Seriatim

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James Wilson (1742–1798) is perhaps the most underrated Founding Father. He was one of six men to sign both the Declaration of Independence and the Constitution of the United States, and his influence on the latter was second only to James Madison’s. Wilson played a central role in the ratifying debates as well, and he also was the moving force behind the Pennsylvania Constitution of 1790. As a law professor and U.S. Supreme Court justice, Wilson produced some of the period’s most profound commentary on the Constitution and American law.

Despite Wilson’s many historic contributions and the high quality of his political thought, he has been largely overlooked by political scientists, historians, and academic lawyers alike. Although most students of the early American republic are aware of Wilson and his role in the framing and ratification of the federal Constitution, few realize the sophistication of his thought or the scope of his contributions. This is evidenced, in part, by the lack of scholarship about Wilson.¹ My essay attempts to fill this void in the literature by demonstrating that Wilson had a sophisticated political theory that strongly influenced his significant role in the creation of the American regime.
A Quick Rise to Prominence

James Wilson was born in Carskerdo, Scotland in 1742, the son of a lower-middle-class farmer. Dedicated to the ministry at birth, Wilson received an uncommonly good education, which culminated in his winning a scholarship to the University of St. Andrews. However, after four years of undergraduate work and one year of divinity school, he was forced to withdraw from the university upon the death of his father.\(^2\) By the time Wilson's brothers were old enough to take care of themselves and their mother, Wilson decided against continuing his studies and emigrated to America to seek fame and fortune.

Wilson arrived in New York in the fall of 1765 and immediately moved to Pennsylvania, where a letter of recommendation helped him to receive an appointment as a tutor at the College of Philadelphia. Although Wilson did well there, he was much too ambitious to remain in the academy. Instead, he applied to read law under one of Pennsylvania's most prominent lawyers, John Dickinson.

After studying under Dickinson for several years, Wilson opened his own private law practice, first in Carlisle and later in Philadelphia. Wilson promptly won a number of important cases—some in which he represented his adopted state. A first-rate legal reputation thereby was secured.\(^3\) An indication of the high regard in which Wilson's legal abilities were held is George Washington's willingness to pay Wilson one hundred guineas to accept his nephew Bushrod as a law student. Bushrod, aware that this fee was well above the going rate, begged his uncle to allow him to study elsewhere, but Washington was convinced of Wilson's superior ability as a lawyer and insisted upon him. Bushrod was evidently well served by this arrangement, as indicated by his own successful legal career and eventual appointment to Wilson's seat on the U.S. Supreme Court.\(^4\)

Wilson also was recognized internationally. For instance, in 1779 Conrad-Alexandre Gérard bestowed upon Wilson the great honor of appointing him France's advocate-general in America. The appointment was confirmed by Louis XVI in 1781, and Wilson held the post until 1783, when he resigned because the French monarch was unwilling to pay the high fees he required. Ultimately, Louis XVI paid Wilson 10,000 livres for his services.\(^5\)

Wilson maintained an active law practice until his appointment to the U.S. Supreme Court in 1790, but from the start of the Revolu-
tionary War until his death he spent the largest portion of his time engaged in affairs of state. In 1774 Wilson joined Carlisle’s Committee of Correspondence and shortly thereafter was elected a deputy to the July 15 meeting of Pennsylvania leaders. Although Wilson was not selected to go to the first Continental Congress, he was recognized as a rising star on the political scene with the publication of his 1774 pamphlet, “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament.” In this pamphlet Wilson provided the first public argument for why the “legislative authority of the British Parliament over the colonies [should be] denied in every instant.”

Wilson was able to put his theory of resistance into practice when in May 1775 he was elected to the Second Continental Congress. After making several important contributions to the debate over independence, he cast the deciding vote in the Pennsylvania delegation, and thus switched the delegation’s vote and allowed the Declaration of Independence to be unanimously adopted. Wilson then turned to the task of regime building, first by opposing what he considered to be dangerous aspects of Pennsylvania’s radical constitution of 1776 and then by serving in Congress under the Articles of Confederation.

Wilson’s principled stands in both state and national politics led him to offend just about every American. Pennsylvania’s aristocrats could not understand Wilson’s consistent support for fully democratic institutions, while commoners and radical democrats never comprehended his advocacy of separated powers and checks and balances. Wilson’s support for the latter, when combined with his defense of several local merchants accused of treason, contributed to his reputation as an enemy of democracy. Opposition to Wilson reached its zenith in October 1779, when a mob descended upon Wilson and his allies. After a short gun battle the mob was chased off, but the “Attack on Fort Wilson,” as the incident became known, exacerbated the view that Wilson was an enemy of democracy—a view that has lasted in some circles to this day.

Democratic Theorist of the American Founding

James Wilson’s greatest contributions to the American republic were made in the Federal Convention of 1787. Among the few delegates to
attend the convention from start to finish, Wilson participated in all of the most important proceedings. He spoke more times (168) than any other member, save Gouverneur Morris, and he often responded to the most serious attacks on the concept of a strong and democratic national government. Indeed, scholars as varied in their interpretations of the American Founding as Samuel Beer, James Bryce, Max Farrand, Ralph Ketcham, Adrienne Koch, Robert McCloskey, and Clinton Rossiter agree that Wilson was second only to James Madison, and was perhaps on a par with him, in terms of influence on the framing of the Constitution.\(^{11}\)

Wilson’s contributions to the debates at the Federal Convention of 1787 were numerous and detailed. The best way to approach them is not to review the story of the entire convention but instead to outline Wilson’s political theory and then explore its practical consequences. Once the framework of Wilson’s political theory is understood, his activities at the convention and, indeed, during his entire political career, fall readily into place.

