James Wilson (1742–1798): America's Forgotten Blackstone

Ethan James Foster
Reno, Nevada

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ABSTRACT

James Wilson, an American founding father and legal scholar, vied to replace Sir William Blackstone's *Commentaries on the Laws of England* with a systematic jurisprudence tailored for the new republic. Wilson articulated and applied his systematic legal theory as Constitutional Convention delegate, Associate Justice of the U.S. Supreme Court, and occupant of the first law professorship created after (and in response to) the Constitution's ratification. Part I discusses the extent to which Blackstone's reception in the American legal system was at odds with the principles that justified the Revolution. Wilson scrupulously read and criticized Blackstone's *Commentaries*, and he hoped to replace the *Commentaries* with his own jurisprudence.

To replace Blackstone's *Commentaries* with an American alternative, Wilson drafted a series of *Lectures on Law*. Part II examines the extent to which Wilson's *Lectures* intentionally mimicked the structure, style, and even some of the content of Blackstone's *Commentaries*. In a way, Wilson attempted to use Blackstone in order to surpass him. This had the potential to disguise Wilson's criticisms and market his own legal philosophy so that it could be palatable, even to Blackstone's supporters.

The heart of Wilson's project was to relocate the American legal understanding of sovereignty, which Blackstone attributed to superiority, in the consent of the governed. Part III examines James Wilson's substantive critique of Blackstone's *Commentaries*, with particular emphasis on Blackstone's definition of law. Wilson believed that, as long as Americans read Blackstone's *Commentaries*, which insisted that law must come from a "superior," the implications that Blackstone's definition had for a general understanding of the law could be dangerous if given a foothold in the American court or classroom. As an alternative, Wilson argued that the fundamental principle of law was that its obligatory force came from the consent of the governed. This principle had vast implications for understanding municipal law. Among other things, Wilson's so-called Revolution Principle—that law derives from the consent of the governed—made sense of America's state and federal constitutions, justified greater public participation in shaping the law in the courtroom, and recommended transformations for the American common law system.

Under Wilson's pen, an intricate legal philosophy emanated from, and was explained by, the Revolution Principle. But Wilson died before he could deliver all of his *Lectures* and before he could complete other projects which could have further vindicated his approach to American law. Part IV concludes with some reflections on the extent to which Wilson's *Lectures* presented one possible vision of America's future jurisprudence, a vision of the law that failed, in the end, to replace Blackstone's successful *Commentaries*.

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At roughly 6 o'clock in the evening of December 15, 1790, a new vision of American jurisprudence was conceived before an audience of America's founding generation that crowded into a single lecture hall. President George Washington, the first lady, the Vice-President, both houses of Congress, a handful of law students, and numerous public guests arrived to hear a lecture on American law to usher in the new Constitution and the federal system that it signified.[1] The speaker, James Wilson, was also distinguished: he had been a signer of the Declaration of Independence, a Constitutional Convention delegate, and, at the time of his lecture, a member of the U.S. Supreme Court. The inaugural lecture was a historic moment that President Washington's attendance commemorated, and one that Wilson hoped would establish his reputation as America's founding legal mind.[2] But one obvious difficulty stood between Wilson and the distinction he coveted: William Blackstone's *Commentaries on the Laws of England* was already achieving the fame and influence that he desired. More urgently, Wilson feared that Blackstone's popularity facilitated a theoretical backsliding from what he called the "Revolution Principle"—that authority derives from the consent of the governed—and to such an extent that he found himself defending it against Blackstone's *Commentaries*.

I. INTRODUCTION: BLACKSTONE'S REVOLUTIONARY RECEPTION

The state of American law was highly indeterminate before the American Revolution, and even after the Constitution's ratification. The American Revolution established the "consent of the governed" as the basis for a new political order, but it was unclear how a change in political institutions necessitated a change in legal systems. As a Scottish immigrant to the American colonies, James Wilson was specially situated to notice unique themes that were developing in the American understanding of law, themes which either reflected or differed from British antecedents and which represented an emerging national legal sense common to the thirteen states.

One common theme in American law was a widespread reliance on the English common law and the exposition it received in William Blackstone's *Commentaries on the*

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[1] *See, e.g.*, Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory* 1984 SUP. CT. REV. 359, 374 (1984) (quoting discoveries from the Pennsylvania Packet and Daily Advertiser).
[2] *Id.*

Laws of England: the persistence of English common law in America represented legal continuity, even as colonial charters gave way to state constitutions. Though an American brand of common law had developed in the colonies, historians like Morton Horwitz and Gordon Wood have noted that legal practitioners viewed the American common law as an inherited English system at work in America.[3] When the colonies were subject to the Crown, says Wood, Americans understood the common law as a wellspring of human rights and part of the British constitution which they believed justified their resistance.[4] What is interesting is that the same American revolutionaries who cited the "consent of the governed" as a political maxim also read Blackstone's *Commentaries* as an authority on common law, despite Blackstone's insistence on parliamentary supremacy.[5]

American insistence on the "consent of the governed" and the English doctrine of parliamentary supremacy reflected divergent views of the English constitution.[6] Indeed, a Revolution pamphlet by James Wilson in 1774 asserted that "the principles on which we have founded our opposition to the late acts of parliament, are the principles of justice and freedom, and of the British constitution."[7] Yet once the Revolution began, the tension between the competing views of the English constitution became so clear that, as Wood notes, "continual talk of desiring nothing new and wishing only to return to the old

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[3] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1780–1860) 5 (Harvard University Press, 1981) (citing Massachusetts Chief Justice Hutchinson who declared the Common Law of England to be the operative rule in 1767); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1776–1787) 9–11 (University of North Carolina Press, 1998) [hereinafter *Creation*].
[4] *Creation*, *supra* note 3, at 9–14.
[5] *See*, *e.g.*, Albert W. Alschuler, *Rediscovering Blackstone* 145 U. PA. L. REV. 1, 5–6 (1996).
[6] *Creation*, *supra* note 3, at 44–45.
[7] 1 JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774)*, *in* COLLECTED WORKS OF JAMES WILSON 3–4 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter *Considerations*].

system and the essentials of the English constitution was only a superficial gloss."[8] In the wake of the Stamp Act crisis, colonial dissidents argued that the British had transgressed their own constitutional principles, such that a Revolution could not be avoided.[9]

Some historians believe that once the Revolution had succeeded, the break with England occurred without leading to a significant repudiation of the English common law system. According to Wood, it followed that a rebellion which appealed to the English constitution did not ultimately stray too far from it.[10] But that is overly-simplistic: Americans needed to know how the law would bear out their new political institutions. Horwitz tells a tale of continuity from English common law inheritance to its deliberate reception: he cites the first Continental Congress in 1774 which "entitled [citizens] to the common law," the Virginia Convention of 1776 which incorporated the English common law, and the fact that all but two states passed reception statutes by 1784, incorporating inherited common law doctrines.[11] Yet his narrative seems trite. Americans still had to consider whether insistence on the "consent of the governed" as the basis of political order required reworking the way that they thought about law. Americans had revolted, not only against British imperial institutions, but also implicitly against its legal system which located sovereignty in a "superior" entity, namely, Parliament. Even if some form of common law was consistent with a consent-based government, the fact that Americans still read Blackstone as authoritative may be surprising.[12]

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[8] *Creation*, *supra* note 3, at 13.
[9] *Id.* at 44–45.
[10] *Id.*
[11] HORWITZ, *supra* note 3, at 4.
[12] *See Creation*, *supra* note 3, at 264–65.

The popularity of Blackstone's *Commentaries* persisted after the Revolution. According to American legal scholar Julius Waterman, "[i]t was in thinly settled colonial America that the Commentaries received most acclaim. By 1776, nearly twenty-five hundred copies were in use here, one thousand five hundred of which were the American edition of 1772; a sale which Burke … said rivaled that in England."[13] Moreover, according to legal scholar Albert Alschuler, Blackstone's fame was such that, "[b]efore 1900, almost every American lawyer read at least part of Blackstone."[14] Thus, Blackstone's popularity persisted, despite the Revolution's success.

There are at least three traditional explanations for the popular reception of Blackstone's *Commentaries* in America.[15] First, Blackstone offered the latest and most familiar legal text for a people trying to fortify their new republic with the rule of law.[16] Basing a republican theory of government on the rule of law required understanding the inherited English common law system, and Blackstone served to fill a gap in legal education that plagued American society in the early Republic.[17] Second, after the thirteen colonies unified in an agreement to share a federal judiciary, there was a need for

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[13] Julius Waterman, *Thomas Jefferson and Blackstone's Commentaries*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 452 (David Flaherty, ed., 1969. *See also* Alschuler, *supra* note 5, at 5.
[14] Alschuler, *supra* note 5, at 7.
[15] For a broader discussion of Blackstone's reception in America, *see generally* KATHRYN PREYER, BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER (2009).
[16] *See generally* 2 Baron de Montesquieu, *The Spirit of Laws*, *in* THE COMPLETE WORKS OF M. DE MONTESQUIEU (Liberty Fund 2016) (1777), http://oll.libertyfund.org/titles/837.
[17] *See, e.g.*, ST. GEORGE TUCKER, *On the Study of Law*, *in View of the Constitution of the United States, with Selected Writings* 1, 3 (Clyde L. Wilson ed., Liberty Fund, 1999) (1803) ("[T]he laws of the Colonies not being at all interwoven with the COMMENTARIES, the colonial student was wholly without a guide in some of the most important points, of which he should have been informed; admitting that he were acquainted with the law of England upon any particular subject, it was an equal chance that he was ignorant of the changes introduced into the colonial codes. . . . The COMMENTARIES, therefore though universally resorted to as a guide to the colonial student, where very inadequate to the formation of a lawyer, without other assistance; that assistance from the partial editions of colonial laws (at least in Virginia) was extremely difficult to be obtained.").

some systematic American jurisprudence—a legal language—that lawyers and citizens could look to when synthesizing, distinguishing, or reconciling the different laws of the United States.[18] Long before the Revolution, many colonial law offices were devoid of legal texts and depended for their courtroom success on appeals to custom and common sense.[19] But Blackstone's *Commentaries* represented a shared inheritance that lawyers in all thirteen states would hold in common when conceiving of a national American jurisprudence that transcended state boundaries.[20] Third, the *Commentaries* targeted a lay audience in addition to lawyers, making it highly accessible.[21]

