

Book Reviews

THE COURT AND THE EMPIRE

THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY. By James G. Wilson.¹ Ashgate, 2002. Pp. 273. \$89.95.

*Michael Kent Curtis*²

This very fine, thought provoking book provides a fresh perspective on American constitutional development from the Founding to the end of the 19th century. Wilson looks at American constitutional structure and history from the perspective of empire. As a result, he has accomplished the remarkable feat of helping his readers to see familiar constitutional landmarks in new ways. Wilson avoids a common scholarly failing: he does not suggest that “empire” is the only explanation of constitutional development—only that it is important and often neglected (p. 15). That claim is fully justified by this path-breaking book.

In his analysis of how ideas of empire shaped the American republic, Wilson looks at how the words “empire” and “republic” were used in early American history. Today President Bush repeatedly denies the existence of an American empire or of imperial ambitions. “America has no empire to extend,” he says, and he assures the world that the United States has “no territorial ambitions. We don’t seek an empire. . . .”³

Americans in the past were not squeamish about the word and its associations. Searching Elliott’s debates and early con-

1. Professor of Law, Cleveland-Marshall School of Law.
2. Professor of Law, Wake Forest University. Thanks to Brian Charville and Joseph Altman for suggestions on an earlier draft.
3. Quoted in Michael Ignatieff, *The Burden*, N.Y. TIMES MAG., Jan. 5, 2003, at 22.

gressional records, Wilson found more than 200 instances in which the word “empire” was used to describe the emerging American republic (p. 11). Sometimes, the word seems to mean no more than a government ruling a large territory (p. 13). But quite often the word means far more than that: a large, ambitious, and expanding nation determined to grow in size, power, and influence—a nation determined to overcome all obstacles that blocked its path to greatness (pp. 1, 2).

While many American leaders planned for “empire,” at the same time they sought to construct a “republic.” The tension between these two goals and between competing republican and imperial visions is the spring that moves Wilson’s story forward. What sort of empire would be constructed? Would it be one with a superior nation ruling subservient colonies or a nation in which newly acquired territories would be incorporated as equal parts of the nation? Would inhabitants of newly acquired territories be equal citizens or subjects? Would expansion proceed by peaceful purchase or by military conquest? What, exactly, would be the nature of the American Republic? At different times the vectors of republicanism and empire produced different results. Sometimes, Wilson tells us, the United States tended toward Machiavelli’s aggressive republicanism. At other times it emphasized Montesquieu’s more humanitarian republican vision.

The first national territories became new states in the United States. After statehood, their inhabitants became full citizens who enjoyed the basic constitutional rights and political privileges of citizens of the original thirteen states.

The Louisiana Purchase greatly expanded the American “empire” by purchase, not conquest. The new territory was not kept as a mere colony. Instead, it was eventually divided into new states. Still, much to the annoyance of Louisianans, Jefferson delayed representative territorial government until the territory would be populated by enough people of the “right” sort. On other occasions, the United States added new territory by force of arms—as in the case of Florida and the additional territory produced by the war with Mexico. None of these territories, however, were relegated to permanent colonial status.

If there were competing visions of “empire,” there were also competing visions of just what sort of republic the United States should be. Led by Hamilton, Federalists sought a strong central government supported by a strong army, by the wealthy, by private creditors holding the national debt, by a central bank, by

tariffs to support manufacturing, and by a commercial economy. Hamilton favored concentrating capital in the hands of a relatively few individuals who could be expected to support the government that helped to enrich them (p. 93). Federalists also supported a strong federal judiciary.

Hamilton had visions of leading a large conquering army that would take over Louisiana and Florida, and even “detach South America from Spain” (p. 92). But Federalist President John Adams thwarted Hamilton’s plans.

After 1800, the nation became more republican—in the crucial sense that the right to vote was extended to virtually all adult white men. But democracy and the thrust for empire went hand in hand. Settlers moved west, and national power followed. Concerns about the danger military power posed to democracy were eclipsed by what later was called “manifest destiny.”

While, according to Wilson, the quest for “empire” does not explain the course of history in a simplistic fashion, still “empire” often has been one of the crucial vectors that influence the result. For example, according to Wilson, John Marshall’s decisions can be understood in part as motivated by an additional, often overlooked, “starting premise.” The additional premise is, of course, Marshall’s “equally universal commitment to the growth of the republican empire” (p. 149). According to Wilson, the additional premise contributes to greater understanding in two ways. First, it shows that expansionism was not merely an external force to which the Court responded, but was instead a value the Court fostered. Second, the additional premise reminds us of the importance of analyzing outcomes as well as arguments and theories of interpretation. It provides a wholesome corrective to the tendency to see doctrinal categories as separate and unrelated (p. 150).