Central to Wilson’s political theory was his view of morality. He followed Richard Hooker, who in turn borrowed from St. Thomas Aquinas, and adhered to a traditional Christian conception of natural law.\(^{12}\) Wilson added to this tradition by his insistence that the natural rights of individuals are firmly based on this law, and that any human law that violates natural rights is void.\(^{13}\) Rights play so important a part in Wilson’s political theory that he argued that their protection is the “primary and principal object in the institution of government.”\(^{14}\)

In his famous law lectures of 1790–1792 Wilson provided a detailed discussion of the rights governments must protect. Central among these are the rights of individuals to safety, property, character, and liberty.\(^{15}\) Wilson had a fairly expansive view of the latter concept. In his judgment, liberty includes freedom of religion and the right to “think, to speak, to write, and to publish freely.”\(^{16}\) Wilson also maintained that all members of society should be equally protected by law because law is based upon moral principles, not popular opinion. And in a statement that foreshadowed John Stuart Mill’s *On Liberty*, Wilson declared: “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.”\(^{17}\)
What sort of government would best protect rights? Because Wilson believed that people could know natural law through their moral senses, and because he had a relatively optimistic view of human nature, he concluded that majority rule is the best way to make human laws. Consequently, he embraced the concept of popular sovereignty, and argued that all legitimate governments must be based directly on the will of the people. His position is best illustrated through his most famous metaphor:

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

Every aspect of government, therefore, must be founded upon the authority of the people. Their consent, he taught, is the “sole legitimate principle of obedience to human laws.”

Wilson’s views about popular sovereignty led him to be the most democratic member of the convention. From the convention’s opening days, Wilson advocated the direct, popular election of both representatives and senators. To ensure that the base of his pyramid was as broad as possible, he successfully fought the inclusion in the Constitution of a property qualification for suffrage. For the same reason he argued that because people, not states, are the basis of representation, members of both houses ought to be elected from proportionally-sized districts. More radical still, he moved that the executive should be directly elected by the people. While some of his proposals were not adopted, Wilson was instrumental in making the Constitution as democratic as it was, and he successfully kept the door open so that it could become more democratic in the future.

For all his democratic idealism, Wilson was aware of the danger of tyranny by the majority. He recognized that people are “imperfect” and that they suddenly may “become inflamed by mutual imitation and example” and do irrational or immoral things that they normally would not do. To prevent this, he supported the Constitution’s system of separated powers and checks and balances. He reasoned that these mechanisms would divide power and make both minority and majority tyranny difficult.
Wilson supported a number of devices that he thought would check the will of an errant majority. These included a six-year term for senators and an executive veto. His most interesting checks, however, involved the judiciary. Early in the convention he supported Madison’s Council of Revision, which consisted of the executive and “a convenient number of the judiciary.” The council would have had an absolute veto over legislative acts. Madison’s proposal was eventually rejected, but Wilson did not give up on efforts to strengthen the judiciary.

Wilson was convinced that the Supreme Court needed to be independent from the other institutions of the national government. He therefore adamantly opposed the Virginia plan’s provision that the legislature appoint the justices. He also fought his old mentor John Dickinson’s proposal that judges be easily removable, and he supported the constitutional prohibition against lowering their salaries. After Wilson helped to form a largely independent Supreme Court, he proceeded to argue for a system of lower federal courts. He eventually agreed to the compromise of giving Congress the power to create lower federal courts in the future.

Not only did Wilson support an independent Supreme Court, he intended it to have the power of judicial review. He most clearly expressed this expectation in his law lectures, where he maintained that a bad law might be vetoed by the executive and that it is “subject also to another given degree of control by the judiciary department, whenever the laws, though in fact passed, are found to be contradictory to the constitution.”

The Supreme Court is in a particularly good position to check Congress, Wilson insisted, because the justices are well trained in complex legal matters and are insulated from popular passions. Wilson later showed that he was serious about this proposition when he led a circuit court in *Hayburn’s Case* (1792) in refusing to comply with an unconstitutional act of Congress.

Was Wilson’s support for checks like judicial review inconsistent with his democratic theory? Elsewhere I argue in detail that it was not, but here I can merely suggest a solution. Wilson made it clear that he did not expect countermajoritarian checks to be used often. About judicial review, for instance, he wrote that “laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the judges in refusing to give them ef-
fect.” He also argued for judicial self-restraint. A judge, Wilson contended, should “remember, that his duty and his business is, not to make the law, but to interpret and apply it.”

Wilson did not believe that the Supreme Court would use its power to thwart the majority on many issues. Instead, he thought the Court would use the power of judicial review only rarely: to strike down blatantly unconstitutional or unjust laws. For Wilson, countermajoritarian checks like judicial review are at best temporary injunctions for preventing majorities from acting out of “passions” and “prejudices” that are “inflamed by mutual imitation and example.” In the final analysis the Court cannot prevent the people from passing a law, but this is as it should be because the people are best able to create just laws. The purpose of checks like judicial review is not, then, to make policy but to restrain improper or unjust laws until the people recognize them as such and correct them.