Some historians go too far in suggesting that Blackstone's *Commentaries* and the English form of common law naturally found a home in America. As previously noted, Horwitz invoked what he saw as an "*inevitable and rapid* reception of the body of English common law in the colonies during the eighteenth century."[22] As for Blackstone, his popularity was unmistakable but the extent of his influence is harder to establish. Some historians leap from Blackstone's popularity to the conclusion that "[t]he Common Law as Blackstone set it forth became the fundamental law in America."[23] Wilfred Prest has implied that Blackstone's reception represented a somewhat natural continuity between the English common law system and the American one, noting that, on account of its relevance, "[t]he *Commentaries* thus became and remained the basis of US legal

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[18] *See id.*
[19] LEWIS WARDEN, THE LIFE OF BLACKSTONE 319 (1938).
[20] *Id.*
[21] S. F. C. Milsom, Literary Director, Selden Soc'y, Selden Soc'y Lecture to Commemorate Blackstone's Bicentenary: The Nature of Blackstone's Achievement (May 31, 1980). *See contra* DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES xiii (3d ed., 1996).
[22] HORWITZ, *supra* note 3, at 5 (emphasis added) (internal citations omitted).
[23] Waterman, *supra* note 13, at 456 (internal citations omitted).

education, hence moulding American legal thought and practice throughout the nineteenth century and beyond."[24] But Blackstone's continued influence, like the influence of the English common law, was not assured from the start. Wood takes a more nuanced view, arguing that English common law sources had combined with local American customs and legal innovations, so that that the same legal system was fed by "two Fountains," one foreign and one domestic.[25] It that is correct, however, continued reliance on English common law and Blackstone's *Commentaries* was not inevitable.

As a theoretical matter, Blackstone's *Commentaries* were problematic for Americans. On the one hand, Blackstone was a definitive commentator on common law, so it is easy to think that America's continued use of common law would lead to a continued reliance on Blackstone, but that requires assuming that Blackstone's reliance on parliamentary supremacy was forgivable and not fundamental to his overall exposition of the common law. If Blackstone's *Commentaries* were not fundamentally at odds with America's constitutional arrangements, common law, or substantive legal fields (such as criminal law), it made sense to read Blackstone for his common-law expertise. If, on the other hand, Blackstone's theory of sovereignty had the potential to change the way Americans thought about their own law, then Blackstone's popularity in America could amount to backsliding on the very principles that justified the American Revolution.

Indeed, Blackstone's popularity in America revealed an underlying cognitive dissonance. As one scholar notes, "[t]hat the monarchical Blackstone so practically contributed to the establishment of Democracy in America… [is] a paradox without

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[24] WILFRID PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 292 (2008).
[25] *Creation*, *supra* note 3, at 296.

parallel in history."[26] What the colonists really needed was some sort of revolutionary theory of authority that justified resistance to Parliament but which would not undermine the authority of colonial institutions and the subsequent U.S. Constitution. The Revolution called for a new legal apparatus to justify it.

James Wilson believed he could supply such a legal theory. The "consent of the governed," what Wilson called the Revolution Principle, had its origins before the Revolution, it was used to justify the Revolution, and it was ultimately enshrined in the U.S. Constitution. Yet despite all this, Americans continued to voraciously read Blackstone's *Commentaries* which defined municipal law in terms of "superiority," a concept that the Revolutionaries had rejected in the form of parliamentary sovereignty. This fact disturbed James Wilson who believed that Blackstone's popularity undercut the Revolution Principle and constituted a regression from the ideas that justified the Revolution. More importantly, Wilson thought that the Revolution Principle extended well beyond the Constitution. The solution, Wilson believed, was to establish an alternative system of jurisprudence that placed the Revolutionary Principle at its center. He believed that the Principle deserved a central place in American legal thought, and to such an extent that it could transform American judicial procedures, the common law, and even substantive fields of law such as criminal law.

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[26] *Waterman*, *supra* note 13, at 456 (internal quotations omitted).

II. WILSON'S *LECTURES ON LAW* AS COMMENTARIES ON THE LAWS OF AMERICA

In the summer of 1790, James Wilson began exploring different venues where he could provide a thorough answer to Americans' nagging legal questions.[27] After choosing the College of Philadelphia, where he served as a trustee, Wilson hoped to deliver the first major series of law lectures that could explain American law under the new Constitution.[28] Moreover, James Wilson's credentials recommended him as a scholar on the original shape of American jurisprudence:[29] George Washington had chosen James Wilson to sit on the first U.S. Supreme Court[30] as he was regarded by his peers as possibly the most learned lawyer to sit as a delegate at the Constitutional Convention.[31]

Born and raised in Scotland, Wilson had attended the University of St. Andrews for four years and received a world-class education in such subjects as Latin, Greek, science, philosophy, mathematics, and history.[32] Most importantly, Wilson's education exposed him to Scottish thinkers like Henry Home (Lord Kames), Francis Hutcheson, and Thomas Reid, all of whom cultivated a unique brand of natural law philosophy that

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[27] *See*, *e.g.*, CHARLES P. SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798 308–09 (1956).
[28] *See*, *e.g.*, *id.* at 309; Christopher F. Lee, James Wilson: Politician and Theorist 2 (May, 1982) (unpublished M.A. thesis, University of Virginia) (on file with Alderman Library, University of Virginia).
[29] George Wythe was the first colonial professor of law before and during the American Revolution, having taught law at William and Mary to such prominent thinkers as Thomas Jefferson and John Marshall. Nevertheless, Wilson was the first post-revolutionary law professor. *See, e.g.*, ALFONS J. BEITZINGER, A HISTORY OF AMERICAN POLITICAL THOUGHT 152, 256 (1972).
[30] GEOFFREY SEED, JAMES WILSON: SCOTTISH INTELLECTUAL AND AMERICAN STATESMAN 141 (1978); SMITH, *supra* note 27, at 305; WILLIAM FREDERICK OBERING, *The Philosophy of James Wilson: Associate Justice of the United States Supreme Court, 1789–1798: A Study in Comparative Jurisprudence, in* 1 PHILOSOPHICAL STUDIES OF THE AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION 1, 8 (Charles A Hart ed., 1938).
[31] *See* 1 James Madison, *Remarks of James Wilson in the Federal Convention, 1787*, *in* COLLECTED WORKS OF JAMES WILSON 80 (Kermit L. Hall & Mark David Hall eds., 2007); *see also* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 78 (2010).
[32] MAIER, *supra* note 31, at 77.

placed the refinement of common sense at the center of an inductive moral philosophy.[33] Wilson emigrated from Scotland to New York in 1765, after which he moved to Philadelphia and worked as a Latin instructor at the College of Philadelphia.[34] He then studied law under John Dickinson and he was admitted to the bar in 1767.[35] As a successful Philadelphia lawyer, Wilson defended aristocratic clients, but he also penned a critique of parliamentary sovereignty in defense of the Revolution in 1774, represented Pennsylvania before the Continental Congress, signed the Declaration of Independence,[36] and became one of the most outspoken members of the Constitutional Convention and a key architect of Pennsylvania's new Constitution.[37] If anyone could rival Blackstone as America's founding legal mind, Wilson seemed best positioned to do so.

Although Wilson had respected Sir William Blackstone's *Commentaries on the Laws of England*,[38] he believed that the American Revolution invited a reexamination of English jurisprudence, an invitation that Wilson accepted. To replace the *Commentaries* with a legal system of his own, Wilson's first lecture had to offer a vision for his project

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[33] *See generally*, *e.g.*, Charles L. Barzun, *Common Sense and Legal Science* 145 VA. L. REV. 151 (2005). For more on the influences of the Scottish philosophical school of common sense realism in general and on James Wilson in particular, *see* GEORGE DAVIE, THE DEMOCRATIC INTELLECT: SCOTLAND AND HER UNIVERSITIES IN THE NINETEENTH CENTURY (3rd ed. 2013); JAMES BUCHAN, CROWDED WITH GENIUS: THE SCOTTISH ENLIGHTENMENT: EDINBURGH'S MOMENT OF THE MIND (2003); MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON (1742–1798) (1997); DAVID ALLAN, VIRTUE, LEARNING AND THE SCOTTISH ENLIGHTENMENT (1993); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988).

[34] MAIER, *supra* note 31, at 77.

[35] *Id.*

[36] Jefferson's Commonplace Book also contains a rhetorical formula he copied from Wilson's pamphlet which reappears in paragraph 2 of the Declaration of Independence. *See, e.g.*, William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 905 (2008).

[37] *See* MAIER, *supra* note 31, at 77. *See also Creation*, *supra* note 3, at 438–39.

[38] 1 JAMES WILSON, *Lectures on Law*, *in* COLLECTED WORKS OF JAMES WILSON 444 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter *Lectures on Law*] ("As author of the Commentaries, he possessed uncommon merit. His manner is clear and methodical; his sentiments—I speak of them generally—are judicious and solid; his language is elegant and pure . . . . On every account, therefore, he should be read and studied. He deserves to be much admired; but he ought not to be implicitly followed.").

that appealed to his audience, and in a way that could persuaded Blackstone's admirers. Indeed, by imitating the *Commentaries*, Wilson attempted to make his criticisms of Blackstone more palatable and establish his own system as a desirable substitute.

A. On the Perceived Need for Lectures on Law

On September 17, 1787 the ink of thirty-nine signatures dried on the new U.S. Constitution.[39] Nineteen days later, James Wilson became the first delegate to defend the Constitution publicly.[40] In a speech that received thirty-eight subsequent printings,[41] Wilson supplied the press with pivotal arguments for Federalists and Antifederalists to cite when voicing their opinions of the Constitution.[42] Wilson began by remarking that he had been invited to provide information which could "serve to explain and elucidate the principles and arrangements of the constitution," but, Wilson said, "confess[ing] that I am unprepared for so extensive and so important a disquisition," he instead defended the Constitution against specific accusations by its opponents.[43]

It is perhaps remarkable that Wilson did not refuse the invitation on grounds of inappropriateness, that one convention delegate could explain and interpret the constitution. On the contrary, he deemed such a "disquisition" important. Rather, Wilson declined the invitation because he was not sufficiently prepared for such a massive undertaking. Nineteen days had passed since Wilson signed the Constitution and there was not enough time—and certainly no point—in preparing a full commentary on the

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[39] MAIER, *supra* note 31, at 35.
[40] *See id.* at 78.
[41] *Id.* at 83.
[42] *See* BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 328 (enlarged ed., Belknap Press 1992).
[43] 1 JAMES WILSON, *State House Yard Speech, October 6, 1787*, *in* COLLECTED WORKS OF JAMES WILSON 171 (Kermit L. Hall & Mark David Hall eds., 2007).

