt the arguments of a very few artful, ſelf-intereſted and deſigning men.

Colonel *Maſon* inſiſted greatly upon *political expediency* and the *ſalus populi*.——Theſe are very dangerous poſitions, and were moſt arbitrarily ſupported againſt every principle of reaſon, juſtice and law, by the houſe of delegates of *Virginia*, inſtituting itſelf into a court, for the determination of *private property*, (refuſing at the ſame time to let the ordinary courts of juſtice hear and decide it) and ſitting as *judges* in a caſe, where they were plaintiffs, giving judgment againſt the defendants, and cauſing an *ex poſt facto* law to be made, vacating the title of the proprietors of *Indiana*.† This was deſpotiſm in the higheſt degree, and eſpecially, as that houſe in

* *William Trent*, Eſq. one of the Members of the Honorable Houſe of Aſſembly of the State of *New Jerſey*.

† Whoever violates *private property*, or *laſſens or endangers it*, Common Senſe ſays, that he is an enemy to his country; and Publick Spirit ſays, that he ſhould *ſuffer* for it. Cowden, vol. 2.

After reprinting several key documents relating to the Indiana Company and its territorial claims, including supporting affidavits from Benjamin Franklin, Patrick Henry, James Mercer, and Edmund Pendleton, *Plain Facts* begins by recounting what occurred in June 1779, when the Virginia House of Delegates voted to reject the company's claims. Three times in quick succession, the pamphlet then blasts the House of Delegates for passing an ex post facto law, which retroactively deprived the Indiana proprietors of their property rights:

> The legislature of Virginia, after council had been heard in the *house* of *delegates*, on behalf of the proprietors of *Indiana*, (the *senate* house *refusing* to permit council to speak) passed an *ex post facto law*, and declared their title to be *void*, and of *no effect* . . . .[211]
>
> Colonel *Mason* insisted greatly upon *political expediency* and the *salus populi*.—These are very dangerous positions, and were most arbitrarily supported against every principle of reason, justice and law, by the house of delegates of *Virginia*, instituting itself into a court, for the determination of *private property*, (refusing at the same time to let the ordinary courts of

text. Note also that many members of Congress were later present when the ex post facto clauses were debated at the Constitutional Convention. *See* CLINTON ROSSITER, 1787: THE GRAND CONVENTION 145 (1966) (observing that forty-two of the delegates to the convention had previously served in the Continental Congress).

211. PLAIN FACTS, *supra* note 201, at 107–08.

> justice hear and decide it) and sitting as *judges* in a case, where they were plaintiffs, giving judgment against the defendants, and causing an *ex post facto law* to be made, vacating the title of the proprietors of *Indiana*. This was despotism in the highest degree, and especially, as that house in behalf of *Virginia*, set up a claim to the lands in question and were of course parties themselves to the cause, which they thus passed judgment upon, and thereby destroyed private right, as far as their power extended.[212]
>
> From the baneful doctrine of *political expediency* have arisen evils of the greatest magnitude, in every age and country. The motives for the *stamp act* and the present war can be accounted for upon the same principle.–It is a doctrine, which harassed and grievously oppressed the subjects of *England*, in the reigns of *Elizabeth*, *James* the First, and *Charles* the First;——it gave birth to *ship money* and *star chamber* imprisonments and numerous other cruel acts of tyranny and imposition;—it generated *Scylla's* proscriptions, and made *Caesar* perpetual dictator, and produced the present *ex post facto* law.[213]

At this point, *Plain Facts* appeals to the authority of David Hume and John Locke on the importance of property rights. The author notes that Hume maintained that "among all civilized nations, it has been the constant endeavor to remove everything arbitrary and partial, from the decision of property,"[214] while Locke observed that "it is a mistake to think, the supreme or legislative power of any commonwealth can do what it will, and dispose of the subjects property arbitrarily, or take away part of them at pleasure. The legislative power . . . is to govern by promulgated, established laws, not to be varied in particular cases."[215] *Plain Facts* then connects Locke's observation to the pernicious effect of ex post facto laws:

> The reason, [Mr. Locke] subjoins, why men enter into society, *is the preservation of their property*; and the end, why they choose and authorize a legislature, *is that there may BE LAWS made*, and rules set, *as guards and fences* to the *properties* of the members of the society; and it is also very aptly observed by a learned author, that the most cautious man in the world cannot, with all his circumspection, *provide* against a law, *that may be made afterwards*. If it be *once* drawn into practice, to deprive men of their properties *by laws, ex post facto*, there is *an end of justice*.[216]

In further support of this argument, *Plain Facts* cites passages from the Virginia Declaration of Rights, Magna Carta, Coke, and a 1774 declaration of the Continental Congress, all of which highlight the importance of jury trials in the determination of property rights. Returning to the main theme, the pamphlet observes:

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212. *Id.* at 108–09.
213. *Id.* at 109.
214. *Id.* at 110.
215. *Id.*
216. *Id.* at 110.

> But we forbear to cite further authorities,— enough have been produced to show the total insecurity to all *property*, wherever the pernicious and ruinous doctrine of *expediency*, and *ex post facto laws* prevail.——And we trust our impartial readers will agree with us in saying, that the validity of the title of the proprietors of *Indiana*, ought not to have been decided by modern ideas, but such as prevailed at the time of its creation; and as it was *good* under the crown of *England*, it ought certainly to have had the same effect under the republic of *Virginia*. A contract made in *China*, or in any other foreign country, would be determined in a court of justice, by the laws of the country, where the contract took its rise. In like manner, the grant in question ought to have been settled *by the laws in being at the time of its being made, and not by an ex post facto law*.[217]

Next, the pamphlet slams Virginia for invidious discrimination against "foreigners," pointing out that the House of Delegates confirmed Charles Simms,[218] a Virginian, in his title to land purchased derivatively from George Croghan, but denied the same right to investors from Pennsylvania, including the Gratz and Franks brothers, even though their title was also derived from Croghan.

> The house of delegates *first* form a bill, and that is enacted into a law . . . declaring,—"That all sales and deeds, which HAVE BEEN, *or shall be made* by any *Indian* or *Indians*, or by any *Indian nation* or *nations* of *Indians*, for lands within the same limits, (to wit, of *the chartered territory*) to or for the separate use of any person or persons whatsoever, *shall be, and same are hereby declared utterly void and of no effect*"—And then the house of delegates *resolve*, that Mr. Gratz, &c. should have their claim investigated and determined in a court of law or equity.—What mockery of justice was this? What a shameful distinction was here made between Mr. *Simms*, a *Virginian*, and Mr. *Gratz*, a *Pennsylvanian*? and both holding under precisely the same right, deduced from Mr. *Croghan*. Why had Mr. *Simms* a special *act* passed in his favor?—and why was Mr. *Gratz* referred to the ordinary courts?—Because you perfectly knew, Gentlemen, the mouths of the judges of the courts of law or equity were *closed* by your ever memorable *ex post facto law* . . . . It was cruel, Sirs, thus to sport with *foreigners*;—you ought, at least for your own sakes, to have preserved a little more ostensible show of moderation and equity, than you dispensed to Mr. Gratz, upon this occasion:—But it seems it was *political justice* to *protect* the title of Colonel *Simms*, and *political expediency* to *reject* the memorial of Mr. *Gratz*, and refer him to a *court*, which you had *previously disqualified* from doing him justice."[219]

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217. *Id*. at 112.

218. Simms is the same Virginian whose title was later at issue in *Irvine v. Sims's Lessee*. *See* 8 DHSC, *supra* note 3, at 153–77. He was opposed in that lawsuit by Dr. William Irvine, a friend of Wilson's and fellow Scot who appears frequently in Smith's biography of Wilson. *See* SMITH, *supra* note 62, at 44, 51–52, 218, 300.

219. *Id*. at 117–18. On October 28, 1779, Barnard Gratz wrote his brother, Michael Gratz, about his plans to petition the Virginia legislature in light of its decision on Colonel Simms's title. *See* WILLIAM VINCENT BYARS, B. AND M. GRATZ: MERCHANTS IN PHILADELPHIA 188 (1916).

Finally, *Plain Facts* also highlights Mason's motivation in invalidating the Indiana Company's title—namely, enhancing the state's treasury:

> Colonel *Mason* next insisted, *that countenancing the grant, to the proprietors of Indiana*, *would exclude a fund, which might be secured to the State, by the sale*—We admit it, and so it ought.—The estate of lord *Fairfax*, Colonel *Mason*, or any other rich person in *Virginia* would (if it was thought *expedient* to pass another *ex post facto law*, and declare their title void) sell for, and produce a very large fund to the treasury of *Virginia*.[220]
>
> After what we have remarked on *political expediency, salus populi*, and *ex post facto* laws,—we shall only add, that deviations from "strict distributive justice," in the decision of *private property* are doctrines, which have not only a direct tendency to loosen the bonds of government, to render all titles wholly insecure, and too often dependent upon the pleasure, policy, refinement, or caprice of a few factious men, but are invasive of the province of a jury, and fixed and learned judges.[221]

Plain Facts makes other, related claims, including one grounded in Article IV of the Articles of Confederation, the direct predecessor to the Constitution's Privileges and Immunities Clause.[222] After running through all of these and other arguments, the pamphlet concludes with a final, powerful blast. "[T]he Proprietors of Indiana are now most anxiously waiting for . . . the state of Virginia [to] come forth, and show publicly what sort of title it pretends to claim under," the pamphlet declares, before ending with a ringing quotation from Blackstone and Magna Carta:

> In fine, they only wish and request, that the sovereign power of the United States would, without further delay, adopt and exercise that excellent and comprehensive assurance to the people, "*Nulli negabimus*, AUT DIFFEREMUS RECTUM AUT JUSTICIAM."[223]

Translation: "To no one will we sell, to no one will we deny or delay, right or justice."