Wilson’s democratic views greatly influenced his theory of federalism. While partisans of the states or the national government argued (and argue) about which is sovereign, Wilson presented the truly democratic view of the subject. For Wilson, only the people are sovereign, and once this principle is settled

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

In America the people decided to split the power of government between the states and the nation. Of course the difficulty with this approach is deciding which powers belong to the states and which belong to the nation. Wilson taught that the “general principle” that should be used to draw “a line between the national and the individual governments of the states” is that

whatever object was confined in its nature and operation to a particular State, ought to be subject to the separate governments of the States; but
whatever in its nature and operation extended beyond a particular State, ought to be comprehended within the federal jurisdiction.  

Wilson attempted to put this principle into practice when, as a member of the Committee of Detail, he played a key role in drafting Article One, Section Eight of the Constitution. Wilson believed that the scope of the national government was limited to powers enumerated in the Constitution. It is true that he supported the necessary and proper clause. But he thought implied powers must be closely connected to enumerated powers—they were not a license to do anything. Powers not given to the national government are reserved to the people, who may or may not chose to give them to the states.

Wilson so strongly believed that the national government was limited to enumerated powers that he opposed the addition of a bill of rights to the Constitution. Why, for example, add a statement that Congress cannot restrict the liberty of the press if Congress has no power over the press? Furthermore, Wilson insisted, a bill of rights would be dangerous because if any rights are left out it might be assumed that they are not retained by the people.

Wilson was not so naive as to think that an enumeration of Congress’s powers would prevent conflicts from arising between the states and the nation. In fact, he warned George Washington in 1791 that “the most intricate and the most delicate questions in our national jurisprudence will arise in running the line between the authority of the national government and that of the several states.” To prevent these conflicts from arising, Wilson thought the national government should commission him to prepare a digest of the laws of the United States to work out the parameters of each government’s powers. Washington liked Wilson’s codification project and encouraged him to pursue it. The project ultimately was abandoned at the urging of Attorney General Edmund Randolph, who considered the task to be beyond any one man.

Wilson did not rely on his codification project alone. He believed that ultimately the national government must judge for itself the proper application of its powers. Initially, this belief led him to support Madison’s proposal that the national legislature have the power to veto state laws. Wilson supported this proposal not because he wanted Congress to examine every state law and strike down those it
did not like. Rather, he considered the congressional veto to be primarily a form of self-defense against encroachments by the states into matters of national jurisdiction.

When it became clear that a congressional veto over state laws was not going to be adopted, Wilson helped to develop an acceptable alternative. As a driving force behind the Committee of Detail, Wilson deserves considerable credit for the supremacy clause of the Constitution. This clause, he eventually was able to convince his ally Madison, was a reasonable alternative to the congressional veto, for it guaranteed that federal laws, made pursuant to the Constitution, would be the supreme law of the land.48

Of course the question still remained: Who decides whether a particular federal law is constitutional, and therefore supreme? Wilson thought that this task belonged to the Supreme Court. He noted that in this institution the

“judicial power of the United States is vested” by the “people,” who “ordained and established” the constitution. The business and the design of the judicial power is, to administer justice according to the law of the land. . . . When the question occurs—What is the law of the land? it [the judiciary] must also decide this question.49

Hence Wilson concluded that the Supreme Court had the power to resolve all disputes involving federalism, subject only to the ultimate power of the people themselves.

The above pages outline James Wilson’s contributions to the creation of a strong and democratic national government that protects individual rights. It is interesting to note how closely America’s current constitutional system resembles the one he envisioned. Early in the nineteenth century states began to make some of the suffrage reforms that Wilson advocated. By the twentieth century his proposal that senators be elected by the people had become enshrined in the Constitution, and his “chimerical” idea that the president be elected by the people has become the political practice, if not the constitutional rule. It was at this time as well that the Supreme Court began to exercise its power to check the other institutions of government and protect individual and minority rights to the extent Wilson conceived. In 1964, for instance, the Court effectuated one of Wilson’s most important ideals when it applied the principle of one-person, one-vote to
the U.S. House of Representatives. Indeed, Justice Hugo Black’s opinion for the Court cited Wilson’s law lectures on this point.50

**Leader in the Ratification Debate**

From the Constitutional Convention Wilson proceeded to the Pennsylvania ratifying convention where, as the only member to attend both, he became the leader of the proratification forces. He began his defense of the Constitution with his famous “State House Yard Speech,” given in Philadelphia on October 6, 1787. There Wilson promoted the benefits of the Constitution and responded to several of the main Antifederalist attacks.51 Most significantly, as noted above, he defended the absence of a bill of rights from the Constitution.