Constitution at the start of its maiden voyage.

There were also political reasons for thinking that a full exposition of the Constitution was untimely. It was more important to defend the Constitution against its opponents, and, in service of that end, Wilson's speech attracted even more attention than the Federalist papers.[44] Historian Pauline Maier notes that Wilson debated with his opponents by keeping a long list of their arguments and sequentially countered each of them, thereby supplying federalists with ready responses for "stock objections to the Constitution."[45] As a political matter, the Constitution needed apologists, not expositors. In fact, an exposition would have exposed more of the Constitution to possible criticism and undermined Wilson's efforts to defend the Constitution in response to piecemeal criticisms. Yet it is likely from what followed in the coming years that Wilson remembered the invitation to interpret and explain the Constitution.

Once the dust had settled over the ratification controversy, the Constitution could receive a full exposition without its survival hanging in the balance. The Constitution's ratification was accompanied by a cessation of debate and widespread acceptance as early as November 1788 when the House of Representatives starting filling its seats with Federalists and Antifederalists alike.[46] The promise of participation pacified some of the Constitution's former opponents. At that point, however, the Constitution was more secure than the dissonant body of American jurisprudence that could apply to its

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[44] BAILYN, *supra* note 42, at 328.
[45] MAIER, *supra* note 31, at 78.
[46] *Id.* at 432–33.

provisions. Meanwhile, James Wilson spent most of 1789 drafting a new constitution for Pennsylvania which was adopted in 1790.[47]

But on December 1 and 15, 1790, Pennsylvania newspapers heralded the upcoming installment of Wilson's lectures on law.[48] As one biographer notes, the significance of the lectures was not lost on the public, for it "attracted special attention as the potential incubator of a new *American system* of jurisprudence."[49] Moreover, Wilson would deliver his lectures in the College of Philadelphia, a fact significant in itself as Philadelphia was then the temporary seat of the Federal Government.[50]

James Wilson recognized that Blackstone was already influencing the education of young American lawyers. According to Wilson, "[a]t this very period of life, the Commentaries, as a book of authority, are put into the hands of young gentlemen, to form the basis of their law education."[51] Wilson lamented that "doctrines received implicitly, at this period of life, are not so easily dismissed in its subsequent stages."[52] In a constitutional democracy, every citizen must concern himself with the well-being of society, and nowhere was the well-being of society most vulnerable than in the formative education of its citizens.[53] Thus, believing that the laws of a democratic republic affected

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[47] *See, e.g.*, SEED, *supra* note 30, at 127–28.
[48] William Rogers, *Law Lectures*, PA. J. & WKLY. ADVERT., Dec. 1, 1790, at 3 *microformed on* N-US PA-5, Reel 23 (Hist. Soc'y Pa.); William Rogers, *Law Lecture*, PA. GAZETTE, Dec. 15, 1790, at 3 *microformed on* Pa. Gazette, Reel #1A, (Hall & Sellers).
[49] SMITH, *supra* note 27, at 309.
[50] *Id.*
[51] 1 *Lectures on Law*, *supra* note 38, at 581.
[52] *Id.*
[53] *Id.* at 453–54.

everyone, Wilson sought to persuade his listeners, regardless of age, sex, or occupation, to recognize that they had a vested interest "in a proper plan of law education."[54]

James Wilson aspired to nothing less than to make law an American project.[55] This was no small undertaking. Such a system would not merely describe how American law differed from that of England, it would provide a uniquely American definition of municipal law, that is, the written and unwritten law that emerges out of specific nations and localities. Members of Wilson's audience may have expected him to critique the English-specific form of Blackstone's *Commentaries* without disturbing its substantive expository contributions to the nature of law. Wilson embarked on an opposite strategy: he arranged his own lectures in a way that mimicked the formal structure of Blackstone's *Commentaries* but he took it upon himself to challenge Blackstone's definition of law.

B. Wilson's Approach to Blackstone

To convince his audience that he was Blackstone's equal, Wilson was eager to refute him by respectfully imitating him. As Virgil's *Aeneid* attempted to surpass Homer's *Odyssey* and *Illiad* through imitation, Wilson hoped to transcend Blackstone *through* Blackstone's own work. By presenting a plan of American jurisprudence that resembled Blackstone's *Commentaries* in significant ways, Wilson could persuade his audience that his own jurisprudence had superior answers for America's most pressing legal question: what was the shape of law and jurisprudence under America's system of

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[54] *Id.* at 455.
[55] William Rogers, *Law Lecture*, PA. GAZETTE, Dec. 15, 1790, at 3 *microformed on* Pa. Gazette, Reel #1A, (Hall & Sellers).

constitutional democracy?[56] Yet by imitating Blackstone, Wilson hoped capture the American legal imagination in its infancy.

Wilson's *Lectures on Law* reflect an ambition, a project of such magnitude that rivalled Blackstone's *Commentaries*. Mark David Hall argues that "one of Wilson's greatest ambitions was to be remembered as America's Blackstone."[57] Indeed, Blackstone provided Wilson the best material on which to model and structure his own *Lectures on Law* if he hoped to produce his own "Commentaries on the Laws of America." Before examining the differences between Wilson and Blackstone, it helps to observe some of the painstaking similarities that Wilson worked into his *Lectures*.

The similarities between Blackstone's plan for the *Commentaries* and Wilson's plan for his *Lectures on Law* are striking. As with Wilson in 1790, Blackstone gave a series of lectures on 1758 which were organized and publishable as commentaries.[58] Sir William Blackstone referred to his own plan in the *Commentaries* as a search through history for primary rules, fundamental principles, and precepts of the law of nature that gave rise to English law.[59] Though Wilson questioned the authenticity of Blackstone's historical arguments, Wilson attempted the same approach and recommended that "[l]aw

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[56] For a related account that exclusively describes Wilson's critique of Blackstone in the effort to defend popular sovereignty, see Candice Dawn Bredbenner, The Legal Philosophy of James Wilson: An American Challenge to Blackstone's Science of Law, 2 (Aug., 1983) (unpublished M.A. thesis, University of Virginia) (on file with Alderman Library, University of Virginia) ("The American legal philosopher hoped to combat the English persuasion by demonstrating the inadequacy of Blackstonian rules for a democratic philosophy of law. This paper approaches Wilson's law lectures from that perspective.").
[57] Mark D. Hall, *Bibliographical Essay: History of James Wilson's Law Lectures, in* COLLECTED WORKS OF JAMES WILSON 401 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter *Bibliography*].
[58] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 531 (Liberty Fund 2016) (1753) [hereinafter *Commentaries*] http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-2-vols.
[59] *Id.* at 35–36.

should be studied and taught as a historical science."[60] Blackstone thought his way of lecturing on the law would provide "a most useful and rational entertainment to students of all ranks and professions,"[61] and he invited a public audience to attend his lectures in addition to a small core class of twenty students.[62] Likewise, a proposal letter that Wilson very likely drafted[63] argued that the plan of delivering law lectures would be designed "to furnish a rational and a useful entertainment to gentlemen of all professions, but particularly to assist in forming the legislator, the magistrate, & the lawyer."[64] Wilson's first lecture was also open to the public as well as a class of fifteen students.[65]

Blackstone viewed his lectures as an effort in jurisprudential architecture, a method of outlining and organizing the whole of the common law and a running metaphor that reflected Blackstone's past education in architecture.[66] For example, Blackstone referred to the common law as a "super-structure" of the highest antiquity in the English legal system, built with "deep wisdom and foresight."[67] Moreover, in discussing the structure of jurisdiction for trusts and securities, Blackstone said that they were as pillars resting on the same foundation of common law, even if they took on "the different taste of their architects."[68] In the spirit of imitation, Wilson described his own

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[60] 1 *Lectures on Law*, *supra* note 38, at 432.
[61] 1 *Commentaries*, *supra* note 58, at 36.
[62] *See* PREST, *supra* note 24, at 112.
[63] *See, e.g.*, *Bibliography*, *supra* note 57, at 402; SMITH, *supra* note 27, at 307.
[64] *Bibliography*, *supra* note 57, at 402.
[65] *Id.* at 401.
[66] 1 *Commentaries*, *supra* note 58, at x.
[67] *Id.* at 328.
[68] *Id.* at 437.

project as an effort to mend the architecture of the great house of legal knowledge and judicial structure.[69] Approaching Blackstone as a legal architect,[70] Wilson declared:[71]

> We now see, how necessary it is to lay the foundations of knowledge deep and solid. If we wish to build upon the foundations laid by another, we see how necessary it is to cautiously and minutely to examine them. If they are unsound, we see how necessary it is to remove them, however venerable they may have become by reputation; whatever regard may have been diffused over them by those who laid them, by those who built on them, and by those who have supported them.

Wilson recommended a new set of foundations for the law: "[t]he authority, the interests, and the affections of the people at large are the only basis, in which a superstructure, proposed to be at once durable and magnificent, can be rationally erected."[72] This architectural theme ran counter to the notion of parliamentary sovereignty. Indeed, Wilson's reference to democratic political structures complemented his metaphor of legal architecture: he appealed to "the rules of judicial architecture" in recommending that "a system of courts should resemble a pyramid. Its base should be broad and spacious: it should lessen as it rises: its summit should be a single point."[73] By this, Wilson was referring to the federal legislature as well as the judiciary with Congress and the Supreme Court at the top of an ascending pyramid, built on a democratic foundation: the consent of the governed.[74]

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[69] *See* 1 *Lectures on Law*, *supra* note 38, at 448, 608.
[70] *Id.* at 720.
[71] *Id.* at 472.
[72] 1 JAMES WILSON, *Speech on Choosing the Members of the Senate by Electors; Delivered, on the 31st December, 1789, in the Convention of Pennsylvania, Assembled for the Purpose of Reviewing, Altering and Amending the Constitution of the State*, *in* COLLECTED WORKS OF JAMES WILSON 299 (Kermit L. Hall & Mark David Hall eds., 2007).
[73] 2 *Lectures on Law*, *supra* note 38, at 945.
[74] Madison, *in* COLLECTED WORKS OF JAMES WILSON, *supra* note 31, at 279.