* * * * * *

Edmund Randolph served as legal counsel to the Indiana Company and helped prepare its case to the Virginia legislature in 1779.[224] Randolph was therefore intimately familiar with the company's objections to Virginia's ex post facto

220. PLAIN FACTS, *supra* note 201, at 136.
221. *Id*. at 139–40.
222. *See id*. at 115.
223. *Id*. at 148. *See* 1 BLACKSTONE, *supra* note 21, at *137 (quoting this passage from Magna Carta).
224. *See, e.g*., LEWIS, *supra* note 70, at 217; Letter from Edmund Randolph to Henry Lee (June 24, 1793), *in* 5 DHSC, *supra* note 3, at 332.

laws. By 1782, however, Randolph had effectively switched sides in this dispute between the Indiana Company and his native state, and had begun resisting congressional jurisdiction over the company's claims on behalf of Virginia.[225] In a pair of 1788 letters he sent to Madison before the Virginia ratifying convention, Randolph confided that "[t]he Indiana claim seriously affects me" and predicted (accurately, as it turned out)[226] that, under the new Constitution, the company would seek compensation in federal court for their old claims against Virginia, the merits of which he felt could not easily be denied.[227] Significantly, Madison's reply, also composed on the eve of the Virginia convention, implicitly equated the Constitution's prohibition of ex post facto laws with a blanket "condemnation of retrospective laws"—one that Madison assumed would apply to the Indiana Company's claims, *if* the Constitution itself were to be applied retroactively.[228] All of these considerations tend to amplify existing doubts about the reliability of Madison's account of what occurred at the constitutional convention with respect to ex post facto laws. They also call into question the narrow understanding of ex post facto laws upon which Madison and Randolph insisted at the Virginia ratifying convention, and which Madison later reaffirmed in the First Congress.[229]

In his analysis of how ex post facto laws were discussed at the state ratifying conventions, Crosskey focused his attention on only two states: Virginia and North Carolina. His account of the Virginia convention was riveting. Among other things, Crosskey argued that "[t]he first intimation that the 'ex post facto' clauses of the Constitution had been intended to relate to criminal statutes only was made in the Virginia ratifying convention"[230] by Madison; that Madison and Randolph defended this novel idea disingenuously, without genuine conviction, to escape damaging attacks by Henry and Mason; and that Randolph, one of the state's best lawyers, had come to Madison's defense with an appeal to the "technical" meaning of "ex post facto law" after Madison's own response to Henry and Mason was unconvincing.[231] Crosskey also pointed out that it was Mason, toward the end of a contentious debate in which Mason and Henry had defeated Madison and Randolph on the merits, who observed that Virginia's interests

225. *See, e.g.*, Letter from James Madison to Thomas Jefferson, *supra* note 209. Randolph was joined in this cause by Madison, both of whom were opposed in Congress by Wharton, Wilson, and others delegates from Pennsylvania, Maryland, Delaware, and New Jersey. John Dickinson, who was President of both Pennsylvania and Delaware during this period, was aware of the latter effort and likely supported it. The same is true of other members of Congress, several of whom later attended the Constitutional Convention. *See supra* note 210.

226. *See* 5 DHSC, *supra* note 3, at 274–351 (compiling the documentary record in *Hollingsworth v. Virginia*).

227. Letter from Edmund Randolph to James Madison (Feb. 29, 1788), *in* 10 PJM, *supra* note 148, at 542–44; Letter from Edmund Randolph to James Madison (Apr. 17, 1788), *in* 11 PJM, *supra* note 148, at 25–27.

228. *See* Letter from James Madison to Edmund Randolph (Apr. 10, 1788), *in* 11 PJM, *supra* note 148, at 18–20.

229. *See supra* notes 59–60 and accompanying text.

230. Crosskey, *supra* note 8, at 547.

231. *Id.* at 550.

could be adequately protected "by [confining] the restriction of ex post facto laws to crimes."[232] Crosskey's analysis of all these events was highly instructive. Nevertheless, his discussion was seriously incomplete. The main piece of the puzzle he neglected to consider was the connection between ex post facto laws and early American land companies.

At the Virginia convention, Mason made plain that his objection to the ex post facto clauses rested in part on their implications for the Indiana Company's claims.[233] On June 11, Mason warned that "if that Constitution is adopted without amendments, there are 20,000 families of good citizens in the North-West District, between the Allegany mountains and the Blue Ridge, who will run the risk of being driven from their lands. They will be ousted from them by the Indiana company."[234] On June 19, Mason returned to this topic and delivered a passionate speech against the Indiana claimants, highlighting the significance of ex post facto laws.

> [A]ll that great tract of country between the Blue Ridge and the Allegany mountains, will be claimed, and probably recovered in the Federal Court, from the present possessors, by those companies who have a title to them.—These lands have been sold to a great number of people.—Many settled on them, on terms which were advertised. How will this be with respect to *ex post facto* laws*?* We have not only confirmed the title of those who made the contracts, but those who did not, by a law in 1779, on their paying the original price. Much was paid in a depreciated value, and much was not paid at all.—Again, the great Indiana purchase which was made to the Westward, will, by this judicial power, be rendered a cause of dispute. The possessors may be ejected from those lands.[235]

As a solution to Virginia's predicament, Mason then proposed a constitutional amendment designed to limit the jurisdiction of federal courts and "render our citizens secure in their possessions justly held."[236]

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232. *Id*. at 551.

233. In his "Objections" to the Constitution, Mason had criticized both the federal and state ex post facto clauses: "Both the general Legislature & the State Legislatures are expressly prohibited from making ex post facto Laws: tho' there never was nor can be a Legislature but must & will make such Laws, when Necessity & the Public Safety require them; which will hereafter be a Breach of all the Constitutions in the Union, and afford Precedents for other Innovations.—" 3 PGM, *supra* note 53, at 993; *see also id*. at 983–84 (documentary evidence suggesting that Mason attempted to strike the ex post facto clauses from the Committee of Style report, but these motions were denied).

234. 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1161 (Merrill Jensen ed., 1976) [hereinafter DHRC].

235. 10 *id*. at 1408 (emphasis original).

236. *Id*. at 1409. Mason's proposed amendment read: "That the Judicial power shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in suits for debts due to the United States, disputes between States about their territory, and disputes between persons claiming lands under the grants of different States." In the latter cases, Mason observed, "there is an obvious necessity for giving [the courts] a retrospective power." *Id*.

Upon hearing Mason's June 19 speech, Madison and Randolph declined to renew their argument that the meaning of "ex post facto law" was technical and limited to crimes. Instead, after initially avoiding Mason's challenge,[237] Madison responded the next day to Mason's contention that the Indiana Company claims would "be brought before these [federal] Courts"[238] by shifting gears and arguing, on an entirely new footing, that federal courts would lack jurisdiction to hear the company's claims. "It is not in the power of individuals to call any State into Court,"[239] Madison now insisted. "The only operation [Article III's jurisdictional grants] can have, is, that if a State should wish to bring suit against a citizen, it must be brought before a Federal Court."[240] Madison was later joined in his rejection of state suability by John Marshall and George Nicholas, and opposed on it by Patrick Henry and William Grayson.[241] For his part, Randolph informed the delegates that "the Indiana Company has been 'dissolved' and that its claim would 'probably never be revived.'"[242] This statement was potentially misleading and seemingly at odds with the concerns Randolph had shared with Madison on the eve of the Virginia convention. Nevertheless, Randolph did inform the convention that he had previously represented the company and believed the Indiana claimants had justice on their side. He also expressed his view that, as a legal matter, the Indiana Company would be forced to seek their remedy not "against the settlers, but the State of Virginia" in a "Court of Equity," which would "direct a compensation to be made by the State, the claimants being precluded at law from obtaining their right, and the settlers having now an indefeasible title under the State."[243]

Just as Mason and Randolph predicted, shortly after the Constitution was ratified a group of Indiana Company shareholders announced their intention to bring their claims against Virginia in a federal court.[244] Before doing so, however, the shareholders made a final attempt to persuade Virginia to deal equitably with their claims. After refusing to consider successive petitions from the Indiana proprietors in 1789 and 1790, the Virginia House of Delegates finally gave them an opportunity to present their arguments to that body in October 1791.[245] According to a November 12, 1791 report published in *Dunlap's Daily American Advertiser*, a House committee recommended that a commission be instituted to investigate and make a report on the merits of the Indiana Company's claims and "what compensation, if any, shall be justly due to the memorialists."[246] However,

237. *Id*.
238. *Id*. at 1408.
239. *Id*. at 1414.
240. *Id*.
241. *Id*. at 1422–68. *See also* 5 DHSC, *supra* note 3, at 281.
242. 5 DHSC, *supra* note 3, at 281 (quoting 10 DHRC, *supra* note 234, at 1468).
243. 10 DHRC, *supra* note 234, at 1454.
244. 5 DHSC, *supra* note 3, at 281.
245. *Id*. at 281–82.
246. DUNLAP'S AM. DAILY ADVERTISER, Nov. 12, 1791 (publishing the November 1 proceedings of the Virginia House of Delegates with respect to the Indiana Company).

Henry "Light Horse Harry" Lee, the Revolutionary War hero who soon would become the next Virginia Governor, opposed this committee recommendation, arguing that:

> [I]t would place the memorialists on a better footing than ever they had been, inasmuch as the resolve would imply a doubt in the house, that the *ex post facto law* complained of by the memorialist, might be wrong—whereas the house could not admit of such a doubt; nor ought they to suffer any power on earth, or any person or persons, but that house, to judge the merits of the Indiana claim.[247]

Lee prevailed in this contest. By a lopsided vote of 126-4, the Virginia legislature reaffirmed its 1779 statute and resolutions invalidating the company's claims.[248]

In the summer of 1792, the Indiana Company retained William Lewis and William Rawle, two close acquaintances of Wilson, to pursue the company's claims in federal court.[249] Soon thereafter, Lewis and Rawle submitted a twenty-eight page "Bill of Equity" to the United States Supreme Court.[250] In the first version of this bill, prepared sometime before August 11, 1792, Wilson was listed as a shareholder of the Indiana Company, and the circumstances of how he acquired these shares were stated in full.[251] In an amended bill filed with the Court, however, Wilson's name does not appear, and the paragraph that described his ownership was deleted.[252]

Despite an evident conflict of interest, Wilson actively participated in the ensuing federal lawsuit, first styled *Grayson v. Virginia* and later *Hollingsworth v. Virginia*. For example, Wilson was present during the August 1792 term in Philadelphia, in which the Supreme Court first ruled in favor of the Indiana Company, issuing a subpoena to Attorney General James Innes to appear before the Court on behalf of Virginia on February 4, 1793.[253] He also participated in the decision by the Supreme Court on August 12, 1796, to issue an Alias Subpoena to the Governor of Virginia and, in the event no appearance was made, to permit the

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247. 5 DHSC, *supra* note 3, at 292 (emphasis added).

