

THE GREAT SYNTHESIZER: NATURAL RIGHTS,
THE LAW OF NATIONS, AND THE MORAL SENSE IN
THE PHILOSOPHICAL AND CONSTITUTIONAL THOUGHT
OF JAMES WILSON

Derek A. Webb*

ABSTRACT

This article argues that the key to understanding James Wilson, one of the leading architects of the Constitution and the first Supreme Court Justice to be sworn in, and yet arguably the most neglected and misunderstood figure from the founding generation, is as a “great synthesizer” of seemingly disparate philosophical and constitutional commitments. Drawing upon the natural rights tradition of early classical liberalism as envisioned by John Locke, Wilson insisted that the new federal government be as democratic and broadly reflective of “We the People” as possible. Drawing upon the law of nations tradition as articulated particularly by Cicero, he became one of the nation’s leading proponents of a strong, centralized federal government in order to form “a more perfect union.” And inspired by the concept of the moral sense and the innate sociality of the human person as discussed in the Scottish Enlightenment by Thomas Reid and Francis Hutcheson, he made clear that the “blessings of liberty” were contingent upon an active and engaged citizenry on the national level. By understanding this overlooked, synthetic quality of Wilson’s thought, we may better understand, in all its richness and complexity, the unique role Wilson played in America’s creation story, gain a new perspective on the original Constitution itself, its achievements and flaws, and reconstruct a compelling constitutional theory that cut across the political alignment of the day but perhaps better anticipated subsequent constitutional development than any of the prevailing positions in 1787.

KEYWORDS

U.S. Constitution, natural rights, law of nations, moral sense, James Wilson

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* Dean’s Visiting Scholar, Georgetown University Law Center
I would like to thank Mortimer Sellers for first inspiring this project and Jonathan Abel, Jud Campbell, William Ewald, Michael McConnell, John Mikhail, Zachary Price, Jack Rakove, Jeffrey Rosen, William Treanor, John Fabian Witt, Danielle and Erik Zimmerman, and Michael Zuckert for helpful feedback and discussions

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I. INTRODUCTION

George Washington has his Monument, Thomas Jefferson has his Memorial, and Benjamin Franklin has his Institute, but James Wilson of Pennsylvania, one of the leading intellectual lights of America's founding generation, remains a relatively overshadowed and neglected figure in American constitutional history.¹ Until recently, even the Supreme Court of the United States did not pay him much attention. When visitors enter the Court, they are first greeted by a regal portrait of John Jay, the Court's first Chief Justice. Strolling down the hallway, they come upon a larger-than-life statue of John Marshall, with select quotes from his opinions etched in marble above and behind him. And in perhaps a fitting tribute to Wilson's historical obscurity, only the most intrepid (or lost) visitors who keep going to the very back of the Court, behind the Marshall statue, around a wall, past a tribute to Justice O'Connor, and veer off to the left in a dimly-lit corner can find a recently hung, oft-maligned portrait of the man who served as one of the first six Supreme Court Justices and played a key role in the creation and defense of the new U.S. Constitution.

For almost as long as constitutional historians have been writing about Wilson, they have recognized and lamented his neglect. As far back as 1897, Andrew McLaughlin observed that "The work of James Wilson as a framer of the Constitution seems not to have received its just recognition."² Seventy years later in 1967, Robert G. McCloskey's observed that "Wilson is well known only to a few constitutional historians, ... he is not much more than a name to most other American historians, and... to educated Americans in general he is not even a name."³ And nearly fifty years after that, Gordon Wood, in a 2006 book review of Akhil Amar's *America's Constitution: A Biography*, described Wilson as "an intellectually important framer who Amar correctly believes has been much neglected."⁴ William Ewald remarked in 2008 that Wilson "has a good claim to be the most neglected of the major American founders."⁵ And the evidence seems to supports this claim that Wilson is best known for being forgotten: in a recent survey of historians and political scientists, James Wilson was voted by a significant margin the number one most neglected figure of the American founding period.⁶ One cannot help but wonder whether constitutional historians in another fifty or so years, say in 2070, will be making similar comments about Wilson's neglect.

¹ The inspiration for the opening phrase of this sentence comes from Michael P. Zuckert, *The Political Science of James Madison*, in *THE HISTORY OF AMERICAN POLITICAL THOUGHT* 149 (Bryan-Paul Frost & Jeffrey Sikkenga, eds., 2003).

² See Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 *POL. SCI. Q.* 1 (1897).

³ JAMES WILSON, *THE WORKS OF JAMES WILSON* (Robert G. McCloskey ed., 1967).

⁴ Gordon Wood, *How Democratic Is the Constitution?* 53 *N.Y. REV. BOOKS* 3 (Feb. 3, 2006).

⁵ See William Ewald, *James Wilson and the Drafting of the Constitution*, 10 *U. PENN. J. CONST. L.*, 902 (2008). For a helpful discussion of how historians and American popular culture have treated Wilson over the years, often unkindly, see Nicholas Pederson, *The Lost Founder: James Wilson in American Memory*, 22 *YALE J. L. & HUM.* 257 (2010).

⁶ *AMERICA'S FORGOTTEN FOUNDERS* xiv (Gary L. Gregg II & Mark David Hall, eds., 2011).

The reasons for Wilson's obscurity itself remain somewhat obscure. But some explanations are at least possible. Unlike some of the lions of the founding generation, Wilson never held nationwide elected office or served as a high ranking cabinet member under the new Constitution.⁷ And unlike some of the great legal giants of his day, whose judicial opinions numbered into the hundreds and effectively transformed the American legal landscape, his tenure on the Supreme Court came at a time of relative inactivity for the Court,⁸ giving him the opportunity to pen only eight signed opinions⁹ of varying quality¹⁰ over the course of seven terms. And unlike several of the most well regarded founding figures, whose lives ended in either a blaze of glory like Hamilton or, as with Jefferson and Adams, after a long life in a nearly poetic death on the 50th anniversary of the signing of the Declaration of Independence, Wilson came to a difficult, ignoble end, twice

⁷ In 1907, the secretary of the James Wilson Memorial Committee, Burton Alva Konkle, who conceived and executed a plan to remove Wilson's remains from North Carolina and return them to a cemetery in Philadelphia near Independence Hall, accompanied by a small memorial service, speculated that Wilson's absence from the more glamorous positions in the new government may partly explain why so few Americans knew of James Wilson. "Had he gone into the picturesque office of President of the United States, or been a dashing Secretary of the Treasury... instead of being buried in the sober and unpicturesque halls of the Supreme Court, he might have been in the popular thought as fully as he has always been in that of the student of constitutional history." Burton Alva Konkle, *The James Wilson Memorial*, 55 AM. L. REG. 1, 2 (1907).

⁸ As Robert McCloskey, both a revered historian of the Supreme Court and a publisher of Wilson's works, observed, "The Court of the 1790's was not yet ready for the great work of its future, nor was the country prepared to accept the judicial leadership of later years. The status of the fledgling Court in the fledgling Republic was ambiguous and, for the moment, comparatively minor... Those years from February 1, 1790, when he first took his seat, and August 21, 1798, when he died, were simply not years of great opportunity for a justice of the Supreme Court, even one with Wilson's intellect and drive." WILSON, *supra* note 3, at 30.

⁹ The opinions were *State of Ga. v. Brailsford*, 2 U.S. 402, 407 (1792), *Chisholm v. Georgia*, 2 U.S. 419, 453 (1793), *United States v. Hamilton*, 3 U.S. 17, 18 (1795), *Bingham v. Cabot*, 3 U.S. 19, 33 (1795), *Hylton v. United States*, 3 U.S. 171, 183 (1796), *Ware v. Hylton*, 3 U.S. 199, 281 (1796), *Wiscart v. D'Auchy*, 3 U.S. 321, 324 (1796), and *Brown v. Van Bramer*, 3 U.S. 344, 356 (1797).

¹⁰ Comparing the quality of Wilson's judicial opinions with John Marshall's, McCloskey observed a considerable difference in style that limited Wilson's influence. "Though far more erudite and a deeper thinker than Marshall, he was unable to match the lucidity, simplicity, and persuasiveness of Marshall's prose style. When we lay a page of his *Chisholm* opinion beside a page from *McCulloch* or *Cohens* the contrast is arresting. Wilson's argumentative talent was by no means slight. But he could seldom resist adorning the essential point of his contention with scholarly references and grandiloquent asides, and his sentences sometimes develop a labyrinthine complexity. At its worst his prose seems the result of a cross-fertilization between a pedant and a Fourth of July orator, and the intervening passages of clear and even memorable English cannot quite save it." WILSON, *supra* note 3, at 36. Regarding the mixed quality of his overall judicial output, Hampton L. Carson, in attempting to explain why "Judge Wilson on the Bench did not equal Mr. Wilson at the Bar," observed that Wilson's personal difficulties while he served on the Court "deprived him of the equanimity of mind so necessary to the proper performance of the duties of a judge." Hampton L. Carson, *The Works of James Wilson* 35 AM. L. REG. & REV. 633, 635, (1896).

arrested in the last year of his life while sitting as a Supreme Court Justice¹¹ for failing to pay his staggeringly high debts incurred from failed land speculation, and dying from malaria in 1798, financially ruined, forced off the Court, and in hiding from his creditors who, as he put it, “hunted him like a wild beast.”¹²

But another reason why Wilson may remain overlooked is that, as a thinker, where he perhaps did most of his living and enjoyed his greatest successes,¹³ he does not clearly stand in the collective public imagination or the scholarly consensus for any single particular big idea. If one is in search of an articulate and uncompromising early American exponent of individual rights, personal autonomy, and democracy, one turns naturally to Jefferson, while if one is interested in an American defender of the importance of tradition, forms, and the rule of law, one may look to Adams.¹⁴ If one is looking for a taste of the spirit of the American enlightenment seasoned with wit, one turns to Benjamin Franklin. If one is looking for a balanced, encyclopedic understanding of the architecture of the new federal government under the Constitution, one consults James Madison, while if one is interested in an early champion of a powerful and well financed national government, Alexander Hamilton is likely your preferred Broadway star. James Wilson, by contrast, seems to pale in comparison, lacking a clear, satisfyingly archetypal idea to help distinguish him as a constitutional thinker.

Wilson’s overlooked genius, however, resided not so much in staking claim to one single, overriding philosophical position or interpretive approach to the Constitution, but rather in a rich, surprising, and compelling synthesis of disparate philosophical and constitutional principles ordinarily kept apart at the time but that have since been mostly blended today. In the course of analyzing a passage from William Blackstone in his lecture on Municipal Law, Wilson noted in an offhand way that “I search not for contradictions. I wish to reconcile what is seemingly contradictory.”¹⁵ This statement, though in this context perhaps little more than a rhetorical flourish, captures nicely the dynamic of his mind which was more inclined to embrace “both... and” formulations than choices between “either... or.”

As a political philosopher, Wilson embraced three ideas that had distinctive, potentially rivalrous origins. He defended the view traditionally associated with early modern liberalism that individuals are naturally free, endowed with various natural rights, and that political authority is created to secure those rights and

¹¹ Giving Wilson the dubious distinction of being the only sitting Justice of the Supreme Court to ever spend time in prison. Ewald, *supra* note 5, at 914-15.

¹² Wilson’s biographer Charles Page Smith aptly summarized Wilson’s final days when he titled the final chapter of his biography “The Morass.” CHARLES P. SMITH, *JAMES WILSON: FOUNDING FATHER, 1742-1798*, at 376-88 (1956).

¹³ Andrew C. McLaughlin put this point most delicately when he observed that “he was not one of those statesmen who master details, who work with promptness and decision for the accomplishment of palpable objects. Nor was he one of those statesmen who know men with unerring judgment... Nor was he one of those who feel acutely the life of the state... his greatest talent was of a different nature. He was above all a political scientist.” McLaughlin, *supra* note 2, at 2.

¹⁴ Their character as natural opposites led Benjamin Rush to quip that Jefferson and Adams collectively represented the “North and South Poles of the American Revolution.”

¹⁵ JAMES WILSON, *COLLECTED WORKS OF JAMES WILSON* 570 (Kermit L. Hall & Mark D. Hall eds., 2007) [hereinafter, WILSON].

derives its authority from the consent of the governed. He endorsed the view typically associated with pre-modern, classical political thought that order and natural law pervades the universe and imposes duties upon individuals and states alike. And he championed the Scottish Enlightenment view that all individuals are born with an innate moral sense that renders them invariably social creatures whose survival and happiness depends upon active participation in both domestic and civil society. Wilson as a thinker thus drew upon Locke, Cicero, and Reid in building his comprehensive philosophical outlook.

