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THE COMMON SENSE AMERICAN REPUBLIC: THE POLITICAL PHILOSOPHY OF JAMES WILSON (1742–1798)

I will call “totalitarian” any form of political society that sets no moral limits on the powers of the State. Such societies are well defined by Mussolini’s formula: “Nothing outside of the State, above the State, against the State; everything to the State, for the State, in the State.”

I will call “democratic” any non-totalitarian form of political society. A democratic society does not deny the authority of the State as representative of the body politic and enforcing laws in view of the common good, but it recognizes the presence, in human beings, of something that is outside of the State, above the State, and which it may become necessary to protect against the encroachments of the State. As an instance of such things, I would cite truth.

—Étienne Gilson¹

Laws may be promulgated by reason and conscience, the divine monitors within us. They are thus known as effectually, as by words or by writing: indeed they are thus known in a manner more noble and exalted. For, in this manner they may be said to be engraven by God on the hearts of men: in this manner, he is the promulgator as well as the author of natural law. Despotism by an artful use of “superiority” in politicks; and skepticism, by an artful use of “ideas” in metaphysics, have endeavoured—and their endeavours have frequently been attended with too much success—to destroy all true liberty and philosophy. By their baneful effects, the science of man and the science of government have been poisoned to their very fountains. But those destroyers of others have met, or must meet with their own destruction.

—James Wilson²

¹ Étienne Gilson, “Dogmatism and Tolerance,” An address to the Faculty of Rutgers University, December 12, 1951.

² James Wilson, Constitutional Framer, “Lectures on Law,” Delivered at the College of Philadelphia, 1790–1791.

In our own day it is commonly said that skepticism is the foundation of liberty. It is also commonly said that the American Framers were themselves skeptics. James Wilson (1742–1798) signer of the Declaration, Framers of the American Constitution, and Justice of the first Supreme Court, is an admirable corrective to this because he, like Etienne Gilson and like Socrates, recognized that free government depends upon the light of reason and true philosophy. Just as Socrates argued in the *Republic* that justice requires vigorous opposition to skepticism, as skepticism is the foundation of tyranny, so Wilson argued that political and legal reasoning must begin with the first principles of reason and the natural law. He drew the conclusion that justice would elude the new democracy if the people knew no philosophy.

At the end of the Second World War, reflecting upon the rise of totalitarianism, Etienne Gilson (1884–1978) argued that totalitarian regimes had been built upon skepticism. The spirit of intellectual and philosophical inquiry was absent, no one was allowed to determine what was true for themselves, and in these states freedom of thought was feared rather than encouraged. Skepticism had led to regimes where the leaders defined the truth and enforced it by ideology, propaganda and force. When Gilson gave a talk at Rutgers University entitled “Dogmatism and Tolerance,” he addressed the claim made by the English philosopher and skeptic Bertrand Russell (1882–1979) that relativism was the *sine qua non* of political freedom. He argued that the practical outcome of assuming that there are no first principles of natural law and reason leads to tyranny, where the leaders of the state determine truth and falsehood for themselves.

Gilson argued that freedom of thought, political tolerance, and the conviction that there is universal and unchanging truth will be found together. Freedom of intellectual inquiry leads to the discovery of truth, and truth, whether that articulated by Aristotle, Plato, Thomas Aquinas, or Kant, maintains civilization, order, and freedom. They taught that “some propositions are not merely probably or practically certain, but unconditionally true, provided only we agree upon the meaning of their terms and are able to understand them.”³ Civilization, therefore, is built upon the natural law and the first principles of reason. Dogmatic statements of the natural law, such as Kant’s categorical imperative: “Human beings must

³ Étienne Gilson, *Dogmatism and Tolerance* (Rutgers, N.J.: Rutgers University Press, 1952), 1.

not be used as means but respected as ends,”⁴ maintain decency and freedom and tolerance within a society. One might say, without stretching the point too far, that Gilson’s life and work expressed that idea. Whether one considers his works on medieval philosophy, or his broader surveys of the history of thought such as *The Unity of Philosophical Experience*, all indirectly or directly are devoted to countering philosophical skepticism.

But, between the philosophy of a Russell and a Gilson lay a greater divide, namely the question of whether reasoning is a matter of logically arguing from given commonly-known first principles, or logically arguing about words and concepts as given because there are no first principles. This is a divide which echoes the debates within the eighteenth century Scottish universities from which James Wilson came. Russell stands, more or less, in the skeptical, empiricist tradition of Hume, who denied first principles, Wilson in the tradition of Thomas Reid and other philosophers in Scotland who disagreed with Hume. So while Russell, following Hume, held that a philosophical truth or dogma is more or less identical to a political ideology because certainty eludes reason, Gilson held that philosophical truths, like mathematical truths, are true according to first principles and the light of the intellect. There is nothing like propaganda or ideology in being attached to a truth that one has discovered by the light of reason and nature. Where, therefore, political freedom is found, there needs also exist an open attachment to dogmas, not least the dogma that truth exists by the light of reason in argument from first principles. What are these first principles which exist in us and from which human beings may reason? It is to Wilson’s answer at the time of the American Revolution that I will turn.