The structural arrangement (or architecture) of Wilson's *Lectures* mimicked Blackstone's *Commentaries* as well.[75] Blackstone's *Commentaries* began with a general synopsis "On the Study of Law" followed by an account "Of the Nature of the Laws in General."[76] Wilson, too, began his *Lectures* with an account "Of the Study of the Law" and the significance of a legal education in democracy, followed by a lecture "Of the General Principles of Law and Obligation," noting his differences with Blackstone on the question of consent and obligation.[77] Wilson's imitations of Blackstone made his differences more acute: instead of delivering a lecture "Of the Absolute Rights of Individuals" to identify a legal source for rights, Wilson gave a lecture "Of the Natural Rights of Individuals" which focused more on a natural law philosophy of rights.[78] Blackstone had arranged his *Commentaries* according the rights of persons and things, reflecting the belief that rights *granted* should be *enumerated*.[79] By contrast, Wilson believed rights inhere and remain in the people and organized his lectures accordingly.[80]

Instead of structuring his *Lectures* around rights of the executive as Blackstone had done, Wilson offered a course in three parts that more closely resembled the continental institutional model of legal treatises.[81] He devoted the first thirteen chapters to the study, nature, and extent of law more generally.[82] In describing the nature of law, Wilson critiqued Blackstone before launching into his own constructive project. The

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[75] For a full comparison of the similarities underlined in a parallel table, see Appendix B.
[76] *See id.*
[77] *Id.*
[78] *Id.*
[79] *Cf. id.*; *see also* 1 *Commentaries*, *supra* note 58, at 121–22.
[80] 2 *Lectures on Law*, *supra* note 38, at 1061–62.
[81] *See generally* Michael Lobban, *Blackstone and the Science of Law* 30 THE HISTORICAL JOURNAL 311, 311–35 (1987).
[82] Appendix B.

second major section included twelve lectures on the constitutional structure and law of federal and state governments.[83] This structure contrasted the British unitary system.

Throughout his second section, Wilson distinguished American constitutional government from English law, pointing toward the need for a uniquely American jurisprudence. Wilson offered the following claim:[84]

> [M]any parts of the laws of England can, in their own nature, have neither force nor application here. Such are all those parts, which are connected with ecclesiastical jurisdiction and an ecclesiastical establishment. Such are all those parts, too, which relate to the monarchical and aristocratick branches of the English constitution. Every one, who has perused the ponderous volumes of the law, knows how great a proportion of them is filled with the numerous and extensive titles relating to those different subjects. Surely they need not enter into the elements of a law education in the United States.

Such English legal structures included provisions on tithing, excommunication, the relationships between superiors and inferiors (which did not exist in a democracy). In effect, the "consent of the governed" served as a filter for excluding such doctrines.

The third and final section of Wilson's *Lectures* comprised ten chapters on the law of crimes.[85] The third section represented a third phase of Wilson's jurisprudential project: to prove that he was capable of condensing and explaining the confusing nature of the law of crime, just as Blackstone had done with the law of property. Wilson viewed the criminal law as an ideal subject of reformation in the United States,[86] and he even

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[83] *Id.*
[84] 1 *Lectures on Law*, *supra* note 38, at 446–47.
[85] Appendix B.
[86] 1–2 *Lectures on Law*, *supra* note 38, at 461, 1095.

claimed that the jurisprudence of criminal law was still in its youth.[87] A series of lectures on criminal law also afforded Wilson the opportunity to marshal his arguments concerning natural law and appeal to the moral intuitions of his audience.[88] Most importantly, Wilson's attempt to reform and clarify the nature of criminal law was measured to show he could write an exhaustive treatment on American law.[89]

Though Wilson's ambitions were not entirely obvious from the outset of his first lecture, it is clearer for historians looking back on the outline of his lectures that he hoped to sway a generation of legal thought just as Blackstone had done, and largely by following a structure of lectures resembling Blackstone's lectures-turned-commentaries. Wilson's efforts at mimicry also suggest that he was keen on the marketability of a system resembling Blackstone's *Commentaries*. But for all his mimicry of Blackstone, Wilson's larger goal was to present a set of legal ideas at odds with the *Commentaries*.

Wilson's ambitious project included but also exceeded his *Lectures on Law*. Wilson wanted to replace Blackstone's legal science with a characteristically American method that derived both legal theory and substance from American customs. To arrive at such certainty would take more time and a painstaking empirical analysis of American legal systems, but Wilson preferred this approach to importing Blackstone's *Commentaries* because he wanted American common law to retain its American features, features that justified redefining law in terms of popular consent.

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[87] 2 *id.* at 1094.
[88] 1 *id.* at 628.
[89] *Id.* at 422.

The opportunity to furnish evidence for his theory came from his home state. Hall notes that in 1791 the Pennsylvania House of Representatives "resolved to appoint a person to revise and digest the laws of the commonwealth; to ascertain and determine how far any British statutes extended to it; and to prepare" recommendations in the form of bills that might improve on Pennsylvania's laws and constitution.[90] Wilson responded in a letter, indicating that by providing his first report on criminal law, "I shall have a fair opportunity of exhibiting a specimen of the manner and the merits both of my plan and of its execution."[91] If Wilson overcommitted himself, it was because he thought he could both shape and explain American law.

As previously stated, Wilson likely hoped to provide a "Commentary on the Laws of America." For evidence, consider the comprehensive outline of Wilson's *Lectures*, the extent to which they mimicked Blackstone's *Commentaries*, and Wilson's efforts to anchor American legal education to American law, constitutions, and institutions, as shown in the drafts of his lectures. Toward that end, the invitation to provide a "mass of our [Pennsylvanian] laws into a body compacted and well proportioned," was an ideal first step, a model for future digests of the laws in the other states.[92] Unfortunately, Wilson's progress stalled since Pennsylvania's House of Representatives had commissioned the project without support or funding of the Senate.[93] Undeterred, Wilson embarked on a related scheme in his scarce spare time.[94] Wilson's projects aimed to

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[90] Bird Wilson, *Preface* to James Wilson, *Lectures on Law*, *in* COLLECTED WORKS OF JAMES WILSON 417 (Kermit L. Hall & Mark David Hall eds., 2007).
[91] *Id.* at 422.
[92] *Id.* at 419.
[93] *Id.* at 423.
[94] *Id.*

prove that American law was unique, both as a matter of fact and theory, and that accepting Blackstone's *Commentaries* undermined a legal reformation in America.

III. THE REVOLUTION PRINCIPLE: THE CENTERPIECE OF WILSON'S *LECTURES*

Wilson's *Lectures* were predicated on a central disagreement with Blackstone over the definition of law more generally and municipal law in particular. The critical part of Wilson's analysis involved his remarks on Blackstone's use of "superiority" as the necessary qualification of sovereignty and the ultimate source of law. He argued that legal obligation came from no other source than the consent of the governed.

A. Wilson on Blackstone's Definition of Law

Early in his first lecture, Wilson hesitated to offer "a regular definition of law."[95] Part of the reason for his hesitation was that natural objects of science (such as the color blue) were hard to define except in terms of principles, whereas artificial constructs (such as a fee tail) were easier to define with precision.[96] Though legal distinctions within a municipality hung on constructed distinctions of the latter sort, law was a science that needed to be studied in terms of principles.[97] Thus, Wilson refused to add to a "lengthy languid list" of failed definitions, assuring his audience, "I have taken the trouble to read them in great numbers."[98] Wilson singled out one definition for review, however, "that given by the Commentator on the laws of England,"[99] which included the claim that law

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[95] 1 *Lectures on Law*, *supra* note 38, at 465 ("It may, perhaps, be expected, that I should begin with a regular definition of law. I am not insensible of the use, but, at the same time, I am not insensible of the abuse of definitions. In their very nature, they are not calculated to extend the acquisition of knowledge, though they may be well fitted to ascertain and guard the limits of knowledge, which is already acquired.").
[96] *Id.*
[97] *Id.* at 466–67.
[98] *Id.* at 467.
[99] *Id.*

is derived from some sovereignty which is justified by its superiority.[100] In its entirety, Blackstone's general definition of law was that it amounted to a rule "prescribed by the *supreme power* of a state."[101] Wilson remarked that, "with regard to the very first principles of government, we set out from different points of departure."[102] That point of departure was to be the source of law: Wilson did not dispute that it came from sovereignty, but he disputed that sovereignty emerged from any sort of superiority.

Wilson readily acknowledged that sovereignty-as-superiority had a long history of acceptance in legal scholarship. In Blackstone's defense, Wilson listed similar remarks on law by Baron Pufendorf, Thomas Hobbes, Brennus the Gaul, Plutarch, Dionysius of Halicarnassus, Cicero, Aristotle, Louis IV, Barbeyrac, Grotius, Tacitus, Marcus Antonius, King Vitigis, Ireneus, Clement, a tragedy of Aeschylus, the bishop of Tours, Heineccius, Baron de Wolfius, and Domat.[103] Wilson noted that Blackstone had thus inherited his notion of "superiority, as a necessary part of the definition of law," and that it was more recently attributable to Pufendorf and Hobbes.[104] But Wilson believed that this pedigree split into two groups: there were those who believed that superiority-as-power carried within it the right to exercise authority over others,[105] such as Hobbes, Brennus the Gaul, Plutarch, and Dionysius.[106] But there were also those who believed that superiority-as-excellence carried within it the right to rule,[107] such as Cicero and

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[100] *See, e.g.*, *id.* at 474, 483.
[101] *Id.* at 549; 1 *Commentaries*, *supra* note 58, at 14 (emphasis in original).
[102] 1 *Lectures on Law*, *supra* note 38, at 443.
[103] *Id.* at 473–82.
[104] *Id.* at 474.
[105] *Id.*
[106] *Id.* at 474–75.
[107] *Id.* at 475–76.

possibly Aristotle.[108] Whichever side of the fence Blackstone fell upon, he enjoyed the opinions of great minds throughout history.