As a constitutional thinker, Wilson endorsed views on the Constitution that blurred boundaries between opposing camps.¹⁶ He sided with Jefferson and the Anti-Federalist critics of the Constitution in speaking out in favor of a much more thoroughly democratic and representative federal government than was ultimately produced. He sided with Hamilton and the Federalists, however, in defending an even stronger national government than the convention in Philadelphia ultimately endorsed. And, in a sense, he split the difference between both these camps on the topic of citizenship, arguing for a robust concept of engaged, vigilant, and dutiful citizenship that Jefferson and the Anti-Federalists endorsed while, in good Hamiltonian and Federalist style, defending an “expanded patriotism” that drew citizens’ primary attachment away from the more factional state and local interests and towards the federal government. Wilson as a constitutional thinker thus staked out views that at different times sounded like Thomas Jefferson, Alexander Hamilton, James Madison, and Melancton Smith.

All this surprising and unorthodox pairing, matching and blending among Wilson’s philosophical and constitutional views has led scholars down one of two equally unsatisfactory avenues. Some have been tempted to conclude that Wilson’s philosophical and constitutional views were a hopeless bricolage of contending and rival approaches, at times a throwback to a classical philosophical orientation, at other times distinctively modern, at times Jeffersonian, at other times Hamiltonian, yet always ultimately confused.¹⁷ Robert McCloskey, for example, observed the

¹⁶ As Arnaud B. Leavelle put it, Wilson’s “governmental doctrines cut across the existing political alignment of his day.” Arnaud B. Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 POL. SCI. Q. 394, 396 (1942). And as Richard Bernstein expressed it, “Wilson does not fit well with the prevailing bright-line boundaries that some modern historians and legal scholars discern in the era of the American Revolution and the making of the Constitution.” R. B. Bernstein, *Bernstein on Hall, ‘The Political and Legal Philosophy of James Wilson, 1742-1798*, H-LAW, H-NET REVIEWS (1998) (reviewing MARK DAVID, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON* (1997)).

¹⁷ Richard Gummere captured the sense of many scholars when he observed that “It is hard to classify Wilson.” Richard M. Gummere, *Classical Precedents in the Writings of James Wilson* 32 COLONIAL SOC’Y MASS: TRANSACTIONS 525, 527 (1937). Alfons Beitzinger observed that Wilson’s philosophy of law was mostly a “muddle” of disparate, unreconcilable sources, concluding that “if one attempts to integrate on an equal basis the natural law approach of a Hooker with the consensual theory of a Locke one is on an impossible course.” Alfons Beitzinger, *The Philosophy of Law of Four American Founding Fathers* 21 AM. J. JURIS. 1, 15-6 (1976). Thomas and Lorraine Pangle gently suggested that “One may accuse him... of moving too superficially and in too harmonizing a spirit through the complex quarrels that divide and animate the history of political philosophy.” LORRAINE SMITH PANGLE & THOMAS PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 175 (1993).

synthetic quality of Wilson's political theory, but concluded that it was ultimately a hopeless collection of highly disparate sources that did not cohere well together.

Perhaps the most noteworthy thing about the theory is its synthetic quality: the refusal to dispense with either the old or the new, the tendency to claim the best of both worlds – or of any of the several worlds that Wilson cherished. The virtue of this quality is that it reflects the eclectic, ambivalent disposition of the American mind itself. America was attached to both the ancient idea of an immutable moral law and the new idea of popular sovereignty, to the concept of order and the concept of liberty, to the need for continuity and the need for progressive change. Wilson's theory embraced all these New World prepossessions and asserted, in spite of logical difficulties, their compatibility... Like his theory, he was conglomerate of values and impulses drawn from widely variant worlds, of incompatibilities brought together only by his own attachment to them, and reconciled only by his own incurable optimism that they *could* be reconciled in some apocalyptic day that never quite arrived.¹⁸

Others, perhaps themselves aware of the complexity of his thinking but personally predisposed to favor just one or two elements of it, or just eager to simplify for their readers, have tended to portray (and either valorize or criticize) just one dimension of his thought to the exclusion of all else. Early Wilson scholarship tended to focus exclusively on the presence and significance of natural law as classically conceived in his philosophical and constitutional thought.¹⁹ Other scholars have focused principally on the ways in which the philosophical developments within the Scottish Enlightenment influenced Wilson's moral and political views.²⁰ Finally, there are a number of scholars who have emphasized Wilson's seemingly singular devotion to consent, popular sovereignty, and democracy as the organizing touchstone for understanding all of his thought.²¹ Not

¹⁸ WILSON, *supra* note 3, at 41.

¹⁹ Examples of this include MAY G. O'DONNELL, JAMES WILSON AND THE NATURAL LAW BASIS OF POSITIVE LAW (1937), WILLIAM OBERING, THE PHILOSOPHY OF LAW OF JAMES WILSON: A STUDY IN COMPARATIVE JURISPRUDENCE (1938), and MARY T. DELAHANTY, THE INTEGRALIST PHILOSOPHY OF JAMES WILSON (1969). Likewise, Mark David Hall, though considerably better than most in acknowledging the multiple traditions upon which Wilson drew, ultimately concluded that "Of primary importance for Wilson was the Christian natural law tradition." MARK D. HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON (1997).

²⁰ Foremost among these scholars is Stephen A. Conrad, who has written three thoughtful articles exploring these connections and illustrating Wilson's focus upon the moral sense and the qualities of good citizenship, including Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 SUP. CT. REV., 359 (1984), Stephen A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 L. & SOC. INQUIRY 1 (1988), and Stephen A. Conrad, *James Wilson's 'Assimilation of the Common-Law Mind'*, 84 NW. L. REV. 186 (1989). Samuel Beer similarly focused upon these connections in a chapter devoted to Wilson in his book, SAMUEL BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM (1993).

²¹ Early forerunners of this approach included John Jezierski, *Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, 32 J. OF

unlike the proverbial blind men each touching a different part of an elephant and concluding that it was, variously, a water spout, a pillar, and a fan, many different Wilson scholars have tended to see in Wilson what they themselves most admire in his thinking, leaving him stand in for that singular idea and little else besides.

Unlike these previous scholars who have either thrown up their hands at the contradictions within Wilson's thought, or have just focused on one element of it to the exclusion of all else, this article dwells at equal length on each of the three critical nodes of his philosophical and constitutional thought, on the trunk, the leg, and the ear, if you will, and thereby both brings out the complexity and richness of his thought, while at the same time illustrating a striking underlying order connecting at several levels his seemingly disparate views. Wilson's disparate philosophical positions, however themselves potentially rivalrous in their origins, led consistently to an approach to the formation and interpretation of the new Constitution that emphasized the power and democratic legitimacy of the federal government independent of the state governments and the significance of a robustly participatory national political culture. His argument that consent was the only means by which political authority could be created led to his view that all the ruling elements under the U.S. Constitution needed to find their touchstone as directly as possible in the approval of "We the people" themselves, and emphatically not the states. His argument that both individuals and states had natural duties to themselves and others led to his view that the new federal government needed to have at least as much power as it was given in Philadelphia to bring forward a "more perfect union," to carry out the various national and international responsibilities which the states on their own could not perform, and to serve as a check upon the potential injustices of state legislatures, particularly with regard to slavery. And his view that people were innately social and possessed of a moral sense led him to the view that to truly secure "the blessings of liberty," Americans would need to gradually develop and actively participate in a distinctly national American civic

THE HIST. OF IDEAS 95 (1971) and George M. Dennison, *The 'Revolution Principle': Ideology and Constitutionalism in the Thought of James Wilson*, 39 THE REV. POL., 157 (1977). More recent scholars who have chosen to single out this dimension in Wilson's thought in an attempt, at least in part, to disprove Charles Beard's thesis that the Constitution was a largely anti-democratic charter, and to champion him for more contemporary audiences, include AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2006), Nicholas Pedersen, *The Lost Founder: James Wilson in American Memory*, 22 YALE J. L. & HUMAN., 257 (2010), and Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & POL. 189 (2013) (who notes, contra Amar, that Wilson was more exceptional and unique in his devotion to democracy than he was actually representative of common Federalist thinking at the time. But in his representation of Wilson's thought as bottomed on exclusively democratic principles, he is actually much closer to Amar than he lets on.) And there have been other scholars who have similarly identified Wilson with this devotion to democracy and popular sovereignty, but have then faulted him for what they consider to be his excessively singular devotion to democratic rule, thereby jeopardizing minority rights. Examples of this perspective include Ralph Rossum, *James Wilson and the 'Pyramid of Government': The Federal Republic*, 6 POL. SCI. REVIEWER 113 (1976), JENNIFER NEDELSKY, *The Democratic Federalist Alternative: James Wilson and the Potential of Participation*, in PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM, 96-140 (1990), and James Read, *Wilson and the Idea of Popular Sovereignty*, in POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON (2000).

culture that in some ways transcended their potentially more parochial local and state attachments. Drawing upon divergent philosophical traditions inherited from different European thinkers of different eras, he sketched a nonetheless coherent constitutional vision of America as democratic as Jefferson might have wished, powerful as Hamilton could have hoped for, and rooted in a robustly participatory civic culture that the Anti-Federalists would have welcomed, but keyed to the national level, and not just the local. In a uniquely Scottish way, Wilson blended rivalrous philosophical traditions in articulating a unique and coherent vision of a new, powerful federal government that stood on its own bottom independent of the states, and was capable of checking those states against their worst tendencies, under America's new constitutional order.

Thus unlike prior scholarship that has either tended to focus on the contradictions within Wilson's thought or just upon one narrow dimension of it, this article provides an account of why Wilson emerged as the unique political figure of his day, whose democratic and civic nationalism scrambled many of the political categories of his time and placed him almost in a category unto his own. It presents him as the "great synthesizer" by showing how his disparate philosophical views, articulated in theoretical terms at various points throughout his career, from his first pamphlet in 1774 to his Lectures on Law in 1790-1792,²² explained and undergirded the concrete proposals he made to the Constitution in the summer of 1787 and his explanation of those proposals throughout the ratification contest in 1787-1788.²³ Wilson himself never took the time to explicitly show his readers all the connections between his theoretical statements and his more practical work as a builder of the Constitution. But the connections are there to see for attentive readers of his entire corpus. This article lays out that underlying web of connections. Clarifying Wilson's synthesis of disparate philosophical views and divergent politics helps us better understand an individual who, though curiously overlooked by history, fused together various constitutional values and strands of thought that, though kept apart at the time of the American founding, have over the course of American political and constitutional development in some ways come together. While history has mostly overlooked James Wilson, Wilson, more than really any other single American founder, argued for, and in a sense, anticipated the spirit in which much of American constitutional history would eventually unfold. Understanding Wilson and his unique synthesis thus helps us to not only better understand a fascinating and overlooked figure, but also helps us to better understand America itself, its founding to be sure, but perhaps even more so its current constitutional design.

²² Though Wilson refined and elaborated his philosophical statements over time, his basic commitments to classical, modern, and Scottish insights did not appear to shift much over time.

²³ Though at first glance there may appear to be some chronological awkwardness in using later-in-time philosophical statements to explain earlier constitutional proposals, Wilson's proposals were often nested at the time within briefer, philosophical statements that he unpacked at greater length just a couple years later during his Lectures on Law.

II. NATURAL RIGHTS, THE REVOLUTION PRINCIPLE, AND “WE THE PEOPLE”

A. THE SOURCE OF THE NILE: CONSENT, THE ORIGINS OF STATES, AND THE RIGHTS OF INDIVIDUALS

At the outset of his first lecture on law, Wilson introduced his subject with an epigrammatic discussion of the relationship between liberty and law. Liberty and law, he said, could not exist without the other. “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.”²⁴ Moreover, the American character could, in his view, best be summarized in the following few words: “That character has been eminently distinguished by the love of liberty, and the love of law.”²⁵

In his first lecture, Wilson focused on the first prong of that statement and drew his audience’s attention to a stunning historical fact. For thousands of years, the source of the mighty Nile river, which flowed through Egypt and alternately brought plenty and fertility or devastation and famine, was unknown to scientists, philosophers, and kings. All were curious, but all ultimately failed to discover its source. Because it remained a mystery, poets started making the literary suggestion that its origin was in a “superior orb” which they then worshipped as divinity. Recently, however, scientists had finally and truthfully discovered its source in a collection of springs “small, indeed, but pure.”²⁶

Wilson drew an analogy between the mystery surrounding the source of the Nile River and the mystery surrounding the source of sovereignty. Sovereignty, like the Nile River, had been with us for a thousand years and presented a magnificent spectacle. It too had alternately been a blessing and a curse for people. And its origin had similarly been sought after by politicians and philosophers for ages. Finally, perplexed by the seemingly unfathomable nature of sovereignty, the politicians and philosophers took on the role of poets and taught that its origins must be divine. And only recently, when investigated by thinkers of a more scientific cast of mind, had something useful and true finally been discovered about the source of sovereignty: that the “ultimate and genuine” source of the “dread and redoubtable sovereign” could be found in “the free and independent man.”²⁷ As he would put it as a Supreme Court Justice two years later in *Chisholm v. Georgia*, “The sovereign, when traced to his source, must be found in the man.”²⁸

This discovery amounted to a revolution in the science of government. Heretofore, that science had simply floundered from one infeasible system to another, all improperly conceptualizing the source of sovereignty. “Sovereignty has sometimes been viewed as a star, which eluded our investigation by its immeasurable height; sometimes it has been considered as a sun, which could not be distinctly seen by reason of its insufferable splendor.”²⁹ Now, finally, it was seen in its true, not mystifying or obfuscating light – the simple and natural fact that all

²⁴ WILSON, *supra* note 15, at 435.