At the time of the American Revolution, certain colonial leaders made recourse to classical natural law arguments in order to defend their rights against the English Parliament. It is surprising, given the general interpretation of the American Founding as primarily Lockean that among the Framers was a man who relied not upon the modern natural law arguments of Locke, but rather upon the classical natural law teaching of Richard Hooker, the sixteenth century Anglican Divine whose treatment of natural law was scholastic. Wilson, in his *Lectures on Law* delivered from 1790 to 1792, opposed the skeptical epistemology of John Locke (1632–1704) and David Hume (1711–1776) in order to argue for philosophical realism and for classical natural law.

⁴ Id., 1–2.

In his *Treatise on Human Nature*, Hume had stated that there is no real knowledge of right and wrong, true and false. The senses deceive, they cannot be depended upon to determine reality. To argue against Hume, Wilson had to do two things: first, he had to affirm that there is truth, and secondly, he had to argue that it is natural to mankind to know truth on the basis of sense-knowledge. James Wilson therefore argued that there exists a natural capacity within people by virtue of what he called their ‘moral sense’ to discover moral truth. The moral sense makes first principles available to the mind, and is discovered in reflecting upon sense knowledge. The first principles of the moral sense guide reasoning. We can depend upon sense knowledge and our moral sense because both are God-given. The Creator gave human beings a conscience by which to apprehend the eternal law of God. God’s providential government of creation ensures that human beings might through conscience and reason and revelation know his Law. This is the classic, not modern, natural law teaching. Modern natural law teaching, as seen in Hobbes, Grotius and Locke, is derived from human nature and the desire for self-preservation. It may presume a created order in the universe, but it does not seek the source of that order in eternal law to discover the natural law.

Reading James Wilson, Framers, signer of the Declaration and Justice of the first Supreme Court, one is reminded that in the latter part of the eighteenth century there was, in the English-speaking world, a vibrant debate between philosophical realists, as we would call them today, and skeptics. It took place in Scotland during the Scottish Enlightenment, sometimes called the Scottish Renaissance. Wilson had moved to the colonies after a childhood in Scotland, education at the University of St. Andrews, and an immersion in the philosophy of that day found in Scottish philosophers and Presbyterian ministers Francis Hutcheson (1694–1746) and Thomas Reid (1710–1796). His subsequent study of the political theology of Anglican Theologian Richard Hooker (1556–1600)—*Of the Laws of the Ecclesiastical Polity*⁵—led him to develop some independence of thought. Combining the metaphysics of Richard Hooker “with the common-sense psychology of the Scottish philosopher Thomas Reid,” Wilson offered a philosophy of law based upon the epistemology of Reid and the

⁵ Richard Hooker’s thought reflects his reading of Platonism, Aristotle, and the medieval philosopher Pseudo-Dionysius to Aquinas. He called Aristotle the “Arch-Philosopher.” See Richard Hooker, *Laws of the Ecclesiastical Polity*, ed. Arthur Stephen McGrade (Cambridge: Cambridge University Press), Book I.10.4.

metaphysics of Hooker, so to mitigate against the subjectivism and relativism implicit in the American principle of popular sovereignty.⁶

Following Reid, Wilson argued that it is wrong to *assume* that ideas in the mind have no real relation to the world,⁷ and to conclude that knowledge has no real relation to sensible reality.⁸ I am far from believing, Wilson once remarked, that “Mr. Locke was a friend to infidelity. But yet it is unquestionable, that the writings of Mr. Locke have facilitated the progress, and have given strength to the effects of skepticism.”⁹ Hume, he said, doubted the possibility of knowing truth at all, doubted the existence of a rational apprehension of natural law, and called into question the precepts of the faith and the science of the philosopher. His epistemology denies the possibility of real knowledge.¹⁰ In his words, “law and liberty cannot rationally become the objects of our love, unless they first become the objects of our *knowledge*.”¹¹ Thus he wrote a textbook for young lawyers in order to educate them in the dangers of skepticism, by instruction in the true philosophy, hoping that his philosophy of law would come to dominate legal education in the new republic. The existence of a strong philosophical culture in his native Scotland perhaps led Wilson to think it could be duplicated in the new nation.

Wilson’s education illustrates once again that truth which Gilson emphasized, that the study of philosophy is not theology, it is built upon first principles of reason, while theology begins in revelation. In the late seventeenth and early eighteenth centuries some Presbyterian university professors decided to revive classical education for the sake of improving the general education of the population at large. Aristotelianism and the

⁶ A. J. Beitzinger, *A History of American Political Thought* (Eugene, OR: Wipf and Stock, reprint), 238.

⁷ The Locke of the *Essay Concerning Human Understanding* does not allow for innate ideas. As many have noted, that position negates whatever reference to laws of nature Locke might want to make in the *Second Treatise*. For if man is a blank slate where does he find any such laws? His natural law theory is moot. To begin with the idea of a self-interested individual who discovers natural law in reason is a very different view of natural law than found in the medieval account, as is clear. Whether or not Reid indeed adequately shows the failure of Hume’s subversion of philosophy is a matter of debate, but for Wilson, it was convincing.

⁸ James Wilson, *Lectures on Law*, ed. Hall and Hall (Indianapolis, IN.: Liberty Fund, 2007, 2 Vols.), 610–611. Wilson quotes Reid at some length in his lectures, sometimes acknowledging the debt, sometimes not.

⁹ Wilson, *Lectures on Law*, 472.

¹⁰ *Id.*, 608–609.