248. *Id*. at 282.

249. Lewis and Rawle were prominent Philadelphia attorneys, who later became leaders of the Supreme Court bar during the period in which Wilson served as Associate Justice. Wilson knew both of them well. Lewis worked closely with Wilson in defending alleged loyalists against treason charges during the Revolution. *See, e.g*., SMITH, *supra* note 62, at 118–23 (recounting Wilson's and Lewis's partnership in this endeavor). Lewis and Wilson were also two of the most active participants in the drafting of the 1790 Pennsylvania Constitution, where they were members of the three-person committee that did most of the final drafting of that document.

250. 5 DHSC, *supra* note 3, at 282.

251. *Id*. at 312 ("And your Orator, James Wilson, saith that he stands seized in fee simple of three hundred shares held by him, by virtue of a deed executed in pursuance of a resolution of the Indiana Company, dated the twenty–seventh day of December, one thousand seven hundred and eighty-one.").

252. *Id*. at 282, 299, 312.

253. *Id*. at 316–17; *see also* LEWIS, *supra* note 70, at 278; SMITH, *supra* note 62, at 352.

Indiana claimants to proceed *ex parte*.[254] Finally, Wilson was also present on February 13, 1797, when the Supreme Court granted a series of motions by William Lewis, authorizing commissions to various individuals to examine witnesses in Pennsylvania, Virginia, and Kentucky.[255]

We will return to *Hollingsworth v. Virginia* in Part III. For now, one final observation about that dispute seems appropriate. On February 18, 1793, the Supreme Court decided *Chisholm v. Georgia*.[256] From Virginia's perspective—and probably also from Wilson's—*Chisholm* and *Grayson*/*Hollingsworth* involved the same basic question: whether a state could be sued in federal court.[257] On its most straightforward reading, Wilson's opinion in *Chisholm* can be read as addressing the Court's jurisdiction over the underlying contractual dispute in that case. At the same time, some of his most memorable remarks in that opinion, such as his pointed reference to the lack of a meaningful difference between a "dishonest merchant" and a "dishonest State,"[258] can be viewed as an oblique commentary on the actions of the State of Virginia in connection with the claims of the Indiana and Illinois-Wabash Companies. If one reads Wilson's *Chisholm* opinion alongside *Plain Facts*, for example, it becomes apparent that they share a common perspective on vindicating natural rights against the unscrupulous actions of dishonest states. Conversely, knowledgeable insiders such as Madison, Randolph, Lewis, and Rawle probably perceived Wilson's opinion to be at least indirectly related to his stake in the companies' claims.

B. The Georgia Company and Georgia's 1795 Sale of Yazoo Lands

On January 7, 1795, the Georgia state legislature passed a bill authorizing the sale of approximately 35 million acres of land in present-day Alabama and Mississippi to four land companies for $500,000. The largest transaction in this "Great Yazoo Lands Sale"[259] was made with the Georgia Land Company, a land syndicate led by United States Senator James Dunn. Wilson was the largest single shareholder in this company, having invested $25,000 in exchange for a claim to 750,000 acres.[260] In August 1795, soon after Justice Paterson delivered his opinion in *Dorrance*, Wilson appears to have purchased the rights to another 1,000,000 acres of Yazoo land.[261] The first Yazoo sale generated controversy almost immediately, and critics maintained that the deal was characterized by bribery, corruption, and fraud—allegations that did not leave Wilson unscathed. At least one commentator writing in the Philadelphia *Aurora* called for Wilson to

254. 3 U.S. (3 Dall.) 320 (1796). Dallas lists this proceeding as Grayson v. Virginia, but by this time, the caption had been changed to Hollingsworth v. Virginia in the Court's own records of the case. *See* 5 DHSC, *supra* note 3, at 340–42.

255. 1 *id*. at 289.

256. 2 U.S. (2 Dall.) 419 (1793).

257. *See*, *e.g*., LEWIS, *supra* note 70, at 282–83.

258. *See Chisholm*, 2 U.S. (2 Dall.) at 456.

259. *See generally* HOBSON, *supra* note 74; MCGRATH, *supra* note 74.

260. 5 DHSC, *supra* note 3, at 505.

261. *Id*.

be impeached.[262] Writing to James Monroe from Philadelphia on March 27, 1795, James Madison informed him that "Wilson and Pendleton the fedl. Judges, though not named in the law are known adventurers. The former is reprobated here by all parties."[263] The Georgia legislature subsequently rescinded these grants in 1796, an act which itself triggered controversy and, eventually, multiple lawsuits. "Yazoo" and its perceived culture of corruption continued to be a hotly contested political issue until 1810, when the Supreme Court finally decided *Fletcher v. Peck*, upholding the original 1795 grants.

For our purposes, two points arising out of the Yazoo Lands Sale deserve emphasis. First, as Charles F. Hobson recounts, the land companies and their supporters were confident that Georgia's 1795 sale was legal and that a succeeding legislature could not simply invalidate it. Notably, their grounds for these beliefs included both the contracts clause and the ex post facto clause of Article I, Section 10. "To [repeal the grants] would itself be an unconstitutional act, they explained, as amounting to an 'ex post facto' law or law impairing the obligation of contract, both of which were prohibited by the U.S. Constitution."[264] These arguments presupposed that ex post facto laws included non-criminal laws. According to Hobson, the Yazoo speculators condemned all "retrospective laws—laws that extend back in time and take effect before passage of the act—as exceeding the boundaries of legislative power. A legislative act, they repeatedly insisted, declares what the law shall be and can operate only prospectively."[265] The speculators also argued that:

> Legislatures . . . could repeal laws adopted by their predecessors, but this repealing power extended only to laws of general application, in which the state was the sole party. It did not extend to a different class of laws—contracts in which there were two parties and in which rights were acquired and vested. Public contracts, like private contracts between individuals, could not be abrogated or annulled by one of the private parties without violating" natural justice."[266]

These arguments anticipate John Marshall's opinion in *Fletcher v. Peck*, which upheld the validity of the 1795 grants on similar grounds.[267] They also reflect the

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262. *Id*. at 506 (citing the PHILA. AURORA, February 16, 1795).
263. *Id*. at 505–06 (citing 15 PJM, *supra* note 148, at 499).
264. HOBSON, *supra* note 74, at 47.
265. *Id*.
266. *Id*.
267. 10 U.S. (6 Cranch) 87, 136–37 (1810) ("The principle asserted is that one Legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights . . . .").

legal opinion on these events that the land companies solicited from Alexander Hamilton, which presumably influenced Marshall in turn.[268] Directly or indirectly, Marshall and Hamilton were probably indebted to Wilson for this argument, which closely tracks Wilson's 1785 essay on the Bank of North America.[269] Whether Wilson actively shared this essay with Hamilton, Robert Goodloe Harper, or the other attorneys who took the lead in formulating the land companies' legal arguments and shaping public opinion of the Yazoo affair during the 1790s is not clear from the existing record. Nevertheless, it seems likely that many of these individuals were familiar with the logic of Wilson's essay, thereby reinforcing the links between Wilson and the arguments made by the Yazoo speculators.[270]

Second, and even more significantly, it is telling that a broad interpretation of "ex post facto law" was presupposed by the very law at issue in the great Yazoo Lands Sale itself. In the course of reciting all of the various provisions of federal law (including the Articles of Confederation, Treaty of Paris, and U.S. Constitution) that permitted the State of Georgia to sell these lands and protected its right to do so, the January 7, 1795 Act of the Georgia legislature granting these vast territories to the Georgia Land Company and three other companies referred to the ex post facto clause of Article I, Section 9 in the following series of "whereas" clauses:

> And whereas in and by the first clause of the sixth article of the Federal Constitution of the United States of America, all engagements entered into before the adoption of the said Constitution, shall be as valid against the United States, under the said Constitution, as under the confederation, *by the third clause of the ninth section of the first article of the said Constitution, no ex post facto law shall be passed*, and by the second clause of the third section of the fourth article, the Congress shall have power to dispose of and make all necessary rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state . . . .[271]

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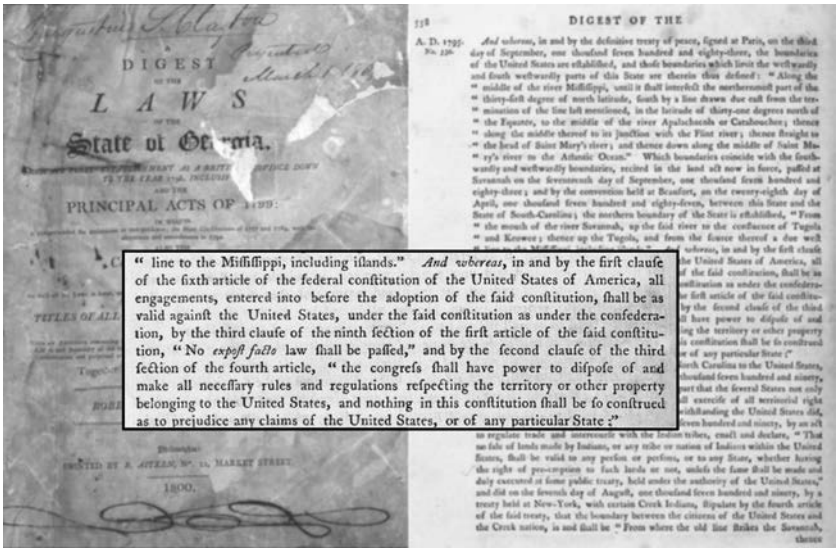
268. *See Alexander Hamilton's Opinion on the Georgia Repeal Act*, *in* MCGRATH, *supra* note 74, at 149–50 (arguing that Georgia's Repeal Act violates the Contracts Clause of Article I, Section 10).

269. *See, e.g.*, CONSIDERATIONS ON THE BANK OF NORTH AMERICA, *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 147, at 71–72 (classifying different types of laws, some of which are laws of general application and can thus be legitimately repealed, and others of which vest rights in individuals and must be governed by principles of contract law).

