

COLLECTED WORKS OF
James Wilson





JAMES WILSON

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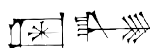
Edited by Kermit L. Hall and Mark David Hall

with an Introduction by Kermit L. Hall

and a Bibliographical Essay by Mark David Hall

Collected by Maynard Garrison

VOLUME I



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COLLECTOR'S ACKNOWLEDGMENTS

The genesis of the *Collected Works of James Wilson* was the chance discovery in 1995 of Andrew Bennett's pamphlet "James Wilson of St. Andrews, an American Statesman" (1928) in a bookstall at the Sunday Antiques Faire at St. Andrews Town Hall. The journey from that initial discovery to this publication was made possible through the help of many scholars, all of whom eagerly shared their knowledge with me. These include: the staff of the University of St. Andrews Library, Jack Rakove (Stanford University), Dennis L. Bark (Hoover Institution), James Billington (Library of Congress), George Carey (Georgetown University), David Kennedy (Earhart Foundation), Hans Eicholz (Liberty Fund), Thomas Vail (Cleveland, *The Plain Dealer*), and Mark David Hall (George Fox University). I am indebted to each of them.

Maynard Garrison
San Francisco, CA

COLLECTOR'S FOREWORD

In 1907 Professor L. H. Alexander of Harvard University observed that “two great figures . . . loom from the Revolutionary era, the one, [James] Wilson’s, whose brain conceived and created the nation; the other, [George] Washington’s, who wielded the physical forces that made it.”¹ Alexander concluded that because of Wilson’s intellectual and theoretical contributions to the nation’s founding, it was certain that future scholars would shower great attention on him. Compared with others of the founding generation, however, that has not happened. There is not a little irony in this development. For example, in 1997 Lady Margaret Thatcher stated before the annual convention of the American Bar Association that the modern political era began with the signing of the Declaration of Independence and the subsequent adoption of the American Constitution in 1787, both documents Wilson helped to shape and to which he affixed his signature. Government created by consideration and choice, rather than force or accident, had become the universally admired model, Thatcher observed, and Wilson was one of the architects of that model. It was Wilson who wove the intellectual threads of his generation into a theory of popularly based government wedded to the rule of law. In theory and action Wilson, as Alexander argued, created a nation.

The path of Wilson’s life, career, and political thought are detailed in Kermit Hall’s introduction. As Hall makes clear, Wilson was at the front rank of the founders. He was also in touch with the future. “By adopting this system,” Wilson explained in 1787, “we shall probably lay a foundation for erecting temples of liberty, in every part of the earth.” He went on to insist that “[t]he advantages resulting from this system will not be confined to the United States; it will draw from Europe many worthy

1. L. H. Alexander, *James Wilson, Nation Builder* (1907), p. 13.

characters, who pant for the enjoyment of freedom.”² Thus the universal admiration for the American system recognized by Lady Thatcher in 1997 was foretold by James Wilson more than two centuries earlier. It is for this reason that we return with respect to his works.

Maynard Garrison
San Francisco

2. Historical Society of Pennsylvania, *Pennsylvania and the Federal Constitution, 1787–1788* (1888), 2: 488.

INTRODUCTION

The Reputation of James Wilson

James Wilson was a dominant figure in the founding of the American nation, not just in politics and law, but in personal ambition. He had a formidable appetite for fame and wealth matched by a powerful intellect. Wilson was one of only six persons to sign both the Declaration of Independence and the Constitution; only Gouverneur Morris spoke more frequently in the Philadelphia Convention of 1787; and scholars rank Wilson as the second most influential member of that convention, behind only James Madison. Wilson was, in the end, a tragic figure, a founder who understood the future too clearly and pointed to it too directly, both for his own immediate reputation and, as significantly, for his standing among generations to come. These volumes are intended to stimulate new research and analysis of Wilson's contributions in the ongoing effort to determine accurately his rightful place in the founding era.