¹¹ *Id.*, 435

study of the classics had never entirely disappeared,¹² but it was decided that the universities of Scotland should implement a unified and homogeneous educational system to raise up the level of general culture in the country, and to advance science. An eccentric, but brilliant man, named Andrew Fletcher of Saltoun (1655–1715)—of interest, no doubt, to Scottish nationalists today—had argued that in order to preserve the distinctiveness of Scottish institutions and culture from the incursion of ideas from English universities, they should implement a unique educational program—a model classical and humanistic education. He hoped Scotland might maintain itself according to the idea of the Greek city state. Part of the plan as set forth in his *Proposal for Schools and Colleges* (1704), was a course of study in both ancient and modern learning. “Ancient philosophy would be taught in the context of ancient literary studies to a relatively small student body.”¹³ It was an “educational policy which gave a priority to philosophy and science studied for the sake of their first principles, not merely for use. The decisive fact about the Scottish Universities . . . was that the medieval curriculum of Grammar, Logic, Ethics, Physics, survived both the Revival of learning and the Reformation.”¹⁴ This was an education in the classics and sciences, culminating in a compulsory course of philosophy, preparing young men for science, law, or divinity. As a result, Philosophy came to have a *cultural hegemony*.¹⁵ Students were able to “argue about Hume’s theory of causality and Berkeley’s theory of perception.”¹⁶ They were taught to argue from first principles. Students studied and argued about the fundamental principles of moral law insofar as they can be “conceived of as antecedent to all positive law and all particular forms of social organizations.”¹⁷ Hence the continuing strength of a philosophy of natural law. For a while in Scotland itself such principles came to be authoritative in common education and discourse.

¹² Richard Tuck, *Natural Right Theories* (Cambridge: CUP, 1979), 44–45. He briefly discusses the general state of Aristotelianism in the Protestant world in the Renaissance.

¹³ Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 257.

¹⁴ George E. Davie, *The Democratic Intellect: Scotland and her Universities in the Nineteenth Century*, ed. Murdo Macdonald (Edinburgh: Edinburgh University Press, reprinted 2013[1961]), 255–256.

¹⁵ MacIntyre, *Whose Justice? Which Rationality?*, 247.

¹⁶ Davie, *The Democratic Intellect*, 12.

¹⁷ MacIntyre, *Whose Justice? Which Rationality?*, 239.

People debate of course whether or not there was real homogeneity of philosophical opinion. Certainly there were significant differences and it is a serious question whether Wilson's thought is more dependent upon Thomas Reid or Francis Hutcheson in his treatment of the moral or common sense.¹⁸ Certainly he borrows frequently, without citation, from both. Nonetheless, Reid must have been central when he was arguing against Hume. Of Hume he wrote:

[Hume] annihilates spirit as well as body and reduces mankind—I use his own words—to a “bundle or collection of different perceptions, which succeed each other with an inconceivable rapidity, and are in a perpetual flux and movement.” “There is properly no simplicity in the mind at one time; nor identity in it at different times; whatever natural propensity”—tis indeed natural—“we may have to imagine that simplicity and identity: they are successive perceptions only that constitute the mind.”¹⁹

For Wilson, here lies the problem with Hume—if Hume is right, then one can never trust the commonplace understanding of the ordinary person. If it cannot be trusted, how can democracy stand? If one cannot rely upon the justice of the common man, there is no natural justice, and law is reduced to being the product of utility.²⁰

For Hume, to regard all justice as a matter of utility was not a problem. He argued that moral and political distinctions are not derived from reason at all. In a friendly dispute with Adam Ferguson²¹ about the natural basis of institutions, Hume had argued that institutions are created by nothing but force.²² All one can say of the genesis of the justice and order

¹⁸ Jean-Marc Pascal, *The Political Ideas of James Wilson: 1742–1798* (New York: Garland Publishing, 1991), Ch. 2. Pascal argues Wilson's philosophy attempted to reconcile Hutcheson and Reid in treating of the relationship of moral sense to common sense reasoning. He also notes, and no doubt this was because Wilson did not live to edit his lectures, that there are large sections in Wilson's discussion of epistemology which are not clearly cited as from Reid or Hutcheson, yet repeat them fairly directly.

¹⁹ Wilson, *Lectures on Law*, 605, quoting Hume's *On Human Nature*.

²⁰ David Hume, “Of the Original Contract” (1748) [www.constitution.org/dh/origcont.htm], accessed on Sept. 09, 2015].

²¹ Adam Ferguson (1723–1813) wrote *An Essay on the History of Civil Society*, in which he made the argument that society is natural not contractual. This book was well known to James Wilson and he drew upon its arguments.

²² Gary L. McDowell, “Commerce, Virtue, and Politics: Adam Ferguson's Constitutionalism,” *Review of Politics* 45:4 (October 1983): 536–552.

which is proper and necessary to mankind, is that all law is the result of the consent of the weak to the strong.

But that is not a philosophy upon which to build a free republic. From Wilson's standpoint, Hume's epistemology leads to nothing but despotism. In this Wilson was at one with all the other Framers, who for all their diversity of views, held to the existence of truth, and viewed human nature rightly, as rational, whatever differences they may have held as to what reason is. Neither Madison, nor Jay, nor Hamilton, nor even Jefferson, were moral relativists. But they did not see what Wilson saw, which is that truth requires both a metaphysical and epistemological foundation in true philosophy.