²⁵ *Id.* at 432.

²⁶ *Id.* at 445.

²⁷ *Id.*

²⁸ *Chisholm v. Georgia*, 2 U.S. 419, 458 (1793).

²⁹ WILSON, *supra* note 15, at 444-45.

political authority begins with free and independent man. This fact was for Wilson the “point of departure” for all thinking about politics. He refers to it variously as the “first and fundamental principle in the science of government,” the “broad and deep foundation of human happiness,” and “the *vital* principle... which diffuses animation and vigour through all the others.”³⁰ The discovery of this obvious but true point of departure now provided the science of government with a helpful foundation which it had been lacking and upon which it could build itself from its infancy into a genuine science.

Spelled out in greater detail, the principle was what he called “the revolution principle.”³¹ According to this principle, all legitimate political authority flows ultimately from the consent of individuals and the people at large. Consent, he said, was “the true origin of the obligation of human laws.”³² As he put it in *Chisholm v. Georgia*, “The only reason, I believe, why a free man is bound by human laws, is that he binds himself... If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise?”³³ And that original power to consent to political authority remained even after the initial formation of the Constitution. As he put it in his *Lectures on Law*, “The supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.”³⁴ This principle, according to which all political authority depended upon popular consent for both its original inception and its ongoing legitimacy, was for Wilson what had sparked the American Revolution.³⁵

And having drafted an important and widely read pamphlet in 1774 urging revolution on precisely these grounds, “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament,” Wilson was well positioned to make this claim.³⁶ In that pamphlet, he formulated the “revolution principle” in these terms.

All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view

³⁰ *Id.* at 446.

³¹ George M. Dennison observed the modern provenance of Wilson’s “revolution principle” when he wrote that it was bottomed on “English theory drawn from the seventeenth century concerning the relationship between ruler and ruled.” And later in that article, he identified Locke as the principal philosophical influence: “Wilson’s explanation of the people’s right of peaceable revolution deserves careful analysis. This conception of revolution certainly had its roots in the seventeenth century and specifically in the ideas associated with the political theory of John Locke.” George M. Dennison, *The ‘Revolution Principle’: Ideology and Constitutionalism in the Thought of James Wilson*, 39 REV. POL. 157, 165, 175 (1977).

³² WILSON at 494.

³³ *Chisholm v. Georgia*, 2 U.S. 419, 456 (1793).

³⁴ Wilson, *supra* note 15, at 441.

³⁵ *Id.* at 442.

³⁶ As James Oscar Pierce put it, Wilson in his 1774 pamphlet “was writing, at the age of less than thirty years, a thesis which became the basis of revolution.” James Oscar Pierce, *James Wilson as a Jurist*, 38 AM. L. REV. 44, 47 (1904).

to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature.³⁷

Scholars have since suggested that this passage had an influence on Jefferson's own formulation of the philosophical preamble of the Declaration of Independence, a document which Wilson himself signed as a member of the Continental Congress.³⁸ But regardless of whether Wilson's formulation of the "revolution principle" exerted some influence on Jefferson's draftsmanship, the point here is that for Wilson, the "revolution principle" was a new discovery of modern political science which he attributed to the thought of John Locke.³⁹ As he put it in the Pennsylvania State Ratifying Convention on December 4, 1787,

"[T]he truth is, that the supreme, absolute, and uncontrollable authority *remains* with the people. I mentioned, also, that the practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle; but we have witnessed the improvement, and enjoy the happiness of seeing it carried into practice. The great and penetrating mind of *Locke* seems to be the only one that pointed towards even the theory of this great truth."⁴⁰

This "great truth" for Wilson amounted to what he called the "first and fundamental principle in the science of government" and would, in his judgment, need to serve as the ultimate legitimating touchstone for the new United States Constitution.⁴¹

³⁷ WILSON at 4.

³⁸ James De Witt Andrews made this claim in 1901, noting the similarities and observing that it "outlines the Declaration of Independence." James De Witt Andrews, *James Wilson and his Relation to Jurisprudence and Constitutional Law*, 40 AM. L. REG. 708, 720 (1901). James Oscar Pierce said that "The spirit of Wilson breathes throughout the great Declaration." Pierce, *supra* note 36, at 49. and Carl Becker noted the similarities as well, remarking that "This reminds us of the Declaration of Independence, and sounds as if Wilson were making a summary of Locke." CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF IDEAS* (1922).

³⁹ There exists some scholarly controversy over precisely which modern thinkers Wilson drew upon in formulating his views on the "revolution principle" and the sovereignty of the people. Garry Wills has variously suggested that it was not John Locke, as the majority of scholars have supposed, but rather Burlamqui or even Jean Jacques Rousseau. GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 250 (2018); Garry Wills, *James Wilson's New Meaning for Sovereignty*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION*, (Terrence Ball & J.G.A. Pocock eds., 1988). But Burlamqui himself was influenced by Locke, so the intervening influence of Burlamqui on Wilson would not eliminate Locke as an ultimate influence. Ewald, *supra* note 5, at 905. And though Rousseau was a theorist whom Wilson read and occasionally cited, Rousseau's claim that individuals lose all their natural liberty upon entering the social contract, and enjoy only those rights which society affirmatively grants, was one which Wilson sharply criticized throughout his career.

⁴⁰ WILSON, *supra* note 15, at 213 (emphasis in the original).

⁴¹ *Id.* at 443.

B. LAYING THE “CORNERSTONE”: WILSON’S DEMOCRATIC FAITH

Wilson’s commitment to the “revolution principle” of 1776, and to rooting all government directly in the “true source of the Nile,” the people, led him to embrace a highly democratic view of the new federal government. While on one Wilsonian metaphor, the people were the “rock” upon which the new Constitution was built,⁴² a static image that might imply that just so long as the new federal government rested ultimately upon the people, all would be well, on another one of his favorite metaphors, the people were a “fountain,” suggesting that their status as the source of all political authority would be a more direct, active, and ongoing one.⁴³

Throughout the Federal Convention, Wilson labored to connect as directly as possible the new institutions of the federal government with the streams coming from the people and to simultaneously disconnect them from the streams of traditional state power. As he put it early on in the deliberations on June 7, “If we are to establish a national government, that government ought to flow from the people at large,”⁴⁴ and most decidedly not the states. And if the new federal government were to be a bona fide government of “We the People,” and not a mere confederation of “We the States,” both the legislature and the executive of the new federal government would have to be drawn as much as possible from the people, and not the states.

Beginning first with the House of Representatives, Wilson contended that it should be as democratic an institution as was practicable and as little indebted to the state governments as possible. In his first substantive comments at the convention on May 31, Wilson said that because he wanted to raise the “federal pyramid” as high as possible, the delegates to the Federal Convention needed to give that pyramid “as broad a basis as possible.”⁴⁵ As Madison recorded Wilson’s very first statement, “Mr. Wilson contended strenuously for drawing the most numerous branch of the legislature immediately from the people.”⁴⁶ Giving this power to the people, Wilson made clear, also meant taking it away from the states. As Madison proceeded to record Wilson’s next set of comments:

He also thought it wrong to increase the weight of the State Legislatures by making them the electors of the national Legislature. All interference between the general and local Governmts (sic) should be obviated as much as possible. On examination it would be found that the opposition

⁴² *Id.* at 202. “I have no idea that a safe system of power in the government, sufficient to manage the general interest of the United States, could be drawn from any other source, or vested in any other authority, than that of the people at large. I consider this authority as the rock on which this structure will stand.”

⁴³ *Id.* at 193. “If we take an extended and accurate view of it, we shall find the streams of power running in different directions, in different dimensions, and at different heights, watering, adorning, and fertilizing the fields and meadows, through which their courses are led; but if we trace them, we shall discover that they all originally flow from one abundant fountain. In this constitution, all authority is derived from the people.”

⁴⁴ *Id.* at 92.

⁴⁵ *Id.* at 82-3. For an intriguing discussion of the “pyramid” metaphor in Wilson’s thought, see JOHN F. WITT, *The Pyramid and the Machine: Founding Visions in the Life of James Wilson* in PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 15-82 (2007).

⁴⁶ *Id.* at 82.

of States to federal measures had proceeded much more from the officers of the States, than from the people at large.⁴⁷

One week later, on June 6, Wilson again showed how his commitment to the revolution principle led him to prefer that the House of Representatives be elected directly by the people and not the state legislatures. In response to a proposal by Charles Pinckney of South Carolina that the House of Representatives be elected by the state legislatures, Wilson countered with a highly democratic counter-proposal in the name of his beloved revolution principle.

He wished for vigor in the Govt, but he wished that vigorous authority to flow immediately from the legitimate source of all political authority. The Govt ought to possess not only 1st the *force*, but 2^{dly} the *mind or sense* of the people at large. The Legislature ought to be the most exact transcript of the whole Society.⁴⁸

Wilson sought with even greater vigor at the Federal Convention, but less success, to directly connect the Senate to the electoral preferences of the people and to simultaneously disconnect it from what he considered to be the parochial interests of the state governments. In the name of the revolution principle, Wilson argued for direct election of Senators by the people rather than the state legislatures, and for proportional representation in the Senate according to each State's population. On both issues, Wilson advanced a uniquely democratic vision for the Senate that at every turn sought to break up state control and place the reins of the new Senate instead in the hands of the people.

Wilson felt so strongly that Senators should be elected by the people rather than by the state legislators that he was willing to take his stand for this in the face of a contrary motion by his former mentor in the law, John Dickinson, under whom Wilson had apprenticed throughout the 1770's. Dickinson had moved on June 7 "that the members of the 2d branch ought to be chosen by the individual Legislatures."⁴⁹ And he did so, he said, to ensure that the Senators would "consist of the most distinguished characters," becoming the American equivalent of the British House of Lords.⁵⁰ According to Madison's notes, Wilson was the first at the convention to rise to challenge Dickinson's motion. And he did so squarely on the basis of the revolution principle. "If we are to establish a national Government," he said, "that Government ought to flow from the people at large."⁵¹ The indirect election of Senators by state legislatures violated the basic principle that individuals, and not states, were represented in the federal government. Because the federal government derived its authority from the people, just as the state governments did, so also should its Senators be drawn directly from the people, just as they were at the state level. Invoking a theory of "dual citizenship," Wilson explained, that because U.S. citizens would be citizens of both the federal government and their particular state governments, the same principles of democratic representation

⁴⁷ *Id.* at 83.

⁴⁸ *Id.* at 90.

⁴⁹ *Id.* at 92.

⁵⁰ Madison's Notes at the Federal Convention, June 7, 1787.

⁵¹ WILSON, *supra* note 15, at 92.

ought to govern in both contexts. “Both Govts were derived from the people – both meant for the people – both therefore ought to be regulated on the same principles.”⁵² And just as one would not interpose an intermediary electoral body in between the people and their state governments, so also one would not put such a body in between the people and their federal government.

Wilson also strongly objected to the allotment of equal numbers of Senators for each state. This arrangement, by which small states like Delaware and Georgia would receive the same number of Senators as large states like Virginia and Massachusetts, flatly violated one of “the essential principles of justice,” namely (once again) that because “all authority was derived from the people, equal numbers of people ought to have an equal number of representatives and different numbers of people different numbers of representatives.”⁵³ As opposed to this natural principle of justice, the defenders of equal votes for states in the Senate rested their system upon “metaphysical distinctions” between the “imaginary beings” known as states. But states, Wilson insisted, were nothing other than “artificial” collections of real, living individuals for whom the federal government was really being formed.

Can we forget for whom we are forming a government? Is it for *men*, or for the imaginary beings called *states*? Will our constituents be satisfied with metaphysical distinctions?... The rule of suffrage ought, on every principle, to be the same in the second as in the first branch. If the government be not laid on this foundation it can be neither solid nor lasting.”⁵⁴

Consequently, it was the numbers of these individuals alone, “the natural and precise measure of representation,” and no other metric, that should determine the number of Senators.⁵⁵

⁵² *Id.* at 104.

⁵³ *Id.* at 116, 93.