But the greatest opinions of history, according to Wilson, were not supported by the facts of history.[109] After all, no "essential difference of qualities" existed among humans that could designate some as superiors fit to rule and inferiors fit to obey.[110] Wilson's critique involved challenging (1) the idea that superiority was a quality that formed the basis of sovereignty, (2) the idea that superiority was conferred (either by God or superior men) to produce sovereignty, and (3) Blackstone's historical arguments. After refuting these points, Wilson offered a legal vision based on the assumption that human society was inherently democratic because all men were created equal.

First, Wilson argued that superiority might manifest itself in three kinds of human traits. These were strength, excellence, and divinity. To the notion that superior strength justified claims to sovereignty, Wilson responded that it was "absolutely false" and that "[e]very obligation supposes motives that influence the conscience and determine the will, so that we should think it wrong not to obey, even if resistance was in our power."[111] Though some thinkers had alleged that force was the basis for sovereignty, Wilson retorted that "[r]esistance to such force is a right; and, if resistance can prove effectual, it is a duty also."[112] To the idea that sovereignty belonged to persons of superior excellence, Wilson answered that excellence only merited acknowledgment and esteem, but it did not

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[108] *Id.*
[109] *Id.* at 476 ("Decent respect for authority is favourable [sic] to science. Implicit confidence is its bane.").
[110] *Id.* at 501.
[111] *Id.* at 501–02.
[112] *Id.* at 502.

follow that obedience was "the necessary consequence" of such recognition.[113] Only when power, goodness, and wisdom were combined in an infinite God was the archetype for authority fulfilled.[114] The superiority of God alone commanded obedience.

Second, it followed that if superiority did not exist by one's essential qualities, it could be derivative. Uncertain whether Blackstone's "sovereign" was superior by essence or delegation, Wilson resorted to mocking Blackstone by quoting him:[115]

> By the Author of the Commentaries, this superior is announced in a very questionable shape. We can neither tell who he is, nor whence he comes. "When society is once formed, government results of course"—I use the words of the Commentary—"as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But as all the members of the society are naturally equal, it may be asked"—what question may be asked? The most natural question, that occurs to me, is—how is this superior . . . to be constituted? . . . But how suddenly is the scene shifted! . . . The person announced was a dread superior: but the person introduced is a humble trustee. For, to proceed, "it may be asked, in whose hands are the reins of the government to be *intrusted?*"

Wilson could not contain his bafflement. Blackstone had apparently sidestepped an obvious question and returned with a recharacterization of the dread sovereign as mild and as a trustee. The implication was that the superior became superior by virtue of common assent. But Wilson reassured his audience that "[i]f the information, how a superior is appointed, be given in any other part of the valuable Commentaries; it has escaped my notice, or my memory. Indeed it has been remarked by his successor in the chair of law, that Sir William Blackstone 'declines speaking of the origin of

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[113] *Id.*
[114] *Id.* at 502–03.
[115] *Id.* at 484.

government.'"[116] Nevertheless, Wilson insisted that derivative superiority made no sense since a lesser rank of men could not establish a higher rank than themselves, and, if they could, "the attempt to make one person more than man" would ensure that "millions must be made less."[117] Even if God intervened to make some men superior, the effect would have been to make the rest of humanity less.[118]

Third, Wilson critiqued Blackstone's pseudo-historical account of the formation of society. Blackstone described sovereignty as authority beyond appeal, the "final say," and the "last word" in a legal contest.[119] Under the Blackstone model of sovereignty, all systems of government were marked by the fact that subjects had surrendered their natural rights to enjoy government protection. He conceded that the location of sovereignty could vary from government to government, but that once a sovereign was established, he denied the possibility that any could to derogate from it.[120] Blackstone conceded that democratic governments were unique in that sovereignty was derived from suffrage, yet he insisted that suffrage was a thing granted by government rather than the natural right of the people.[121] In governments that boasted a parliamentary body, electors might influence the constitution of the sovereign, but this occurred at the sovereign's consent.[122] The consent of the governed was not a necessary ingredient for government's continuance, only the spark that first set government in motion.[123] Once established,

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[116] *Id.*
[117] *Id.* at 487.
[118] *Id.* at 490.
[119] *See, e.g.*, 1 *Commentaries*, *supra* note 58, at 243–44.
[120] *Id.* at 108 (referring to the colonies belonging to England at the time).
[121] *Id.* at 170–71.
[122] *See id.*
[123] *Id.* at 250–51.

Blackstone argued, authority flowed downward to the people.[124] Such a pattern, Blackstone argued, could be observed in even the most unconnected nations of Mexico, Peru, and the "Jewish republic."[125] The presence of law everywhere in the world throughout time and without exception made the necessity of obedience obvious.

Wilson noted that many rulers lacking strength or excellence (qualities associated with superiority) had held authority in the past, such as the unvirtuous Louis XIV, yet he held his power anyway because his subjects consented to be governed by him.[126] In no historical instance had authority existed without the consent of the governed. Consent could be reluctant and passive, but it was always required for authority to exist. Whereas Blackstone had argued that the presence of law throughout history proved the existence of superiority and the need for obedience, Wilson turned the argument on its head: evidence of obedience throughout history revealed that law and authority were contingent on the continuous consent to be governed. Wilson called this principle the "revolution principle," proved as it was through the American Revolution.[127]

B. The Revolutionary Principle of Law

Wilson believed that he had discovered the fundamental principle of legal science. He bragged that, "[t]he foundations of political truth have been laid but lately: the genuine science of government . . . is, indeed, but in its infancy[.]"[128] That was because "[t]he dread and redoubtable sovereign, when traced to his ultimate and genuine source,

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[124] *Id.* at 30–31.
[125] *Id.*; *see also* BOORSTIN, *supra* note 21, at 43.
[126] *Cf.* 1 *Lectures on Law*, *supra* note 38, at 433, 478, 482.
[127] *Id.* at 442.
[128] *Id.* at 444.

has been found, as he ought to have been found, in the free and independent man. This truth . . . may be appreciated as the first and fundamental principle in the science of government."[129] For Wilson, consent (and not superiority) was the ultimate source of legitimate law and government. He set out to prove the argument as both a matter of theory and as a matter of fact.

As a matter of theory, Wilson summarized Blackstone's definition of municipal law after conducting an extensive comparison of passages lifted from Blackstone's *Commentaries*, excerpted here as Appendix A. According to Wilson, two key features underlay Blackstone's definition of municipal law: "1. That in every state, there is and must be a supreme, irresistible, absolute, uncontrolled authority, in which the rights of sovereignty reside. 2. That this authority, and these rights of sovereignty must reside in the legislature[.]"[130] One might have expected Wilson to dispute both principles. But he made a surprising concession: "[i]n the first general proposition, I have the pleasure of agreeing entirely with Sir William Blackstone."[131] The problem was not the theoretical existence of sovereignty, but its locus. For Wilson, the "dread and redoubtable sovereign, when traced to his ultimate and genuine source," is "the free and independent man."[132] In other words, he agreed that sovereignty existed in every state, but on the condition that it was diffused among the people rather than concentrated in some sort of superior.

In defending his theory, Wilson relied on select statements by Richard Hooker, Lord Shaftesbury, Edward I, Lord Chancellor Fortescue, and Lord Chief Justice Vaughan

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[129] *Id.* at 445–46.
[130] *Id.* at 551.
[131] *Id.*
[132] *Id.* at 445.

that traced the ultimate source of municipal law to its source in consent.[133] But to get from "ultimate source" as some had agreed to "ultimate sovereign," Wilson felt he had to discuss the nature of obligation. Recalling that only a divine source could command total obedience, Wilson identified the individual as the depository of "that law, which is communicated to us by reason and conscience, the divine monitors within us, and by the sacred oracles, the divine monitors without us."[134] In other words, all people had access to natural law, "promulgated by reason and the moral sense."[135] That was why Wilson was comfortable saying that "[t]he law of nature, the law of nations, and the municipal law form the objects of the profession of law."[136] Natural law was nothing less than the God-given power to reason and form judgments based on the conscience.

As a former Scotsman, Wilson's view of natural law was deeply informed by the writings of Scottish philosophers including Adam Smith, David Hume, Francis Hutcheson, and Thomas Reid, all of whom discussed the possibility that humans possessed a "moral sense."[137] Wilson asserted that "[t]he power of moral perception is … a most important part of our constitution" and that a moral sense exists within the individual, together with a sense of beauty, in much the same way that the sense of smell exists with respect to external objects.[138] In defense of this notion, Wilson appealed to the fact that all languages "speak of a beautiful and a deformed, a right and a wrong, an agreeable and disagreeable, a good and ill, in actions, affections, and characters. All

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[133] *Id.* at 496, 565.
[134] *Id.* at 498
[135] *Id.*
[136] *Id.* at 499.
[137] *See generally, e.g.*, Chisholm v. Georgia, 2 U.S. 419, 453–66 (citing both David Hume and Thomas Reid for their theories of epistemology, all in a Supreme Court case). *See also* n. 33.
[138] 1 *Lectures on Law*, *supra* note 38, at 509–10.

languages, therefore, suppose a moral sense, by which those qualities are perceived and distinguished."[139] The universal effect of moral vocabularies throughout history and across the world suggested that there was a general cause of "that intuitive perception of things, which is distinguished by the name of common sense."[140] The moral sense, then, was an intuitive faculty, and the only one that "assumes authority, [such that] it must be obeyed."[141] Obligation entered existence the moment the moral sense (or conscience) became convinced. Thus, governments were wholly unnecessary to oblige people to follow self-evident moral truths, but municipal laws become useful for expounding derivative moral truths that require reasoning rightly from self-evident principles.[142]

The consent of the governed derived its force from the moral sense of obligation which came from no lesser authority than God.[143] In fact, Wilson even stated that "our conscience, in particular, is the voice of God within us: it teaches, it commands, it punishes, it rewards."[144] If people are only obligated out of a conviction of the conscience, then "[c]onsent is the sole principle, on which any claim, in consequence of human authority, can be made upon one man by another."[145] Also, if obedience carried with it a certain moral assent, claims to sovereignty from superiority made no sense.