Common Sense

Wilson argued that philosophy begins with a common sense apprehension of that reality to which our senses *and our reflection* give us access. It begins with sense knowledge, it is refined by education and clarity. Philosophizing is the exercise of finding general rules of conjecture for what we observe and reflect upon. Human beings can have real knowledge, and seeking truth (philosophy) is not a specialized activity, but is what every man does when he deliberates to himself as to whether to do this or that, or indeed, reflects upon being. The mind is an active principle, Wilson said.

Here lies the great dispute with Hume. Hume's error lies in thinking that what I think I know is the product of thought, primarily, rather than being,²³ and as men do not know being, moral judgements are the product of custom, and accepted in an irrational manner. One might call Hume an anti-philosophical philosopher, and he undermines the ordinary kind of thinking of people. So, Wilson, following Reid held, with the common man, that we cannot reject the common beliefs of mankind as bereft of any merit, and certain beliefs are antecedent to reason, although corruptible by bad reasoning. The exercise of common sense "is that degree of judgement which is to be expected in men of common education and common understanding."²⁴

²³ Étienne Gilson, *The Nature and Unity of Philosophical Experience* (New York: Scribner's, 1937), 316. This is Gilson's mode of expression, not Reid nor Wilson, but grasps the same idea.

²⁴ Wilson, *Lectures on Law*, 599.

Ordinary people have in their conscience or moral sense “the *communes notitiae*, the common notions and practical principles of virtue, though the application of them is often extremely unnatural and absurd.”²⁵ One is misled if one concludes from the savagery of certain societies that these principles don’t exist. These common notions exist, even when that application is absurd. “These seeds are planted in their minds by nature, though, for want of culture and exercise, they lie unnoticed.”²⁶ Each has the seed of a logician within. Each has the seeds of a philosopher or an orator. The mind as an active principle works upon what it receives.²⁷ There are various ways of thinking, called operations of the mind, and in all peoples we observe the exercise of these principles. The power of reasoning from these notions is “strictly the process, by which we pass from one judgement to another.”²⁸ But it may be weak and faulty, without direction.

How do we come by these common notions? The external senses and the internal sense both contribute—the “external sense conveys to us information of what passes without us” and the internal sense, or consciousness, what passes within. Our perception through the external senses is as it were a branch of intuitive knowledge, and part of the constitution of our nature.²⁹ The knowledge from seeing, hearing, touching is a power simple and original in the human mind.³⁰

The internal sense or consciousness is purely intellectual. Perceiving, remembering, imagining, reasoning, judging, approving, these are all objects of this consciousness. This is the kind of knowledge that we have about ourselves by looking into ourselves, not through philosophical proof. As Wilson, following Reid, pointed out, even Hume cannot deny the existence of consciousness.

²⁵ *Id.*, 517.

²⁶ *Id.*

²⁷ *Id.*, 590.

²⁸ *Id.*, 600.

²⁹ Wilson does not give a developed metaphysics of form and matter in his epistemology. Furthermore, while recognizing Aristotle is right about first principles, one should recognize that the idea of the moral sense or common sense is not identical to Aristotle. It is closer to *synderesis* in Thomas Aquinas, but that would require further discussion. A full discussion of the similarity of Wilson’s moral sense to the philosophy of Thomas Aquinas appears in William F. Obering, *The philosophy of law of James Wilson* (Washington, D.C.: Catholic University of America, 1938).

³⁰ Wilson, *Lectures on Law*, 591.

“Mr Hume, after annihilating body and mind, time and space, action and causation, and even his own mind, acknowledges the reality of the thoughts, sensations, and passions of which he is conscious” . . . Let us felicitate ourselves, that there is, at least, one principle of common sense, which has never been called in question. It is a first principle, which we are required and determined, by the very constitution of our nature and faculty to believe.³¹

Even if Hume denies all first principles, he cannot deny the existence of that capacity of consciousness within the mind which is a principle of common sense. In a discussion of memory, conception and judgement, Wilson applied himself to the task of uniting external and internal senses with consciousness.³² It is indeed these senses which help provide first principles.

The efficient cause of moral obligation is moral sense, reason, and God as creator of mankind, wrote Wilson. To God as creator we will turn, but what is reason? The ultimate ends of man can never be reasoned to, they are reasoned from. Reason performs many services. She determines the proper means to an end, and decides between alternatives; she exhibits an object to the mind, and determines the motives to an action; she judges concerning subordinate ends.³³ Reason will prove, extend, and apply what the moral sense has suggested to us. Although some philosophers have argued, he wrote, that reason is the supreme “arbitress of human knowledge; that by her solely we ought to be governed, that in her solely we ought to place confidence; that she can establish first principles and correct the mistakes of common sense,”³⁴ that is a mistake. Reason is too easily misled, it is a means by which to obtain the good end, it does not offer that end itself.³⁵

³¹ Id., 595.

³² Hutcheson referred to the internal and external senses: “Senses are either *external* or *internal* [and mental]. The external depend on certain organs of the body, so constituted that upon any impression made on them, or motion exciting, whether by external impulses or internal forces in the body, a certain feeling [perception] or notion is raised in the soul . . . By these senses we acquire the first notions of *good* and *evil*” (Francis Hutcheson, *Philosophiae Moralis Institutio Compendiaria with A Short Introduction to Moral Philosophy*, ed. Luigi Turco (Indianapolis, Indiana: Liberty Fund, 2007), 26).

³³ Wilson, *Lectures on Law*, 513.