⁵⁴ *Id.* at 107-8. Wilson would return to this theme of the greater importance of the “majesty of the people” in comparison with the states in his opinion in *Chisholm v. Georgia* when he would argue that the purported sovereignty of the state of Georgia did not prevent it from being sued in federal court by a private citizen of another state. As he put it there, “In the United States, and in the several States, which compose the Union, we go not so far [as to entirely eliminate the legal significance of the people, as happens in England]: but still we go one step farther than we ought to go in this unnatural and inverted order of things. The states, rather than the People, for whose sakes the States exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the United States. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? ‘The United States,’ instead of the ‘People of the United States,’ is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union. It presents only the second: It presents only the artificial person, instead of the natural persons, who spoke it into existence. A State I cheerfully admit, is the noblest work of Man: But Man himself, free and honest, is, I speak as to this world, the noblest work of God... With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object, which the nation could present. ‘The PEOPLE of the United States.’” *Chisholm v. Georgia*, 2 U.S. 419, 462-63 (1793).

⁵⁵ *Id.* at 107-08.

Turning to the President, Wilson campaigned on behalf of similar instincts in arguing for a nationwide, democratic election of the President that sought to avoid vesting the decision in the hands of state operatives. At the pinnacle of Wilson's imagined "federal pyramid" would stand the President, whose democratic credentials would be the most substantial of any officer in the new system and whose vision would be the least clouded by the "local, confined, and temporary" perspectives of any particular state or region. What Wilson fought for, mostly on his own at the Convention, was a singular executive who could justly be called "the man of the people."⁵⁶ If the people were the ultimate source of all political authority, the new President would be the ultimate repository of that authority and its ultimate guardian.

At the Federal Convention, the Pennsylvania Ratifying Convention, and again in his Lectures on Law in 1791, Wilson repeatedly, and singularly, characterized the President as "the man of the people." That locution, so characteristic of the contours of Wilson's thought, conveyed yet again the twofold dynamic of the revolution principle, which at once drew the national government closer to the people at large and simultaneously distinguished it from the perspective of the particular state governments. This dynamic came through with particular clarity during the Pennsylvania Ratifying Convention, when Wilson explained why the President could veto acts of Congress. As Wilson put it, "The President, sir, will not be a stranger to our country, to our laws, or to our wishes. He will, under this Constitution, be placed in office as the President of the whole Union, and will be chosen in such a manner that he may be justly styled THE MAN OF THE PEOPLE; being elected by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection."⁵⁷

Thus on June 1 at the Federal Convention, the same day that he proposed that the President be unitary, Wilson proposed that the President be elected directly by the people at large in one single, nationwide election. Even though he knew his proposal would be greeted as "chimerical" by many, which made him "almost unwilling" to make this proposal, the experience of statewide elections of the governors of New York and Massachusetts had convinced him that "an election of the first magistrate by the people at large, was both a convenient & successful mode."⁵⁸ And once again, the logic of the revolution principle, which amplified the necessity of consent by the people at large, and simultaneously diminished the intervening influence of the states, seemed to be at work. "He wished to derive not only both branches of the Legislature from the people, without the intervention of State Legislatures but the Executive also; in order to make them as independent as possible of each other, as well as of the States."⁵⁹

Confronted, however, by the fact that his colleagues at the Federal Convention deemed direct election by the people "impractical," but challenged by George Mason to take some time to propose an alternative, Wilson the next day counter-

⁵⁶ See generally Christopher S. Yoo, *James Wilson as the Architect of the American Presidency*, 16 GEO. J. L. & PUB. POL'Y. 51 (2019).

⁵⁷ *Id.* at 205.

⁵⁸ *Id.* at 84-5.

⁵⁹ *Id.* at 85.

offered with what turned out to be the first blueprint for the Electoral College.⁶⁰ But Wilson's proposed Electoral College, unlike the Constitution's final product, was to be a direct reflection of his revolution principles. Namely, the number of electors would be *directly proportional* to population. Each state would be divided into districts of equal populations. And within those districts, those citizens qualified to vote for members of the House of Representatives would choose a single elector. Electors from all the districts would then meet and cast ballots for the national executive. And in the course of laying out his case for this special body of electors, chosen directly by the people and directly proportional to the numbers of people, he reiterated his earlier concern about detaching the states from the electoral process. As Madison recorded it, "Mr. Wilson repeated his arguments in favor of an election without the intervention of the states."⁶¹

And three months later in early September, when the delegates were concluding their work on the details of the Electoral College, Wilson added an additional democratic safeguard to the selection mechanism. If no single candidate obtained a majority of the votes in the Electoral College, the "eventual appointment," he said, should be made by the House of Representatives rather than the Senate. Having the House rather than the Senate make the final decision enhanced the President's democratic credentials while at the same time detaching the Presidency from the direct involvement of the states, which at this point during the Convention had, to Wilson's regret, obtained an electoral preeminence in the Senate. If the Senate were to make the final appointment, Wilson worried that "the President will not be the man of the people as he ought to be, but the Minion of the Senate."⁶² And as the "Minion of the Senate," he would be captured by the states, thereby both diminishing the President's democratic bona fides and obstructing his uniquely national vantage point at the same time.

Thus, in Wilson's rendering, from the very bottom of the "federal pyramid" to its very top, bills could only become laws if they enjoyed the assent of both democratically elected representatives who mirrored the sentiments of their constituents, and a democratically elected "man of the people" positioned to "watch out for the whole."⁶³

Wilson's "democratic faith"⁶⁴ put him considerably out in front of most of his fellow Federalist colleagues in attempting to root the branches of government in the most democratic foundations possible. Federalists mostly shared Wilson's

⁶⁰ Madison's Notes at the Federal Convention, June 2, 1787.

⁶¹ *Id.*

⁶² WILSON, *supra* note 15, at 164.

⁶³ *Id.* at 205.

⁶⁴ For others who have described Wilson's attitude in terms of "democratic faith," see McLaughlin, *supra* note 2, at 15, "Wilson, on the contrary, was given over to the democratic faith;" Leavelle, *supra* note 16, at 405, "Wilson's defense of the widespread use of the franchise was the practical expression of his faith that men are capable of free and meaningful choices;" and Conrad (quoting McLaughlin), who observed that Wilson was "given over, at least by the late 1780's, to a 'democratic faith.'" Stephen A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 LAW & SOC. INQUIRY 1, 14 (1988). As President, Theodore Roosevelt also put Wilson's commitment to democracy in terms of "faith." "He [Wilson] believed in the people with the faith of Abraham Lincoln." Theodore Roosevelt, At the Dedication Ceremonies of the New State Capitol Building at Harrisburg, PA. Quoted in Pederson, *supra* note 5, at 304.

philosophical starting point that government's authority derived from the consent of the people. They were, however, considerably less punctilious in recognizing that this principle therefore required that all its branches be derived directly from the election of the people.⁶⁵ James Madison, for example, famously broadened the definition of a republic to include those governments in which "the persons administering it be appointed, either directly or indirectly, by the people," and then found all elements of the proposed government to meet this flexible criteria.⁶⁶ Indeed, Madison would go on in *Federalist* 63 to happily describe the American system as one in which there was "the total exclusion of the people, in their collective capacity, from any share" in direct governance.⁶⁷ Wilson, by contrast, insisted that "the difference between a mediate and immediate election was immense"⁶⁸ and added that the "chain of connection" between the people and their government might "consist of one link, or of more links than one; but it should always be sufficiently strong and discernible."⁶⁹

Wilson's commitment to the revolution principle of 1776, and to rooting all government directly in the "true source of the Nile," the people, thus led him to embrace a surprisingly Anti-Federalist stance with regard to the democratic elements of the Constitution. He shared the Anti-Federalists view of representation as "mirroring" the people themselves.⁷⁰ And he supported the direct election of a proportionally representative Senate, like many Anti-Federalists as well.

It was for this reason that when Pennsylvania revised its state constitution in 1790, Wilson broke ranks with his fellow Pennsylvania Federalists like William Lewis, Thomas McKean, and Timothy Pickering in favor of a considerably more democratic charter. As a fellow delegate to the 1790 state constitutional convention Alexander Graydon reported, Wilson, "hitherto deemed an aristocrat, a monarchist and a despot, as all the federalists were, found his adherents on this occasion, with few exceptions, on the democratic or antifederal side of the house."⁷¹

⁶⁵ Robert McCloskey observed that Wilson's differences with his Federalist colleagues on this point could be seen even at the level of vocabulary. Wilson often used the word "democracy" with a positive valence, even though "it was not in high favor at the time, especially among Federalists." WILSON, *supra* note 3, at 26. As Akhil Amar noted, "in both his opening and concluding speeches before the Pennsylvania ratifying convention, Wilson pronounced the Constitution "purely democratical," and in yet another speech he boasted that "the DEMOCRATIC principle is carried into every part of the government." AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 16-7 (2006).

⁶⁶ THE FEDERALIST NO. 39 (James Madison) (George W. Carey & James McClellan eds., 2001).

⁶⁷ *Id.* THE FEDERALIST NO. 63 (James Madison). For a helpful survey of the ways in which Wilson stood apart from his fellow Federalists by insisting upon the importance of democracy, see generally Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & POL. 189 (2013).

⁶⁸ WILSON, *supra* note 15, at 101.

⁶⁹ *Id.* at 183.

⁷⁰ It may have been for this reason that Herbert Storing occasionally quoted from Wilson when he wanted to convey the Anti-Federalist understanding of representation as a mirror reflecting within the halls of federal power the interests and concerns of the people. HERBERT STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION* 16, 17, n.13, 62 (1981).

⁷¹ Morton Rosenberg, *In Search of James Wilson*, 117, n. 28. Quoted in SMITH, JAMES WILSON, *supra* note 12, at 302-303.

And yet, Wilson's application of the revolution principle to the Constitution's selection mechanisms had a twofold dynamic, anchoring the nation's new institutions directly in the people while at the same time severing it as much as possible from state control. In this way, Wilson's application of the revolution principle had a nationalizing tendency, breaking down state prerogative in the name of "We the people." The application of the same principle by critics of the Constitution like the author of "Brutus" or "Federal Farmer," or later by Thomas Jefferson, was mostly in the opposite direction, seeking to enhance the democratic credentials of the new government in order to protect the states and resist consolidation of power in the hands of a small and imperial federal aristocracy. In this respect, as in others, Wilson ironically stood apart from many of his contemporaries by bringing together positions often held miles apart.

III. NATURAL LAW, THE LAW OF NATIONS, AND A "MORE PERFECT UNION"

A. THE "COMPASS" AND "POLE STAR": NATURAL LAW, THE LAW OF NATIONS, AND THE DUTIES OF STATES

Citizens are only bound by laws to which they have given their consent. This was the central thesis of Wilson's opening lectures and the wellspring of his strenuous commitment to the "revolution principle." But laws made by legislatures were not the only kinds of law to which people were bound. For if positively enacted municipal laws were the only laws that could bind, what guidance did the people have before any laws were made at all? And for that matter, what sorts of norms should guide their decision making when they proposed to enact laws in the first place? The revolution principle helped identify which laws were in fact legally binding. But it did not help answer the even more fundamental question of which laws *should* be enacted in the first place.

To answer this question, Wilson turned in his third and fourth lectures to a study of natural law. Wilson variously described natural law as the "compass," "chart," and "pole star" by which we regulate our course.⁷² At times he described natural law in decidedly theological terms, placing it within a larger Thomistic rubric that included eternal, celestial, divine, and human law, and calling natural law the communication of God to man through the faculties of reason and the moral sense.⁷³ At other times he sounded a more classical philosophical note, emphasizing natural law's transcendent permanence and universality, quoting

⁷² WILSON, *supra* note 15, at 500.

⁷³ For accounts that highlight the influence of theological or scholastic sources on Wilson's philosophy of law, see MAY G. O'DONNELL, JAMES WILSON AND THE NATURAL LAW BASIS OF POSITIVE LAW (1937); WILLIAM F. OBERING, THE PHILOSOPHY OF LAW OF JAMES WILSON (1938), Alfons Beitzinger, *The Philosophy of Law of Four American Founding Fathers*, 21 AM. J. JURIS. 1, 12-17 (1976). For a more recent version of this argument, see also MARK D. HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 35-67 (1997), who argued that "Of primary importance for Wilson was the Christian natural law tradition" at 194.

Cicero “it is, indeed, a true law, conformable to nature, diffused among all men, unchangeable, eternal... It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations.”⁷⁴ And at still other times, he described it in more immanent terms, saying that the natural law was best perceived through our instincts and faculty of moral sense by which good and bad immediately registered for us as pain and pleasure.⁷⁵ And occasionally he knit together the theological, transcendent, and immanent qualities of the natural law, when he observed that “Order, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us we admire a rule, from which a deviation cannot, or should not, or will not be made.”⁷⁶ However philosophically construed, natural law served for Wilson as the ultimate touchstone for moral guidance.