Wilson was the first member of the Federal Convention to defend the Constitution publicly. He did his job so well that Pennsylvania became the second state, and the first large one, to ratify the Constitution. Because of his success, Federalists throughout the country enlisted his aid in their own ratification efforts. George Washington, for instance, sent a copy of Wilson’s “State House Yard Speech” to a friend, and noted that

> the enclosed Advertiser contains a speech of Mr. Wilson’s, as able, candid, and honest member as was in the convention, which will place most of Colonel Mason’s objections in their true point of light, I send it to you. The republication of it, if you can get it done, will be serviceable at this juncture.52

By December 29, 1787, the speech had been reprinted in 34 newspapers in twelve states.53 In addition, it was published in pamphlet form and circulated throughout the nation. It was so important, Bernard Bailyn insists, that “in the ‘transient circumstances’ of the time it was not so much the Federalist papers that captured most people’s imaginations as James Wilson’s speech of October 6, 1787, the most famous, to some the most notorious, federalist statement of the time.”54 Many defenders of the Constitution in other states referred to the speech for ammunition in their own ratification battles.55 It soon became, in Gordon Wood’s words, “the basis of all Federalist thinking.”56
As his final act of constitution making, Wilson was pleased to lead Pennsylvania in disposing of its constitution of 1776. The Pennsylvania constitutional convention of 1789–1790 commenced with Wilson, the Federalist leader, and William Findley, the leader of the western radicals, agreeing to renounce the old constitution and begin debating a new draft constitution Wilson wrote. In the draft Wilson provided for a government based firmly on the will of the people but limited through a strong system of separated powers. Ironically, Wilson, who often had been labeled an aristocrat, broke with his old allies and joined the western democrats on several issues. Most significant, he led the fight for the direct, popular election of representatives, state senators, and the governor. Wilson’s contributions to the Pennsylvania Constitution of 1790 are noteworthy for present purposes insofar as they demonstrate that he did not argue for democratic institutions at the Federal Convention simply because he was from a large state.

U.S. Supreme Court Justice

After the Constitution was ratified, Wilson thought he deserved a position in the new national government. Accordingly, he wrote to President Washington and suggested that he be appointed chief justice of the United States. Washington responded coolly, writing: “To you, my dear Sir, and others who know me, I presume it will be unnecessary for me to say that I have entered upon my office without the constraint of a single engagement.” Eventually, however, Wilson was appointed and confirmed as an associate justice of the first Supreme Court. From this position he was to play an important role in the formation of American law. Although he participated in fewer than two dozen cases, he left his mark in a variety of ways.

One of the most significant decisions by Wilson as a Supreme Court justice is also one of the most overlooked. In 1792 Congress passed the Invalid Pensioners Act, which provided federal assistance to veterans injured in the Revolutionary War. It also required federal circuit court judges to determine whether individuals who claimed benefits were eligible for them. The judges’ decisions were subject to final approval by the secretary of war and Congress. The first case arose in the New York Circuit, where Chief Justice John Jay and Associate Jus-
tice William Cushing were presiding with District Judge James Duane. These judges informed Congress that they had problems with this duty, but that they would perform it out of respect for the legislators and the pensioners.60

When a case arose in the Pennsylvania Circuit, Justices Wilson and John Blair, along with District Judge Richard Peters, refused to accept the pensioner’s case. Under Wilson’s leadership the justices and the judge wrote a letter to President Washington in which they argued that reviewing invalid pensioners’ claims was not a judicial function and, more important, that it violated the principle of separation of powers because the secretary of war and Congress had the final say. They refused to hear the claim.61

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

Because the Supreme Court never issued an official opinion, Hayburn’s Case (1792) is often overlooked by students of the judicial process.62 But it is fair to consider the case to be, in Hayburn’s words, the “first instance in which a court of justice has declared a law of Congress unconstitutional.”63 James Madison evidently agreed with this assessment, as indicated by a letter to Richard Henry Lee in which Madison commented that the circuit court judges in Pennsylvania had pronounced the act “unconstitutional and void.”64 Similarly, St. George Tucker, in his 1803 “republicanized” edition of Blackstone’s Commentaries, cited Hayburn’s Case as evidence that the judiciary has the duty to void an unconstitutional act of Congress.65 Thus, eleven years before Marbury v. Madison (1803) the justices, led by Wilson, were engaging in judicial review of federal legislation.

Without a doubt, Wilson’s most significant opinion came in the 1793 case Chisholm v. Georgia.66 The case arose when Chisholm, the executor of the estate of a Loyalist, sued Georgia for payment of a debt incurred during the Revolutionary War. Georgia officials claimed that, as a sovereign, Georgia could not be sued. The state officials recognized that to submit Georgia to the jurisdiction of the federal courts would strike a major blow to state sovereignty. This concern had been repeatedly raised by the Antifederalists, who had argued in many of
the ratifying conventions that individuals would be able to sue states as states.67

In *Chisholm* the Antifederalists’ worst nightmare seemed to come true: the Supreme Court ruled four to one against Georgia. Wilson joined the majority and wrote the most memorable and theoretically interesting of the seriatim opinions. He moved far beyond the simple legal question and concluded that the case was not primarily about jurisdiction but instead concerned the question whether “the people of the United States form a Nation?”68

Wilson provided an elaborate answer to this question. As he was wont to do, he began with an examination of the relevant jurisprudential issues. He opened with a quote from Thomas Reid about the importance of language. Language is important because imprecise words can lead to bad political theory. For instance, people often misuse the terms “state” and “sovereign.” To define these terms, Wilson returned to first principles and reminded his audience that people are “fearfully and wonderfully made,” and that they are endowed by their “Creator” with “dignity.” A state, on the other hand, is but an “inferior contrivance of man.” While a state is certainly “useful and valuable,” the people should never forget that a state exists to serve them, not vice versa.69