Wilson's writings have always competed for attention against the better known works of the founding generation, notably *The Federalist Papers* authored by John Jay, James Madison, and Alexander Hamilton.ⁱ Moreover, scholars have turned repeatedly to the individual writings of Madison, Thomas Jefferson, and John Adams to discern the nature of free institutions. The materials in this volume suggest that Wilson, as the historian Gordon Wood has noted, was one of the most, if not the most, ardent advocates for the people as the sovereign base of the new American constitutional system.ⁱⁱ

Wilson deserves attention as well because he sketched a genuinely systematic view of the law. His *Lectures on Law*, while never published in a

i. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (1961).

ii. Gordon Wood, *The Creation of the American Republic* (1998): 212.

single volume during his life, were nonetheless intended to make him the American equivalent of Sir Edward Blackstone, the great English legal commentator. The *Lectures* reflect Wilson's scholarly approach to matters of public affairs, a quality that set him apart from Thomas Jefferson, Oliver Ellsworth, Edmund Randolph, Tapping Reeve, and George Wythe. Wilson attempted to blend the ideas of liberty and the rule of law with the new idea of popular sovereignty. Moreover, the *Lectures* stand in marked contrast to Wilson's contributions as a justice of the Supreme Court. He crafted few opinions while on the high court; in eight years, Wilson produced about twenty total pages of written opinions, a legacy that reflected neither his talent as a lawyer nor his impact on American law. His most important opinion, in *Chisholm v. Georgia* (1793), was quickly overturned by the ratification of the Eleventh Amendment.ⁱⁱⁱ In this light his ambitious project to synthesize principles of natural law and popular will in the *Lectures* stands as his most definitive statement about the character of American law.

The *Lectures*, there is no doubt, were a serious contribution to the literature of the law that no student of its early national origins can ignore. Wilson deserves high marks for his efforts to reduce and synthesize American law, a particularly difficult task in light of the jumble of colonial legal practices and the traditions of the English common law. What set him apart from his better-known contemporaries was his gift for addressing the law in broad, often bold strokes that encompassed philosophy, psychology, and political theory.

Despite the obvious importance of his contributions, Wilson continues to struggle for attention in comparison with the other founders at least in part because of his personal life. Wilson's adult life was marked by land-development schemes, a corresponding inability to reconcile his quest for individual wealth with a scrupulous attention to the public interest, and ultimately the distinction of being the only justice of the Supreme Court ever imprisoned for debt. That made Wilson something of a paradox. He was trained in the Scottish Moral Enlightenment tradition of Thomas Reid and Francis Hutcheson, which stressed, among other things, the close relationship among public virtue, moral commitment to the public interest,

iii. 2 U.S. 419 (1793).

and respect for the will of the people based on their intrinsic good. This philosophical perspective, however, collided with Wilson's fabled scramble for wealth, power, and social station. Wilson's articulated philosophy was based on a relatively optimistic view of human nature; his personal conduct betrayed to his critics a more pessimistic assessment. Madison, who was also schooled in the Scottish Moral Enlightenment, diverged from Wilson by rejecting the latter's strongly populist impulses and substituting in their place the belief that if men were angels there would be no need for a constitution in the first place. Wilson has been considered a conservative because of his opposition to the Pennsylvania Constitution of 1776, but at the Constitutional Convention of 1787 he was the only founder to argue for "the direct election of the executive, the direct and proportional election of senators, and the principle of 'one person, one vote.'" ^{iv}

However, like Chief Justice John Marshall, he also supported the constitutional separation of powers and checks and balances—even suggesting in his *Lectures* that the Supreme Court could strike down an act of Congress if it violated the Constitution or natural law.^v Although he lost many battles at the Constitutional Convention, America's constitutional system has come to closely resemble that advocated by Wilson. Accordingly, the materials in this volume can help us better understand the political and legal ideas underlying the American experiment in constitutional government.