The individual, reasoning morally, was therefore the vessel of sovereignty in a society. From that premise, it followed that "if a man cannot bind himself, no human

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[139] *Id.* at 511.
[140] *Id.*
[141] *Id.* at 512.
[142] *See id.* at 513.
[143] *Id.* at 508.
[144] *Id.* 518.
[145] *Id.* at 572.

authority can bind him."[146] The consequence was that either people bound themselves to their laws or else those laws were illegitimate.[147] But did any form of municipal law exist that respected the Revolution Principle? Wilson thought so. According to him, the common law was "a law of liberty," taking the form of "a common bond. In that bond, there are these words written—*I bind myself*. . . . The substantial parts of that bond are parts of the common law of England."[148] But what Wilson found remarkable about the common law was that it emerged from customs which existed apart from government institutions. Instead, the common law functioned under the authority of the people.[149] It was fundamentally a product of society, not government.

Before entering into a history of the common law, however, Wilson took direct issue with a widely accepted pseudo-history of the formation of authority. Allegedly, all superiors developed in the course of three steps: (1) Each individual voluntarily joined with others for the pursuit of common interests, security, and happiness.[150] This first step was the formation of society. (2) To regulate a society, a government had to be formed.[151] Finally, (3) the government needed a head, an ultimate authority.[152] For no apparent reason, this third party became the sovereign. Wilson's argument was that, though the first two steps always existed where governments were established, the third step was hardly necessary. Not only, then, was Blackstone wrong with respect to America in saying that "the authority, which is legislative must be *supreme*," but Blackstone was also

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[146] *Id.* at 574–75.
[147] *Id.*
[148] *Id.* at 575.
[149] *Id.* at 572.
[150] *Id.* at 553–54.
[151] *Id.* at 554.
[152] *Id.*

wrong with respect to Britain as the Parliament issued its acts with the tripartite concurrence of the king, the lords, and the commons, subject to electors: a system of checks and balances that undermined any theory based on uncontrollable authority.[153] Even the British constitution, then, proved that sovereignty was contractual in nature.[154]

In addition to his abstract theoretical arguments, Wilson argued that the common law was the best form of municipal law because it derived from customs, and customs carried within them "intrisick evidence of consent."[155] According to Wilson, consent may be manifested by either approval, ratification, or experience, but customs that emerged via common approbation were ratified through use and preserved through experience.[156]

As a historical matter, Wilson defended his theory of law as implicit within the most ancient forms of customary law. He invited his readers to "ascend to the first ages of societies. Customs, for a long time, were the only laws known among them. The Lycians had no written laws; they were governed entirely by customs. Among the ancient Britons also, no written laws were known: they were ruled by the traditionary… laws of the Druids."[157] After sketching out a more detailed history of customary law, Wilson added that "the common law of England is a customary law" and that, therefore, "history and law combine their evidence in support of consent."[158] Whereas Blackstone and Puffendorf had defined municipal law in such a way that it took the form of a "rule" as

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[153] *Id.* at 557–58; 565–66.
[154] *Id.* at 565–67.
[155] *Id.* at 567.
[156] *Id.* at 564.
[157] *Id.* at 494.
[158] *Id.* at 495–96.

distinguished from a "compact or agreement," the common law possessed all of these qualities.[159] Thus, the common law was the best-established form of law.

Having completed his critique of Blackstone's definition of law and by supplying a fundamental principle of his own, Wilson suggested ways in which self-government necessarily shaped every feature of the law. To that end, Wilson used the Revolution Principle as a litmus test for Blackstone's doctrines and the basis for constructing his own *Lectures on Law*.[160] Put in political terms, democracy would serve as the standard for evaluating which parts of Blackstone's *Commentaries* deserved to be imported. To guide America into a self-awareness of American law, a more extensive education than Blackstone's *Commentaries* was needed. Wilson wondered, "[s]hould the elements of a law education, particularly as it respects publick [sic] law, be drawn entirely from another country—or should they be drawn . . . from the constitutions and governments and laws of the United States, and of the several States composing the Union?"[161] After dismantling Blackstone's definition of law, Wilson asserted that "the elements of a law education ought to be drawn from our own constitutions and governments and laws."[162] But to do that required great care and considerable work beyond the *Lectures* themselves.

Wilson recognized the tensions between revolution and law, between repudiation and incorporation of English jurisprudence, and between the nature of law and legal science. Wilson believed that American law was characterized by a new definition of law based on the sovereignty of the governed. Wilson's definition was not a definition of

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[159] *Id.* at 562–64.
[160] *Id.* at 440.
[161] *Id.*
[162] *Id.* at 446.

"American law," but a definition of law that America offered the world. Wilson argued that the best way to reconcile the American Revolution with a stable legal system was not to play down the Revolution, but to place the Revolution at the center of American jurisprudence in the form of a principle captured by the Declaration of Independence: that "the sovereign power residing in the people; they may change their constitution and government whenever they please[.]"[163] Wilson's jurisprudence both justified and used the Revolution as a basis for revisiting Blackstone's definition of law.[164]

Having accomplished his critique, Wilson gave his audience a sense of the argument he hoped to construct in his lectures. Wilson wrote, "I hope I have evinced, from authority and from reason, from precedent and from principle, that *consent* is the sole obligatory principle of human government and human laws. To trace the formation and administration of every part of our beautiful system of government and law, will be a pleasing task in the course of these lectures."[165] Though Wilson's *Lectures* were not comprehensive, Wilson plainly believed that popular consent made sense of written constitutions, suggested ways in which courtroom procedures might be reformed, and provided a theoretical basis for transforming the substance of municipal law.

C. Consent of the Governed Made Sense of Written Constitutions

With characteristic audacity, James Wilson denied that Britain had a constitution. Wilson defined the term constitution as "that supreme law, made or ratified by those in whom the sovereign power of the state resides, which prescribes the manner, according to

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[163] *Id.* at 443.
[164] *Id.* at 471.
[165] *Id.* at 579.

which the state wills that the government should be instituted and administered."[166] This definition required an authority higher than the government by which the government might be governed. But Wilson noted that "[t]he order of things in Britain is exactly the reverse of the order of things in the United States. Here, the people are masters of the government; there, the government is master of the people."[167] Thus, "no such thing as a constitution, properly so called, is known in Great Britain."[168] Through America's colonial charters, state constitutions, and U.S. Constitution, the people had asserted their sovereign authority over their governments.[169]

The significance of the people's attachment to their constitutions was easy to miss, however, because Wilson meant something greater than the notion that the people may band together to amend their constitutions: they were already bound together like a corporation by virtue of their constitutions: "In free states, the people form an artificial person or body politick, the highest and noblest that can be known. . . . To this moral person, we assign, by way of eminence, the dignified appellation of a *state*."[170] If true, this corporate theory of federalism added to a "layered" sense of public participation rather than taking it away: the U.S. was a people comprised of peoples. It seems that Wilson was engaged in the act of national myth-making, since his narrative failed to account for the significance and precedence of colonial charters, but perhaps because doing so would have diminished the novelty that the written constitutions enjoyed.

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[166] *Id.* at 712.
[167] *Id.* at 719.
[168] *Id.*
[169] 2 *id.* at 853.
[170] *Id.* at 831.

Under the Wilsonian myth of statecraft, the consent of the governed formed the base of the pyramid-like superstructure of federal government with each of the three branches forming a face of the pyramid.[171] For example, the legislative power identified in Article I of the U.S. Constitution established a manner of elections that was both free and equal, such that "vot[ing] for members of a legislature, is to perform an original act of sovereignty."[172] The sovereignty of a legislator was to the sovereignty of the elector what the light of the moon was to that of the sun: derivative and inferior, yet natural and good.[173] Moreover, Article IV, Section 4 of the U.S. Constitution provided that "the United States shall guaranty to every state in this Union a republican form of government."[174] This would enable the people to regulate intermediate institutions[175] and restrict the federal government to a limited grant of enumerated powers.[176]

Turning to the federal executive power, Wilson called attention to the fact that the President was an elected representative, and, therefore, a public servant acting at the will of the people.[177] Here, Wilson resisted Blackstone's insinuation that the power of pardoning required placing the executive above the law, since the power of pardoning was explicitly granted to the President and governors through the U.S. and state constitutions.[178] Even prerogative powers, then, were contained by American democracy.

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[171] *Id.* at 833–34.
[172] *Id* at 833–38.
[173] *Id.* at 834.
[174] *Id.* at 839.
[175] *Id.*
[176] *Id.* at 870–72.
[177] *Id.* at 873–76.
[178] *Id.* at 883.

Finally, Wilson defended the new federal court system which had no obvious analogue in England. Wilson argued that the Constitutional arrangement of federal courts was (1) immediately supported by consent through ratification, and (2) accountable to public opinion instead of the arbitrary whims of a king. First, "the only reason, why a free and independent man was bound by human laws, was this—that he bound himself. Upon the same principle on which he becomes bound by the laws, he becomes amenable before the courts of justice, which are formed and authorized by those laws." In other words, a legal system based on consent carried with it (by implication) an agreement to be held accountable to those laws in a way that was established by those laws.

Though courts were not obviously democratic institutions, Wilson insisted that American judges were easier to hold accountable as they held office, at least in Pennsylvania, during good behavior, whereas the English counterparts were subject to the pleasure of the king.[179] Even if some American judges were hard to remove, their openness to public scrutiny subjected judges to that "opinion, which is the best, or perhaps, the only cement of society, [which] may curb the authority of the powerful, and the passions of the judge[.]"[180] This was manifestly one of Wilson's weaker arguments, but he depended for its force on the assumption that the origin of consent, namely, the moral sense of the people, could serve to keep judges within their proper boundaries. The weakness of this claim is more evident today because American judges are prone to listen selectively to public opinion, if at all. Yet Wilson's vision of the judiciary would have made judges more vulnerable to the people. The courtroom was not beyond Wilson's

[179] *Id.* at 913.
[180] *Id.* at 944.

plan for democratic reformation. Indeed, the "revolutionary principle" of the consent of the governed could produce changes within the courtroom.