³⁴ Id., 603.

³⁵ Wilson’s argument is not unlike that found in the *Summa Theologiae*, I, q. 79, a. 12, a. 13, where Thomas speaks of *synderesis*.

To those who argue against the existence of the moral sense, Wilson replied, that human beings want to argue well—this is part of human nature—it is evident in the desire of ordinary men and women to dispute and judge about matters good and ill. Even the untutored child has the “apprehension of right and wrong,” if not right knowledge. Hence the “strong inclination in children to hear such stories as paint the characters and fortunes of men. Hence that joy in the prosperity of the kind and faithful, and that sorry upon the success of the treacherous and cruel, with which we often see infant minds strongly agitated.”³⁶ And he added that these principles are “totally distinct from the ideas of utility and agreeableness.”³⁷ The moral sense determines the “end, which he ought to pursue; and he has intuitive evidence that his end is good: but the means of attaining this end must be determined by reason.”³⁸

By way of another example, Wilson observed that the presence of language among all peoples in the world illustrates that moral sense is natural and common to all people.³⁹ Languages were not invented by philosophers, they were “contrived by men in general, to express common sentiments and perceptions. The inference is satisfactory, that where all languages make a distinction, there must be a similar distinction in universal opinion or sentiment.”⁴⁰ For example, people distinguish “an agreeable and disagreeable, a good and ill, in actions, affections, and characters.”⁴¹ All people do not agree about the *most* beautiful thing, but they have an innate desire to make such a distinction. This moral sense improves through habit and education; thus, the *capacity* for moral reasoning is innate and proves its existence. Wilson, thinking like Aristotle, concluded that if there exists a good experienced man, he is the man who models common sense, and that is why we appeal not to the common sense of savages but to “men in their most perfect state.”⁴²

³⁶ Wilson, *Lectures on Law*, 510.

³⁷ *Id.*, 509.

³⁸ *Id.*, 514.

³⁹ This argument expressing “the universality of all languages in expressing moral sanctions” is from Reid (see Pascal, *The Political Ideas of James Wilson: 1742–1798*, 60).

⁴⁰ Wilson, *Lectures on Law*, 511.

⁴¹ *Id.*, 511.

⁴² *Id.*, 515–516. The passage in the *Nicomachean Ethics*, 1113a20–34, to which Wilson probably refers is translated by J. A. K. Thomson: “For the man of good character judges every situation rightly; i.e. in every situation which appears to him is the truth. Every disposition has its own appreciation of what is fine and pleasant; and probably what makes the

Why is this not obvious to philosophers today? “The school of Mr. Locke has given rise to two sects: at the head of one are Berkely and Hume: at the head of the other are Hartley and Priestly.”⁴³ Incoherent as their philosophies are, they “all agree in *assuming the existence of ideas*” without any agreement as to how they appear in the mind.⁴⁴ One philosopher destroys mind by saying it is the same thing as matter, another attacks truth of mind and destroys matter, and so it goes.

In essence, they seem not to recognize that man is composed of body and soul intimately connected, even if we cannot explain entirely in what manner connected. But as a consequence of this connexion “the body lives and performs the functions” and the mind is well adapted to its several end. The mind is for an order higher than that of the body, even “more of the wisdom and skill of the divine Architect is displaced in its structure.”⁴⁵ Thus perception belongs to consciousness, “but the manner in which they are perceived, we cannot explain; for we cannot trace the connexion between our minds and the impressions made on our organs of sense; because we cannot trace the connexion which subsists between soul and body.”⁴⁶

Can one hold someone responsible for stealing or murder if one cannot be certain of what our sense and reason tells us? Wilson observed that the courtroom relies entirely upon common sense knowledge. Unfortunately, he said, Lockean principles had already intruded themselves upon the study of law. Chief Baron Gilbert in his jurisprudence “grounds his general observations on the doctrine of Mr. Locke, that knowledge is nothing but the perception of the agreement or disagreement of our ideas.”⁴⁷ Perusing the first pages of Lord Chief Baron Gilbert’s *Treatise upon Evidence*, “unfolds the reason why I have employed so much pains to expose and remove the sandy and unsound foundation on which the principles of the law of evidence have been placed.”⁴⁸

man of good character stand out furthest is the fact that he sees the truth in every kind of situation: he is a sort of standard and yardstick of what is fine and pleasant.”

⁴³ Wilson, *Lectures on Law*, 605.

⁴⁴ Id., 606–612.

⁴⁵ Id., 590.

⁴⁶ Id., 590–591.

⁴⁷ Id., 614.

⁴⁸ Id., 614 and 798. The dates of Chief Justice Jeffrey Gilbert are 1674–1726.

Superiority and Inferiority in Law

“Despotism by an artful use of ‘superiority’ in politicks; and skepticism, by an artful use of ‘ideas’ in metaphysics, have endeavoured—and their endeavours have frequently been attended with too much success—to destroy all true liberty and philosophy. By their baneful effects, the science of man and the science of government have been poisoned to their very fountains. But those destroyers of others have met, or must meet with their own destruction.”⁴⁹ The other target of his reference to “despotism by the artful use of ‘superiority’ in politics” was William Blackstone (1723–1780), whose influential work of jurisprudence was entitled *The Commentaries on the laws of England* (1765), also had the marks of skepticism.