Wilson built on this distinction, and informed his readers that the people always retain their power of original sovereignty. While the people may vest aspects of this sovereignty in states, this is merely sovereignty of a “derivative” nature. It is therefore inaccurate to speak of a “sovereign state,” for only the people are sovereign. Wilson thereby looked at the issue from the perspective of the Union and decreed that the people as a whole—including the citizens of Georgia—created the Constitution. Consequently, “as to the purposes of the Union . . . Georgia is NOT a sovereign State.”70

On the basis of “general jurisprudence,” Wilson concluded that Georgia is not a sovereign state and that it has a duty to fulfill its contracts. Although Wilson probably was tempted to rest his decision on these theoretical grounds, he proceeded to examine a number of precedents that supported his proposition that governments could be sued. Wilson admitted that in England this had not been the case since the Norman Conquest. Yet under the Saxon government, rulers were subject to the law. Similarly, he pointed to several Greek and Spanish precedents that seemed to support his position.
Given that the sovereign people can grant the national government whatever powers they choose, the only question that remained was whether they did indeed give the Supreme Court jurisdiction over state governments.\textsuperscript{71} To answer this question Wilson finally turned to Article III, Section 2 of the Constitution, where it states that the judicial power “shall extend to controversies, between a state and citizens of another state.”\textsuperscript{72} Clearly, Wilson contended, this provision shows that the people gave the Supreme Court the jurisdiction to hear cases like Chisholm’s. Georgia therefore must submit to the will of the sovereign people and subject itself to the jurisdiction of the Court.\textsuperscript{73}

Wilson’s opinion has been criticized—including in this collection—for being unnecessarily complex.\textsuperscript{74} It is true that Wilson could have forgone the theoretical discussion and simply turned to the text of the Constitution. But Wilson recognized the power of language and ideas. He firmly believed that popular sovereignty was the foundation upon which the American system of government was based. Consequently, he wanted to attack head-on—and in detail—the notion of state sovereignty, which he correctly perceived could tear the nation apart.

Americans were not yet willing to embrace Wilson’s views on sovereignty. Indeed, states’ rights advocates moved quickly to pass a constitutional amendment to reverse \textit{Chisholm}. Unfortunately, there are no records of Wilson’s reaction to the Eleventh Amendment. One reasonably may presume, however, that Wilson would have considered the Eleventh Amendment unwise because it allowed states to judge themselves. That said, Wilson undoubtedly would have accepted the amendment because he supported the power of the people to change the Constitution as they saw fit.

Wilson played a role in two other important early Supreme Court decisions involving federalism. In \textit{Hylton v. U.S.} (1796), he concurred with the Court that Congress’s uniform tax on carriages was not a direct tax and was therefore constitutional.\textsuperscript{75} Wilson did not write an opinion because the Court upheld the ruling he made on circuit. The case significantly strengthened the ability of the new national government to raise revenue by upholding a key element of Alexander Hamilton’s plan for rescuing the finances of the fledgling republic. The mere acceptance of this case also implied that the justices believed that the Court had the power to strike down acts of Congress. In fact, when Wilson was presiding over the circuit court arguments in the case, he told the government’s counsel that the justices were of the
opinion that federal courts could strike down congressional legislation as unconstitutional.\textsuperscript{76}

In \textit{Ware v. Hylton} (1796), Wilson held that the national government’s treaty-making power takes precedence over state law. Specifically, the 1783 treaty with Great Britain, which required repayment of prewar debts to British citizens, preempted a 1777 Virginia law that effectively abolished those debts.\textsuperscript{77} Wilson was tempted to make this ruling solely on the basis of the “law of nations,” but he ultimately joined the rest of the Court in declaring that the supremacy clause operated retroactively. An important precedent concerning the supremacy of federal law thereby was established.\textsuperscript{78}

Throughout his legal career Wilson evidenced a profound commitment to the idea that law must be based on the will of the people. He challenged, for instance, the conventional wisdom that juries should judge only facts. Instead, Wilson proposed that in at least some instances they should be able to judge law as well. In his first charge to a federal grand jury, Wilson stated that

\begin{quote}
  it may seem, at first view, to be somewhat extra-ordinary that twelve men, untutored in the study of jurisprudence, should be the ultimate interpreters of the law, with a power to overrule the directions of the Judges who have made it the subject of their long and elaborate researches, and have been raised to the seat of judgment for their professional abilities and skill.\textsuperscript{79}
\end{quote}

Wilson believed that a jury could decide both facts and laws because it is serving as a representative of society.\textsuperscript{80} Jurors therefore may choose to reject a judge’s instructions on a point of law, even though a judge is better trained in law than they are. For Wilson, when it comes to principles of right and justice, the common person is able to know truth as well as—if not better than—the trained expert.\textsuperscript{81}

Wilson respected juries because he felt they represent the will of the people. For a similar reason he cherished the common law.\textsuperscript{82} Indeed, Wilson declared that “every lovely feature [of common law] beams consent.”\textsuperscript{83} Common law is one of the most democratic of all types of law because people have agreed to it and have participated in its development throughout the ages.\textsuperscript{84} As he did with democracy, Wilson supported common law not as an end in itself but because it is an important means by which natural law can be known.\textsuperscript{85}

This was not to say, however, that common law is perfect. Wilson recognized that it contained errors, and he criticized aspects of it
throughout his law lectures. But, like society, common law is in a state of progression because its “authority rests on reception, approbation, custom, long and established. The same principles, which establish it, change, enlarge, improve, and repeal it.”

