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Justice, Law, and the Creation of the American Republic: The Forgotten Legacy of James Wilson

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James Wilson was one of six men to sign both the Declaration of Independence and the Constitution of the United States. In the Federal Convention of 1787, he spoke more often than all but one other delegate (Gouverneur Morris), and by all accounts he played a critical role in framing the Constitution. His early defense of the proposed Constitution and his leadership in the Pennsylvania ratifying convention did much to secure the document's acceptance. Wilson served as one of the new nation's first Supreme Court Justices, and his *Lectures on Law* contain some of the period's most profound commentary on the Constitution and American law.

In spite of these tremendous accomplishments, few Americans have ever heard of Wilson. However, over the past several decades, scholars have come to a deeper appreciation of his contributions to the creation of the American republic. This emerging consensus is reflected well in a survey that Gary L. Gregg and I took of more than 100 political scientists, historians, and law professors. We asked these scholars to list and rank America's most underrated Founders. James Wilson easily topped the list of 73 forgotten Founders, and a diverse array of scholars agreed that he should be numbered among the most important.[1]

An overview of Wilson's life and accomplishments with a focus on his political and legal ideas demonstrates that Wilson is a sophisticated thinker who had a significant impact on America's Founding. Although he did not win every battle in the Federal Convention of 1787, America's constitutional system as it has developed over time closely resembles his vision.

In his *Lectures on Law*, Wilson wrote that:

> There is not in the whole science of politicks a more solid or a more important maxim than this—that of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles.[2]

If American citizens, like governments, should reflect upon the first principles of our constitutional republic, the political and legal ideas of one of the greatest theorists among the Founders simply cannot be ignored. A consideration of Wilson and the role he played in America's Founding assists us in rediscovering these principles.

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[1] Gary L. Gregg and Mark David Hall, eds., *America's Forgotten Founders* (Louisville, Ky.: Butler Books, 2008), p. 5.

[2] Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson*, 2 vols. (Indianapolis, Ind.: Liberty Fund Press, 2007), p. 698. Hereafter cited as *Collected Works*. Because the volumes are paginated sequentially, I provide only page numbers in citations.

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SCOTTISH ROOTS AND LAW PRACTICE

James Wilson was born in Carskerdo, Scotland, in 1742, the son of a lower-middle-class farmer. William and Alison Wilson dedicated their son to the ministry at birth, and James accordingly received an education uncommon to children of his class. After gaining a fine classical education at Culpar grammar school, he won a bursary to the University of St. Andrews in 1757. Here Wilson studied for four years before entering the university's divinity school, St. Mary's, in 1761.

Upon the death of his father, he was forced to withdraw from the seminary to support his mother and younger siblings by working as a tutor. When his brothers were old enough to take care of their mother, Wilson emigrated to America to seek fame and fortune.

Wilson arrived in New York in the fall of 1765 and immediately moved to Pennsylvania, where a letter of recommendation helped him to receive an appointment as a tutor at the College of Philadelphia (today the University of Pennsylvania). He taught Latin and Greek for a year before reading law under John Dickinson, one of Pennsylvania's most prominent attorneys. His rapid rise in the legal profession is illustrated by his 1779 appointment to be France's advocate-general in the United States. He served in this position until 1783, when he resigned because Louis XVI was unwilling to pay the high fees he required.

In 1782, Pennsylvania asked Wilson to represent the state in a land dispute with Connecticut. The case was argued before a tribunal formed under the Articles of Confederation, and Wilson's careful arguments won the day.

His legal prominence is also indicated by George Washington's willingness to pay him 100 guineas to accept his nephew, Bushrod, as a law student. Bushrod, aware that such a fee was well above the going rate, begged his uncle to allow him to study elsewhere, but Washington insisted on Wilson, although he had to pay the fee with a promissory note. Bushrod was evidently well served by this arrangement, as indicated by his successful legal career and eventual appointment to his mentor's seat on the Supreme Court.

LECTURES ON LAW AND POLITICAL THEORY

Wilson maintained a law practice until the early 1790s, but after the start of the War for Independence, he spent most of his time engaged in affairs of state. Before turning to his contributions to the creation of the American republic, a brief account of his moral and democratic theory is appropriate to show that he was a sophisticated thinker whose actions were driven by political principles.

Wilson's ideas are most systematically presented in a series of law lectures he delivered from 1790 to 1792 at the College of Philadelphia. His inaugural lecture was a major public event. In addition to students, the audience included "the President of the United States, with his lady—also the Vice-President, and both houses of Congress, the President and both houses of the Legislature of Pennsylvania, together with a great number of ladies and gentlemen."[3]

The lectures are particularly important to students of American thought because Wilson believed that law should be "studied and practiced as a science founded in principle," not "followed as a trade depending merely upon precedent." Consequently, he spent most of his time focusing on philosophical matters, especially those pertaining to morality, epistemology, metaphysics, and politics. He thought that once these foundations of jurisprudence were mastered, students then could learn what he termed "the retail business of law." The lectures progressed naturally from abstract political theory to more concrete legal and constitutional issues, including the appropriate powers of Congress, the President, and the Supreme Court.[4]

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[3] *Pennsylvania Packet and Daily Advertiser*, December 25, 1790. The following draws from Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798* (Columbia: University of Missouri Press, 1997), which includes an extensive discussion of the relevant secondary literature.