270. Wilson knew Harper, and he was present on February 13, 1797, when Harper was sworn in to the Supreme Court bar. *See* 1 DHSC, *supra* note 3, at 288–90. In addition to his efforts on behalf of the Yazoo speculators, culminating in *Fletcher v. Peck*, Harper became the lead attorney for the Illinois-Wabash Company after Wilson's death, arguing their case to the Supreme Court in *Johnson v. M'Intosh*. *See generally* ROBERTSON, *supra* note 64, at 29–44, 45–76. For his part, Hamilton was familiar with Wilson's bank essay and may have owned a copy, having referred to it in a letter to Jeremiah Wadsworth in 1785. *See* 3 PAH, *supra* note 92, at 625–27.

271. 5 AM. L.J. 354, 404, 424 (1814) (emphasis added). *See also* Figure 3.

FIGURE 3. Excerpt from Digest of the Laws of the State of Georgia (1800)



DIGEST
OF THE
LAWS
OF THE
State of Georgia.
PRINCIPAL ACTS OF
1800.

DIGEST OF THE

A. D. 1795. No. 330.

And whereas, in and by the definitive treaty of peace, figned at Paris, on the third day of September, one thouſand ſeven hundred and eighty-three, the boundaries of the United States are eſtabliſhed, and thoſe boundaries which limit the weſtwardly and ſouth weſtwardly parts of this State are therein thus defined: "Along the "middle of the river Miſſiſſippi, until it ſhall interſect the northernmoſt part of the "thirty-firſt degree of north latitude, ſouth by a line drawn due eaſt from the ter- "mination of the line laſt mentioned, in the latitude of thirty-one degrees north of "the Equator, to the middle of the river Apalachicola or Catahouchee; thence "along the middle thereof to its junction with the Flint river; thence ſtraight to "the head of Saint Mary's river; and thence down along the middle of Saint Ma- "ry's river to the Atlantic Ocean." Which boundaries coincide with the ſouth- weſtwardly and weſtwardly boundaries, recited in the land act now in force, paſſed at Savannah on the ſeventeenth day of September, one thouſand ſeven hundred and eighty-three; and by the convention held at Beaufort, on the twenty-eighth day of April, one thouſand ſeven hundred and eighty-ſeven, between this State and the State of South-Carolina; the northern boundary of the State is eſtabliſhed, "From "the mouth of the river Savannah, up the ſaid river to the confluence of Tugelo "and Keowee; thence up the Tugelo, and from the ſource thereof a due weſt

" line to the Miſſiſſippi, including iſlands." *And whereas*, in and by the firſt clauſe of the ſixth article of the federal conſtitution of the United States of America, all engagements, entered into before the adoption of the ſaid conſtitution, ſhall be as valid againſt the United States, under the ſaid conſtitution as under the confederation, by the third clauſe of the ninth ſection of the firſt article of the ſaid conſtitution, "No *expoſt facto* law ſhall be paſſed," and by the ſecond clauſe of the third ſection of the fourth article, "the congreſs ſhall have power to diſpoſe of and make all neceſſary rules and regulations reſpecting the territory or other property belonging to the United States, and nothing in this conſtitution ſhall be ſo conſtrued as to prejudice any claims of the United States, or of any particular State;"

PRINTED BY R. ASTLEY, No. 12, MARKET STREET.

1800.

The point of the italicized reference to Article I, Section 9 in this passage was to underscore that Georgia considered the United States to be bound by its previous laws and decisions with respect to Georgia's territorial boundaries, jurisdiction, and rights. The most important of these legislative acts was the decision by the outgoing Confederation Congress to reject a proposed cession by Georgia of its western lands on July 15, 1788.[272] Any repeal of this decision on which Georgia had relied would be an unconstitutional ex post facto law, according to the 1795 legislation.

Crosskey did not consider the Yazoo Lands Sale in his discussion of ex post facto laws. On reflection, this seems surprising. Because of its notoriety, the Yazoo affair is more than just another illustration of an original public meaning of "ex post facto law" unlike the one adopted in *Calder v. Bull*. "For three decades," C. Peter McGrath reminds us, "the name 'Yazoo' stood for a series of events which scandalized the state of Georgia, troubled Congress and the administrations of Washington, Adams, Jefferson, and Madison, and divided Jefferson's Republican party."[273] Particularly after President Washington submitted Georgia's legislation to Congress on February 17, 1795, along with a warning that it held extraordinary significance for the peace and welfare of the United States,

272. *See id*. at 425 (observing that, on that date, Congress rejected the February 5, 1788, cession Georgia had offered the United States); *cf*. 34 JCC, *supra* note 122, at 323–26 (describing the report of the congressional committee that recommended rejecting Georgia's proposed cession). The JCC lists the date of the Georgia cession as February 1 instead of February 5. *Id*. at 323.

273. MCGRATH, *supra* note 74, at vii.

thousands of Americans probably became familiar with the basic facts of the case, and hundreds, if not thousands, likely set their eyes on the text of the 1795 Act. This last group presumably included Wilson and the other land company proprietors, along with members of the Georgia legislature, members of Congress, judges and other government officials, newspaper publishers, and other close observers of the Yazoo affair. To some extent, then, all of these individuals were probably familiar with this counterexample to the allegedly "technical" meaning of "ex post facto law" espoused by Randolph and Madison at the Virginia ratifying convention, and later endorsed by Justices Chase, Iredell, and Paterson in *Calder v. Bull*.

Furthermore, many of these early Americans were "founders" in at least one obvious sense of that term. For example, George Matthews, who signed the 1795 bill into law, was a major figure in Georgia politics and served as Governor when Georgia ratified the Constitution. Like the other twenty-five delegates to the Georgia ratifying convention, he voted to adopt the Constitution on January 2, 1788.[274] Likewise, Georgia Secretary of State John Milton, who certified the 1795 land sale, also served as a delegate to the Georgia ratifying convention.[275] There is no indication that either of them took issue with this reference to the federal ex post facto clause in the 1795 bill. Consequently, what seems evident from all of these circumstances is probably true: Matthews, Milton, and other founders who were actively involved with the Yazoo sale understood the Constitution's prohibition of ex post facto laws to encompass retroactive civil laws.

C. The Illinois-Wabash Company and Wilson's 1797 Memorial and Letter to Congress

The final body of evidence reviewed in this Part concerns the Illinois-Wabash Company. As we have seen, Wilson drafted at least three memorials to Congress from 1780 to 1788, seeking recognition of the company's land titles.[276] Between 1790 and 1797, he drafted at least three additional memorials for the same purpose, the last of which clearly implied that the company's property rights were protected by the ex post facto clauses.[277] When the last of these petitions was denied on February 3, 1797, Wilson responded by writing a sharply-worded letter to the House and Senate committees to which the company's memorial had been assigned.[278]

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274. 3 DHRC, *supra* note 234, at 270, 275, 276, 279.

275. *Id.*

276. *See supra* notes 172–93 and accompanying text. *See also* Kades, *supra* note 167, at 1085.

277. *Id. See* MEMORIAL OF THE ILLINOIS AND WABASH LAND COMPANY, 13TH JANUARY, 1797, REFERRED TO MR. JEREMIAH SMITH, MR. KITTERA, AND MR. BALDWIN. PUBLISHED BY THE ORDER OF THE HOUSE OF REPRESENTATIVES (Philadelphia, Richard Folwell 1797) [hereinafter 1797 Memorial] (asserting that the company's property rights could not be abrogated "by any ex post facto ordinance or law"). *See also* 1 American State Papers, Public Lands 64 (1834) (same).

278. *See id.* at Appendix No. III. I refer to Appendix No. III of this document as a "letter" mainly for convenience. In fact, the document is not an ordinary letter and might be more accurately described as a "supplemental petition" to the 1797 Memorial. The printed document by Richard Folwell is not signed by or attributed to Wilson individually. Instead, it is presented as the joint product of company agents.

Wilson's letter, which along with the company's 1797 Memorial was later published in Philadelphia by Richard Folwell, is noteworthy for at least four interrelated reasons. First, the letter provides fresh insight into Wilson's thinking at this late stage of his life, supplementing the more familiar elements of his political and legal philosophy one finds in his *Law Lectures* and his judicial opinions, such as *Hayburn's Case*, *Chisholm*, *Henfield's Case*, and *Ware v. Hylton*. Second, Wilson's letter draws heavily on Paterson's grand jury charge in *Vanhorne's Lessee v. Dorrance*. Because Paterson's grand jury charge "is the most extensive federal court discussion of judicial review before Marbury,"[279] the fact that Wilson strongly embraces Paterson's logic in his letter is significant for our understanding of the early history of judicial review. Third, in the course of echoing "one of the learned and independent judges of the Supreme Court of the Union" (Paterson), Wilson supplies a striking gloss on several of the topics, including natural law, natural rights, separation of powers, and ex post facto laws, which Justices Chase, Iredell, and Paterson later addressed in their opinions in *Calder v. Bull*. Moreover, Wilson's letter suggests that there may have been sharp disagreements between him and his fellow Justices on some of these matters, including the scope of "ex post facto laws." In fact, in light of these differences it seems possible that Chase and Iredell may have been *responding* to Wilson when they engaged in their famous debate over natural rights in *Calder*, and that Paterson's opinion may have been written with Wilson partly in mind as well. Finally, Wilson's letter constitutes one of his last public statements on topics of any kind. Within a few months, Wilson left Philadelphia for good, never to return. Thereafter, his correspondence is scanty.[280]

Addressed to "The Honorable Committees of the Senate & House of Representatives of the United States, on the Illinois and Wabash Land Purchases," Wilson's letter begins by recalling the situation in which the Illinois-Wabash Company found itself upon learning that a joint committee of Congress had decided to adopt a 1792 Senate Committee report rejecting the company's land titles. Wilson's letter summarizes this 1792 report, along with a more favorable House committee report issued that same year which recognized that the company's deeds adequately extinguished Indian title and recommended that "on the principles of equity and justice" the United States should strike a deal with the company. Wilson emphasizes that the primary objective of the company's 1797 Memorial was either to achieve a compromise with Congress based on the principles of the House

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At the end of the document, this statement appears: "N.B. The Agents appointed by the Illinois and Wabash Companies to manage this business in Congress, are the President and Council, viz., James Wilson, Esq. President, Robert Morris, Esq. William Smith, D.D. John Steinmetz, and John Nicholson, Council." *Id.* at 7. Although he might have received input from Morris or other Council members, there seems little doubt that the document was written by Wilson.

279. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 526 (2005).