Beginnings

James Wilson was born in 1742 at Carskerdo, Scotland. His father was a farmer who resided in the vicinity of St. Andrews.^{vi} Despite his

iv. Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798* (1997), 21. For further discussion of Wilson's support of democratic institutions see chapter 4 of this volume.

v. *Ibid.*, chapter 5. Hall argues that a proper understanding of Wilson's political philosophy shows how his acceptance of democratic institutions and countermajoritarian checks may be reconciled (see especially chapters 2, 4, and 5).

vi. The best discussion of Wilson's early life is Charles Page Smith, *James Wilson: Founding Father, 1742–1798* (1956), especially pp. 1–89. More generally see Randolph G. Adams, *Political Ideas of the American Revolution* (1922); Arnaud B. Leavelle, "James Wilson and the Relation of the Scottish Metaphysics to American Political Thought," *Political Science Quarterly* 57 (September 1942): 394–410; George W. Carey, "James Wilson's Political Thought and the Constitutional

modest beginnings, Wilson received a splendid classical education at Culpar grammar school, which enabled him to win a scholarship to the University of St. Andrews in 1757. This education served him well throughout his life, training him in scholarly analysis and simultaneously providing a lifelong intellectual compass. The Scottish Moral Enlightenment and the Common Sense school of philosophy associated with it pervaded these institutions and deeply influenced Wilson.

After completing his studies, Wilson moved to America in the midst of the Stamp Act agitations in 1765. Early the next year, he accepted a position as a Latin tutor and then a lecturer in English Literature at the College of Philadelphia (later part of the University of Pennsylvania), only to abandon it to study law under John Dickinson. On borrowed capital, he also began a lifelong passion—speculating in land. The College awarded him an honorary Master of Arts degree in 1766. In 1768, the year after his admission to the Philadelphia bar, Wilson set up practice at Reading, Pennsylvania. Two years later he moved westward to the Scotch-Irish settlement of Carlisle and built up a broad clientele. The following year he married Rachel Bird, the daughter of a wealthy Berks County landowner,

Convention,” *The Political Science Reviewer* 17 (Fall 1987): 50–107; Morton M. Rosenberg, “James Wilson, Forgotten Founding Father,” *International Journal of Social Education* 2 (Spring 1987): 30–43; Arthur E. Wilmarth, Jr., “Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Republic,” *George Washington Law Review* 72 (December 2003): 113–93; Ralph Rossum, “James Wilson and the ‘Pyramid of Government’: The Federal Republic,” *Political Science Reviewer* 6 (Fall 1976): 113–34; Rossum, “James Wilson,” in *Encyclopedia of the American Constitution*, 4 vols. (1986), 4: 2068; Stephen A. Conrad, “Metaphor and Imagination in James Wilson’s Theory of Federal Union,” *Law & Social Inquiry* 13 (1988): 1–70; Conrad, “The Rhetorical Constitution of ‘Civil Society’ at the Foundation: One Lawyer’s Anxious Vision,” *Indiana Law Journal* 72 (Spring, 1997): 335–73; Conrad, “Polite Foundation: Citizenship and Common Sense in James Wilson’s Republican Theory,” *Supreme Court Review* 1984 (1985): 359–86; Conrad, “Undercurrents of Republican Thinking in Modern Constitutional Theory: James Wilson’s ‘Assimilation of the Common-Law Mind,’” *Northwestern University Law Review* 84 (Fall 1989): 186–219; Garry Wills, “James Wilson’s New Meaning of Sovereignty,” in *Conceptual Change and the Constitution* (1988): 99–106; John V. Jezierski, “Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty,” *Journal of the History of Ideas* 32 (January–March 1971): 95–106; Lyle Dennison, “The ‘Revolution Principle’: Ideology and Constitutionalism in the Thought of James Wilson,” *Review of Politics* 39 (1977): 157–91; Daniel Farber, *Lincoln’s Constitution* (2003), 47–49, 81–85; Kermit L. Hall, *The Supreme Court and Judicial Review in American History* (1985): 1–10; and Daniel J. McCarthy, “James Wilson and the Creation of the Presidency,” *Presidential Studies Quarterly* 17 (Fall 1987): 689–96. In preparing this essay, I have relied heavily on the insights of Conrad, Wilmarth, and McCloskey.