[4] *Collected Works*, pp. 1030, 825.

Central to Wilson's political and legal theory was his view of morality. He followed Richard Hooker, who in turn borrowed from St. Thomas Aquinas, in adhering to a traditional Christian conception of natural law. Wilson agreed with these thinkers that law is either divine or human and that there are four "species" of divine law: eternal law, celestial law, natural physical laws, and natural moral laws. Like them, he thought that human law "must rest its authority, ultimately, upon the authority of that law which is divine," but unlike them, he offered a rich account of the natural rights possessed by individuals.[5]

Wilson taught that because natural rights are based on natural law, they exist prior to government. Protecting these rights is the state's most important responsibility. He asked rhetorically:

> What was the primary and principal object in the institution of government? Was it—I speak of the primary and principal object—was it to acquire new rights by a human establishment? Or was it, by a human establishment, to acquire a new security for the possession or the recovery of those rights, to the enjoyment or acquisition of which we were previously entitled by the immediate gift, or by the unerring law, of our all-wise and all-beneficent Creator?
>
> The latter, I presume, was the case….[6]

Wilson provided an extensive discussion of the nature and scope of natural rights throughout his works. For reasons of space, I discuss only his understanding of the rights to life and liberty.

Wilson argued that because "man, fearfully and wonderfully made, is the workmanship of his all perfect Creator," the right to life must always be respected. He wrote with evident approval that:

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and in some cases, from every degree of danger.[7]

On the basis of this principle, Wilson criticized ancient societies, such as Sparta, Athens, China, and Rome, for the practice of exposing or killing unwanted infants. He also condemned the "gentle Hindoo" who "is laudably averse to the shedding of blood; but he carries his worn out friend and benefactor to perish on the banks of the Ganges."[8]

Like most legal theorists prior to the late 20th century, Wilson condemned suicide:

> [I]t was not by his own voluntary act that the man made his appearance upon the theatre of life; he cannot, therefore, plead the right of the nation, by his own voluntary act to make his exit. He did not make; therefore, he has no right to destroy himself. He alone, whose gift this state of existence is, has the right to say when and how it shall receive its termination.

Wilson did support the death penalty for crimes such as murder and treason. If a person is sentenced to death, however, he stipulated in a grand jury charge that "an interval should be permitted to elapse before its execution, as will render the language of political expediency consonant to the language of religion."[9]

Wilson believed that all men and women have a right to liberty, but he rejected the extremely individualistic understanding of freedom envisioned by many modern philosophers. Instead, liberty must always be

[5] *Ibid.*, p. 498.
[6] *Ibid.*, pp. 1053–1054.
[7] *Ibid.*, pp. 353, 1068.
[8] *Ibid.*, p. 1067.
[9] *Ibid.*, pp. 534, 323.

understood within the limits of moral and civil law: "Without liberty, law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness." This concept was so important to Wilson that he quoted a similar dictum from Cicero as the epigraph for his law lectures: "Lex fundamentum est libertatis, qua fruimur. Legum omnes servi sumus, ut liberi esse possimus [Law is the foundation of the liberty which we enjoy. We are all servants of the laws, so that we can be free]."[10]

Wilson had a fairly expansive conception of the scope of liberty protected by natural law. This is best illustrated by his discussion of freedom of conscience—in his words, the "rights of conscience inviolate":

> [The] right of private judgment is one of the greatest advantages of mankind; and is always considered as such. To be deprived of it is insufferable. To enjoy it lays a foundation for that peace of mind, which the laws cannot give, and for the loss of which the laws can offer no compensation.[11]

Because individuals must be at liberty to make their own choices, Wilson supported the general freedom of a person to "act according to his own inclination" if he "does no injury to others" and if "some publick interests do not demand his labours." It is not clear exactly how far Wilson was ready to extend this principle, but at a minimum he meant that the civil government should not interfere with an individual's liberty to think and believe what he or she wants. This was particularly true in matters of faith.[12]

Given the influence of Christianity on Wilson's political theory, it is important to emphasize that he was an advocate of religious liberty. In his inaugural law lecture, after he praised John Locke's essay on religious toleration, he reminded his audience that a law protecting freedom of religion had been passed in Maryland as early as 1649. He then noted that when Lord Baltimore was urged to repeal the law, "with the enlightened principles of a man and a Christian, he had the fortitude to declare, that he never would assent to the repeal of a law, which protected the natural rights of men, by ensuring every one freedom of action and thought."

Note that Wilson did not think liberty is restricted to matters of the heart and mind. He thought that people had the right to act upon their convictions: to "speak, to write, to print, and to publish freely." Yet he believed that each of these rights has limits, as indicated by his support for laws against slander, libel, and blasphemy.[13]

Wilson discussed a variety of other natural rights, including the rights to property and reputation. In each case, he argued that because rights are based upon God's universal and absolute laws, they must always be respected.