280. In Burton Alva Konkle's collection of Wilson's letters, Wilson's correspondence from February 1797 until his death in August 1798 consists of only eight letters. Seven are written to his son, Bird, and the remaining letter is written to Joseph Thomas. *See* 2 BURTON ALVA KONKLE, THE LIFE AND WRITINGS OF JAMES WILSON 513–38 (1985).

committee report or for Congress to create "some method or mode for a judicial decision of the principle" on which the Senate committee report was based. By adopting the 1792 Senate committee report without further action, he remarks, the joint committee had effectively ignored the prayer of the company's memorial, which was "its very essence." As a result, the company was "left just where [it was] in 1792," and "even on a worse footing than [it] stood before," since the favorable House committee report had been ignored, and no effort had been made to resolve the disputed issue between the Senate committee and the company.[281]

Wilson's letter expresses gratitude for the opportunity the company was given to show that the Indian title was extinguished by the company's deeds. However, he questions whether "by resolves of the Legislature, acting as one party on behalf of the United States, without the citizen of the other party consenting," Congress could make a "constitutional determination" on this issue. Therein lay the crux of the matter, Wilson says, for "if it should be determined by Congress, that the Indian title was not extinguished by the deeds, there must be an end of the business, so far as a compromise [is] concerned." If, on the other hand, Congress were to agree that Indian ownership was extinguished and title to the lands was now "vested in the companies, according to their deeds," then a second legal issue would arise: namely, whether this title "vested absolutely in the Grantees for their own use, or in trust for the nation," in light of the retroactive principle of the Senate committee report, which banned "private persons from making Indian purchases, as well before as since the Revolution."[282]

It is at this point that Wilson turns to Paterson's opinion in *Dorrance*. On "this head of Constitutional Legislative authority," Wilson writes, "we beg leave to insert a few extracts from a late charge given by one of the learned and independent judges of the Supreme Court of the Union."[283] Wilson then quotes extensively from Paterson's grand jury charge, rearranging and editing some of Paterson's language, and interleaving comments of his own. The result makes for a powerful blast, which is worth quoting at length. What follows is how Paterson's argument appears in Folwell's 1797 publication of Wilson's letter, except that I have italicized Wilson's own commentary and revisions so they can be more easily identified:

> Some of the judges in England, *says he*, have had the boldness to assert, that an act of Parliament, made against natural equity, is void. *It is true, this opinion contradicts the doctrine of the omnipotence of Parliament, to bind the subject in all cases whatsoever, and that their authority and Acts, are not to be drawn into question in any other place, or by any other power—a doctrine from which the people of the United States justly revolted, we trust, never to be subjected to its effects again—For, says the same upright Judge*, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is

281. 1797 Memorial, *supra* note 277, at 1–3 (Appendix No. III).
282. *Id.* at 3–4.
283. *Id.* at 4.

> widely different: Every State in the Union has its constitution reduced to written exactitude and precision.—
>
> What is a *Constitution*? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it.
>
> What are Legislatures? Creatures of the *Constitution*; they owe their existence to the Constitution. It is their commission, and, therefore, all their acts must be conformable to it, or else they will be *void*. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, as absolutely *void*. Speaking of points reserved to the people, by declarations of Rights and Constitutions—As to these points, *says he*, there is no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the Legislature had passed an act declaring, that, in future, there should be no *trial by jury*, would it have been obligatory? No: It would have been *void* for want of jurisdiction, or constitutional extent of power. *Such also would be a law, or any ex post facto act of a legislature, impairing the right of contracts, or affecting life, liberty, or property, as secured by the Constitution.—No person, continues he*, can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage. The right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the Constitution. *And elsewhere it is laid down that* the judiciary power is not subordinate to, but co-ordinate with the legislative and executive—*they are all limited by the Constitution, which says to each of them*, "Thus far shall ye go, and no farther."[284]

After firing these shots, Wilson concludes his letter by delivering another stern lecture about the need for Congress to devise some method for a "judicial decision" on the company's claims. In doing so, he reiterates his conviction that it would not be proper for Congress to designate itself the relevant tribunal:

> The *prayer* of our Memorial is for a compromise on equitable terms, if any right is found vested in us, which can be available to the United States by the extinguishment of the *Indian Title*, under our *deeds*; and that some method may be devised for a *judicial decision* of the question; fully confiding in the wisdom and justice of Congress, that in their legislative capacity, and as

284. *Id.* at 4–6. The emphasis on "Constitution" and "void" in the second and first part of the third paragraphs are not in Dallas' report of Paterson's opinion in *Dorrance*. Thus, they appear to be Wilson's additions. *See also* Figure 4.

> parties in the case, on behalf of the United States, they would not consider *themselves* as the proper tribunal of decision, nor refuse the *citizen* his humble suit of an amicable investigation and decision of a *Title* in the proper place. For such refusal would be omnipotence in legislation—a *power* above *law*; and we should be left with the first example, under our happy Constitution, of citizens having or claiming a *right* without a *remedy*.[285]

What should one make of these passages? From a contemporary perspective, they seem extraordinary. To begin with, Wilson's letter constitutes an aggressive warning issued to members of Congress by a sitting Supreme Court Justice, which quotes another Justice affirming that the Constitution is "paramount to the power of the legislature," that "every Act of the legislature, repugnant to the Constitution is absolutely void," and that "Omnipotence in legislation is despotism."[286] So described, the effort seems out of place and heavy-handed, to say the least. When one recalls that Wilson already was "reprobated . . . by all parties" in the wake of the Yazoo controversy,[287] the harsh light in which his letter was probably received becomes readily apparent. Wilson has often been characterized as socially awkward or having a "tin ear" when it came to grasping how his actions would be perceived by others.[288] His letter seems like a good illustration; to describe it as maladroit and ineffective seems like an understatement. It is perhaps not surprising, then, that this appeal, Wilson's last attempt to persuade Congress to act more favorably toward his company's longstanding claims, was entirely unsuccessful.[289]

When one looks at the matter from Wilson's perspective, on the other hand, the frustration and exasperation evident in his letter seem more understandable. Over the course of nearly twenty years of diligent attempts to vindicate the Illinois-Wabash claims, Wilson had watched Virginia first pass a series of ex post facto laws invalidating the company's titles and then attempt to cede the territories in question to Congress on the condition that Congress, too, act retroactively to render the company's contracts null and void. Later, even though the Constitution he had worked so hard to frame and ratify explicitly prohibited ex post facto laws, Wilson had watched Madison and Randolph misrepresent the meaning, not only of that prohibition, but also of state suability, at the Virginia ratifying convention in order to fend off the claims of the Indiana Company. He

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285. *Id*. at 6–7.

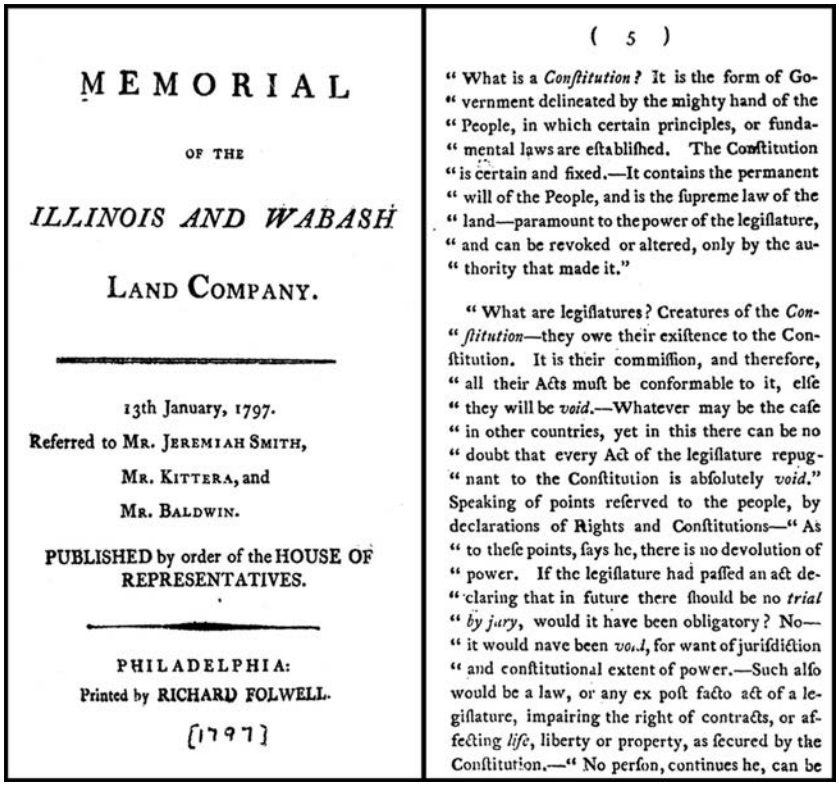
286. *Id*. at 5–6.

287. *See supra* note 263 and accompanying text.

288. *See*, *e.g*., WITT, *supra* note 62, at 71 (suggesting that Wilson's contributions to the constitutional convention, although much-praised, were often "clumsy and ill calculated to advance his goals").

289. *See* February 16, 1797, *in* 6 ANNALS OF CONGRESS 1551–52 (recording a final Senate resolution rejecting the 1797 Memorial and noting that "on [a] motion, to reconsider this resolution, for the purpose of reading a petition on the subject, it passed in the negative"). Because by February 16 both houses of Congress had already received and acted upon the 1797 Memorial, the "petition on the subject" to which this statement refers was presumably Wilson's supplemental letter.

FIGURE 4. Memorial of the Illinois and Wabash Land Company (1797)



MEMORIAL

OF THE

ILLINOIS AND WABASH

LAND COMPANY.

13th January, 1797.

Referred to MR. JEREMIAH SMITH,

MR. KITTERA, and

MR. BALDWIN.

PUBLISHED by order of the HOUSE OF REPRESENTATIVES.

PHILADELPHIA:

Printed by RICHARD FOLWELL.

[1797]

(5)

" What is a *Conſtitution?* It is the form of Go-
" vernment delineated by the mighty hand of the
" People, in which certain principles, or funda-
" mental laws are eſtabliſhed. The Conſtitution
" is certain and fixed.—It contains the permanent
" will of the People, and is the ſupreme law of the
" land—paramount to the power of the legiſlature,
" and can be revoked or altered, only by the au-
" thority that made it."