a union that joined her family's considerable wealth with the young lawyer's voracious appetite for speculation in land. The marriage produced six children and lasted until 1786, when Rachel Wilson died. Seven years later Wilson married again, to Hannah Gray, half his age and a resident of Boston, who outlived him.

Of Wilson's children, the best known was his third, Bird, born in 1777. Bird became his father's favorite, and he alone among the children was permitted to enter his study to read while his father worked. Wilson also took the young boy with him as he went about Philadelphia doing business and conferring on matters of politics and law. In 1792 the fifteen-year-old Bird graduated from the University of Pennsylvania and went on to become one of the chief managers of his father's gradually collapsing financial empire. Following the elder Wilson's death, it fell to Bird to arrange for the publication of his father's *Works* in 1804, including the *Lectures on Law*.

While Wilson began his family he also entered the swirl of Revolutionary era politics. In Carlisle in 1774 he assumed the chairmanship of the city's committee of correspondence, attended the first provincial assembly, and completed preparation of *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*. This tract was an early statement challenging British authority; it was also Wilson's first direct published attack on what became one of his favorite targets, Parliamentary sovereignty. His authorship of the pamphlet established him as a Whig leader, and it is one of the most important documents in this collection.

The next year, voters sent Wilson to the provincial assembly, which in turn sent him to the Continental Congress, where he sat mainly on military and Indian affairs committees. In 1776, bound by the Pennsylvania legislature not to vote for independence, he joined the moderates in Congress, voting for a three-week delay in considering Richard Henry Lee's resolution of June 7 for independence, what ultimately became in the hands of Thomas Jefferson the Declaration of Independence. Wilson, however, after Pennsylvania freed the state delegates to vote their consciences, switched his vote, and on the July 1 and 2 ballots he voted in favor of and ultimately signed the Declaration of Independence.

At the same time, Wilson strenuously opposed the republican Pennsylvania constitution of 1776. That position proved politically costly, and in

1777 he lost his seat in Congress when his aggressive frontier constituents viewed him as out of step with the fast-moving revolution. Wilson relocated to Annapolis during the winter of 1777–78, subsequently taking up residence in Philadelphia, where he resided for the remainder of his life.

Wilson's quest for wealth became increasingly apparent. In Philadelphia he emerged as a spokesperson for and leader of conservative republican groups determined to break with the British without fundamentally losing economic control. Despite the dislocations created by the war, Wilson's economic fortunes blossomed. He became a successful businessman, and the uncertain state created by the conflict served his speculative interest in land well. In June 1779 the French government appointed Wilson its advocate general in the new United States, a post he held until 1781. In this office, Wilson skillfully addressed commercial and maritime matters involving France while defending the Loyalists who opposed the American Revolution. Wilson resigned the post in 1783, however, because the French had failed to honor their agreement to compensate him. Two years later, however, the King of France rewarded him with a lump-sum payment of ten thousand livres.

Wilson's success in the face of the hardship of others made him a target. Motivated by soaring inflation and food shortages brought on by the war, a mob attacked Wilson's home in the fall of 1779. He and thirty-five other prominent businessmen were barricaded inside his home at Third and Walnut Streets, a residence that came to be known as Fort Wilson. The fracas proved a turning point for both Wilson's political fortunes and the conservatives in the city, who gained political traction in the face of casualties. Congress in 1781 selected him to be one of the directors of the Bank of North America, led by Robert Morris. Morris had been not just a client but a fellow investor with Wilson in several speculative land deals. A year later, he was selected to serve again in the Continental Congress, a post that he held until 1787.