The question that his treatment of Blackstone raises is, to what degree is any legal and political system dependent upon a metaphysic? Can one simply adopt a definition of law absent a recognition of the underlying principles?

Blackstone defines law as “that rule of action which is prescribed by some superior, and which the inferior is bound to obey.”⁵⁰ This definition ought to make one pause and think, wrote Wilson. “Can there be *no* law without a superior? Is it *essential* to law, that inferiority should be involved in the obligation to obey?”⁵¹ If law is only ever created by the act of a superior over an inferior, then what place is given to a higher law, and on what ground does an inferior appeal against the ruling of a superior. The positive law of the nation ends up, on such an account, being supreme. Blackstone argued that Parliament is sovereign. While Blackstone used the terms *law of nature* and *natural right*,⁵² effectively, they are synonymous with existing English laws and liberties. When civil society and Parliament are supreme and the source of all law, then civil law and natural law are identified.

Theories of sovereignty took two forms in the seventeenth century: absolutist divine right of a King whose will is a direct command, and con-

⁴⁹ Id., 492 and 614.

⁵⁰ Id., 471.

⁵¹ Id.

⁵² Blackstone claims to incorporate a theory of the law of nature into his treatise on law, but this is undermined by his theory of parliamentary sovereignty. See his *Commentaries on the Laws of England*, vol. I, “Introduction,” s. ii. Blackstone’s metaphysic and epistemology is the same as Locke and Hobbes, i.e. natural law is a law of self-preservation, not a participation of reason in the eternal law. In addition, Blackstone’s God is Will and Power alone; Wilson adopts Hooker’s account of God.

tract theory, which when connected to a positivist view of law, placed absolute sovereignty in the chosen magistrate who personifies their will. In either case it is will, not truth and goodness, which is sovereign. On either account, there was no standard for law external to passion and will.

Against this theory of sovereignty, American colonists revived a theory of higher law, in order to assert that there exists in human beings something that is outside and above the state. In the words of Thomas Aquinas, “if something is contrary to natural law it cannot be made just as a result of human volition” (*S.Th.*, II–II, 57, 2, ob. 2). Richard Hooker, who is Thomistic in his account of natural law, served as a respected English source for them,⁵³ although there were a variety of sources to which they could appeal, not least the English legal minds, Coke and Fortescue.⁵⁴ Wilson made the most use in repeating Hooker’s account of natural, divine, and eternal law, and his theory of consent.

The structure of the *Lectures on Law*, shows that Wilson depended more on Richard Hooker than Blackstone. Instead of writing a commentary on the existing laws of England, Wilson presents a work of political philosophy. In the order of presentation Wilson begins with law as an expression of God’s providential wisdom, offering an account of eternal, divine and natural law (following the first book of the *Ecclesiastical Polity*).⁵⁵ He

⁵³ Russell Kirk, *The Roots of American Order* (Washington, D.C.: Regnery Press, 1991), 246–247. Beitzinger, *A History of American Political Thought*, 5, 34–35, 41, 88–89, 116–117, 132, 140, 147, 162, 235–239.

⁵⁴ As to the varieties, see B. F. Wright, Jr., “American Interpretations of Natural Law,” *The American Political Science Review* 20:3 (August 1926): 524–547.

⁵⁵ Following Richard Hooker, Wilson describes law this way:

“Of law there are different kinds. All, however, may be arranged in two different classes. 1. Divine. 2. Human laws. The descriptive epithets employed denote, that the former have God, the latter, man, for their author. The laws of God may be divided into the following species.

I. That law, the book of which we are neither able nor worthy to open. Of this law, the author and observer is God. He is law to himself, as well as to all created things. This law we may name the ‘law eternal’.

II. That law, which is made for the angels and the spirits of the just made perfect. This may be called the ‘law celestial’. This law, and the glorious state for which it is adapted, we see, at present, but darkly as through a glass: but hereafter we shall see even as we are seen; and shall know even as we are known. From the wisdom and goodness of the adorable Author and Preserver of the universe, we are justified in concluding, that the celestial and perfect state is governed, as all other things are, by his established laws. What those laws are, it is not yet given us to know; but on one truth we may rely with sure and certain confidence—those laws are wise and good. For another truth we have infallible authority—those laws are strictly obeyed: ‘In heaven his will is done’.

follows that with its import for nations, both domestically and internationally, and then moves on to a discussion of man as an individual (epistemology), as a member of society, and of the world. Only at that point does he discuss customary and common law, the positive laws which a particular nation may develop for itself over time. Following upon common law comes his discussion of government, executive, legislative and judicial powers, and then the practice of criminal law and rights. Hence, Wilson sees common and statute law as secondary to natural law, which is the standard of justice.

What common law does show is that consent is the most basic foundation of all positive law, both customary and statutory. In the medieval legal idea of consent, unlike in contract theory, people do not renounce their will. One, indeed, can never be obliged by a law to which one has not consented, and one never absolutely alienates one's sovereignty. Wilson is a democrat by reason of his conviction that all men have common sense, and a moral sense which offers them access to first principles and so are at all times sovereign actors.