It also served as the touchstone for the laws passed by legislatures as well. For the same body of principles that applied to individuals applied equally to political societies. As addressed to individuals, they were commonly known as “natural law.” As addressed to political societies, they could be known as the “law of nations.”⁷⁷ Either way, they specified a body of principles that, though not legally

⁷⁴ WILSON, *supra* note 15, at 523. For an account that highlights the influence of classical political thought in general, and Cicero in particular, see Richard Gummere, *Classical Precedents in the Writings of James Wilson*, 32 COLONIAL SOC’Y MASS: TRANSACTIONS 525 (1937). For an account that highlights the Aristotelian dimensions of Wilson’s thought, see MARY T. DELAHANTY, *THE INTEGRALIST PHILOSOPHY OF JAMES WILSON* (1969) (arguing that Wilson was “carrying forward and making applicable the traditional political concepts, concepts which have their origin in the writings of Aristotle. For to know the philosophy of Aristotle is to understand the thought of James Wilson.”) See also George Carey, who concluded that Wilson’s belief in a “higher law from which rights are derived – a higher law and rights which are not the product of convention or ‘created’ through agreements or contract” suggested that his “basic premises, positions, and concerns... are essentially those which characterize classical political thought.” George Carey, *James Wilson’s Political Thought and the Constitutional Convention*, 17 POL. SCI. REVIEWER 49, 58 (1987).

⁷⁵ WILSON, *supra* note 15, at 520. For an account that highlights the influence of decidedly modern intellectual influences on Wilson’s theory of natural law, see Thomas Pangle, who observed that “despite his repeated invocations of ‘the judicious Hooker,’ as well as other spokesmen for the Thomistic or Stoic traditions, Wilson’s conception of the natural law proves to differ fundamentally from that of ancient and medieval rationalists.” THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE*, 122 (1988). See also James R. Zink, who observed that “In contrast to the natural law tradition, Wilson’s view of political life is grounded in an account of the origins of politics, much like those of Hobbes and Locke before him... he consistently presents a largely modern political teaching in which the security of individual natural rights provides the operative political standard.” James R. Zink, *The Language of Liberty and Law: James Wilson on America’s Written Constitution*, 103 AM. POL. SCI. REV. 442, 443 (2009).

⁷⁶ *Id.* at 464. Daniel Robinson’s suggestion that Wilson’s understanding of natural law was a “Christianized version of Cicero’s presuppositions” seems promising. Daniel N. Robinson, *Do the People of the United States form a nation? James Wilson’s Theory of Rights*, 8 INT’L J. CONST. L. 287, 288 (2010).

⁷⁷ For the classical provenance of this argument, see Gummere, *supra* note 74, at 532-33, who observed that “The Law of Nature, with its consequent development into the Law of Nations... harks back to Aristotle, the Stoics, Cicero, Seneca, and Ulpian.

binding, were morally binding on individuals and states alike. As morally binding, they identified in general terms what people and states should do. “The laws of morality are equally strict with regard to societies, as to the individuals of whom the society are composed.”⁷⁸ Or as he also put it, “the law of nations, properly so called, is the law of nature applied to states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals. Universal, indispensable, and unchangeable is the obligation of both.”⁷⁹

The law of nations imposes duties upon states of two kinds. The first kind included “duties which a nation owes itself” while the second included “duties which it owes to others.”⁸⁰ Ordinarily, when scholars and politicians considered the laws of nations, they were inclined to think only of the second category and ignore the first. States might have duties towards one another, especially in light of treaties, this thinking went, but no such obligations to themselves. But just as the natural law imposed upon individuals important duties towards themselves, so also did it impose upon states responsibilities to themselves.

Wilson then enumerated a stunning list of duties that states owed themselves.⁸¹ The first duty a state had was, in its ongoing existential struggle for survival, to preserve itself against dissolution and to protect its members from external attack. Next, it had the duty to ensure its freedom, by forming a strong and viable political and legal structure that was capable of self-correction and self-improvement through an amendment process. Connected with the duty to ensure its freedom was the duty of self-knowledge and the duty to guide itself according to the “genius and manner of the people.” States also had the duty to burnish their reputations through the pursuit of honest fame, encouragement of true patriotism, and the observation of strict justice with neighbors and, of particular relevance for the Americans, former inhabitants of the land. States were also charged with the all-around duty of “self-improvement,” and “perfection,” by which Wilson meant the increase of its numbers through immigration and marriage and the improvement of the minds and character of citizens. Finally, the state had the duty to promote the happiness of its

⁷⁸ *Id.* at 532. For a discussion of how Wilson’s understanding of the law of nations departed from Grotius’s view that the law of nations obliged only those who consented to it, see Eduardo Velasquez, *Rethinking America’s Modernity: Natural Law, Natural Rights and the Character of James Wilson’s Liberal Republicanism*, 29 *POLITY* 193, 205-06 (1996).

⁷⁹ WILSON, *supra* note 15, at 529.

⁸⁰ *Id.* at 533, 540.

⁸¹ Ralph Rossum seems to have curiously overlooked this critical dimension of Wilson’s thought, leading him to conclude that Wilson evaluated governments only on the basis of whether they were sufficiently democratic, and not on the basis of whether they created good policies. As he put it, “The direct political question, ‘Is this law or government decent, good, or useful?’ is obscured or forgotten in Wilson’s preoccupation with the question, ‘Is this law or government truly representative, that is, has it in some sense received the consent of the people?’” Wilson thus replaced the question of goodness with the question of legitimacy... He subordinated the quality of the policy to the quantity and immediacy of consent it received.” Ralph Rossum, *James Wilson and the ‘Pyramid of Government.’* *The Federal Republic*, 6 *POL. SCI. REVIEWER* 113, 125 (1976). As his list of duties that states owed to their citizens illustrates though, Wilson was at least as concerned with the substance of government policy as he was with the democratic procedures by which it acted.

citizens, which above all required the promotion of education of the young and the promotion of “the arts, sciences, philosophy, virtue, and religion.”⁸²

While Wilson’s list of duties that states owed to themselves was extensive, his list of duties that states owed each other was at least as impressive. First, states were obligated to keep their promises and “preserve inviolably their treaties and engagements” (*pacta sunt servanda*)⁸³ They were also obligated to draft treaties that were clear and crafted and interpreted in good faith (*bona fides*). Beyond the observation of voluntary contracts, states also had broader obligations to one another. Nations were forbidden to do injustice to one another. In other words, they were forbidden to do anything that would diminish the happiness and perfection of another state, such as exciting disturbances within it, depriving it of natural advantages, dishonoring its reputation, or fomenting the hatred of its enemies. It was this requirement of the law of nations that Wilson invoked in his jury instructions in *Henfield’s Case*, a case in which a U.S. citizen had seized a French ship in violation of the Neutrality Proclamation, when he said that U.S. citizens were bound to keep the peace between nations with whom the United States was at peace.⁸⁴ Beyond this, nations were under an obligation to do positive good to one another. They were obliged, for instance, to give one another (when asked and when it was appropriate in light of other more pressing responsibilities) what was necessary for their preservation and even their perfection. They were even under an obligation to love one another. By the device of “moral abstraction,” nations could (and should) promote the enlarged and elevated virtue of extending benevolence beyond the sphere of one’s own small circle to include, for instance, “the commonwealth of Pennsylvania, the empire of the United States, the civilized and commercial part of the world, the inhabitants of the whole earth.”⁸⁵ Thus, if states would listen to the laws of nations, too often drowned out in commotion, they would heed the fact that “mankind are all brothers”⁸⁶ and would act accordingly on the world stage.

B. SUPPLYING THE “KEYSTONE”: WILSON’S DEFENSE OF A STRONG FEDERAL GOVERNMENT

If states were obligated to preserve themselves, ensure the just treatment of all its citizens while promoting their happiness and welfare, avoid disintegration, overcome weakness and inconvenience, burnish its reputation among other states, honor its obligations and treaties with nations, and even occasionally act benevolently towards foreign nations, then the behavior of the United States under the Articles of Confederation amounted to a violation of the laws of nature. For as a freestanding nation since it declared its independence in 1776, America was under the obligations of the law of nations. As he put it as a Justice of the Supreme Court

⁸² WILSON, *supra* note 15, at 539.

⁸³ *Id.* at 547.

⁸⁴ *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793), in WILSON, *supra* note 15, at 368.

⁸⁵ *Id.* at 544.

⁸⁶ *Id.* at 545. “At last, however, the voice of nature, intelligible and persuasive, has been heard by nations that are civilized; at last it is acknowledged that mankind are all brothers: the happy time is, we hope, approaching, when the acknowledgement will be substantiated by a uniform corresponding conduct.”

in 1796, “When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”⁸⁷ Wilson, unsurprisingly, was dismayed by the failure of state legislatures to meet their responsibilities and frustrated by the Confederation government’s inability to raise funds and coerce the states into honoring their obligations.⁸⁸ Thus at several stages in his role as a delegate to the Constitutional Convention, Wilson proposed that the federal government enjoy numerous constitutional advantages over its predecessor, including particularly, 1) the necessary and proper clause, 2) a veto power held by the national legislature over state legislation, 3) the power to ban the importation and spread of slavery, and 4) a strong, unitary executive. Wilson’s conviction that the laws of nations and principles of justice imposed extensive obligations upon states led him to become one of the more outspoken nationalists at the convention.

At the Federal Convention, Wilson played a key role in inserting, or in some cases at least attempting to insert, into the Constitution’s text, sufficiently broad grants of power so that the new federal government under its new and improved Constitution could better carry out all the tasks that he believed the law of nations imposed on the young country. And those tasks were indeed considerable. “War, commerce, and revenue were the great objects of the Gen Government,” he said at the Federal Convention.⁸⁹ But to accomplish what he called the “great national objects,” the federal government needed considerable powers at home and abroad.⁹⁰ “If this government does not possess internal as well as external power, and that power for internal as well as external purposes, I apprehend that all that has hitherto been done must go for nothing. I apprehend a government that cannot answer for the purposes for which it was intended is not a government for this country.”⁹¹ The law of nations, in other words, prescribed to all nation’s governments various tasks which it was of the very definitional essence of a nation to carry out. A fundamental inability to perform those tasks meant that the nation itself did not exist. At the Pennsylvania Ratifying Convention, Wilson put his finger on the existential dimensions of the thirteen states’ dilemma in 1787.

I stated, on a former occasion, one important advantage; by adopting this system, we become a *nation*; at present we are not one. Can we perform a single national act? Can we do any thing to procure us dignity,

⁸⁷ *Ware v. Hylton*, 3 U.S. 199, 281 (1796).

⁸⁸ With respect to the state legislatures, he said that “We have seen the Legislatures in our own Country deprive the Citizen of Life, of Liberty & of Property. We have seen Laws of Attainder, Punishment and Confiscation.” Cited in AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY*, 109 (2006). And with respect to the failure of the Confederation Congress, he observed that “The great fault of the existing confederacy is its inactivity. It has never been a complaint ag^t Cong^s that they governed overmuch. The complaint has been that they have governed too little. To remedy this defect we were sent here.” WILSON, *supra* note 15, at 117. Six years later in *Chisholm v. Georgia*, Wilson observed, “To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its Legislative authority: Executive or Judicial authority it had none.” *Chisholm v. Georgia*, 2 U.S. 419, 463 (1793). See also, RICHARD R. BEEMAN, *PLAIN HONEST MEN*, 51 (2009).

⁸⁹ WILSON, *supra* note 15, at 146.

⁹⁰ *Id.* at 281.

⁹¹ *Id.* at 256.

or to preserve peace and tranquility? Can we relieve the distress of our citizens? Can we provide for their welfare or happiness? The powers of our government are mere sound. If we offer to treat with a nation, we receive this humiliating answer: 'You cannot, in propriety of language, make a treaty, because you have no power to execute it.'... Can we borrow money?... Can we raise an army? This system, sir, will make us a nation, and put it in the power of the Union to act as such. We shall be considered as such by every nation in the world. We shall regain the confidence of our citizens, and command the respect of others.⁹²

As a delegate to the Federal Convention, one of Wilson's most notable efforts to give the federal government the power "to become a nation" was through the necessary and proper clause. Wilson was one of five members of the Committee of Detail that produced the first rough draft of the Constitution.⁹³ After it produced several drafts that only included specifically enumerated powers, such as the power to regulate commerce, coin money, etc., their final draft included the clause, "And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this constitution, in the government of the United States, or in any department or officer thereof."⁹⁴ Though no smoking gun proof exists for this attribution, historians have concluded that Wilson was "most likely" responsible for its inclusion.⁹⁵ And while it received hardly any commentary during the remainder of the Convention, Anti-Federalists would eventually focus upon it as one of the elastic clauses by which they feared Congress would expand its power.