Wilson was a prominent advocate of democracy, but he did not believe majorities should restrict the rights of minorities. Foreshadowing John Stuart Mill, he proclaimed that "[o]n one side, indeed, there stands a single individual: on the other side, perhaps, there stand millions: but right is weighted by principle; it is not estimated by numbers." Yet unlike Mill, Wilson believed that rights are limited by the natural law upon which they are founded. He rejected the individualistic view of rights that would come to dominate American political theory and law.[14]

God's moral laws may be known through "reason, conscience, and the Holy Scriptures." Following Francis Hutcheson and Thomas Reid, Wilson taught that God gives everyone a moral sense that provides knowledge of the first principles of morality. He found biblical support for this position in St. Paul's claim that natural law is "engraven by God on the hearts of men." Such knowledge allows men and women to answer most moral

[10] *Ibid.*, pp. 435, 415. The translation is by Joshua W. D. Smith of Veritas School in Newberg, Oregon.
[11] *Ibid.*, p. 539.
[12] *Ibid.*, p. 1056.
[13] *Ibid.*, pp. 433–434, 1046, 1134–1136, 1159.
[14] *Ibid.*, p. 1043.

questions, but it is occasionally necessary to reason from first principles to solve particular dilemmas.[15]

A person's moral sense, and even the moral sense of a society, may become corrupt through disuse, faulty education, or bad laws. Thus, it is not surprising that people have moral disagreements and that some cultures accept practices that are considered immoral by others.

Even so, careful consideration shows that individuals and cultures agree on moral issues far more often than they disagree. As people come to understand the requirements of natural law, it may be said to progress. In Wilson's words, "the law of nature, though immutable in its principles, will be progressive in its operations and effects." He was quite clear that it is only our knowledge of the natural law that changes, not the natural law itself.[16]

When Wilson combined his moral epistemology with his optimistic view of human nature, he came to the conclusion that majority rule is the best way to make human laws that are compatible with natural law. Consequently, he embraced popular sovereignty and argued that all legitimate governments must be based directly on the will of the people. His views are illustrated well through his most famous metaphor:

> The pyramid of government—and a republican government may well receive that beautiful and solid form—should be raised to a dignified altitude: but its foundations must, of consequence, be broad, and strong, and deep. The authority, the interests, and the affections of the people at large are the only foundation, on which a superstructure, proposed to be at once durable and magnificent, can be rationally erected.

Every aspect of government must be founded upon the authority of the people. Their consent, he taught, is the "sole legitimate principle of obedience to human laws."[17]

At times, Wilson sounded like a simple majoritarian, but it must be remembered that he believed the primary purpose of government is to protect natural rights. He knew that people are "imperfect" and suddenly may "become inflamed by mutual imitation and example" and commit immoral actions. Truly democratic institutions address the problem of minority tyranny, and to prevent majority tyranny, he supported separation of powers and checks and balances.[18]

However, it is critical to recognize that these checks were intended to be only temporary; he never supported rule by elites as did many thinkers influenced by the radical Enlightenment. Fortunately for the United States, Wilson's contributions to the creation of the American republic were influenced by a far more traditional approach to law and politics.

WILSON AND THE WAR FOR INDEPENDENCE

In 1768, shortly after reading John Dickinson's *Letters from a Farmer in Pennsylvania*, Wilson penned a pamphlet entitled "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament." In it, he argued that Parliament had absolutely no authority over the colonies' internal *or* external affairs.

Most Patriots agreed with Wilson's first point, but few had arrived at the second. At the urging of Francis Alison, a fellow Scott and colleague from the College of Philadelphia, he did not publish the pamphlet in 1768. However, by 1774, Wilson felt that the time had come to declare publicly that the "legislative authority of the British Parliament over the colonies" should be "denied *in every instant*."[19]

Central to Wilson's argument was his conviction that the law of nature requires that governments be based directly on the people. Because the colonists

[15] Romans 2:15; *Collected Works*, pp. 522, 470.
[16] *Collected Works*, p. 525.
[17] *Ibid.*, pp. 833–834, 564; cf. pp. 725, 299.
[18] *Ibid.*, p. 697.
[19] Robert McCloskey, ed., *The Works of James Wilson* (Cambridge, Mass.: Harvard University Press, 1967), Vol. 2, p. 721.

were not represented in Parliament, this body could claim no authority over them. Wilson conceded that the colonists were obligated to obey the King in exchange for his protection, but he implied that if this protection was removed, the obligation would cease.

"Considerations" articulated what would be later known as the "dominion" or "commonwealth" status of English colonies. Wilson drafted the pamphlet six years before Jefferson and Adams published similar arguments and 70 years before the British adopted the policy. Shortly after its publication in 1774, the essay was recognized as one of the most powerful statements for colonial independence from Parliament. It is noteworthy that Thomas Jefferson copied several passages from it into his *Commonplace Book*—including passages similar to ones in his draft of the Declaration of Independence.[20]

Wilson was forced to put his theory of resistance into practice when he was elected to the Second Continental Congress. He was a reluctant revolutionary, but he eventually cast the Pennsylvania delegation's deciding vote in favor of independence, thus allowing the Declaration of Independence to be adopted unanimously. His support for independence was driven by his twin convictions that government must be based on the consent of the governed and that the Crown was violating the natural rights of Americans.