D. Consent of the Governed Justified Reforming Courtroom Procedure

For American courts to function properly, Wilson believed that they needed to defer to the common law and even to juries who were sometimes justified in stating the law. Wilson took the common law to be the best legal expression of consent through custom.[181] In America, something resembling the English common law could incorporate the Revolution Principle which already justified public participation in the federal system of government through voting, running for office, and serving on juries.[182] By grounding the common law on the consent and customs of the governed instead of those customs built by judges in the name of *stare decisis*, Wilson placed an inherited legal system on the foundation of what he took to be a fundamental legal principle: the historical study of customary law best reflected the law that enjoyed the present consent of the governed.[183] In other words, the custom of gavelkind—that custom which developed through case law—was only authoritative as evidence of the customs of the people, but Wilson believed that courts must accommodate their precedent to the "circumstances, the exigencies, and the conveniences of the people, by whom [the common law] is appointed."[184] The common law began and subsisted by popular consent.

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[181] 1 *id.* at 569.
[182] *Id.* at 442; *see* Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 196–97 (2013).
[183] 2 *Lectures on Law*, *supra* note 38, at 952.
[184] *Id.* at 773–75.

Under Wilson's plan, juries served three crucial functions: first, they functioned as an "abstract of the citizens"[185] such that the accused had the benefit of being tried by the best approximations of themselves.[186] In Wilson's words, "the person who would undergo a trial might, with an almost literal propriety, be said to try himself."[187] Second, the only discretionary and arbitrary sovereign allowed under Wilson's definition of law was the people, and, so, the people reserved to themselves the right of condemning their own members through the criminal jury system.[188] In his view, juries exercised "a species of legislative power," and this power "therefore should, be exercised in person."[189] This legislative power of the jury thus justified a more active involvement in court.

Third, juries served as proxies and purveyors of the common moral sense which formed the most essential ingredient in customary, and, by extension, common law.[190] Wilson defended this institutional arrangement by comparing the alternatives: when judges decided questions of fact, they exercised the sort of arbitrary authority that the people reserved to themselves. By contrast, if juries decided occasional questions of law, these instances provided examples and experiments in the science of the common law, a body of law that was ultimately derived from the people.[191] Since juries served as "an abstract … of the citizens at large," Wilson was comfortable with the idea that "jurors

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[185] *Id.* at 962.
[186] *Id.* at 971, 985–86.
[187] *Id.* at 961.
[188] *Id.* at 957–63.
[189] *Id.* at 1008.
[190] *Id.* at 996–1002.
[191] *Id.*

possess the power of determining legal questions."[192] Thus, the people could transform the courtroom and shape its law, albeit in limited degrees.

E. Consent of the Governed Justified Transforming Substantive Law

Upon examining the American constitutional system of government, Wilson wanted to selectively incorporate parts of the English common law as they had been received from other, more ancient traditions. In particular, Wilson advocated for what he believed to be a milder and more ancient form of criminal law,[193] rather than focusing first on property law which he criticized as disordered, arcane, and austere.[194] As shown in Appendix B, Blackstone's *Commentaries* dwelt largely on property law, but Wilson planned to carve out his reputation in the realm of reforming criminal law. English property law was characterized in terms of an individual's relationship to the crown and compatible with the logic that laws came from superiors and that rights were enjoyed at the permission of government.[195] The view of rights that Wilson ascribed to Blackstone was that rights to private property, liberty, health, reputation, and life "flow from a human establishment, and can be traced to no higher source."[196] As such, rights were not the immediate product of God-given nature. Instead, [t]he connection between man and his natural rights is intercepted by the institution of civil society."[197] Wilson took that to be one of the greatest faults of Blackstone's theory of rights.

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[192] *Id.* at 1002.
[193] *Id.* at 769.
[194] *Id.* at 770.
[195] *Id.* at 770–72.
[196] *Id.* at 1057.
[197] *Id.*

By contrast, Wilson rooted his common-law conception of criminal law in natural rights. Wilson objected to the general opinion of his day that people surrendered their natural rights when they wanted to "obtain the blessings of a good government."[198] According to Wilson, "[n]ature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and will active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness[.]"[199] Consequently, everyone possessed the right to "exert those powers for the accomplishment of those purposes, in such a manner, and upon such object as his inclination and judgment shall direct. . . . This right is natural liberty."[200] Far from being the opposite of liberty, then, law was a guide toward the attainment of those ends which befit humanity. As a result, it was incumbent on law to protect the exercise of such rights.[201] In that sense, law enlarged the natural rights of citizens rather than curbing them. For Wilson, people did not check their natural rights at the door of civilization in order to enjoy the benefits of government. Indeed, Wilson conceived of a natural-rights explanation for the entirety of criminal law, and that as a common-law enterprise.

Wilson outlined what he believed to be the proper relationship between the state and natural rights. "Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members," as "those rights result from the natural state of man; from that situation, in which he would find himself, if no civil

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[198] *Id.* at 1055.
[199] *Id.*
[200] *Id.* at 1055–56.
[201] *Id.* at 1056.

government was instituted."[202] Notice that the natural state of man was not *pre-societal*, but *pre-governmental*. For Wilson, the natural state of humans was always social, and that people could survive without the institution of governments. Rights, in turn, were to be understood in terms of the proper ends of human life, depending on the environment in which a person lives: "In his unrelated state, man has a natural right to his property, to his character, to liberty, and to safety."[203] Yet people also enjoyed rights and duties that corresponded to their natural family relationships.[204] Finally, on account of "general relations" humans were entitled to other rights:[205] these included the right to be safe from injury.[206] In short, rights corresponded to the natural relationships a person enjoyed. For every right, a corresponding duty existed for all others to respect.[207] The breach of such duties formed the basis of Wilson's vision for criminal law.[208]

Though the particular details of Wilson's theory are extensive, four features should serve to highlight themes in what Wilson openly called "my system of criminal jurisprudence."[209] First, Wilson believed that the substance of criminal law should develop within the common law, but that the basic divisions of penalties should be codified in statutes.[210] Second, to the extent that common law reflected customs, and to the extent that customs reflected the manners of the people, the criminal law had the potential to promote public refinement instead of merely punishing deviants. In a

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[202] *Id.* at 1061.
[203] *Id.* at 1062.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* at 1118.
[208] *Id.* at 1087.
[209] *Id.* at 1110.
[210] *Id.* at1116–28.

statement that sounds remarkable today but which reflected his Presbyterian upbringing, Wilson added that "Christianity is a part of the common law."[211] Likewise, Wilson's common law of crimes was designed to be the subject of public fascination and endearment, not aversion. In words that he later used in a jury instruction, Wilson crowed that "[p]unishments ought unquestionably to be moderate and mild."[212] This was owing to the belief that "the acerbity of punishment deadens the execution of the law . . . . When, on the other hand, punishments are moderate and mild, every one will, from a sense of interest and of duty, take his proper part in detecting, in exposing, in trying, and in passing sentence on crimes."[213] In Wilson's vies, it was not enough that people passively consented to the law: to the extent that the law gave voice to a common moral sense, the people needed to learn to love the law and involve themselves in its execution.

Third, Wilson believed that, in a democracy, treasonous crimes were those that attacked the community rather than some sovereign crown. In the English statute of treasons, Wilson remarked, repudiation of allegiance and waging war against the laws of the crown qualified as treason.[214] By contrast, Wilson invoked the milder U.S. Constitution for the proposition that "treason consists in levying war against the United States."[215] This set a high threshold, and one which excluded "aggravated riot" from the scope of treasonous crimes.[216]

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[211] *Id.* at 1159.
[212] *Id.* at 1107.
[213] *Id.* at 1108.
[214] *Id.* at 1154.
[215] *Id.* at 1152.
[216] *Id.* at 1155.

Fourth, though Wilson advocated for the milder enforcement of certain crimes, he wanted to expand the scope of criminal jurisprudence to include crimes against liberty.[217] Wilson reminded his audience that "[l]iberty, as we have seen on former occasions, is one of the natural rights of man; and one of the most important of those natural rights."[218] Wilson complained, however, that the violations of the right to liberty "are scarcely discernible in our code of criminal law."[219] Yet the right to liberty was consistent with Wilson's logic: if rights formed the basis of duties and people enjoyed a right to liberty, there must be a duty to respect liberty, the violation of which was criminal.

IV. CONCLUSION: AMERICA'S JURISPRUDENCE AND THE PATH NOT TAKEN

Wilson died before all of his lectures had been written and delivered.[220] Had Wilson lived longer, he might have transformed his lectures into a sort of *Commentaries on the Laws of America*. His earlier lectures were more substantial than the drafts of his later lectures, suggesting that he had planned to continue adding to his later lectures when the occasion approached to present them. Moreover, Wilson's unfinished lecture "On the History of Property" suggests that he had planned to venture boldly into the territory occupied by Blackstone's *Commentaries*.[221] For all of his criticisms, Wilson's project was fundamentally constructive. Wilson did not attempt to overhaul Blackstone's *Commentaries*. As a revolutionary legal scholar, Wilson was torn between the perceived need to craft an American jurisprudence and his respect for Blackstone's

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[217] *Id.* at 1130–32.
[218] *Id.* at 1130.
[219] *Id.*
[220] *Bibliography*, *supra* note 57, at 402–13.
[221] *See* 1 *Lectures on Law*, *supra* note 38, at 387–97.

accomplishments. To reconcile this tension, Wilson tried to refute Blackstone by imitating him.[222] He admired Blackstone and used the structure of the *Commentaries*, originally a set of lectures, as a template for his own *Lectures on Law*.[223] Blackstone was the model. Wilson's vision extended to revisiting, rather than reinventing, that model.

With the benefit of hindsight, it is now easy to see that Blackstone's *Commentaries* survived Wilson's challenge. But in 1790, Blackstone's success was not a foreordained conclusion. As Wilson lectured before an audience that included both houses of the legislature, an alternative form of American jurisprudence was emerging under his meticulous pen.[224] But Wilson never finished delivering his lectures.[225] In fact, he died at the age of fifty-six, leaving many of his projects unfinished.[226] Wilson died with his overarching plan left incomplete. Wilson never saw the publication of his *Lectures*, though they were arranged and published by his son Bird Wilson in 1804.[227] The *Lectures* were themselves mostly complete, though not fully edited by Wilson.[228] He had hoped for a systematic cultivation and study of American law, independent from the authority of Blackstone's *Commentaries*.