The principle of consent was attested to in medieval English law, prior to modern ideas of sovereignty. Wilson repeats it: There was an old medieval adage attributed to "the English Justinian, [King] Edward the first. *Lex justissima, ut quod omnes tangit, ab omnibus approbetur.*" What touches all should be approved by all.⁵⁶ Lord Chancellor Fortescue, who had written that "the statutes of England are framed, not by the will of the prince but by that and by the assent of the whole kingdom."⁵⁷ They did not

III. That law, by which the irrational and inanimate parts of the creation are governed. The great Creator of all things has established general and fixed rules, according to which all the phenomena of the material universe are produced and regulated. These rules are usually denominated laws of nature. The science, which has those laws for its object, is distinguished by the name of natural philosophy. It is sometimes called the philosophy of body. Of this science, there are numerous branches.

IV. That law, which God has made for man in his present state; 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. This law has undergone several subdivisions, and has been known by distinct appellations, according to the different ways in which it has been promulgated, and the different objects which it respects.

As promulgated by reason and the moral sense, it has been called natural; as promulgated by the holy scriptures, it has been called revealed law. As addressed to men it has been denominated the law of nature; as addressed to political societies it has been denominated the law of nations" (Wilson, *Lectures on Law*, 497–498).

⁵⁶ Id., 565. Edward I (1239–1307).

⁵⁷ Id. Lord Chancellor Fortescue (1394–1480).

argue for the superiority of Parliament. There was also the example of consent which the Framers all agreed could be found in the old Anglo-Saxon law. Thinking that the most ancient laws of England affirmed self-government some colonial lawyers like James Otis ironically found themselves defending colonial rule through ancient English law against Parliament. Wilson could even appeal to the Roman Digest: “for the Roman law, was not, in every age of Rome the law of slavery.”⁵⁸ “In the original constitution of Rome, the sovereign power, the *dominium eminens*, as it is called by the civilians, always resided in the collective body of the people.”⁵⁹ The principle was stated, if not always followed. More recently, there was Hooker: “‘Over a whole grand multitude’, says the judicious Hooker, ‘consisting of many families, impossible it is, that any should have complete lawful power, but by consent of men, or by immediate appointment by God’.”⁶⁰ Furthermore, the

lawful power of making laws to command whole politick society of men, belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth, to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived, at the first, from their consent, upon whose persons they impose laws, it is no better than a mere tyranny. Laws they are not, therefore, which public approbation hath not made so.⁶¹

Who has power to make law? The answer lies in the consent of those who are governed. “The consent of those whose obedience the law requires. This I conceive to be the true origin of the obligation of human laws.”⁶² His recourse to an essentially medieval and teleological view of law makes possible the argument that the sovereign power in the reason and conscience of the ordinary person makes popular rule the best form of government.

⁵⁸ Id., 496.

⁵⁹ Id., 571.

⁶⁰ Id., 483.

⁶¹ Hooker, *Laws of the Ecclesiastical Polity*, Book I.8.10.

⁶² Wilson, *Lectures on Law*, 494.

The Governance of God

Who has superior standing and sovereignty which gives them authority to write positive law in the new nation? Wilson, the democrat, replied that the people are sovereign; this is affirmed in the American constitution. But where do the people find the source of their authority? To what or whom do they owe obedience? Is the superiority and sovereignty of the people founded upon their appetites and desires and passions? Are they left without a moral compass? No, he answered, because God did not leave them bereft and without a compass. They have moral sense, reason and the law of God.⁶³ Our “Creator has a supreme right to prescribe a law for our conduct and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles.”⁶⁴ By that law we govern ourselves, for between “beings, who, in their nature, powers, and situation, are so perfectly equal, that nothing can be ascribed to one, which is not applicable to the other, there can be neither superiority nor dependence.”⁶⁵

There are two ways to know God, by our moral sense or conscience intellectual and active, and revelation of Holy Scriptures. “Far from being enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other. The divine law, as discovered by reason and the moral sense, forms an essential part of both.”⁶⁶ Insofar as God is author of creation and author of revelation, the law written into both cannot disagree, and each person has access to both by which to govern themselves and govern society:

“Order, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot or should not, or will not be made . . . Animated nature is under a government suited to every genus, to every species, and to every individual of which it consists.”⁶⁷ God’s law is “a law more distinguished by the *goodness*, than by the *power* of its all gracious Author.”⁶⁸ “Were we to suppose—but the supposition cannot be made—that infinite goodness could be disjoined from almighty

⁶³ Id., 500.

⁶⁴ Id.

⁶⁵ Id., 501.

⁶⁶ Id., 499.

⁶⁷ Id., 464.

⁶⁸ Id., 471.

power—but we cannot—must proceed to the inference. No, it never can be drawn; for from almighty power infinite goodness can never be disjoined.”⁶⁹

God is good and wise, not simply will. It is again Richard Hooker who offers him support. Hooker had argued (against certain Puritan theologians) that God works by his own law which is suitable to his goodness. God is not arbitrary in his actions. “They err therefore who think that of the will of God to do this or that, there is no reason besides his will.”⁷⁰ Wilson concomitantly said: “Let us join, in our weak conceptions, what are inseparable in their incomprehensible Archetype—infinite power—infinite wisdom—infinite goodness; and then we shall see in its resplendent glory, the supreme right to rule: we shall feel the conscious sense of the perfect obligation to obey.”⁷¹ By God’s infinite power He provides for us, by His infinite wisdom he knows us, by His infinite goodness He proposes our happiness. To His goodness alone we trace the principle of his laws. “The rule of his government we shall find to be reduced to this one paternal command—Let man pursue his own perfection and happiness.”⁷²

Blackstone was wrong about the nature of law because he was wrong about the nature of Law. God in his wisdom provides for us to trace through our reason the principles of his law. Wilson put it this way:

No division has been more common, and perhaps, less exceptionable, than, that of the powers of the mind into those of the understanding and those of will. And yet even this division, I am afraid, has led to a mistake. The mistake I believe to be this: it has been supposed that in the operations ascribed to the will, there was no employment of the understanding; and that in those ascribed to the understanding, there was no exertion of the will.⁷³

If, according to Blackstone, the colonists cannot appeal against Parliament’s taxing power, one must agree with Wilson that Blackstone has incorporated the principle of tyranny into his definition of law.