After voting for independence, Wilson returned to state politics to oppose Pennsylvania's radical constitution of 1776. Although he sympathized with its democratic elements, he was against vesting most civil power in a unicameral legislature.

This stand, coupled with his defense of two Quakers accused of treason and his opposition to wartime price controls, encouraged Philadelphians to view him as an enemy of democracy. In October of 1779, when tensions were running high, a mob descended on Wilson and several of his fellow anti-constitutionalists. These men armed themselves and took refuge in Wilson's house. After a short gun battle, the mob was chased off, but the "Attack on Fort Wilson," as the incident came to be known, exacerbated the view that Wilson was an aristocrat.

Throughout the 1780s, Wilson advocated the creation of a banking system that could help to ensure the circulation of sound currency. He supported the formation of the Bank of North America and in 1785 was hired to write a pamphlet defending the embattled institution.

Wilson's "Considerations on the Bank of North America" is significant for his provocative argument that even under the Articles of Confederation, "[t]o many purposes, the United States are to be considered as one undivided, independent nation." Moreover, he proposed that the Confederation Congress possessed a variety of implied powers, including the power to charter a national bank, and he vigorously defended the necessity of such a bank. The essay contains most of the arguments later made by Alexander Hamilton in support of a national bank under the United States Constitution.[21]

THE FEDERAL CONVENTION OF 1787

Wilson's greatest contributions to the American republic were made in the Federal Convention of 1787. Among the few delegates to attend the Convention from start to finish, Wilson participated in all of the most important proceedings.

As mentioned earlier, he spoke more times (168) than any other member, save Gouverneur Morris, and he often responded to the most serious attacks on the concept of a strong and democratic national government. Scholars as varied in their interpretations of the American Founding as Samuel Beer, James Bryce, Max Farrand, Ralph Ketcham, Adrienne Koch, Robert McCloskey, Paul Johnson, Clinton Rossiter, and John Fabian Witt agree that Wilson was second only to James Madison, and was per-

[20] Gilbert Chinard, ed., *The Commonplace Book of Thomas Jefferson* (Baltimore, Md.: Johns Hopkins University Press, 1926), pp. 39–44.

[21] *Collected Works*, p. 66.

haps on a par with him, in terms of influence on the Constitution.[22]

To Wilson, the critical problem faced by delegates was creating a strong national government that would protect and promote natural rights. Because he thought democratic institutions were the most likely to respect rights, he supported them throughout the debates.

- To ensure that the base of the pyramid of government was as broad as possible, he opposed property qualifications for voters.
- He was one of relatively few Founders to argue for the direct, popular election of both Representatives and Senators and was virtually alone in his conviction that members of *both* houses ought to be elected from proportionally sized districts.
- More surprising still, he concluded that the President should be "the man of the people" and therefore elected directly by them.
- Finally, he opposed such restrictions on elected officials as term limits and age requirements, believing that the people should be free to elect anyone they choose.

Some of Wilson's proposals were adopted, but many were too progressive for the era. Nevertheless, he was instrumental in making the Constitution as democratic as it was, and over the years, America's national political system has become almost as democratic as he desired.[23]

Wilson was the most democratic of the major Founders, but he was not a simple majoritarian. He recognized that majorities could be tyrannical and so advocated a number of devices that he thought would check the will of an errant majority.

His most interesting arguments in this regard involved the judiciary. Early in the Convention, he supported Madison's proposed Council of Revision, which would have consisted of the executive and "a convenient number of the national Judiciary." The Council would have had an absolute veto over legislative acts. Madison's idea was eventually rejected, but Wilson did not abandon his effort to strengthen the judiciary.[24]

Wilson was convinced that the Supreme Court needed to be independent from the other branches of the national government. He therefore opposed the Virginia Plan's provision that the legislature appoint judges. He also fought his old mentor John Dickinson's proposal that judges be easily removable and supported the constitutional prohibition against lowering their salaries.

Wilson also believed that the Supreme Court should have the power of judicial review. In his law lectures, he contended that a bad law might be vetoed by the executive and that it is "subject also to another given degree of control by the judiciary department, whenever the laws, though in fact passed, are found to be contradictory to the constitution." Moreover, like every Justice but one who served on the Supreme Court before John Marshall, Wilson thought the Court could strike down laws that violate the natural law.[25]

DEMOCRACY, FEDERALISM, AND SOVEREIGNTY

There is a natural tension between Wilson's support for checks like judicial review and his commitment to

[22] Samuel Beer, *To Make a Nation: A Rediscovery of American Federalism* (Cambridge, Mass.: Harvard University Press, 1993), p. 360; James Bryce, "James Wilson: An Appreciation," *Pennsylvania Magazine of History and Biography*, Vol. 60 (1936), p. 360; Max Farrand, *The Framing of the Constitution of the United States* (New Haven, Conn.: Yale University Press, 1913), p. 197; Ralph Ketcham, *James Madison: A Biography* (New York: Macmillan, 1970), p. 229; Adrienne Koch, ed., *Notes of the Debates in the Federal Convention of 1787* (New York: W. W. Norton, 1987), p. xii; Robert G. McCloskey, "James Wilson," in *The Justices of the United States Supreme Court: Their Lives and Major Opinions*, ed. Leon Friedman and Fred Israel (New York: Chelsea House, 1969), Vol. 1, p. 79; Paul Johnson, *A History of the American People* (New York: HarperCollins, 1997), p. 193; Clinton Rossiter, *1787: The Grand Convention* (New York: W. W. Norton, 1966), pp. 247–248; and John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, Mass.: Harvard University Press, 2007), p. 16.