Wilson taught that in addition to providing a good rule of justice, common law is practical. Among its other benefits, it can help define terms and fill in gaps not covered by statutory law. Further, common law is of such “vast importance” that “by it, the proceedings and decisions of courts of justice are regulated and directed.” Because common law is complex and important, he encouraged lawyers to specialize in it.

One of the most pressing unsettled legal issues in the new republic was the extent to which common law should be accepted by American courts, particularly federal courts. Antifederalists generally opposed a federal common law because they feared it would increase the power of the national government. Wilson joined many of his Federalist colleagues in arguing that common law, insofar as it is not in conflict with the Constitution or federal statutory law, should be accepted by federal courts. His most important contributions in this regard were his grand jury charges in the United States circuit court cases of Gideon Henfield and Joseph Ravara.

In July 1793, Gideon Henfield was charged before a grand jury with, among other things, engaging in acts hostile to nations at peace with the United States by seizing a British ship. No statute explicitly forbade Henfield’s activities, but Wilson argued that the common law is the basis of jurisprudence in America, that American common law, like English common law, incorporated the law of nations, and that Americans are therefore liable for violations of common law. Although to the great rejoicing of the Antifederalists the jury acquitted Henfield, Wilson’s charge contributed to the eventual, though short-lived, acceptance of common law claims by the federal courts.

Wilson also played a role in the prosecution of Joseph Ravara, consul-general of the Republic of Genoa. Ravara was indicted by a grand jury, with Supreme Court Justices Wilson and James Iredell and District Judge Richard Peters presiding, for “sending anonymous and threatening letters to Mr. Hammond, the British Minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money.” Because this case was poorly reported, scholars
long have debated the exact nature of the charges.\textsuperscript{95} Recent scholarship has shown that both the prosecutors and the defense attorneys understood that the central charge was based on common law.\textsuperscript{96} Ravara was found guilty, but he was pardoned by President Washington for diplomatic reasons. The case is significant because it was the first time a person was convicted in a federal court for violating the common law, and because Wilson was again at the forefront of the action.

As mentioned above, Antifederalists did not want the federal courts to have jurisdiction in common-law cases because it would strengthen the power of the national government. As a Federalist, Wilson did not share this concern. Rather, he was so enamored of the democratic character of the common law that he felt it necessary for courts to use it if they are to make just decisions. Because the common law stems from the custom of many people over many years, it was, in Wilson’s mind, similar to natural law. Thus he joined the Federalists in advocating federal common-law jurisdiction not because he wanted to expand the power of the national government but, rather, because he believed common law to be extremely democratic, and therefore an excellent approximation of natural law.\textsuperscript{97}

Perhaps Wilson’s most important contribution to American jurisprudence took place off the bench. From 1790 to 1792 he found time to teach law at the College of Philadelphia. There, Wilson presented the first set of lectures on American constitutional law.\textsuperscript{98} The significance of Wilson’s lectures is indicated by the audience that attended his inaugural address, which included

the President of the United States, with his lady—also the Vice-President, and both houses of Congress, the President and both houses of the Legislature of Pennsylvania, together with a great number of ladies and gentlemen . . . the whole comprising a most brilliant and respectable audience.\textsuperscript{99}

Wilson’s lectures are important for the present discussion because he believed law should be “studied and practiced as a science founded in principle [not] followed as a trade depending merely upon precedent.”\textsuperscript{100} Consequently, Wilson spent most of his time focusing on philosophical matters, especially those that pertained to morality, epistemology, metaphysics, and politics. He thought that once these foundations of jurisprudence were mastered, students then could learn what he termed “the retail business of law.”\textsuperscript{101}
This is not to say, however, that Wilson did not discuss mundane legal matters. His lectures progressed naturally from abstract political theory to more concrete constitutional issues, such as the powers of Congress, the president, and the Court. He also examined state and local governments, relatively uninteresting offices like sheriff and coroner included. He lectured on specific crimes against individuals and property as well, and the punishments associated with those crimes. Yet even when Wilson discussed the most banal of subjects he was careful to return as often as possible to the first principles of American jurisprudence.

It is unfortunate that Wilson delivered only half of his planned lectures. Although he had written all of them, several are in outline form. Wilson eventually hoped to complete and revise his lectures and thereby provide the definitive account of American law. Even without these revisions, however, Wilson’s lectures have been described accurately as among the most systematic and theoretically interesting studies of the Constitution and American law articulated by a Founder.102

Wilson’s writings illustrate his great faith in “the science of politics.”103 He believed that political science was in its infancy, and that the greatest discoveries lay ahead.104 He attempted to contribute to this progress through his investigation of the fundamental principles of law and politics. And unlike many political thinkers, Wilson attempted to apply the knowledge he gained through study to real political problems.

A Sad End to a Still Important Life

Wilson spent an ever-increasing amount of time during the later years of his life trying to manage his business affairs. He had borrowed heavily to speculate in western lands and was fighting constantly to meet bills and to borrow more money for further investments. In 1797 an economic downturn devastated the overleveraged Wilson, along with many other prominent men—including Robert Morris, the “Financier of the Revolution” and at one point the richest man in America.105 Unable to find assistance to meet the variety of notes coming due, Wilson was forced to flee from his creditors. Thrown into jail on two separate occasions, he spent his final days hiding from creditors in a tavern in Edenton, North Carolina, the hometown of Justice James Wilson.
Iredell. Here, with his wife by his side, Wilson contracted malaria and died on August 21, 1798. He was buried with little ceremony on the estate of Mrs. Iredell’s father.