" What are legiſlatures? Creatures of the *Con-*
" *ſtitution*—they owe their exiſtence to the Con-
ſtitution. It is their commiſſion, and therefore,
" all their Acts muſt be conformable to it, elſe
" they will be *void*.—Whatever may be the caſe
" in other countries, yet in this there can be no
" doubt that every Act of the legiſlature repug-
" nant to the Conſtitution is abſolutely *void*."
Speaking of points reſerved to the people, by
declarations of Rights and Conſtitutions—" As
" to theſe points, ſays he, there is no devolution of
" power. If the legiſlature had paſſed an act de-
" claring that in future there ſhould be no *trial*
" *by jury*, would it have been obligatory? No—
" it would have been *void*, for want of juriſdiction
" and conſtitutional extent of power.—Such alſo
would be a law, or any ex poſt facto act of a le-
giſlature, impairing the right of contracts, or af-
fecting *life*, liberty or property, as ſecured by the
Conſtitution.—" No perſon, continues he, can be

had witnessed one congressional committee issue a favorable report on the Illinois-Wabash claims in 1788, and another do so in 1792. Yet he had also observed a Senate committee undercut the company's position by embracing a retroactivity principle at odds with both the letter and the spirit of the Constitution. He had written a powerful opinion about sovereignty, federal jurisdiction, and individual rights in *Chisholm*, only to see Congress respond by adopting the Eleventh Amendment. Now, four years later, Congress had not only rejected the company's latest petition and endorsed the flawed Senate committee report, but it had also implicitly assigned itself the role of judge and jury in determining the company's rights.

Considerations like these may be what led Wilson to declare so forcefully in his letter that "the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable" and that "any ex post facto act of a legislature,

impairing the right of contracts, or affecting life, liberty, or property" is void.[290] In formulating the first of these statements, Wilson quoted Paterson, but the original passage in *Dorrance* on which Wilson relied concerned the 1790 Pennsylvania Constitution. Referring to that instrument, Paterson had written: "The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution."[291] Wilson lifted this proposition out of its original context—which, of course, he knew better than anyone, having served as one of the chief draftsmen of the 1790 Pennsylvania Constitution[292]—and turned it into a precept about natural rights *simpliciter*: "the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable." Wilson also silently transformed Paterson's reference to "a right not *ex gratia* from the legislature, but *ex debito* from the constitution" from a proposition about the Pennsylvania Constitution to one referring to the Constitution of the United States.

Wilson's second statement, concerning "any ex post facto act of a legislature," is purely his contribution, which he carefully composed in order to amplify both Paterson's remarks about the limits of legislative power and his own reference to ex post facto laws in his 1797 Memorial. To persuade members of Congress to recognize his company's property rights, Wilson's 1797 Memorial had declared that those rights originated in valid purchases made before the Declaration of Independence. Accordingly, Wilson says, they "remain sound and unforfeited, and have never been relinquished under the revolution, nor can be touched by any *ex post facto* ordinance or law, but continue unimpeached and upon the same basis of law and equity as they were under the British Government."[293] In a similar fashion, his letter declares that "the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable," and that "any ex post facto act of a legislature, impairing the right of contracts, or affecting life, liberty, or property" is unconstitutional. In each case, the affirmation of both judicially cognizable natural rights and a civil application of the ex post facto clauses seem clear and unmistakable. Wilson's remarks may have triggered the subsequent reflections

290. 1797 Memorial, *supra* note 277, at 5–6.

291. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (1795).

292. For a partial documentary record of Wilson's substantial contributions to this endeavor, which included serving first on eleven-member committee to draft the 1790 Pennsylvania Constitution, and then on a three-member committee (with William Lewis and William Findlay) to revise this draft and compose the final document, see MINUTES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, WHICH COMMENCED AT PHILADELPHIA, ON TUESDAY THE TWENTY-FOURTH DAY OF NOVEMBER, FOR THE PURPOSE OF REVIEWING, AND IF THEY SEE OCCASION, ALTERING AND AMENDING THE CONSTITUTION OF THIS STATE (Philadelphia, Zachariah Poulson 1789–1790) [hereinafter MINUTES OF THE PA. CONVENTION]; MINUTES OF THE GRAND COMMITTEE OF THE WHOLE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, WHICH COMMENCED AT PHILADELPHIA, ON TUESDAY THE TWENTY-FOURTH DAY OF NOVEMBER, FOR THE PURPOSE OF REVIEWING, AND IF THEY SEE OCCASION, ALTERING AND AMENDING THE CONSTITUTION OF THIS STATE (Zachariah Poulson, Philadelphia 1789–1790) [hereinafter MINUTES OF THE GRAND COMMITTEE]. For a narrative account, see SMITH, *supra* note 62, at 296–304.

293. 1 American State Papers, Public Lands 64 (1834).

on these topics by Justices Chase, Iredell, and Paterson in *Calder*—a topic warranting further inquiry.

Wilson's observations are notable for their clarity, along with their sweeping character—both unusual features in contemporaneous discussions of ex post facto laws. For example, shortly after the Constitution was signed on September 17, 1787, Roger Sherman and Oliver Ellsworth sent the document to Connecticut Governor Samuel Huntington together with a letter, in which they wrote: "The restraint on the legislatures of the several states respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligations of contract by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected."[294] This statement may or may not have been intended to mislead readers about the scope of the ex post facto and contracts clauses, as Crosskey alleged, but it is unquestionably ambiguous and confusing.[295] Something similar seems true of Tench Coxe's *American Citizen*, which may have been the first Federalist effort to rebut Mason's objections to the ex post facto clauses by artfully implying that they were restricted to retrospective criminal laws. Wilson and other Federalists had encouraged Coxe to take up his pen in order to "show the general advantages & obviate some of the Objections to the System,"[296] and Coxe obliged, writing a series of essays that appeared in over a dozen newspapers and magazines. Responding to Mason, Coxe wrote: "Laws, made after the commission of the fact, have been a dreadful engine in the hands of tyrannical governors. Some of the most virtuous and shining characters in the world have been put to death, by laws *formed to render them punishable*, for parts of their conduct which *innocence permitted*, and to which *patriotism impelled them*. These have been called *ex post facto* laws, and are exploded by the new system."[297] A reader might easily be led by these remarks to commit the fallacy of affirming the consequent, and thereby conclude that Coxe believed that *all* ex post facto laws are criminal in nature. Coxe's many connections to *Plain Facts* and the Indiana and Illinois-Wabash Companies, however, yield a different picture.[298]

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294. 13 DHRC, *supra* note 234, at 471. The Sherman/Ellsworth letter was first published in *The New Haven Gazette* on October 25, 1787, and subsequently reprinted in twenty–three newspapers (all but one of which were in the Northern states, the lone exception being Virginia). *Id*. at 470. The letter focused exclusively on the restriction against state ex post facto laws in Article 1, Section 10.

295. *See* CROSSKEY, *supra* note 39, at 330.

296. *See* 13 DHRC, *supra* note 234, at 437 (excerpt of October 21 letter from Coxe to James Madison, explaining that "At the request of Mr. Wilson, Dr. Rush and another friend or two I added a 4th paper, calculated to shew the general advantages & obviate some of the Objections to the System. It was desired by these Gentlemen for the purpose of inserting in one of several handbills, which it was proposed to circulate thro our Western counties"). Coxe sent copies to Madison, Hamilton, and William Tilghman. *Id*. at 431.

297. 13 DHRC, *supra* note 234, at 433.

298. *See, e.g*., *supra* notes 63, 70, 206–07 and accompanying text. *See also* 5 DHSC, *supra* note 3, at 291–92, 300, 312.

When Wilson helped draft the prohibition on ex post facto laws in the 1790 Pennsylvania Constitution,[299] he was in a different posture than Sherman, Ellsworth, and Coxe were in 1787. The same is true when he wrote his Memorial and letter to Congress in 1797. In his letter, Wilson's characterization of ex post facto laws now made perfectly clear that: (1) such laws could be civil as well as criminal in nature; and (2) they could be, but need not be, laws impairing rights of contract. He further clarified that "*any* ex post facto act of a legislature . . . affecting life, liberty or property, as secured by the Constitution" would be unconstitutional. By drawing a distinction between a "*law* . . . impairing the right of contracts, or affecting life, liberty or property" and "any ex post facto *act* of a legislature" doing the same, Wilson foreshadowed Chase's similar distinction in *Calder v. Bull*.[300] His thundering pronouncement, echoing Paterson, that "omnipotence in legislation is despotism" also resonates with parts of Chase's opinion,[301] as do other statements Wilson makes. For all these reasons, it seems necessary and appropriate for scholars to take a closer look at *Calder* and to reconsider the famous exchange between Chase and Iredell through the lens of Wilson's 1797 Memorial and letter. A plausible case can be made that Chase and Iredell may have had Wilson at least partly in mind when they engaged in this debate. However, a more detailed investigation of this issue is needed before any firm conclusions can be drawn.

III. HOLLINGSWORTH V. VIRGINIA

When the Supreme Court finally decided *Hollingsworth v. Virginia* during the February 1798 Term, Wilson was already in North Carolina, on the run from his creditors. Consequently, he did not participate in this final resolution of the case against Virginia that he had helped to advance over the course of two decades. After President Adams informed Congress that the Eleventh Amendment was formally adopted on January 8, 1798, U.S. Attorney General Charles Lee promptly initiated new proceedings in *Hollingsworth* on behalf of Virginia. Seeking to rid his native state of the Indiana claims once and for all, Lee asked the Supreme Court to hold that the Eleventh Amendment applied retroactively to bar diversity suits already in progress against the states.[302] The subsequent proceedings are revealing for many reasons, not the least of which is the light they

299. "That no ex post facto law, nor any law impairing contracts, shall be made." PA. CONST. Art. XVII (1790). *See generally* MINUTES OF THE PA. CONVENTION, *supra* note 292; MINUTES OF THE GRAND COMMITTEE, *supra* note 292; SMITH, *supra* note 62, at 296–304.

300. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Opinion of Chase, J.) ("An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the social compact, cannot be considered a *rightful exercise* of *legislative* authority.").

301. *Id.* at 387–88 ("I cannot subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute* and *without control*; although its authority should not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the State.").