[23] *Collected Works*, p. 164.

[24] *Ibid.*, p. 91.

[25] *Ibid.*, p. 707.

democracy. In advocating the former, he made it clear that counter-majoritarian checks should not be used often. In the Federal Convention, he noted that "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the judges in refusing to give them effect." He also argued explicitly for judicial self-restraint, contending that a judge should "remember, that his duty and his business is, not to make the law, but to interpret and apply it."[26]

Wilson did not believe that the Supreme Court would use its power to thwart the majority on many issues. Instead, he thought that it would use judicial review only rarely to strike down blatantly unconstitutional or unjust laws. For Wilson, counter-majoritarian checks are temporary injunctions, useful in preventing majorities from acting out of "passions" and "prejudices" that are "inflamed by mutual imitation and example." In the final analysis, the Court cannot prevail against a sustained supermajority, but this is as it should be because the people are best able to create just laws. The purpose of checks like judicial review is not to make policy, but to restrain improper or unjust laws until the people recognize them as such and correct them.[27]

Wilson's democratic views influenced his understanding of federalism. While partisans of the states or the national government argued about which is sovereign, Wilson contended that only the people are sovereign and that once this principle is settled:

> [T]he consequence is that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good. They can distribute one portion of power to the more contracted circle, called *state governments*; they can furnish another proportion to the government of the United States. Who will undertake to say, as a state officer, that the people may not give to the general government what powers and for what purpose they please? How comes it, sir, that these state governments dictate to their superiors?—to the majesty of the people?[28]

In America, the people decided to split the power of government between the states and the nation. Wilson argued that the general principle that should be used to draw "a proper line between the national government and the governments of the several states" is that:

> Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States.[29]

Wilson attempted to put this principle into practice when, as a member of the Committee of Detail, he played a significant role in drafting Article I, Section 8 of the Constitution. Believing that the scope of the national government was limited to powers enumerated in the Constitution, he supported the Necessary and Proper Clause but thought that implied powers must be closely connected to enumerated powers. Powers not assigned to the national government are reserved to the people, who may or may not choose to give them to the states.

Because the national government is limited to its enumerated powers, Wilson did not think it necessary to add a bill of rights to the Constitution. Why, he argued, add an amendment stating that Congress cannot restrict the liberty of the press if Congress has no power over the press? Furthermore, Wilson contended

[26] *Ibid.*, pp. 121, 953.
[27] *Ibid.*, p. 697.
[28] *Ibid.*, p. 202. Emphasis in original.
[29] *Ibid.*, p. 184.

that a bill of rights would be dangerous because if any rights are left out, it might be assumed that they are not retained by the people.[30]

Throughout the Constitutional Convention, Wilson strove to help frame a strong and democratic national government that would protect individual rights, and it is interesting to note how closely America's current constitutional system resembles the one he envisioned.

- Early in the 19th century, states began to make some of the suffrage reforms advocated by Wilson.
- By the 20th century, his proposal that Senators be elected by the people had become enshrined in the Constitution, and his "chimerical" idea that the President be elected by the people is virtually always the political practice, if not the constitutional rule.
- As well, the Supreme Court has become a co-equal part of the national government that both checks the other branches and plays an important role in protecting individual rights.

RATIFICATION DEBATES AND THE PENNSYLVANIA CONSTITUTION OF 1790

From the Constitutional Convention, Wilson proceeded to the Pennsylvania ratifying convention where, as the only member to attend both, he became the leader of the pro-ratification forces. He began his defense of the Constitution with his famous "State House Yard Speech," given in Philadelphia on October 6, 1787. There, Wilson promoted the benefits of the Constitution and responded to the main Anti-Federalist attacks. Most significantly, as noted above, he defended the absence of a bill of rights from the Constitution.

Wilson was the first member of the Federal Convention to defend the Constitution publicly. Under his leadership, Pennsylvania became the second state—and the first large state—to ratify the Constitution. Federalists throughout the country enlisted his aid in their own ratification efforts. George Washington, for instance, sent a copy of Wilson's "State House Yard Speech" to a friend, noting:

> [T]he enclosed *Advertiser* contains a speech of Mr. Wilson's, as able, candid, and honest member as was in the convention, which will place most of Colonel Mason's objections in their true point of light, I send it to you. The republication of it, if you can get it done, will be serviceable at this juncture.[31]

By December 29, 1787, Wilson's speech had been reprinted in 34 newspapers in 12 states. In addition, it was published in pamphlet form and circulated throughout the nation. Bernard Bailyn has noted that "in the 'transient circumstances' of the time it was not so much the *Federalist* papers that captured most people's imaginations as James Wilson's speech of October 6, 1787, the most famous, to some the most notorious, federalist statement of the time." Defenders of the Constitution in other states referred to the speech for ammunition in their own ratification battles. It soon became, in Gordon Wood's words, "the basis of all Federalist thinking."[32]

As his final act of constitution-making, Wilson helped to lead Pennsylvania in dissolving its constitution of 1776 and creating a new one. The Pennsylvania constitutional convention of 1789–1790 commenced with Wilson, the Federalist leader, and William Findley, the leader of the western democrats, agreeing to renounce the old constitution and begin debating a plan written by Wilson. His draft provided for a government based firmly on the sovereignty of the people but limited through a system of separated powers.