The mob violence in Philadelphia also prompted Wilson to adopt an even stronger nationalist position, one that coincided with his self-interest in the success of the Bank of North America. In 1785 the radical elements of the Pennsylvania legislature proposed revoking the bank's charter. In return for a fee of four hundred dollars, Wilson agreed to write a pamphlet in support of the bank. The bank had established a modicum

of fiscal stability during the revolutionary crisis, but as significantly, Wilson was indebted to it for more than thirty thousand dollars in loans. His widely circulated pamphlet, *Considerations on the Bank of North America*, offered a vision of the powers of the national government that foreshadowed the new Constitution drafted two years later. Wilson insisted that repeal of the Bank's charter by the Pennsylvania Assembly would be economically foolish.

His position at once aligned him with the conservative elements in Pennsylvania politics and affirmed his strong nationalism. It also was unsuccessful. The Assembly repealed the charter in Pennsylvania; Wilson's opponents painted him as more interested in his own economic advantage than in the well-being of his fellow citizens. Yet even his sharpest critics stood in awe of the erudition of *Considerations* and of Wilson's general intelligence.

The Philadelphia Convention of 1787 and the Ratification of the Constitution

Wilson's greatest moment in public life came in the Philadelphia Convention of 1787.^{vii} Wilson was a staunch advocate for separation of powers that included an independent and powerful judiciary, a popularly elected president, and a bicameral legislative branch. He prevailed in his arguments in support of the judiciary, although one of his pet ideas, a Council of Revision, lost not once but three times before the delegates. Wilson's hope of having a popularly elected president with a three-year term also failed, with the delegates instead adopting an electoral college, which Wilson came to support, and a four-year term. Article I did include a bicameral scheme, as Wilson proposed, but with the Senate selected by state legislators rather than the people.

Wilson also advocated for federalism and the related concept of dual sovereignty. Since the people were the foundation of all government, they could construct as many levels of authority as they wished. Thus, the

vii. The best description of Wilson's contributions to the Philadelphia Convention are in Smith, pp. 215–61.

people could not only establish a national government of enumerated powers but simultaneously lend their support to state governments vested with the traditional police powers of health, safety, morals, and welfare. Ironically, both John C. Calhoun and Abraham Lincoln in the years leading up to the Civil War found in Wilson's ideas arguments to support either the limited or the perpetual nature of the Union.

Wilson's colleagues selected him to be one of the six delegates who reported the final document for acceptance, a genuine honor to a person uniformly recognized as one of its chief architects. And Wilson also played a decisive role in the ratification of the Constitution in his important home state. He was the only member of the Pennsylvania state convention of 1787 to ratify the Constitution who had served in the Philadelphia Convention. Following the ratification of the federal constitution in Pennsylvania, Wilson participated in a second state convention to align the state constitution with the new federal document.

The Writings in This Volume: Legal Philosopher and Associate Justice

In 1789 President George Washington appointed Wilson an associate justice of the Supreme Court. At the same time Wilson agreed to give a series of law lectures at the College of Philadelphia. The documents in this collection speak to his role in both.

Wilson used his university position to deliver his *Lectures on Law*. The *Lectures* comprise almost seven hundred pages of text; the first was publicly delivered on December 15, 1790. They were long on theory and short on the kinds of blackletter law issues that might be of practical value to students. The *Lectures* were lectures. They were not finely hewn essays meant to be read rather than spoken.^{viii} Only about half of them were delivered over the course of two winter terms at the law school, hardly enough time for Wilson to sketch his ambitious vision of American law. At the same time, Wilson was also busy becoming a justice of the Supreme Court and managing his increasingly chaotic business affairs.

viii. Robert G. McCloskey, ed., *The Works of James Wilson*, 2 vols. (1967), 1: 37–43.