302. *See* LEWIS, *supra* note 70, at 289; 5 DHSC, *supra* note 3, at 289. Lee may also have wanted to take advantage of Wilson's absence from the bench. In March 1797, Virginian William Heth wrote to Lee suggesting to postpone trial in *Irvine v. Sims's Lesee* until October. He added: "but then again,

shed on contemporaneous beliefs about ex post facto laws. Two principal points, pulling in opposite directions, merit close attention. On the one hand, a careful review of *Hollingsworth*—a case Crosskey neglected to discuss—confirms that the phrase "ex post facto law" was widely presumed at the time to encompass retroactive civil laws. On the other hand, *Hollingsworth* helps to explain the Supreme Court's contrary decision six months later in *Calder v. Bull*, thereby undercutting Crosskey's thesis that the decision in *Calder* was made in order to assist Wilson.

In calling for a retroactive application of the Eleventh Amendment in *Hollingsworth*, Lee and his co-counsel, John Marshall, were opposed by U.S. Attorney William Rawle, representing the Indiana Company, and future Pennsylvania Supreme Court Justice William Tilghman, representing Alexander Moultrie and the other complainants in *Moultrie v. Georgia* (a related land case arising out of the Yazoo controversy).[303] Rawle and Tilghman had worked together in *Vanhorne's Lessee v. Dorrance*, where, together with their co-counsel, Joseph Thomas and William Lewis, they had argued that the ban on ex post facto laws in Article I, Section 10 applied to a wide range of civil matters, including Pennsylvania's 1780 Gradual Abolition Act.[304] Now, joining forces again in *Hollingsworth*, these two esteemed Philadelphia lawyers attempted to rebut Lee's argument by applying what they took to be the constitutional prohibition against retroactivity to the Eleventh Amendment itself.

Tilghman began his oral argument on behalf of the land companies by emphasizing that it would be "a great hardship" for persons like their clients, who had already initiated valid suits, to be "deprived of a right of action, or be condemned to payment of costs, by an amendment of the Constitution *ex post facto*."[305] For that reason alone, he argued, the Eleventh Amendment should be construed to leave federal jurisdiction "unimpaired, in relation to all suits instituted, previously to the adoption of the amendment."[306] Tilghman then raised two more specific objections to Lee's contention that the Eleventh Amendment should be applied retroactively. First, he argued that the Amendment was not yet valid because the President himself had not approved it. To support this argument, he pointed to the language in Article I, Section 7 of the Constitution requiring that "every order, resolution, or vote to which the concurrence of the Senate and the House of Representatives may be necessary … shall be presented to the

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Wilson might be in the way, before whom we can never consent it shall be try'd." 8 DHSC, *supra* note 3, at 157.

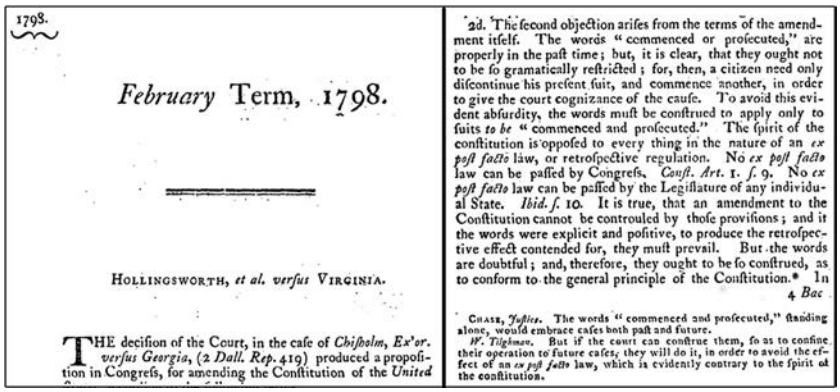
303. 5 DHSC, *supra* note 3, at 288–89. On Marshall's participation in this case, which may bear some relation to his discussion of ex post facto laws in *Fletcher v. Peck*, see also 3 THE PAPERS OF JOHN MARSHALL 67–68 (William C. Stinchcombe & Charles T. Cullen eds., 1979).

304. *See* 8 DHSC, *supra* note 3, at 477–98, 480, 486 (reprinting Tilghman's notes of oral argument in *Dorrance*).

305. Hollingsworth v. Virginia, 3 U.S. 378, 378 (1798).

306. *Id.*

FIGURE 5. *Hollingsworth v. Virginia* as Reported by Alexander Dallas in the Third Volume of his Reports (1799)



1798.

February Term, 1798.

HOLLINGSWORTH, *et al. verſus* VIRGINIA.

THE deciſion of the Court, in the caſe of *Chiſholm, Ex'or. verſus Georgia*, (2 *Dall. Rep.* 419) produced a propoſition in Congreſs, for amending the Conſtitution of the *United*

2d. The ſecond objection ariſes from the terms of the amendment itſelf. The words "commenced or proſecuted," are properly in the paſt time; but, it is clear, that they ought not to be ſo gramatically reſtricted; for, then, a citizen need only diſcontinue his preſent ſuit, and commence another, in order to give the court cognizance of the cauſe. To avoid this evident abſurdity, the words muſt be conſtrued to apply only to ſuits *to be* "commenced and proſecuted." The ſpirit of the conſtitution is oppoſed to every thing in the nature of an *ex poſt facto* law, or retroſpective regulation. No *ex poſt facto* law can be paſſed by Congreſs. *Conſt. Art.* 1. *ſ.* 9. No *ex poſt facto* law can be paſſed by the Legiſlature of any individual State. *Ibid. ſ.* 10. It is true, that an amendment to the Conſtitution cannot be controuled by thoſe proviſions; and if the words were explicit and poſitive, to produce the retroſpective effect contended for, they muſt prevail. But the words are doubtful; and, therefore, they ought to be ſo conſtrued, as to conform to the general principle of the Conſtitution.* In

4 *Bac*

CHASE, *Juſtice*. The words "commenced and proſecuted," ſtanding alone, would embrace caſes both paſt and future.

W. Tilghman. But if the court can conſtrue them, ſo as to confine their operation to future caſes, they will do it, in order to avoid the effect of an *ex poſt facto* law, which is evidently contrary to the ſpirit of the conſtitution.

President of the United States" for his signature.[307] More significantly for our purposes, Tilghman also argued that the Amendment should not be applied retroactively because doing so would violate the spirit, if not the letter, of the Constitution:

> The spirit of the constitution is opposed to everything in the nature of an *ex post facto* law, or retrospective regulation. No *ex post facto* law can be passed by Congress. Const. Art. 1, s. 9. No *ex post facto* law can be passed by the Legislature of any individual state. Ibid. s. 10. It is true, that an amendment to the Constitution cannot be controlled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be construed, as to conform to the general principle of the Constitution.[308]

Tilghman's line of reasoning in this passage clearly presupposes that ex post facto laws can be civil as well as criminal. Otherwise, his argument makes little sense. In that case, Lee or someone else could have responded to Tilghman that since the term "ex post facto law" pertains only to criminal matters, its application in this civil context was wholly inapposite. In fact, that is not what happened. Instead, Justice Chase merely challenged a narrow linguistic point made by Tilghman, and he did so in a manner that left untouched Tilghman's broad interpretation of "ex post facto."[309] Moreover, Tilghman's response to Chase's

307. *Id*. at 379. For an extensive discussion of this aspect of *Hollingsworth*, see Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

308. *Hollingsworth*, 3 U.S. at 379. *See also* Figure 5.

309. Chase observed that "[t]he words 'commenced and prosecuted,' standing alone, would embrace cases both past and future," to which Tilghman responded: "But if the court can construe them, so as to

question reinforced the same reading of that phrase.[310] For his part, Lee also answered Tilghman in a way that presupposed that ex post facto laws could be both civil and criminal.[311]

The Supreme Court ultimately sided against Tilghman on both of his main arguments, holding both that the Eleventh Amendment was validly enacted without presidential signature and that it applied retroactively to bar suits instituted before the amendment was adopted.[312] The Court's decision in *Hollingsworth* that the amendment applied retroactively to bar existing suits was in some respects a fitting end to the constitutional drama over the ex post facto clauses. Its primary effect was a decisive defeat for the Indiana Company. In addition, the Court's resolution of this issue foreshadowed what transpired in *Calder*, as a brief recap of some key events reveals.

From the late 1770s onward, the crux of the Indiana Company's complaint against Virginia was that its laws abrogating the company's Indian deeds were illegitimate ex post facto laws.[313] Because the Constitution expressly forbids ex post facto laws, the question naturally arose whether the Constitution itself would apply retroactively to invalidate Virginia's declaratory laws. On the eve of the Virginia ratifying convention, Madison was clearly thinking along these lines and expressed his concerns to Randolph about the revival of the Indiana Company's claims.[314] Randolph replied that he did not believe the Constitution would apply retroactively in the manner Madison envisioned.[315] When Mason raised his own concerns about the Indiana Company's claims at the Virginia ratifying convention, Madison and Randolph evidently hit upon the strategy of arguing that "ex post facto law" was a technical phrase that applied only to criminal laws.[316] However, the argument appears to have been drawn from whole cloth, and the convention records suggest that few if any delegates were persuaded by it. In any event, when Mason brushed this suggestion aside, Madison and Randolph quickly abandoned it and moved on to other matters. Mason agreed with them that *if* the ex post facto clauses were narrowly construed, Virginia's interests would be more adequately protected. But he was not content to rely on this artificial construction. Instead, Mason argued that Virginia ought to propose a constitutional amendment that would prevent the federal courts from exercising jurisdiction over the company's claims. This set the stage for the discussion of state suability at the Virginia convention, in which Madison and other Virginia Federalists took the position that nonconsenting states could not be sued in federal court.

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confine their operation to future cases, they will do it, in order to avoid the effect of an *ex post facto* law, which is evidently contrary to the spirit of the constitution." *Id*.

310. *Id*.

311. *Id*. at 381 ("The policy and rules, which in relation to ordinary acts of legislation, declare that no *ex post facto* law shall be passed, do not apply to the formation, or amendment, of a constitution.").

312. *Id*. at 382.

313. *See supra* notes 157, 199, 201–02, 211–23 and accompanying text.

314. *Id*.

315. *Id*.

316. *Id*.