[30] *Ibid.*, p. 172.

[31] George Washington to David Stuart, October 17, 1787, in *The Writings of George Washington*, ed. Jared Sparks (Boston: Russell, 1835), Vol. 9, pp. 271, 357.

[32] Bernard Bailyn, *The Ideological Origins of the American Revolution*, enlarged ed. (Cambridge, Mass.: Harvard University Press, 1992), p. 328; Gordon Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), pp. 530, 539–540.

Wilson, who often had been labeled an aristocrat, broke with his old allies and joined the democrats on several issues. Most significantly, he led the fight for the direct, popular election of representatives, state senators, and the governor. Wilson's contributions to the Pennsylvania Constitution of 1790 are noteworthy insofar as they demonstrate that he did not argue for democratic institutions at the Federal Convention simply because he was from a large state.

WILSON AS SUPREME COURT JUSTICE

After the Constitution was ratified, Wilson wrote to President Washington and suggested that he be appointed Chief Justice of the United States. Washington responded coolly, writing: "To you, my dear Sir, and others who know me, I presume it will be unnecessary for me to say that I have entered upon my office without the constraint of a single *engagement*."[33] Eventually, however, Wilson was appointed and confirmed as an Associate Justice of the Supreme Court. From this position, he was to play an important role in the formation of American law.

One of Wilson's most significant decisions is also one of the most overlooked. In 1792, Congress passed the Invalid Pensioner Act, which provided federal assistance to men injured in the War for American Independence. It required federal circuit courts to determine whether veterans were eligible for these benefits. The judges' decisions were subject to final approval by the Secretary of War and Congress.

The first case arose in the New York Circuit, where Chief Justice John Jay and Associate Justice William Cushing were presiding with District Judge James Duane. These judges informed Congress that they objected to this duty but would perform it out of respect for the legislators and the pensioners.[34]

When a case arose in the Pennsylvania Circuit, Justices Wilson and John Blair, along with District Judge Richard Peters, refused to accept the petitioner's case. Under Wilson's leadership, the judges wrote a letter to President Washington in which they argued that reviewing claims was not a judicial function and, more significantly, that it violated the principle of separation of powers because the Secretary of War and Congress had the final say.

In response to the Pennsylvania circuit judges' letter, Attorney General Edmund Randolph applied to the Supreme Court for a writ of *mandamus* requiring the circuit court to perform its duty. Fortunately for future Chief Justice John Marshall's reputation, the full Court did not have to rule on the matter. Before the Justices could act, Congress altered the offending legislation and mooted the case.

Because the Supreme Court never issued an official opinion, *Hayburn's Case* (1792) is often overlooked by students of the judicial process, but it is fair to consider the case to be, in the words of the reporter of the House of Representatives, the "first instance in which a court of justice has declared a law of Congress unconstitutional." James Madison agreed with this assessment, as indicated by a letter to Richard Henry Lee in which he commented that the circuit court judges in Pennsylvania had pronounced the act "unconstitutional and void." Similarly, St. George Tucker, in his 1803 republicanized edition of Blackstone's *Commentaries*, cited *Hayburn's Case* as evidence that the judiciary has the duty to void an unconstitutional act of Congress. Thus, 11 years before *Marbury v. Madison* (1803), federal judges, led by Wilson, were engaging in judicial review of federal legislation.[35]

Wilson's most significant Supreme Court opinion came in the 1793 case of *Chisholm v. Georgia*. The contro-

[33] See Hall, *Political and Legal Philosophy of James Wilson*, p. 25.

[34] John Jay, William Cushing, and James Duane to George Washington, in *Hayburn's Case*, 2 U.S. 410 (1792); in *Collected Works*, pp. 346–350.

[35] 3 *Annals of Congress* at 557; James Madison to Richard Henry Lee, April 15, 1792, quoted in Maeva Marcus and Robert Teir, "Hayburn's Case: A Misinterpretation of Precedent," *Wisconsin Law Review*, July 1988, pp. 527, 531; St. George Tucker, ed., *Blackstone's Commentaries*, Vol. I, Part I (Philadelphia, Pa.: Birch and Small, 1803), Appendix, p. 5.

versy arose when Chisholm, executor of the estate of a Loyalist, sued Georgia for payment of a debt incurred during the War for Independence. The state claimed that because it was sovereign, it could not be sued. Georgia recognized that to submit to the jurisdiction of the federal courts would strike a major blow to state sovereignty. This concern had been raised repeatedly by the Anti-Federalists, who had argued in many of the ratifying conventions that individuals would be able to sue states.

In *Chisholm*, the Anti-Federalists' worst nightmare seemed to come true: The Supreme Court ruled four to one against Georgia. Wilson joined the majority and wrote the most memorable and theoretically interesting of the *seriatim* opinions. He moved far beyond the simple legal question to argue that the case was not primarily about jurisdiction, but instead concerned whether or not "the people of the United States form a Nation?"