Beyond empowering the federal government to carry out its various "great national objects," Wilson treated with equal importance the task of enabling the government to check the states from carrying out injustice and obstructing the more general, public welfare. Along with his Virginia colleague James Madison, he would propose that Congress be given the power to "negative" any law passed by the states that interfered with the federal system. Before any state law could take effect, it would need to survive the scrutiny of the federal Congress. While Congress could not directly pass any legislation for the states, it could prevent legislation that encroached upon the federal government or harmed the rights of individuals. Wilson was nearly as passionate in defense of this proposal as was Madison, who would later report to Jefferson that its absence from the Constitution was its principal defect. According to Wilson,

We are now one nation of brethren. We must bury all local interests and distinctions... No sooner were the State Govts formed than their jealousy and ambition began to display themselves. Each endeavored to cut a

⁹² *Id.* at 280-81.

⁹³ *Id.* at 264. The other four were Nathaniel Gorham, Oliver Ellsworth, Edmund Randolph, and John Rutledge.

⁹⁴ WILSON, *supra* note 15, at 131.

⁹⁵ BEEMAN, *supra* note 88, at 274. For an extended discussion of the role Wilson played on the Convention's all-important Committee of Detail, and the role he may have played as a member in inserting other textual provisions such as "We the People," the Supremacy Clause, and the enumeration of activities forbidden to the states, *see* Ewald, *supra* note 5, at 983-93.

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' Congress & compare the first & last draught of it. To correct its vices is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts.⁹⁶

This power was, for Wilson, essential to guarantee that the state governments would not exceed their powers and encroach upon the prerogatives of the federal government.

Madison would add that a second, equally compelling reason for the legislative veto was to prevent the states from encroaching upon the rights of their own citizens.⁹⁷ While Wilson himself did not mention this second reason at the Convention, he appeared to share this concern. Some scholars, however, have suggested that Wilson cared less than Madison about the dangers of “majority tyranny.” Jennifer Nedelsky and James Read, for example, have independently made the suggestion that Wilson, unlike Madison, was not as concerned with the protection of individual liberties against majority tyranny, arguing that “one looks in vain in Wilson’s writings for any recognition of the problem of reconciling civil liberties with the principle of popular sovereignty... he seems not to have believed that majority rule would pose a serious threat to individual rights.”⁹⁸ But while it is true that Wilson did not write as thematically on this issue as Madison, his various utterances on the topic should at least mitigate Nedelsky and Read’s concern. For starters, Wilson frequently observed that the protection of individual rights was a leading purpose of all government which required constant vigilance. In his 1774 pamphlet, Wilson called the protection of individual rights the “primary end” of government.⁹⁹ And in his Lectures on Law, he wrote that “Government, in my humble opinion, should be formed to secure and enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”¹⁰⁰ And when government, acting on behalf of the majority, acted in ways that directly violated the rights of even a single individual, “it is tyranny; it is not government...This,

⁹⁶ Wilson, *supra* note 15, at 92-93.

⁹⁷ James Madison to Thomas Jefferson, October 24, 1787. “A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform therefore which does not make provision for private rights, must be materially defective.”

⁹⁸ James Read, *Wilson and the Idea of Popular Sovereignty*, in JAMES READ, POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON, 113-114 (2000). See also JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM, 96-140 (1990).

⁹⁹ WILSON, *supra* note 15, at 15.

¹⁰⁰ *Id.* at 1061.

I repeat it, is tyranny: and tyranny, though it may be more formidable and more oppressive, is neither less odious nor less unjust—is neither less dishonourable to the character of one party, nor less hostile to the rights of the other, because it is proudly prefaced by the epithet—legislative.”¹⁰¹ The brute fact of majority will was not enough to make policy rightful. In such cases when the majority of society oppressed even a single individual, he pointed out, “The citizen has rights as well as duties... On one side, indeed, there stands a single individual: on the other side, perhaps, there stand millions: but right is weighed by principle; it is not estimated by numbers.”¹⁰² Wilson hoped (perhaps beyond measure) that in the ordinary course, popular will would not often conflict with individual right.¹⁰³ But as a legal theorist, he acknowledged that when it did, the claims of individual right outweighed the mere interests of even millions of members of the community, and to sacrifice the former to the latter constituted what he called “tyranny.”

The legislative veto was thus in Wilson’s mind so essential to preserve the strength of the new federal government that he called it “the key-stone wanted to compleat the wide arch of Government we are raising.”¹⁰⁴ He explained: “the firmness of judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law, than to declare it void when passed.”¹⁰⁵ Thus while federal judges had the power to invalidate unconstitutional state laws in the course of resolving a particular case or controversy, this alone was an insufficient guarantee of the supremacy of the federal government and the individual rights of citizens within the states. What was above all required, in Wilson’s mind, was to take the radical step of giving the federal government a preemptive veto on all proposed state legislation, thereby supplying the “keystone” for a strong and truly national political system.

To Wilson and Madison’s disappointment, they could not persuade their colleagues of the appropriateness of a legislative veto. But in lieu of it, Wilson fought hard for the inclusion of specific prohibitions on state power, often in the name of securing elementary principles of justice prescribed by the law of nations. He likely helped add the phrase “anything in the Constitution or laws of any State to the contrary notwithstanding” to the Supremacy Clause. Along with Madison he helped ensure that Congress would have the power to create inferior tribunals below the Supreme Court, since the courts of the federal government, he said, were more likely than those of the states to decide with justice and impartiality, especially in cases dealing with citizens from different states or foreign countries.¹⁰⁶ As a delegate to the Federal Convention he helped to include the various prohibitions on the state governments in Article I, Section 9. And as a delegate to the Pennsylvania Ratifying Convention, he sang their praises more highly than perhaps any other participant in the ratifying debates, saying that “If only the following lines were inserted in this Constitution, I think it would be worth our adoption: ‘No state shall

¹⁰¹ *Id.* at 1044.

¹⁰² *Id.* at 1043. Quoted in Hall, 146.

¹⁰³ *Id.* “Fortunate, however, it is, that in a government formed wisely and administered impartially, this unavoidable competition can seldom take place, at least in any very great degree.”

¹⁰⁴ *Id.* at 154.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 248.

hereafter emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.”¹⁰⁷

And perhaps most poignantly, he observed that on the issue of slavery, the most glaring and serious instance of a violation of individual rights and what he called “the great principles of humanity” by the state governments at the time, the federal Congress was better situated to handle the matter justly than the individual state governments. Giving Congress the power to ban the importation of slavery after 1808 and tax any imported slaves up until then to control the presence of slavery in any new states would help by “laying the foundation for banishing slavery out of this country.”¹⁰⁸ While he said that he wished that the ban could start sooner, the ban on the importation of slavery, “notwithstanding the disposition of any state to the contrary,” “presents us with the pleasing prospect, that the rights of mankind will be acknowledged and established throughout the union.”¹⁰⁹ “If there was no other lovely feature in the constitution but this one, it would diffuse a beauty over its whole countenance. Yet the lapse of a few years, and congress will have a power to exterminate slavery from within our borders.”¹¹⁰ Such an outcome would be a “delightful prospect” and “expand the breast of a benevolent and philanthropic European” like Jacques Necker, a French writer whose explanation of the contradiction between slavery and the respect for human rights Wilson quoted at the Pennsylvania Convention:

In short, we pride ourselves on the superiority of man, and it is with reason that we discover this superiority, in the wonderful and mysterious unfolding of the intellectual faculties; and yet the trifling difference in the hair of the head, or in the color of the epidermis, is sufficient to change our respect into contempt, and to engage us to place beings like ourselves, in the rank of those animals devoid of reason, whom we subject to the yoke; that we may make use of their strength, and of their instinct at command.¹¹¹

The institutional remedy for this practice, Wilson hoped, was a Congress empowered to slowly cut off both the supply of slavery via importation and the spread of slavery into the territories. By giving Congress final say over slavery in the territories and the admission of new states, precisely because it would be “under *the control* of Congress,” and not the states, the new Constitution ensured, in his judgment, that “slaves will never be introduced amongst them.”¹¹² And by giving Congress the power to tax and prohibit the importation of slaves, Wilson hoped the new Constitution would help put this practice on the course of ultimate extinction.

The final way in which Wilson advanced the cause of a strong national government was through his proposal that there be one, single, and powerful executive. Wilson, as we have seen, stood out for his proposal that the president should be elected directly by the people. He also was the first at the convention to

¹⁰⁷ *Id.* at 242.

¹⁰⁸ *Id.* at 210.

¹⁰⁹ *Id.* at 241.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 210.

propose that the president in fact be just a single individual, making this motion on the first day of the convention's deliberations on the executive, and actively pushing forward the argument on the grounds that this would give "most energy, dispatch, and responsibility to the office."¹¹³ While a bicameral legislature rooted as directly as possible in the people would produce the laws for society, all of this would be "nugatory and abortive" unless "the laws are vigorously and steadily executed."¹¹⁴ Indeed it was not the absence of laws but the "weak and irregular execution" of laws that had prompted the calling of a general convention to remedy the Articles of Confederation.¹¹⁵ And since their *execution* was what brought the democratically enacted laws "home to the fortunes, and farms, and houses, and business of the people," it was best to vest the executive branch in a single individual who could act with "promptitude, activity, firmness, consistency, and energy."¹¹⁶ Indeed, Wilson went so far as to propose that the president have an unqualified veto of legislation that could not be overridden by Congress¹¹⁷ and, once he accepted the Convention's decision that the president's veto could be overridden by a 2/3 vote of Congress, he observed in the Pennsylvania ratifying convention that Presidential veto messages could still have a long term effect, noting that "even if his objections do not prevent its passing into a law, they will not be useless; they will be kept, together with the law, and, in the archives of Congress, will be valuable and practical materials, to form the minds of posterity for legislation."¹¹⁸ Wilson also proposed that the president enjoy the exclusive power to appoint judges and ambassadors without the further requirement of Senate approval.¹¹⁹ With regard to the power of appointment, he observed that "A principal reason for unity in the Executive was that officers might be appointed by a single responsible person"¹²⁰ and then later added that "Good laws are of no effect without a good Executive; and there can be no good executive without a responsible appointment of officers to execute. Responsibility is in a manner destroyed by such an agency of the Senate."¹²¹ Elsewhere in his *Lectures on Law*, he expanded upon the importance of a powerful executive, noting that all governments needed to have equal mixtures of goodness, wisdom, and power.¹²² The democratic elements of government, which supply "public virtue and purity of intention," laid the foundation or cornerstone of government. But the monarchical elements of government, which supply "energy and vigour," were needed to prevent the improvidence and weak execution too often associated with democracies. By being the directly elected "man of the people," while also being singular and strong, Wilson's proposal for an executive who would "hold the helm,"

¹¹³ *Id.* at 83. See also Robert E. DiClerico, *James Wilson's Presidency*, 17 PRESIDENTIAL STUD. Q. 301, 303 (1987).

¹¹⁴ WILSON, *supra* note 15, at 698.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ WILSON, *supra* note 15, at 88.

¹¹⁸ WILSON, *supra* note 15, at 206. Quoted in Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 PRESIDENTIAL. STUD. Q. 689, 692 (1987).

¹¹⁹ *Id.* at 89. For a fuller discussion of Wilson's thoughts on the veto and appointment powers of the President, see DiClerico, *supra* note 113, at 311-14 and Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 PRESIDENTIAL. STUD. Q. 689 (1987).

¹²⁰ *Id.*

¹²¹ *Id.* at 164.

¹²² *Id.* at 696.

attempted to bring together both democratic and monarchic elements. And in so doing, “on the basis of goodness, we erect the pillars of wisdom and strength.”¹²³

Through his advocacy on behalf of a federal government that could carry out great national objects, his proposal of the necessary and proper clause, legislative veto over state laws, various specific checks upon state power, his embrace of Congress’s power to stop the importation and spread of slavery, and a powerful, unitary executive, Wilson advanced a vision of the federal government that would be powerful, vigorous, and supreme. While grounded upon the “cornerstone” of democracy, it possessed aristocratic and monarchical elements that were anathema to many Anti-Federalists and, at least in the case of the legislative veto, the supposed “keystone” of his system, went beyond what even many Federalists were prepared to accept.