Randolph was prescient about the form in which the company would seek to assert its claim after the adoption of the new constitution. By bringing its claim against Virginia as a cause in equity, the company arguably held to a consistent position on ex post facto laws. Rather than maintain that the Constitution itself, as the Supreme Law of the Land, applied retroactively to invalidate Virginia's law—an application that would violate the spirit, if not the letter, of the Constitution's ban on ex post facto laws—the company appealed to the federal courts' equitable powers to make Virginia compensate the company for its losses. By framing its case in this manner, the Indiana proprietors managed to protect themselves against a charge of inconsistency: namely, that they were condemning Virginia for its ex post facto laws, while simultaneously relying on a retroactive application of Article I, Section 10. For its part, Virginia argued in *Hollingsworth* that the Eleventh Amendment applied retroactively to strip the Supreme Court of whatever jurisdiction it had when the company commenced its claim. By doing so, Virginia threw its weight behind what was, in effect, another ex post facto law, much like it did in 1779, when the state passed its original declaratory acts invalidating the company's titles.

Ultimately, Virginia triumphed on all of the major issues. The Eleventh Amendment cut back diversity suits against the states. In *Hollingsworth*, a case ultimately decided without Wilson's input, the Court applied the Amendment retroactively to bar the Indiana Company's claim. Finally, in *Calder*, the ex post facto clauses themselves were narrowed in line with the Madison-Randolph argument about their supposedly "technical" meaning. In retrospect, *Hollingsworth* was thus a critical juncture in the chain of events leading up to and resulting in the decision in *Calder*. By holding that the Eleventh Amendment could be applied retroactively, *Hollingsworth* opened the door to *Calder's* broader determination that all ex post facto laws were limited to criminal matters. A contrary holding in *Hollingsworth* would have been at least somewhat at odds with what Justices Chase, Iredell, and Paterson decided in *Calder*. Conversely, a different construal of ex post facto laws in *Calder* would have been in at least some tension with what the Court did in *Hollingsworth*. The Justices might have distinguished the cases, of course, or found some other workaround to reconcile them. Nevertheless, in retrospect it seems clear that *Hollingsworth* and *Calder* pointed in the same direction. Both cases required the Justices to confront a series of difficult interpretive problems that paved the way for their ultimate decision that the phrase "ex post facto law" was a term of art in the Constitution, which refers exclusively to retroactive criminal laws.

CONCLUSION

Let us take stock and draw together some of the main threads of this study. An examination of Wilson's career as a land speculator sheds light on the prohibition of ex post facto laws in the Constitution and confirms that this ban was widely understood at the founding to extend to retroactive civil laws. The gravamen of the complaint leveled against the state of Virginia by the various land companies

with which Wilson was closely involved was that Virginia had passed a series of unjust and illegitimate ex post facto laws when it declared the companies' land titles to be void. The clearest illustration of this point can be found in *Plain Facts*, but similar arguments in different language can be found in the various land company memorials submitted to Virginia and Congress during this period. It seems likely that Wilson had a hand in composing *Plain Facts*, but even if he did not, he clearly was familiar with this pamphlet and probably played an active role in disseminating it. During this period, Wilson worked closely with Samuel Wharton, pressing the interests of the land companies in Congress, while James Madison, George Mason, Edmund Randolph, and other Virginians actively opposed them. John Dickinson was the President of both Pennsylvania and Delaware during this period and was acquainted with these events and with *Plain Facts*. More generally, Dickinson was familiar with the basic criticisms leveled by the Indiana, Vandalia, and Illinois-Wabash Companies against the State of Virginia. The same is true of many other delegates to the constitutional convention, many of whom were either members of Congress or actively engaged in these controversies at the time. Considerations like these tend to make Madison's account of what occurred in Philadelphia with respect to the ex post facto clauses even less credible than it already appears.

In his essay on the Bank of North America, Wilson does not use the phrase "ex post facto law" when referring to the proposed repeal of the bank's charter by the Pennsylvania legislature. In criticizing that proposed repeal, however, Wilson makes a strong case against any retroactive civil legislation that interferes with vested rights.[317] Wilson's argument meshes well with the explicit criticism of ex post facto laws in *Plain Facts* and the similar objections to Virginia's retroactive laws found in various land company memorials. In his bank essay, Wilson also formulates the claim that certain types of legislation, including laws granting a corporate charter, are in effect implied contracts between the state and the grantees, which the state is not simply free to repeal at will.[318] Alexander Hamilton and other supporters of the land company claims in the Yazoo Lands Sale later took up and elaborated the logic of this argument, as did Marshall in *Fletcher v. Peck*. Particularly after *Calder v. Bull* was decided, this contract-based argument gradually took the place of the ex post facto clauses in protecting vested property rights from legislative interference. The record suggests that Wilson likely would have endorsed both lines of argument, however, and would not have regarded them as mutually exclusive.

The ex post facto clause in the 1790 Pennsylvania Constitution sheds additional light on Wilson's understanding of the federal constitutional prohibition of ex post facto laws. Wilson served on the eleven-person committee that first drafted the former clause, and then again on the three-person committee that

317. *See* CONSIDERATIONS ON THE BANK OF NORTH AMERICA, *supra* note 269 and accompanying text.

318. *Id.*

revised its language.[319] In doing so, he took pains to make clear that the provision at issue forbids both ex post facto laws and laws impairing contracts.[320] The grouping together of these prohibitions in the 1790 Pennsylvania Constitution may have been partly intended to undercut, and at any rate does appear to call into question, Randolph's claim at the Virginia ratifying convention that ex post facto laws and bills of attainder appear together in the U.S. Constitution because both are criminal in nature. Furthermore, there is no evidence to suggest that Wilson opposed adding an ex post facto clause to the Pennsylvania Constitution, or that he believed doing so would "proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so,"[321] as he is supposed to have argued with respect to the federal ex post facto clause at the constitutional convention. If Wilson was, in fact, reluctant to add such a clause to the U.S. Constitution, then his opposition seems more likely to have been strategic than principled. Because of his familiarity with long-simmering controversies about retroactive laws, such as Virginia's laws abrogating the Indiana and Illinois-Wabash titles, it seems plausible that Wilson may have felt that adding language about ex post facto laws to the Constitution would make that document more difficult to ratify.

The 1795 law by means of which Georgia granted millions of acres to the Georgia Land Company and three other land syndicates expressly referred to the ex post facto clause of Article I, Section 9, in the context of civil, rather than criminal, retroactivity. As the single largest shareholder in "the greatest real estate deal in history,"[322] Wilson undoubtedly was familiar with this 1795 law. There are no indications, however, that Wilson or anyone else perceived anything unusual in this use of the federal ex post facto clause. Hundreds, if not thousands, of people either played a role adopting this 1795 law or encountered it after the fact, including Governor George Matthews, Georgia state legislators, company shareholders, President Washington, members of Congress, Americans who read about the law in newspapers, and so on. The fact that no one seems to have objected that the Great Yazoo Lands Sale's reference to the federal ex post facto clause in a civil context was inapt, therefore, appears to be significant and probative.

In February 1797, in one of his last publicly recorded acts, Wilson wrote a letter to members of Congress on behalf of the Illinois-Wabash Company. In this letter, Wilson not only quoted extensively from Justice Paterson's opinion in *Dorrance*, but also clearly affirmed his conviction that any ex post facto law "affecting life, liberty or property" was unconstitutional and void. Wilson's February letter came on the heels of his January 13, 1797 Memorial, which also clearly affirmed a broad understanding of ex post facto laws. Because of their

319. *See supra* note 299 and accompanying text.
320. *Id.*
321. 2 FARRAND'S RECORDS, *supra* note 5, at 376.
322. MCGRATH, *supra* note 74, at 7.

heavy-handed appeal to judicial authority and his conspicuous conflict of interest, Wilson's Memorial and letter were probably a source of embarrassment to the other Justices, particularly Chase (on account of his connection to the Illinois-Wabash Company) and Paterson (on account of the uses to which Wilson put his opinion in *Dorrance*). Both Wilson's Memorial and his letter may have influenced the Justices' opinions in *Calder v. Bull*, a matter that calls for further investigation.

Charles Lee, William Rawle, and William Tilghman all made arguments presupposing that ex post facto laws could be civil as well as criminal in *Hollingsworth v. Virginia*, an important pre-*Calder* case, which, like the other cases and controversies involving the land companies with which Wilson was associated, Crosskey did not discuss. *Hollingsworth*'s holding that the Eleventh Amendment applies retroactively to bar even those suits instituted prior to the adoption of the amendment seems like a fitting end to the drama over ex post facto laws in many respects. Once the Supreme Court decided *Hollingsworth*, the door was open to limiting the ex post facto clauses to criminal matters in *Calder*. An alternative construction of "ex post facto law" in *Calder* would have been at least somewhat in tension with *Hollingsworth*.

As for *Calder v. Bull* itself, on the basis of the historical evidence discussed in this Article, it seems highly improbable that Chase, Iredell, and Paterson deliberately narrowed the scope of ex post facto laws in that case primarily in order to benefit Wilson, as Crosskey alleged in 1947 and then again in 1953. As a result of our investigation, a more likely explanation would seem to rest at least in part on the Justices' growing concern with land speculation and the many controversies surrounding the Great Yazoo Lands Sale, the Indiana Company, and the Illinois-Wabash Companies—all of which involved Wilson to a significant extent. Justice Iredell's Grand Jury Charge in April 1795, shortly after the notorious Yazoo grants were made, and his opinion in *Minge v. Gilmour* can both be read in this contextual fashion,[323] as can Justice Paterson's apparent change of heart in between *Dorrance* and *Calder*. A sustained examination of these opinions, of the broader ideological commitments of Chase, Iredell, Paterson, and other founders, and of *Calder* itself, however, are topics for another occasion. So, too, is the reliability of Madison's treatment of ex post facto laws in his *Notes*. Crosskey may have gone too far in attacking Madison and questioning his honesty and integrity. Nonetheless, on the basis of what has been uncovered here, it seems likely that he was on to something.

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323. *See James Iredell's Charge to the Grand Jury of the Circuit Court for the District of New York*, *in* 3 DHSC, *supra* note 3, at 14, 17 (observing that "[a]n *ex post facto* law, so far as it respects crimes (its only meaning we have now occasion to consider) means, as I understand it, a law that in any manner alters the consequences of an act from what they were at the time when the act was done . . . ."); Minge v Gilmour, 17 F. Cas. 440, 443 (C.C.D.N.C. 1798) (opinion of Iredell, J.) (noting that, during oral argument in *Calder v. Bull*, "[a] majority of the judges appeared to be convinced" of the narrow meaning of the ex post facto clauses, but that "upon the doubt of one" the case had not yet been decided).