Wilson sees the jurisprudence of John Marshall as implementing much of Hamilton’s Federalist national vision. He describes some of Marshall’s techniques: the emphasis on the unity of the nation; his powerful invocation of popular sovereignty—on the nation created by the people of the United States and the consequent subordination of the states in many respects; and on the Court as the agency that could peacefully settle disputes that might otherwise lead to war (pp. 152-55). In *Fletcher v. Peck*, Chief Justice Marshall reminded the state of Georgia that “She is part of a large empire,” a “member of the American union” –

a union with a supreme Constitution that “imposes limits on the legislatures of the several states” (p. 154).

This truncated discussion cannot do justice to Wilson’s analysis. Still, even many of those who have been teaching John Marshall’s decisions for some years will be enriched by reading Wilson’s chapter on “Chief Justice John Marshall’s Hamiltonian Empire.” One example shows how Wilson’s empire thesis lets us see old words in a new light.

In the course of upholding the constitutionality of the bank in *McCulloch v. Maryland*, Marshall explicitly included the bank within his imperial vision that extended far beyond the country’s existing boundaries at the Mississippi River: “Throughout this vast republic, from the St. Croix to the Gulf of Mexico, *from the Atlantic to the Pacific*, revenue is to be collected and expended, armies are to be marched and supported” (p. 181; Wilson’s emphasis).

Wilson’s also makes fruitful use of the idea of “empire” to illuminate sectional strife leading up to the Civil War. Each section, the North and the South, sought “to extend its own empire through expansion and . . . economic force” (p.188). At the same time, some leaders sought to avoid excessive sectional conflict by balanced expansion of both the Northern and Southern empires.

Wilson has a keen eye for constitutional irony. By the time of the effort to annex Texas, the South had become fearful of simple majority rule. It strongly insisted on protection of the minority section. Strict construction of the Constitution and the supermajority required for amendment were devices Southerners now relied on to protect slavery. But when they could not get the needed two-thirds majority to approve a treaty annexing Texas as a new slave state, “they convinced a majority in each House to pass a law authorizing annexation” (p. 195).

War with Mexico under President Polk revealed the (at least temporary) triumph of the aggressive, military route to empire over the more pacific approach used by Jefferson in purchasing Louisiana. The approaches would alternate throughout subsequent history, but the aggressive, military approach would appear again and again. “Mr. Polk’s war” had its critics, including Congressman Abraham Lincoln, Senator Daniel Webster, and Senator Henry Clay. But Wilson notes that “one of the interesting patterns in American history is how often the anti-imperialist advocates lost” (p. 195).

Some Southerners, concerned about the lack of suitable land for the spread of slavery, looked longingly at Mexico, Cuba,

and South America. Visions of a vast slave empire danced in their heads. Wilson quotes a Virginia editor who rhapsodized about “the magnificent country of tropical America,” about “an empire founded on military ideas; representing the noble peculiarities of Southern civilization” controlling the “two dominant staples of the world’s commerce—cotton and sugar. . . . What a splendid vision of empire” (p. 202). Here Wilson says the word empire connotes “lust for domination and glory” (p. 202). Similarly, Wilson says that the frequent use of the word by Founders and later leaders often had a similar meaning—not lust for an empire for slavery but lust for a glorious empire nonetheless.

Regardless of how it would be acquired, would it be an empire for republican liberty or would the lust for domination and glory transform the American republican ideal? Some of the most intriguing parts of this remarkable book refract this question through the prism of the *Dred Scott* case. As Wilson sees it, *Dred Scott* contains strands of the republican ideal of an empire of equal units and citizens—mixed, of course, with racism and racial exclusiveness.

On the positive side, *Dred Scott* ruled that no part of the American territory could be relegated to the status of a colony. No territory could be a place where American citizens were not protected by the guarantees of the Constitution and the Bill of Rights. The national government could not rule citizens in national territories by fiat. Nor could it acquire territory for colonial purposes. The other side of the story, of course, is *Dred Scott’s* holding that even free black citizens of Northern states who were descended from slaves could never be citizens of the United States:

Taney needed to eliminate free blacks’ national citizenship rights because the next part of his opinion proclaimed the general principle that all American citizens have equal rights . . . to move with their property throughout the Territories. Consequently, Congress’ banning slavery in the Missouri Compromise was . . . a taking of property of innocent people in violation of due process (p. 216).