And just as his radicalism on behalf of democratic values could best be seen as an extension of his philosophic views on consent, so also can his strong nationalism be understood as a function of his philosophic views on the natural law and the laws of nations. To the degree that the law of nations obligated states to preserve themselves from dissolution and maintain the freedom of its citizens, the legislative veto and the specific checks upon state power were crafted with precisely these aims in mind. Since “general principles of humanity” revealed the wickedness of slavery, Congress’ power to ban its importation and spread into the territories was a key institutional advantage over states that might wish to maintain the practice. To the degree that the law of nations obligated states to promote the good faith observation of all its treaties and maintain friendly and even benevolent relations with other governments, a strong and responsible executive authority was particularly required. Finally, to the extent that the law of nations imposed extensive obligations upon states, it also gave states the power necessary to fulfill those obligations. “The law of nature prescribes not impossibilities: it imposes not an obligation, without giving a right to the necessary means of fulfilling it.”¹²⁴ The necessary and proper clause, in Wilson’s mind at least, was the constitutional response to this philosophical requirement. In sum, just as his application of the revolution principle led Wilson to advocate a direct connection between the new federal government and the people themselves, that enhanced the federal government’s democratic quotient while circumventing the states and enhancing the independence and prestige of the federal government, his recourse to the laws of nations led him to advocate a government strong enough to carry out the extensive obligations all nations bore and powerful enough to check the state governments and defend the prerogatives of what he often termed the whole over its parts.

¹²³ *Id.* at 712. Gordon Wood nicely summarized Wilson’s understanding of the new American system as a “mixed or balanced democracy,” based upon a “purely democratic” foundation while still enjoying the advantages offered by the other kinds of government. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, 603-04 (1969).

¹²⁴ Wilson, *supra* note 15 at 536.

IV. THE MORAL SENSE, CIVIC DUTIES, AND THE “THE BLESSINGS OF LIBERTY”

A. *THE FRENCH PRISONER AND THE SPIDER: MORAL SENSE AND SOCIABILITY*

In his seventh lecture on law, Wilson told a story. There once was a French nobleman who, on account of some crime, had been imprisoned alone in an apartment. He had been kept there for some time, not allowed to interact with others, until he discovered the presence of a spider in his cell. Having longed for some kind of companionship, he was delighted by this discovery and took up an imaginary conversation with it for some time. The spider’s very presence lifted his spirits. But eventually this interspecies friendship was discovered by the nobleman’s keeper. The keeper then killed the spider, reducing the nobleman once again to absolute solitude. Years later once he had been released from his confinement, the nobleman would characterize this event, the killing of a little insect, as one of the greatest moments of distress in his life.¹²⁵

For Wilson, human nature at its core was social and interpersonal. The moral sense, characterized by the luminaries of the Scottish Enlightenment like Thomas Reid and Frances Hutcheson and defended by Wilson, was that core faculty in individuals that made them invariably relational creatures connected as if by a chain to others. The moral sense provided the very intuitive starting points for our understandings of both our rights and our duties to others. The natural liberty intuited by Locke and the natural law articulated by Cicero were known, ultimately, only by virtue of this inborn and God-given capacity to sense and feel moral right and moral wrong. The modern insight of the revolution principle and the classical understanding of an immutable set of moral obligations both hinged ultimately upon this inborn, intuitive moral sense. “In short, if we had not the faculty of perceiving certain things in conduct to be right, and others to be wrong; and of perceiving our obligation to do what is right, and not to do what is wrong; we should not be moral and accountable beings.”¹²⁶ The moral sense not only teaches right from wrong in some abstract sense, but does so by making individuals capable of taking in and viscerally feeling the very same things others feel. The very expressions on another’s face, for instance, flies like an “electric shock” from one to another. Infants before they can reason can quickly intuit the meaning of facial gestures and can make them themselves, communicating invariably and precisely the feelings which they themselves experience. Humans are, in other words, internally constituted for, and radically in need of, society.

The academic label for this philosophical position when Wilson wrote was the “social system,” defended particularly by the members of the Scottish Enlightenment, and formulated in part in response to other philosophers in England and on the continent who articulated what was called the “selfish system.” Defenders of the selfish system, like Mandeville, rejected the claim that there was some sort of secret chain uniting individuals to one another and advanced instead the view that human social behavior was based purely on self-interest.¹²⁷

¹²⁵ *Id.* at 622.

¹²⁶ *Id.* at 512.

¹²⁷ Arnould B. Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 POL. SCI. Q. 394, 396 (1942).

Wilson, it should be said, did not so much refute the selfish system in his lecture on law as he did prove its basic point that humans were considerably better off as active and engaged members of society than they were apart.¹²⁸ In one particularly evocative passage, Wilson says

In all our pictures of happiness, which at certain gay and disengaged moments, appear in soft and alluring colours, to our fancy, does not a partner of our bliss always occupy a conspicuous place? When, on the other hand, phantoms of misery haunt our disturbed imaginations, do not solitary wanderings frequently form a principal part of the gloomy scene?¹²⁹

Our necessities were better attained through social collaboration than solitary efforts. Even the fully grown and healthy would have extreme difficulty producing all the many “arts of life” that contribute to comfortable existence. Moreover, even if our necessities could somehow be produced by a lone Robinson Crusoe, a solitary existence would lack affection, social joy, and the intellectual pursuits. Although perhaps comfortable, the solitary figure cut off from society would be inclined to “sour discontentment, sullen melancholy, listless languor.”¹³⁰ Quoting Cicero, Wilson observed that “human nature is so constituted, as to be incapable of solitary satisfactions. Man, like those plants which are formed to embrace others, is led, by an instinctive impulse, to recline on those of his own kind.”¹³¹ Society, in other words, provided not only our necessities but our very happiness.

Continuing the horticultural theme in Cicero’s meditation, Wilson then quoted Alexander Pope,

Man, like the gen’rous vine, supported lives;
The strength he gains is from th’ embrace he gives.¹³²

Though initially counterintuitive, Wilson stressed that society did not simply and directly give us our necessities and happiness, but made this possible by providing opportunities for service to others. In the domestic sphere, “We see those persons possess the greatest share of happiness, who have about them many objects of love and endearment.”¹³³ In the marketplace, acts of beneficence such as giving favors, offering professional advice, or pouring into others our knowledge refresh the spirit and bring greater satisfaction than the mere hoarding of money and wisdom. In short, “he who acts on such principles, and is governed by such affections, as sever him from the common good and publick interest, works, in reality, towards his own misery: while he, on the other hand, who operates for the good of the whole, as is by

¹²⁸ For the intriguing suggestion that Wilson’s attempt to reconcile self-interest with sympathy for others owed more to Adam Smith than Thomas Reid, see Roderick M. Hills, Jr. *The Reconciliation of Law and Liberty in James Wilson*, 12 HARV. J. L. & PUB. POL. 889, 916-220 (1989).

¹²⁹ Wilson, *supra* note 15, at 622.

¹³⁰ *Id.* at 631.

¹³¹ *Id.* at 632. Quoting Cicero from *De Amicitia*, 23.

¹³² *Id.* Quoting Pope’s *Essays on Man*, Ep. 3 v. 311.

¹³³ *Id.*

nature and by nature's God appointed him, pursues, in truth, and at the same time, his own felicity. Regulated by this standard, extensive, unerring, and sublime, self-love and social are the same."¹³⁴

But while humans were better off when integrated in a thick web of community life, Wilson did not believe that they would consistently seek that out, or that even if they did, the results would necessarily always be positive. Some scholars have faulted Wilson for overconfidence in the unfailing goodness of human nature and the moral sense. Rossum, for example, argued that Wilson rather naively subscribed to the view that all people were "naturally social, veracious, liberal, and benevolent," and that therefore "[s]uch men would never tyrannize each other," leading Wilson, unlike the more sensible Madison, to be inadequately concerned about checking factional impulses through wise institutional design.¹³⁵ But Wilson was much less sanguine about human nature than Rossum makes out. As Wilson put it in his 1774 pamphlet, "A very little share of experience in the world – a very little degree of knowledge in the history of men, will sufficiently convince us, that a regard for justice is by no means the ruling principle in human nature."¹³⁶ In his State House Yard Speech on October 6, 1787, he put it even more plainly, observing that "It is the nature of man to pursue his own interest, in preference to the public good."¹³⁷ But he did believe that humans *ought* to seek out rich community life to correct and overcome temptations to overriding and self-destructive self-love. "Self-love and social are the same," for Wilson, but only when conduct is "regulated by this standard" of generosity towards and regard for others.

*B. FORGING AMERICA'S "NATIONAL CHARACTER":
"WHAT ARE LAWS WITHOUT MANNERS?"*

The impressive new federal government that Wilson hoped to establish, grounded in the cornerstone of democratic consent, and rising up to the keystone of a powerful new union, itself ultimately rested upon the manners and mores of its citizens. The liberty of the citizens to choose their representatives and make their laws guaranteed a free republic that would not descend into oppression. The obligations imposed by the natural law and the vigor of a strong national government guaranteed that freedom would not devolve into license and anarchy. But without the love of liberty and law by the new republic's citizens, neither the cornerstone (democratic consent) nor the keystone (a strong, national government) would be fully secure. Early in the contest over ratification of the Constitution in Pennsylvania, Wilson stressed how contingent the seemingly impressive edifice of the new Constitution was upon the character of the people. For all its philosophical legitimacy, the "revolution principle" alone would not guarantee that the "blessings of liberty" would be secured to ourselves and our posterity, as the Constitution's Preamble promised. Indeed, it was precisely because the Constitution attempted to institutionalize the "revolution principle" that the character of the people was the indispensable prerequisite for political well-being. As Wilson put it,

¹³⁴ *Id.* at 634.

¹³⁵ Rossum, *supra* note 81, at 124-25. *See also* Witt, at 59-70.

¹³⁶ WILSON, *supra* note 15, at 17-8.

¹³⁷ *Id.* at 176.

Oft have I viewed with silent pleasure and admiration the force and prevalence, through the United States, of this principle—that the supreme power resides in the people; and that they never part with it. It may be called the *panacea* in politicks. There can be no disorder in the community but may here receive a radical cure. If the error be in the legislature, it may be corrected by the constitution; if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government, if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy: from their power, as we have seen, there is no appeal: to their error, there is no superiour principle of correction.¹³⁸

Just two weeks after the Constitution was officially ratified, Wilson gave a Fourth of July Oration on the Adoption of the Constitution, in which he observed that all the exciting opportunities created by the new federal government would be for naught if the citizens would not be actively engaged in its governance.

But while we cherish the delightful emotion, let us remember those things, which are requisite to give it permanence and stability. Shall we lie supine, and look in listless languor, for those blessings and enjoyments, to which exertion is inseparably attached? If we would be happy, we must be active. The constitution and our manners must mutually support and be supported.¹³⁹

Thus over forty-five years before Tocqueville would observe the ways in which the American political system depended on a set of peculiar civic mores and character traits for its well-being, Wilson would make this same observation just weeks after the Constitution's ratification.

And that civic character, in turn, depended greatly upon civic knowledge. Before liberty and law could be loved, Wilson said, they needed to be understood.¹⁴⁰ "What are laws without manners?" Wilson asked. Answering his own question with another question, he asked, "How can manners be formed, but by a proper education?"¹⁴¹ Consequently, in his *Lectures on Law*, Wilson said that while in the 1780's he had spent his energy "forming a system of government," he now planned in the 1790's to spend his energy "forming a system of education" that would undergird the new government.¹⁴²

Wilson's educational program was designed to shape citizens who would play an active and informed role in government. For while securing the rights of

¹³⁸ *Id.* at 191-92.

¹³⁹ *Id.* at 290.

¹⁴⁰ *Id.* at 435.

¹⁴¹ *Id.* at 451.

¹⁴² The connection between self-interest and service to others in Wilson's mind is perhaps nowhere better illustrated than in his full description of his own motivations. "I have been zealous - I hope I have not been altogether unsuccessful - in contributing the best of my endeavours towards forming a system of government; I shall rise in importance, if I can be equally successful - I will not be less zealous - in contributing the best of my endeavours towards forming a system of education likewise, in the United States. I shall rise in importance, because I shall rise in usefulness." *Id.* at 450.

citizens had been an understandable and essential preoccupation among American politicians from the time of the Revolution to the formation of the new Constitution, Wilson insisted more clearly than any other figure from the founding generation that with every right came a corresponding civic duty.

I express it now, as I have always expressed it heretofore, with a far other and higher aim - with an aim to excite the people to acquire, by vigorous and manly exercise, a degree of strength sufficient to support the weighty burthen which is laid upon them - with an aim to convince them, that *their duties rise in strict proportion to their rights*; and that few are able to trace or to estimate the great danger, in a free government, when the rights of the people are unexercised, and the still greater danger, when the rights of the people are ill exercised.¹⁴³ (emphasis added)

American citizens had their rights, and they knew them by heart. The key was to teach them how to best use them as knowledgeable and engaged citizens, whether as voters, jurors, or even elected officials, so that their liberties would truly be the “blessings” referred to in the Constitution.