One year before Bird Wilson published his father's *Lectures*, another approach to American jurisprudence emerged: St. George Tucker published an American edition of Blackstone's *Commentaries*, complete with a gloss on differences between Blackstone's

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[222] *See id.* at 472.
[223] *See, e.g.*, Appendix B.
[224] *See, e.g.*, Conrad, *supra* note 1, at 374 (quoting discoveries from the Pennsylvania Packet and Daily Advertiser).
[225] *Bibliography*, *supra* note 57, at 401.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 408.

jurisprudence and American jurisprudence.[229] Tucker's heavily annotated edition of the *Commentaries* echoed Wilson's arguments in criticizing such repugnant passages as "Sovereignty and Legislature are indeed convertible terms; one cannot subsist without the other."[230] Yet it was easier to keep Blackstone in the American study of law than to build one from the ground up, let alone use a new definition of sovereignty to transform a legal system. Indeed, Tucker's work became an "instant success," and what historians recognize as "the definitive edition of Blackstone available in America" for its time.[231]

Blackstone was easy, accessible, and recognizable. For his part, St. George Tucker despaired of the possibility of discovering a "unitary common law" in America and offered a heavily glossed version of Blackstone's *Commentaries* as a half-measure toward producing uniformity in the divergent state systems.[232] Tucker lamented the lack of any systematic approach to American jurisprudence or digest of American laws, making that a justification for offering up his edition of Blackstone's *Commentaries*.[233] Wilson's approach offered a slow path to legal certainty through the inductive study of American common law systems that respected diversity but promoted unity from within the American judiciary. Tucker's approach offered legal certainty, and a source of uniformity and conformity that came from abroad.

Had Wilson lived longer, Wilson might have published his lectures and his digest of Pennsylvania law. Yet Wilson's death at the age of fifty-six put an end to his

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[229] See generally TUCKER, *supra* note 17.
[230] *Id.* at 18–20.
[231] Alschuler, *supra* note 5, at 11.
[232] HORWITZ, *supra* note 3, at 11.
[233] TUCKER, *supra* note 17, at 3; *see* n. 7.

envisioned jurisprudence, even if the Revolutionary Principle persists today as a foundational element of American government. Wilson's death marked a lost opportunity to use the "consent of the governed" as the centerpiece for a comprehensive system of American common law. Blackstone's system was ready to use and therefore more attractive, despite its foreign origins. Even if Blackstone's doctrine on sovereignty was repugnant to Americans, Blackstone's admirers must not have believed, as Wilson had, that the entire common law system was connected to what one thought of "sovereignty."

Later theorists began writing treatises on the technical character of American law with St. George Tucker's gloss on Blackstone's *Commentaries* (1803), Chancellor James Kent's *Commentaries* (1826), and Justice Joseph Story's *Commentaries* (1833).[234] But none went so far as Wilson had in attempting to articulate a uniquely American *definition* of law. By wrestling with different definitions of sovereignty, by using the Revolution Principle as the basis for understanding American law, and by refuting Blackstone through imitation, Wilson offered a vision of American jurisprudence that nevertheless failed to take hold in America's legal imagination. Thus, through Wilson, the history of American jurisprudence marks one lost effort to redefine law in American terms.

[234] *See, e.g.*, HORWITZ, *supra* note 3, at 257–58.

APPENDIX A

I now proceed to the consideration of municipal law—that rule, by which a state or nation is governed. It is thus defined by the learned Author of the Commentaries on the Laws of England: "A rule of civil conduct, prescribed by the *supreme power* of the state, commanding what is right and prohibiting what is wrong."

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"Legislature," we are told, "is the greatest act of superiority, that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are, indeed, convertible terms; one cannot subsist without the other." "There must be in every government, however it began, or by whatsoever right it subsists, a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii,* or the rights of sovereignty reside." "By sovereign power is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration, by a new edict or rule, and to put the execution of the laws into whatever hands it pleases: and all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end." "In the British parliament, is lodged the sovereignty of the British constitution." "The power of making laws constitutes the supreme authority." "In the British parliament," therefore, which is the legislative power, "the supreme and absolute authority of the state is vested." "This is the place, where that absolute despotick power, which must, in all governments, reside somewhere, is intrusted by the constitution of these kingdoms." "Its power and jurisdiction is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds." "It can change and create afresh even the constitution of the kingdom and of parliaments themselves. It can, in short, do every thing that is not naturally impossible." "What the parliament doth, no authority upon earth can undo." "So long as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control." "Hence the known apothegm of the great Lord Treasurer Burleigh, that England could never be ruined but by a parliament."

It is obvious, that though this definition of municipal law, and this account of legislative authority be applied particularly to the law of England and the legislature of Great Britain; yet they are, in their terms and in their meaning, extended to every other state or nation whatever—"to every government, however it began, or by whatever right it subsists." Indeed, the opinion of Mr. Locke and other writers, "that there remains still inherent in the people a supreme power to remove and alter the legislature," is considered to be so merely theoretical, that "we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing."

APPENDIX B: BLACKSTONE'S COMMENTARIES (LEFT) AND WILSON'S LECTURES ON LAW (RIGHT)

INTRODUCTION: OF THE STUDY, NATURE, AND EXTENT OF THE LAWS OF ENGLAND	**PART I: LECTURES ON LAW [OF THE STUDY, NATURE, AND EXTENT OF LAW IN GENERAL]**
§ I: On the Study of the Law	Ch. I: Introductory Lecture. Of the Study of the Law in the United States.
§ II: Of the Nature of the Laws in General	**PLAN**
§ III: Of the Laws of England	Ch. II: Of the General Principles of Law and Obligation
§ IV: Of the Countries Subject to the Laws of England	Ch. III: Of the Law of Nature
BOOK 1: OF THE RIGHTS OF PERSONS	Ch. IV: Of the Law of Nations
Ch. I: Of the Absolute Rights of Individuals	Ch. V: Of Municipal Law
Ch. II: Of the Parliament	Ch. VI: Of Man, as an Individual
Ch. III: Of the King, and His Title	Ch. VII: Of Man, as a Member of Society
Ch. IV: Of the King's Royal Family	Ch. VIII: Of Man, as a Member of a Confederation
Ch. V:Of the Councils Belonging to the King	Ch. IX: Of Man, as a Member of the Great Commonwealth of Nations
Ch. VI: Of the King's Duties	Ch. X: Of Government
Ch. VII: Of the King's Prerogative	Ch. XI: Comparison of the Constitution of the United States, with that of Great Britain
Ch. VIII: Of the King's Revenue	Ch. XII: Of the Common Law
Ch. IX: Of Subordinate Magistrates	Ch. XIII: Of the Nature and Philosophy of Evidence
Ch. X: Of the People, whether Aliens, Denizens, or Natives	**PART II: LECTURES ON LAW [OF THE CONSTITUTIONAL LAW OF THE UNITED STATES]**
Ch. XI: Of the Clergy	Ch. I: Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department
Ch. XII: Of the Civil State	Ch. II: Of the Executive Department
Ch. XIII: Of the Military and Maritime States	Ch. III: Of the Judicial Department
Ch. XIV: Of Master and Servant	Ch. IV: Of the Nature of Courts
Ch. XV: Of Husband and Wife	Ch. V:Of the Constituent Parts of Courts.—Of Judges
Ch. XVI: Of Parent and Child	Ch. VI: The Subject Continued. Of Juries
Ch. XVII: Of Guardian and Ward	Ch. VII: The Subject Continued. Of Sheriffs and Coroners
Ch. XVIII: Of Corporations	Ch. VIII: The Subject Continued. Of Counsellors and Attornies
BOOK 2: OF THE RIGHTS OF THINGS	Ch. IX: The Subject Continued. Of Constables
Ch. I: Of Property, in General	Ch. X: Of Corporations
Ch. II: Of Real Property; And, First, of Corporeal Hereditaments	Ch. XI: Of Citizens and Aliens
Ch. III: Of Incorporeal Hereditaments	Ch. XII: Of the Natural Rights of Individuals
Ch. IV: Of the Feodal [sic] System	**PART III: LECTURES ON LAW [OF THE LAW OF CRIMES]**
Ch. V:Of the Ancient English Tenures	Ch. I: Of the Nature of Crimes; and the Necessity and Proportion of Punishments
Ch. VI: Of the Modern English Tenures	Ch. II: Of Crimes Against the Rights of Individuals to Their Property
Ch. VII: Of Freehold Estates of Inheritance	Ch. III: Of Crimes Against the Right of Individuals to Liberty, and to Reputation
Ch. VIII: Of Freeholds, Not of Inheritance	Ch. IV: Of Crimes Against the Right of Individuals to Personal Safety
Ch. IX: Of Estates Less than Freehold	Ch. V:Of Crimes, Immediately Against the Community
Ch. X: Of Estates upon Condition	Ch. VI: Of Crimes, Affecting Several of the Natural Rights of Individuals
Ch. XI: Estates in Possession, Remainder, and Reversion	Ch. VII: Of Crimes Against the Rights of Individuals Acquired Under Civil Government
Ch. XII: Of Estates in Severalty, Joint-Tenancy, Coparcenary, and Common	Ch. VIII: Of the Persons Capable of Committing Crimes; and of the Different Degrees of Guilt Incurred in the Commission of the Same Crime
Ch. XIII: Of the Title to Things Real, in General	Ch. IX: Of the Direct Means Used by the Law to Prevent Offences [sic]
Ch. XIV: Of Titles by Descent	Ch. X: Of the Different Steps Prescribed by the Law, for Apprehending, Detaining, Trying and Punishing Offenders.
Ch. XV: Of Title by Purchase and I. By Escheat	
Ch. XVI: II. Of Title by Occupancy	
Ch. XVII: III. Of Title by Prescription	
Ch. XVIII: IV. Of Title by Forfeiture	
Ch. XIX: V. Of Title by Alienation	
Ch. XX: Of Alienation by Deed	
Ch. XXI: Of Alienation by Matter of Record	
Ch. XXII: Of Alienation by Special Custom	
Ch. XXIII: Of Alienation by Devise [sic]	
Ch. XXIV: Of Things Personal	
Ch. XXV: Of Property in Things Personal	
Ch. XXVI: Of Title to Things Personal by Occupancy	
Ch. XXVII: Of Title by Prerogative and Forfeiture	
Ch. XXVIII: Of Title by Custom	
Ch. XXIX: Of Title by Succession, Marriage, and Judgment	
Ch. XXX: Of Title by Gift, Grant, and Contract	
Ch. XXXI: Of Title by Bankruptcy	
Ch. XXXII: Of Title by Testament, and Administration	