Wilson notes Colonel Walker’s effort to capture Nicaragua to set up a new slave state, an effort not sanctioned by the federal government.

Imagine that a new Walker triumphed after *Dred Scott*. The South would not have wanted Nicaragua to remain a slave colony; it needed additional representation in the House, Senate, and Presidential Electoral College. To guarantee equality throughout the

empire, *Dred Scott* [held] that Congress had no constitutional authority to maintain perpetual colonies. By requiring that all lands eventually had to be admitted as equal states, Taney fully constitutionalized Franklin and Jefferson's belief in a geographically equal republic. . . . But this approach created a major legal problem for the slave interests. Admitting Nicaragua into the Union might provide every adult male in that jurisdiction with full United States citizenship, with the right to vote and other important constitutional privileges. Local residents, mostly of color, would constitute a voting majority within the new State. . . .

Whether he had Southern Slave Power expansion in mind or not, Chief Justice Taney wrote *Dred Scott* in such a way that it could be easily reinterpreted . . . to solve such problems (pp. 217-218).

Just as African-Americans could never be citizens according to *Dred Scott*, so a later decision written by a Justice as determined as Taney might deny citizenship to other "lesser" races. Such constitutional analysis would help to secure control of the new Southern slave empire for Southern whites (p. 218).

The tension between a republican empire in which all were equal citizens and a colonial empire surfaced in the aftermath of victory in the Spanish-American War. Would the brown skinned people of the Philippines be full American citizens, protected by all guarantees of the Constitution and the Bill of Rights and voting in national elections? In *The Insular Cases*, the Court gave its answer, and in brief, the answer was "no." Our new colonial subjects could be taxed without representation, denied trial by jury, denied the protections of Article IV, and faced with tariffs that would be constitutionally prohibited within the Union. Even American citizens in the Philippines could be denied jury trial and some, but not all, other guarantees of the Bill of Rights (pp. 243, 249). The majority of the Court concluded that any other approach would unduly hinder American power and expansion.

There is much more to this fine book, including an incisive discussion of the role of the corporation. The corporation made it possible "to extend imperial power without needing to expand territorial sovereignty" (p. 244). "Protected by government subsidies, internal free trade, and military force abroad, American corporations helped formulate foreign policy in Washington and domestic policies throughout the Americas" (p. 244). Wilson also discusses the role of the Court in entrenching "these organs of private power into the Constitution by characterizing them as constitutional 'persons' . . . deserving constitutional rights"

(p. 244). John Hay, Lincoln's secretary and much later Secretary of State lamented, "This is a government of the people, by the people, and for the people no longer. It is a government of corporations, by corporations, and for corporations . . ." (p. 244).

Not all will agree with each of Wilson's normative judgments, which are sometimes critical of the road taken to achieve the American Empire. Still, Wilson sees both positive and negative aspects to the American empire. He notes that the powerful American empire defeated Nazism and Fascism and contained the Soviet Empire. Those who reject nuance and complexity in favor of seeing our history as a simple story of the unfolding triumph of American morality, liberty, and justice over evil will be irritated. But all can find the descriptive aspects of the book thought provoking and challenging.

Carl Jung suggests that for positive transformation people need to examine their shadows, the dark side of their personalities that they tend to repress, deny, and disown. As it is for individuals, so it is for nations. James Wilson confronts us with our national shadow, though he does far more than that. Some of his descriptions will prove controversial. But without scholars like Wilson, we are less likely to live up to our ideals. Again and again in American history, agents of progressive change have performed the service of comparing American ideals and practice. Though hardly appreciated when they began, they often helped us to achieve positive transformations—abolition of slavery, enfranchisement of women, and the end of the racial caste system imposed by law and custom.

Whether one agrees with that assessment or rejects it, indeed whether one considers Wilson's thesis basically "right" or "wrong," he has performed a service to scholarship and understanding by producing this important book. Readers will see the landscape of constitutional law illuminated by the floodlight of "empire." If it gets the attention it deserves, Wilson's book will generate new thought and new ideas from critics and supporters alike.