Perhaps it is as a result of his early, ignoble death that James Wilson is not better known today. Because he died at a relatively young age he was unable to complete his law lectures and law digests. Yet Wilson is worthy of study because his sophisticated and innovative political theory informed his many important contributions to the creation of the American republic. As this essay has endeavored to show, Wilson was instrumental in supporting and reconciling some of the best ideas of his (and our) day: popular sovereignty, majority rule, and minority rights. The tension remains between these ideas, which means that Wilson should be regarded not only as an influential historical figure but as someone who can inform current debate.

NOTES

1. There is one good biography of Wilson, and several scholars have published interesting but narrow articles about his political theory. No work, however, provides a systematic account of Wilson’s political and legal philosophy. I attempt to do so in The Political and Legal Philosophy of James Wilson (1742–1798) (Columbia: University of Missouri Press, 1997), from which the present essay is adapted.


2. Most nineteenth- and early-twentieth-century scholarship about Wilson holds that Wilson studied at the University of Edinburgh and that of Glasgow, as well as at St. Andrews. There is little evidence to support these claims.

3. The most important of these cases was the 1782 dispute between Pennsylvania and Connecticut over the Wyoming Valley. The case in question was argued in Trenton, New Jersey, before a tribunal formed under Article IX of the Articles of Confederation. Wilson’s presentation convinced the judges of Pennsylvania’s rightful claim to the land. Significantly, Connecticut acquiesced to the decision, which marked the first time a dispute between states had been settled under the auspices of the national government. The successful culmination of this lawsuit likely inspired Wilson’s later support for a strong federal judiciary. See Seed, James Wilson, 185; Smith, James Wilson, 170–76.


9. Wilson’s participation in these trials had important implications for American treason law. There is good reason to believe, Charles Smith proposes, that Wilson was the primary advocate of the treason clause of the federal Constitution, which requires, among other things, two witnesses to the same overt act of treason. Smith, James Wilson, 116–28. See also William Hurst, “Treason in the United States,” Harvard Law Review 58 (1944): 404.


14. *Works*, 585, 592–93. It is true, as Barry Alan Shain points out, that Wilson, like most Founders, would have rejected the excessively individualistic view of rights held by many modern Americans. Yet Wilson’s view of rights was more liberal and less communal than Shain claims. For Wilson’s position, see ibid., 585–610. For Shain’s argument, see Barry Alan Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton: Princeton University Press, 1994).


16. Ibid., 71, 104, 579.


and Sentiment in America (New York: Oxford University Press, 1972) that Wilson was primarily influenced by David Hume.

Wilson’s view of human nature, while optimistic, was not naive. He recognized that individuals have free wills and therefore can know the good but refuse to pursue it. On this subject, see especially Works, 199, 211, 385. Gordon S. Wood suggests in The Radicalism of the American Revolution (New York: Alfred A. Knopf, 1991), 239–40, that Wilson’s position was not uncommon during the American Founding.


22. Wilson believed that every person “whose circumstances do not render him necessarily dependent on the will of another, should possess a vote in electing” representatives. Unlike many of the delegates, Wilson did not think property ownership was necessary to be independent. Works, 407–8, 84, 313, 411, 605, 725; Farrand, Records, II:201.


27. Farrand, Records, I:94–100, 421, 426; Works, 328–30, 341, 391,
416–17. Wilson also played an important role in the creation of the contract and guarantee clauses.

29. Ibid., 119.
30. Ibid., II:428–29; Works, 297.
32. Ibid., I:104, II:73.
34. Farrand, Records, II:73.
35. For more, see Hall, “The Wilsonian Dilemma.”
36. Farrand, Records, II:73.
38. Ibid., 291.
41. See Rossiter, 1787, 200–209.
43. Works, 264; McMaster and Stone, Pennsylvania, 143.
46. Edmund Randolph to George Washington, 21 January 1792, in Konkle MSS, VI:326–27. See also Perry Miller, The Life of the Mind in America, From
the Revolution to the Civil War (New York: Harcourt, Brace, and World, 1965), 239–49.

47. Farrand, Records, II:391.

48. Ibid., II:168–69. See also Ketcham, James Madison, 228–29, 302; Rossiter, 1787, 197, 208, 214.


59. George Washington to James Wilson, quoted in Smith, James Wilson, 304 (emphasis in original). Washington’s cool reply may be attributed to, at least in

60. John Jay, William Cushing, and James Duane to George Washington, in *Hayburn’s Case*, 2 U.S. (2 Dall.) 410 (1792). In the unreported case of *United States v. Yale Todd* (1794) the Court stated that Jay, Cushing, and Duane acted inappropriately. The Court also may have declared the Invalid Pensioners Act unconstitutional.


66. 2 U.S. (2 Dall.) 419 (1793).


68. 2 U.S. (2 Dall.) at 453.

69. Ibid., 455. William Casto agrees that Wilson’s natural-law jurisprudence played an important role in his opinion. Casto also maintains that under modern standards of judicial conduct, Wilson should have recused himself from the case because of its implications for litigation over the Indiana Company, a company in which Wilson owned stock. Yet by eighteenth-century standards Wilson’s participation was not inappropriate. See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 192–95.

70. 2 U.S. (2 Dall.) at 457.