Wilson began his elaborate answer with a quotation from Thomas Reid about the significance of language. Language is important, he claimed, because imprecise words can lead to bad political theory. For instance, people often misuse the terms "state" and "sovereign." To define these terms, Wilson returned to first principles and reminded his audience that people are "fearfully and wonderfully made" and that they are endowed by their "Creator" with "dignity." A state, on the other hand, is but an "inferior contrivance of man." While a state is certainly "useful and valuable," the people should never forget that a state exists to serve them, not vice versa.[36]

Wilson built on this distinction and argued that the people always retain their power of original sovereignty. While they may vest aspects of this sovereignty in states, it is sovereignty of a "derivative" nature. It is therefore inaccurate to speak of a "sovereign state," for only the people are sovereign. The people as a whole, including the citizens of Georgia, created the Constitution. Therefore, "as to the purposes of the Union… Georgia is NOT a sovereign State."[37]

On the basis of "general jurisprudence," Wilson concluded that Georgia is not a sovereign state and that it has a duty to fulfill its contracts. After discussing a number of precedents that supported this position, he addressed the question of whether the Supreme Court has jurisdiction in the dispute. To answer it, Wilson turned to Article III, Section 2 of the U.S. Constitution, which states that the judicial power "shall extend to controversies, between a state and citizens of another state." Clearly, Wilson contended, this provision shows that the people gave the Supreme Court the jurisdiction to hear cases of this nature. Georgia therefore must submit to the will of the sovereign people and subject itself to the jurisdiction of the Court.

Americans were not yet willing to embrace Wilson's views on sovereignty. Indeed, advocates of states' rights moved quickly to pass a constitutional amendment to reverse *Chisholm*. There are no records of Wilson's reaction to the Eleventh Amendment, but one may presume that he considered it to be a mistake because it allowed states to judge themselves. That said, he undoubtedly would have accepted the amendment because he supported the power of the people to change the Constitution as they saw fit.

Wilson played a role in two other important Supreme Court decisions.

- In *Hylton v. U.S.* (1796), he agreed with his fellow Justices that Congress's uniform tax on carriages was not a direct tax and was therefore constitutional. Wilson did not write an opinion because the Court upheld the ruling he made while riding circuit. The case significantly strengthened the ability of the new national government to raise revenue by upholding a key element of Hamilton's plan for rescuing the finances of the fledgling republic. The mere acceptance of this case also implied that the Justices believed they had the power to strike

[36] *Chisholm v. Georgia*, 2 U.S. 419 (1792); quotes from *Collected Works*, pp. 351–353.

[37] *Ibid.*, p. 355. Emphasis in original.

down acts of Congress. In fact, when Wilson was presiding over the circuit court arguments in the case, he told the government's counsel that the Justices were of the opinion that federal courts could strike down congressional legislation as unconstitutional.[38]

- In another 1796 decision, *Ware v. Hylton*, Wilson held that the national government's treaty-making power takes precedence over state law. Specifically, the 1783 treaty with Great Britain, which required repayment of pre-war debts to British citizens, preempted a 1777 Virginia law that effectively abolished those debts. Wilson was tempted to make this ruling solely on the basis of the "law of nations," but he ultimately joined the rest of the Court in declaring that the Supremacy Clause operated retroactively. An important precedent concerning the supremacy of federal law thereby was established.[39]

THE WILL OF THE PEOPLE

Throughout his legal career, Wilson evidenced a commitment to the idea that law must be based on the will of the people. He even taught that juries should be able to judge laws as well as facts. In his first federal grand jury charge, he informed jurors that:

> [I]t may seem, at first view, to be somewhat extraordinary, that twelve men, untutored in the study of jurisprudence, should be the ultimate interpreters of the law, with a power to over-rule the directions of the Judges, who have made it the subject of their long and elaborate researches, and have been raised to the seat of judgment for their professional abilities and skill.[40]

A jury can adjudicate both fact and law because it is serving as a representative of society, and the common person is able to know principles of justice as well as, if not better than, the trained expert.

Wilson respected juries because he thought they represent the will of the people. Similarly, he cherished the common law because its "every lovely feature beams consent." Common law is one of the most democratic of all types of law as people have agreed to it and have participated in its development throughout the ages. Wilson supported common law, like democracy, not as an end in itself but because it is an important means by which natural law can be known. Common law, like society, is not perfect but nevertheless is in a state of progression because its "authority rests on reception, approbation, custom, long and established. The same principles, which establish it, change, enlarge, improve, and repeal it."[41]

A SAD END TO A SHORT LIFE

Throughout the 1790s, Wilson spent more and more time managing his increasingly chaotic business affairs. He had borrowed heavily to speculate in western lands and was fighting constantly to meet bills and to borrow more money for further investments.

In 1797, an economic downturn devastated the overleveraged Wilson, along with investors such as Robert Morris, "Financier of the Revolution" and at one point the richest man in America. Unable to find assistance to meet the variety of notes coming due, Wilson was forced to flee from his creditors. Thrown into jail on two separate occasions, he spent his final days hiding in a tavern in Edenton, North Carolina, the hometown of Justice James Iredell. Here, with his wife by his side, Wilson contracted malaria and died on August 21, 1798. He was buried with little ceremony on the estate of Mrs. Iredell's father.