Citizens were thus expected to be engaged in the “business of the commonwealth.” Wilson’s vision was not of a society in which merely passive spectators claimed their rights and freedoms to be left alone. Rather, he expected citizens to devote as much of their time and energy as they could spare to active, informed, and public citizenship. “The publick duties and the publick rights of every citizen of the United States loudly demand from him all the time, which he can prudently spare, and all the means which he can prudently employ, in order to learn that part, which it is incumbent on him to act.”¹⁴⁴ As he had said in his Fourth of July oration, the commonwealth would be better off from such engaged participation. “For believe me, no government, even the best, can be happily administered by ignorant or vicious men.”¹⁴⁵ And as he had laid out in his chapter “Of Man, as a Member of Society,” citizens themselves would be better off by throwing their hats into the civic ring, for as Pope had said, “the strength he gains is from the embrace he gives.”

This view of citizenship was far more redolent of the Jeffersonian and Anti-Federalist vision, which emphasized the importance of civic virtue and the subordination of individual interests to the common good.¹⁴⁶ It contrasted, for the most part, with the Federalist vision, which tended to deemphasize the importance of civic virtue, took men as they were, and relied instead upon the corrective devices of wisely designed institutions that would channel self-interest and check ambition with ambition.¹⁴⁷ Wilson thus sounded less like his Federalist colleague James

¹⁴³ *Id.* at 436.

¹⁴⁴ *Id.* at 436.

¹⁴⁵ *Id.* at 292.

¹⁴⁶ See generally JEAN YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON AND THE CHARACTER OF A FREE PEOPLE* (1998) and HEBERT STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 19 (1981).

¹⁴⁷ The *locus classicus* of this position may be found in Federalist 51. See also Martin Diamond, *Ethics and Politics: The American Way*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* (Robert H. Horwitz ed., 1986). In a similar vein, Samuel Beer

Madison, who argued that the “policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public,”¹⁴⁸ and more like the Anti-Federalist Melancton Smith, who said that “Government operates upon the spirit of the people, as well as the spirit of the people operates upon it – and if they are not conformable to each other, the one or the other will prevail... Our duty is to frame a government friendly to liberty and the rights of mankind, which will tend to cherish and cultivate a love of liberty among our citizens.”¹⁴⁹ While the Anti-Federalists, like Wilson, wanted the motives of civic engagement to predominate among citizens, the Federalists were more content to see rational self-interest prevail.

Wilson’s concern for civic engagement, however, is in one key respect decidedly different from the kind of engagement envisioned by Jefferson and the Anti-Federalists. The Anti-Federalists believed that civic virtue was best realized in small, economically and culturally homogenous republics on the scale of local townships and states and not on the level of the nation.¹⁵⁰ Anti-Federalists promoted robust programs of education, but kept these “seminaries of useful learning” at the local level.¹⁵¹ Jefferson too proposed that civic education would thrive primarily on the smaller scale of “ward republics.”¹⁵² Citizens were thus to love their liberty and participate in politics, but the focus of their attention would ideally be on the local and state levels.

Wilson, by contrast, promoted civic education on the national level. Wilson’s preference for civic nationalism, it seems, was a function of his views on moral psychology.¹⁵³ While Wilson celebrated the moral sense and the capacity humans had for reaching out beyond themselves and becoming parts of larger wholes, he also observed that this capacity was a double-edged sword. On the one hand, it could lead individuals out of the cold, lonely, solipsistic world of self-concern. But on the other hand, it could lead individuals into over-identification with relatively small, cliquish, factional, dogmatic, and self-righteous groups that held themselves out, for all intents and purposes, as the whole world for their individual members.

observed that Wilson differed from the authors of the *Federalist Papers* by arguing that citizens would become bonded to the national government not just because the federal government would provide more efficient administration, as Madison and Hamilton suggested, but because through their participation in the national government, they would develop an ennobling affective connection with the new extended republic. “As a theory of public affections, Wilson’s view differed from that of *The Federalist* primarily by holding that the social bond in a republic came not so much from the benefits of government as from the process of self-government. The national republic would therefore have a stronger hold on the emotions of its citizens than would state governments not only because of the results of ‘better administration’ but also and chiefly because of the wider focus of participation.” SAMUEL BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 363 (1993).

¹⁴⁸ THE FEDERALIST NO. 51 (James Madison).

¹⁴⁹ HERBERT STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 19 (1981).

¹⁵⁰ *Id.* at 20.

¹⁵¹ *Id.* at 21.

¹⁵² See Thomas Jefferson to Samuel Kercheval, July 12, 1816.

¹⁵³ Although as James Bryce pointed out, the fact that Wilson was himself an immigrant from Scotland, and had not developed deep, personal ties with any particular state, likely also contributed to his tendency to prefer the national to a state-based view. James Bryce, *James Wilson: An Appreciation*, 60 PA. MAG. HIST. & BIOGRAPHY. 358, 360 (1936).

“With regard to the sentiments of the people,” it is “difficult to know precisely what they are. Those of the particular circle in which one moved, were commonly mistaken for the general voice.”¹⁵⁴ Like Madison on this score, Wilson worried about the natural propensity to faction at the local level, observing that “Faction itself is nothing else than a warm but inconsiderate ebullition of our social propensities.”¹⁵⁵ Just as a republic could not long thrive if all citizens tucked themselves away into their private domestic spheres, it could also not thrive if citizens associated themselves exclusively with various small, tribal teams that rarely overlapped and viewed each other with mutual hostility and suspicion.

Consequently, Wilson argued that the faculty of the moral sense needed to be gently corrected on this score through an education that promoted primary identification with the nation as a whole, and not the states. “This spirit [of *esprit du corps*] should not be extinguished: but in all governments, it is of vast moment – in confederated governments, it is of indispensable necessity – that it should be regulated, guided, and controlled.”¹⁵⁶ In particular, it should be regulated and guided in such a way as to encourage an “expanded patriotism” that prevented an “excess of concentricity” by channeling the social passions beyond the “narrow and contracted sphere” of localities and states towards a devotion to the larger good of the whole country.¹⁵⁷ This expanded patriotism, Wilson said, “will preserve inviolate the connection of interest between the whole and all its parts, and the connection of affection as well as interest between all the several parts.”¹⁵⁸ And eventually it would form what he called at the Pennsylvania ratifying convention, America’s “national character,” using that phrase in a way not to be found anywhere in the *Federalist Papers* or the writings of prominent Anti-Federalists.

As we shall become a nation, I trust that we shall also form a national character, and that this character will be adapted to the principles and genius of our system of government: as yet we possess none; our language, manners, customs, habits, and dress, depend too much upon those of other countries. Every nation, in these respects, should possess originality; there are not, on any part of the globe, finer qualities for forming a national character, than those possessed by the children of America. Activity, perseverance, industry, laudable emulation, docility in acquiring information, firmness in adversity, and patience and magnanimity under the greatest hardships;—from these materials, what a respectable national character may be raised!¹⁵⁹

Thus while Jefferson and Anti-Federalists like Melancton Smith argued for a smaller republic of civic virtue and Federalists like Hamilton and Madison argued for an extended sphere of enlightened self-interest, Wilson split the difference

¹⁵⁴ WILSON, *supra* note 15, at 96.

¹⁵⁵ *Id.* at 668.

¹⁵⁶ *Id.* at 669.

¹⁵⁷ *Id.* at 668-71. For the ways in which Wilson’s defense of an “expanded patriotism” reflected concerns about the dangers of parochialism similar to those of the Scottish moral sense thinkers upon whom he drew, see McCarthy, *supra* note 119, at 694.

¹⁵⁸ *Id.* at 671.

¹⁵⁹ *Id.* at 281.

between these positions, arguing for the self-conscious formation of a “national character” and an extended sphere of republican engagement and civic activity.¹⁶⁰

V. CONCLUSION: JAMES WILSON: THE GREAT SYNTHESIZER

James Wilson was, in more ways than one, a man of contradictions. He was an immigrant who campaigned to forge an organic American national culture alongside a generation of American revolutionaries almost entirely born on American soil. He was educated in the Roman civil law, and breathed in its philosophical, literary, and scholastic dimensions, and yet became one of the earliest exponents and celebrators of America’s common law tradition. He had a reputation as a high-minded aristocrat, who adorned himself in opulent attire, wore his spectacles in regal fashion, and crisscrossed the streets of Philadelphia in a posh carriage drawn by four horses, while holding himself out as a fervent advocate of democracy and the common man. And he nursed a seemingly unquenchable thirst for lands far beyond his ability to pay for them, while saying “How miserable, and how contemptible is that man, who inverts the order of nature, and makes his property, not a means, but an end!”¹⁶¹ It was this last contradiction which would lead to his ultimate undoing, prompting Justice Wilson to leave the Supreme Court in an effort to avoid his creditors who hunted him down and to evade the long arm of the law.

Perhaps because of these personal contradictions, he was particularly inclined to attempt reconciliation in the theoretical arena whenever possible. “I search not for contradictions. I wish to reconcile what is seemingly contradictory,” he said in his *Lectures on Law*. And as we have seen, Wilson attempted to take in a wide variety of philosophical and constitutional sources, influences, traditions, and principles, and make them work as a coherent, overall system. Some of the greatest Wilson scholars have since concluded that just as the contradictions in his personal life did not work out, so also his intellectual commitments amounted to a hodgepodge of intriguing yet ultimately irreconcilable commitments. Other scholars who have studied Wilson have often been drawn to him because of one particular idea in his system, whether it was his commitment to democracy and popular sovereignty, a strong federal government, the law of nations, natural law theory, or the moral sense, which they have tended to focus on to the exclusion of all else, typically casting him as either the heroic champion of that singular idea or its excessively single-minded acolyte.

All this mixing and matching rendered him a unique figure at the time. Aligned politically with the Federalists, he nonetheless departed from them by insisting as strenuously as anyone from his era that all legitimate political authority needed to have as close a connection with “We the People” as possible, “mirroring” the people themselves rather than “refining and enlarging” the popular perspective. Aligned

¹⁶⁰ For an account that similarly points out how Wilson navigated between the Federalists and Anti-Federalists on the question of civic engagement, but lays greater stress on the concept of a “written constitution” as the critical mediating channel through which citizens learn both their rights and duties, see James R. Zink, *The Language of Liberty and Law: James Wilson on America’s Written Constitution*, 103 AM. POL. SCI. REV. 442 (2009).

¹⁶¹ *Id.* at 449.

in some ways intellectually with the Anti-Federalists and Jefferson, he nonetheless proposed the formation of a powerful federal government with broadly stated purposes, expansive grants of power, extensive checks on the state governments, particularly with the power to restrict the spread of slavery, and a popularly elected, energetic executive figure that could enable the federal government to efficiently carry out all its many responsibilities under the laws of nations. And taken as he was with the importance of manners for a healthy democracy, he encouraged the cultivation of an active and engaged citizenry, but practically alone among all the founding figures, directed those energies towards the extended sphere of the nation as a whole.

And Wilson forged this unique constitutional synthesis via an amalgam of several disparate philosophical principles. As an immigrant to America at the age of twenty-three from Scotland, where he had received a philosophical and legal education at both the College of St. Andrew and the University of Glasgow at the height of the Scottish Enlightenment,¹⁶² Wilson had been exposed to several rich philosophical traditions from which he developed his worldview. He took from Locke his “revolution principle,” Cicero and other classical and medieval sources the “pole star” of natural law and the law of nations, and Reid and Hutcheson the insight into the moral sense and the inherent sociality of human nature. It was in the light of these three philosophical sources that Wilson stitched together his unique synthesis about the American Constitution that transcended the categories of his day.

But while Wilson was for the most part *sui generis* during the American founding, blending together constitutional commitments that were ordinarily kept apart, what the American founding kept apart, subsequent history has since mostly brought together. Robust democratic norms bottomed on Wilson’s revolution principle have gradually, though not completely, won the day, via political developments, Supreme Court decisions, and a parade of twentieth century amendments to the text of the Constitution, such as the Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, in which suffrage has been expanded and the Senate made directly elected by the people rather than the state legislatures. A strong federal government with expansive powers has emerged, made possible in part due to checks placed upon state governments via the Reconstruction Amendments and led in many ways by a plebiscitary president who has functioned as the agenda setting “man of the people.” And a national civic culture has decidedly emerged, in which citizens identify with, care more about, and involve themselves more regularly with the ups and downs of national political affairs than they do with local or state government.

As such, Wilson’s status as the American founding’s “great synthesizer” of diverse philosophical and constitutional commitments, kept apart in his own time, but mostly knitted together since then, should prompt contemporary legal scholars, political theorists, historians, and citizens alike to pay increased attention to this figure, in all his manifold and fascinating complexity, perhaps neglected in his own time due to his idiosyncratic views, but now the founder in whom we can best make out the shape of our own constitutional design.

¹⁶² William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. OF PA. J. OF CONST. L., 1053, 1113-14 (2010); Martin Claggett, *James Wilson - His Scottish Background: Corrections and Additions*, 79 PA. HIST.: J. OF MID-ATL. STUD. 154 (2012).