71. Ibid., 461–64.

72. Ibid., 457–58, 463, 465 (quoting the Constitution).

73. Ibid., 464–66.


75. 3 U.S. (3 Dall.) 171 (1796).
77. 3 U.S. (3 Dall.) 199 (1796).
78. Ibid., 281. Wilson joined unanimous Supreme Court decisions in *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792) and *Glass v. The Sloop Betsy*, 3 U.S. (3 Dall.) 6 (1794) that also helped strengthen the power of the national government.
81. Wilson seemed to leave open the door for a judge to order a new trial if the jury erred to a significant degree. *Works*, 541–42. In addition, Wilson’s dissent in *Wiscart v. D’Auchy*, 3 U.S. (3 Dall.) 321, 324–27 (1796) supported the power of the Supreme Court to rule on facts as well as law when reviewing equity and admiralty decisions. Wilson’s argument was based primarily upon the Judiciary Act of 1789, which he read as not making an exception to the Court’s appellate jurisdiction. Intriguingly, although Wilson appeared willing to admit that Congress could make exceptions to the Court’s appellate jurisdiction, in dictum in *Wiscart* he suggested that “if a positive restriction existed by law, it would, in my judgement, be superseded by the superior authority of the constitutional provision.” Ibid., 325. It is not certain what Wilson meant by this, but he likely was arguing that Congress could not limit the Court’s appellate jurisdiction in at least some areas of law.

It should be noted that Wilson was attacked in the Pennsylvania ratifying convention for being against the right to trial by jury in civil cases. Wilson responded to this attack by noting that although he was for the right to trial by jury in almost every case, the delegates at the Federal Convention believed that state laws varied on the matter so much that it would be disruptive to include anything about it in the Constitution. McMaster and Stone, *Pennsylvania*, 403–5.
83. Ibid., 182.
84. Ibid., 122, 335.
85. Gary McDowell confuses the relation between consent and common law, at least in Wilson’s legal theory, when he writes that “Americans had begun to offer a new foundation for the common law. No longer seen to rest on the old nat-
ural-law foundation, the common law was viewed as resting on consent expressed in the form of custom and continued usage.” Gary L. McDowell, Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy (Chicago: University of Chicago Press, 1982), 54. For further discussion of this issue, see J. C. D. Clark, The Language of Liberty, 1660–1832 (Cambridge: Cambridge University Press, 1994), 93–110, and the literature cited therein.

86. See, for example, Works, 647, 818–19. Wilson also recognized that common law could be misused by unscrupulous lawyers. Ibid., 562.

87. Ibid., 353, 564.

88. Ibid., 811–15.

89. Ibid., 182.

90. Ibid., 560–61. Wilson also maintained that every citizen should have at least an elementary knowledge of common law. Ibid., 69–96, 559.


92. William Casto notes that Wilson made a similar argument as a special prosecutor in the De Longchamps Affair. See Casto, The Supreme Court, 131–32.


94. United States v. Joseph Ravara, 2 U.S. (2 Dall.) 297 (1793). The “several other persons” mentioned in the charge were George Washington.


97. Presser, The Original Misunderstanding, 71. William Obering stressed that Wilson’s conception of the common law was “guided by the philosophy of the Schoolmen. . . .” Although this is an exaggeration, Wilson clearly believed that the common law is a way to know the natural law and that it is closely connected with religion. In his law lectures, Wilson noted that “Christianity is a part of the common law.” See William F. Obering, “Our Constitutional Origins,” Thought 12 (1937): 617; Works, 671.

For a different view of Wilson’s approach to the common law, see Stephen A. Conrad, “James Wilson’s ‘Assimilation of the Common-Law Mind,’” Northwestern University Law Review 84 (1989): 186–219, esp. 195, 198–99. Conrad argues that Wilson’s main concern about the common law was the reconciliation of its reliance on tradition with the Revolution’s principle of consent. While there is much to admire in Conrad’s essay, he errs by ignoring Wilson’s position that common law is a means by which natural law can be known.

98. George Wythe, professor of law at The College of William and Mary from 1779 until 1791, is regarded as America’s first law professor. Wilson is a close second, however, and he was the first to lecture systematically about the Constitution.


100. Works, 564.

101. Ibid., 397–98. Wilson cared about legal history as well. Indeed, he repeatedly referred to law as a “historical science,” and he spent a good deal of time tracing the origin and history of different legal concepts. This activity fit into his conception of law as a science insofar as he was using history to investigate the fundamental principles of law. If precedents agreed with these principles, Wilson was happy to use them. If they did not, he was willing to abandon precedent in favor of “good” law. Ibid., 350, 356, 384, 562–65.


103. Works, 785.

104. Ibid., 784–85, 562–65.

105. Wilson’s attorney, Joseph Thomas, “who had been universally thought an honest man,” was discovered at this time to have “abandoned, after having defrauded among others some of his most intimate friends.” To avoid prosecution, Thomas abandoned his pregnant wife and fled with his clients’ money. It is unclear to what degree Thomas was responsible for Wilson’s financial collapse, but his flight in the midst of Wilson’s troubles could not have helped matters. James Iredell to Mrs. Iredell, 6 August 1798, in McRee, Life and Correspondence of James Iredell, II:533–34.

106. Because of a mistake made by the federal government, Wilson’s date of death is occasionally given as 28 August 1798. It actually was 21 August 1798,