⁶⁹ Id., 503. Here we note Wilson is siding with the Magisterial Reformers such as Hooker, and is rejecting Puritan theology which describes God as absolute and arbitrary power.

⁷⁰ Hooker, *Laws of the Ecclesiastical Polity*, Book I.2.5.

⁷¹ Wilson, *Lectures on Law*, 503.

⁷² Id.

⁷³ Id., 587.

So Wilson's great opposition to Blackstone led him to make an argument for the ontological reality of eternal law through Richard Hooker in order to show that understanding rather than will is the foundation of just law. But this can hardly be that surprising given his education in Scotland where he was taught to think from first principles.

Conclusion

Étienne Gilson had remarked that a democracy can be distinguished from a totalitarian regime by the fact that it "recognizes the presence in human beings, of something that is outside of the State." James Wilson argued that the new United States of America should affirm that principle in its founding jurisprudential and political philosophy. For how could Americans claim that its revolution was just, if they could not also show that justice is eternal and natural. As one constitutional lawyer remarked: "The act of legislating would stand out as a massive act of presumption unless it were understood that there are in fact propositions with a universal reach, which can define what is good or bad, just or unjust, for people in general."⁷⁴ But that of course requires that people study so as to know the first principles of justice.

Such a project also requires defending the capacity of mankind to know this truth, and Wilson pointed to such an argument in his *Lectures on Law*, even though it was not made as thoroughly as might have been necessary. He was also too sanguine in his view of America, as it would appear that as America was not as inclined to philosophical speculation as the *metaphysical* Scots. There was no struggle in the universities in America between sceptics and realists. People did not argue in the streets about the merits of Humean skepticism. Reid's works were important to the first decade or so of university educated Americans, and certainly the Scottish philosophical tradition had some purchase on some academics, but those early generations of Americans were not so inclined to pursue philosophy—practical individuals, they required only a nominal understanding of truth, which as de Tocqueville pointed out, was provided by religious faith.

All Wilson's energy, all his work and study, all that hope came to nothing, as later generations knew Blackstone's *Commentaries* much better than his lectures. Abraham Lincoln read his Blackstone and Bible together, and indeed, the potentially negative effects of Blackstone's skeptical defi-

⁷⁴ Hadley Arkes, *First Things* (Princeton, N.J.: Princeton University Press, 1986), 4.

dition of law are made moot when read in the context of divine law, although as Wilson noted, outside of that context it is more dangerous. Why was Wilson wrong in his assessment of the American mind? Why was he doomed to obscurity rather than celebrated and read? He had been quite as famous in his day as Madison and Hamilton.

The first answer must lie in his ignominious death. To die in debt and shame will tarnish a reputation. Only in the early twentieth century was his body restored to its rightful place and reinterred in Christ Churchyard, Philadelphia, although his book, edited by his son, was available for study soon after his death. Mostly it lay in obscurity with an occasional revival of interest from a primarily Christian audience. Roman Catholic writers took him up in the early twentieth century,⁷⁵ and helped inform John Courtney Murray⁷⁶ when he made an argument about the presence of natural law thought at the Founding. Perhaps it did not seem so important to read a philosophical argument for the relation of constitutional law to natural law when such a relationship was assumed. After the philosophies of progressivism and pragmatism came to dominate legal thinking, that relationship was ignored. But in retrospect, the lack of attention to this robustly philosophical natural law argument for popular sovereignty seems to have been a serious loss to American legal thought. Nonetheless, the fact that there was a Framers who argued so robustly against philosophical skepticism, and so persuasively for true philosophy should not be overlooked. Today when it is assumed that skepticism about truth is the foundation of tolerance and freedom, it is very necessary to read James Wilson, this neglected but important, Framers.

**THE COMMON SENSE AMERICAN REPUBLIC:
THE POLITICAL PHILOSOPHY OF JAMES WILSON (1742–1798)**

SUMMARY

James Wilson (1742–1798), lawyer, Justice of the first Supreme Court of the United States, and Constitutional Framers argued, as did Étienne Gilson, that a citizenry who have adopted philosophical skepticism will lose their political freedom, as self-rule requires that citizens be able to reason rightly about the natural law. He advocated a common sense philosophical

⁷⁵ William J. Obering, S.J., *The Philosophy of Law of James Wilson* (Washington, D.C.: Catholic University of America, 1938).

⁷⁶ John Courtney Murray, *We Hold These Truths* (Kansas City, MO: Sheed and Ward, 1960).

education in natural law for all lawyers, so that they might know the first principles of moral reasoning.

KEYWORDS: natural law, Étienne Gilson, constitution, James Wilson, William Blackstone, Alasdair MacIntyre, John Locke, Richard Hooker, David Hume, skepticism, liberty, freedom, despotism.