Wilson's early, ignoble death has contributed to his relative obscurity. Because he died at a relatively young age, he was unable to complete his law lectures.

[38] *Hylton v. U.S.*, 3 U.S. 171 (1796).

[39] *Ware v. Hylton*, 3 U.S. 199 (1796); in *Collected Works*, pp. 370–371.

[40] Maeva Marcus *et al.*, eds., *The Documentary History of the Supreme Court of the United States, 1789–1800* (New York: Columbia University Press, 1988), Vol. 2, p. 39.

[41] *Collected Works*, p. 567.

Unlike most Founders remembered today, he did not serve in the executive branch; nor did he serve long as a Supreme Court Justice. Additionally, he left relatively few papers with which scholars can work. These factors help to explain why Wilson is not better known today, but they do not indicate that this fate is just.

AN ENDURING LEGACY

As noted at the outset, Wilson believed that "of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles."[42] This does not mean that contemporary policy problems can be solved simply by asking "What would the Founders do?" but it does suggest that we do well to reflect on the principles that animated the men and women who helped win American independence and create our constitutional republic.

America's Founders were committed to a common core of ideals. Of course, they had disagreements among themselves, particularly with respect to how these ideals should be implemented. A narrow focus on five or six famous Founders runs the risk of distorting the Founders' views as a whole. An accurate account is possible only if we consider a wide range of Founders, including men and women like Abigail Adams, Samuel Adams, Fisher Ames, Elias Boudinot, Daniel Carroll, John Dickinson, Oliver Ellsworth, Patrick Henry, John Jay, Luther Martin, George Mason, Gouverneur Morris, Charles Pinckney, Edmund Randolph, Benjamin Rush, Roger Sherman, Mercy Otis Warren, John Witherspoon, and, of course, James Wilson.

For instance, scholars often portray America's Founders as secular thinkers, but this position is impossible to maintain if one examines more than a handful of select elites. Clearly, Wilson was influenced by a Christian conception of natural law, and his theory of natural rights is best understood in light of this tradition. Notably, his expansive view of the right to life was shaped by his conviction that humans are created in God's image, and his view of an individual's right to liberty is constrained by moral law.[43]

Similarly, academics, attorneys, and jurists interested in the Founders' views on religious liberty and church–state relations too often rely on narrow studies of a few unrepresentative Founders, usually Thomas Jefferson and James Madison. Expanding this conversation to include Wilson and others reveals that while everyone supported religious liberty, virtually no one advocated the strict separation of church and state.[44]

Of course, the Founders had some disagreements about specific policies. For instance, even by Federalist standards, Wilson was an extreme nationalist. It is telling, however, that he came to support the specific enumeration of the national government's powers. Indeed, he helped draft what became Article I, Section 8 of the Constitution. Since the 1930s, the national government has acted as if it possesses unlimited power. A return to first principles reminds us that the federal government has an important but limited role in our constitutional republic.

In two important respects, Wilson was *unrepresentative* of the Founding generation.

[42] *Ibid.*, p. 698.

[43] For evidence that Christianity had an important impact on most Founders, see Daniel L. Dreisbach, Mark D. Hall, and Jeffry H. Morrison, eds., *The Founders on God and Government* (Lanham, Md.: Rowman and Littlefield, 2004), which includes essays on Washington, Adams, Jefferson, Madison, Witherspoon, Franklin, Wilson, Mason, and the Carrolls; Daniel L. Dreisbach, Mark David Hall, and Jeffry H. Morrison, eds., *The Forgotten Founders on Religion and Public Life* (Notre Dame: University of Notre Dame Press, forthcoming), which includes essays on Abigail Adams, Samuel Adams, Oliver Ellsworth, Alexander Hamilton, Patrick Henry, John Jay, Edmund Randolph, Benjamin Rush, Roger Sherman, Thomas Paine, and Mercy Otis Warren; and Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (San Francisco: Encounter Books, 2002). Barry Alan Shain makes a similar argument in *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton, N.J.: Princeton University Press, 1994), although he disagrees with my interpretation of Wilson.

[44] Mark David Hall, "Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases," *Oregon Law Review*, Vol. 85 (2006), pp. 563–614.

First, unlike most Founders—even those most prominently remembered—he left a systematic account of his political and legal theory in his *Lectures on Law*. This work deserves to be better known.

Second, Wilson had a more optimistic view of human nature than most of the Founders. He never denied that men and women can act in a self-interested manner, but he thought that good laws and institutions can significantly improve human beings. America is fortunate that most Founders did not share his overly optimistic (though not unduly utopian) view of human nature.

James Wilson is worthy of study because his sophisticated and innovative political theory informed his many important contributions to the creation of the American republic. He was instrumental in supporting and reconciling some of the most important ideas of his day (and ours): popular sovereignty, majority rule, limited government, and minority rights. A tension remains between these ideas, which means that Wilson should be regarded not only as an influential historical figure, but also as someone who can guide us in thinking through the current debates in our politics.

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