THE BIBLE AND JAMES WILSON'S RULE OF LAW

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Abstract: In this liberal, democratic age, rule of law has been taken granted as a precept of good politics, but practically speaking, it seems to be alarmingly fungible, especially in the modern American context. Is rule of law simply a nice theory, or a binding authority for democratic politics? For clarity on this issue, I suggest a turn to one of the earliest and most sophisticated thinkers in the American legal tradition. James Wilson, a Founder who went on to become one of the first Supreme Court justices, constructed a theory of the rule of law uniquely inspired by biblical and Christian metaphysical principles. His works provide important insight into how the rule of law should or could operate in the American context, and demonstrate the enduring relevance of biblical and theological ideals for the modern American legal order.

If they think of it at all, Americans unconsciously view the idea of the rule of law through the lens the American Founding, and, more specifically, through the lens of the *Federalist Papers*.[1] In these famous documents, James Madison laid out a new framework for understanding how laws would remain sovereign over all American people—a framework that vested the rule of law in a practically-constructed Constitutional system which, taking for granted a less-than-angelic nature for men, sought to make ambition counteract ambition between, within, and among political institutions. While it is difficult to downplay the role that Publius and *The Federalist Papers* played in constructing the American conception of the rule of law, Hamilton, Madison, and Jay were not the only American Founders to articulate a vision for the rule of law. In fact, sticking to the *Federalist Papers* (and, more generally speaking, the stereotypical understanding of the Founding) affords only partial glimpse into how the rule of law was conceived during the Founding era.

Moreover, the vision for rule of law espoused by Publius demonstrates, in the modern American context, that the best laid plans of mice and men often go awry. Rule of law, Publius maintained, could be upheld through competing institutions of government jealously preserving their own power. Hamilton, Madison, Madison, and Jay did not, and perhaps could not, have predicted a lethargic legislature that would willing cede its most precious authorities (including the startlingly relevant power of war declaration) to a sprawling and increasingly commanding executive. The most pressing questions regarding the health of the American rule of law center this evolution of power; short of repeatedly articulating that *this isn't how it's supposed to work* and hoping for deliverance from a slow-moving, selective Supreme Court with its own problems regarding the question of legitimacy, it seems there is little to be done preserve the rule of law in America so articulated. The American rule of law as imagined by Publius has long felt flimsy—a nice theory with

[1] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), 47.

few remaining teeth and little means of enforcing its practical value for American politics. If Publius is all Americans have to work with, then the prospects for American rule of law seem grim indeed.

Luckily, there were other American Founders who certainly valued the rule of law, but along theoretical grounds different from those of Publius. Chief among such Founders is the Pennsylvanian James Wilson, who went on to serve as a U.S. Supreme Court Justice. Wilson's rule of law theory diverged from that of Publius in many ways, but in no way more significantly than in terms of Wilson's moral framework for the rule of law. In opposition to Publius's moral agnosticism, Wilson's rule of law sought to ground the principle of the rule of law in the moral and metaphysical. This is made apparent especially in Wilson's reliance on explicit biblical references to furnish his theory of the rule of law, and the inspiration he drew from the common-sense school of the Scottish Enlightenment. Wilson anticipated the necessity of abiding moral and metaphysical principles among the American people to preserve the sanctity of legal principles. In short, Wilson recognized the need for the rule of law to root itself not merely in institutions, but in higher-order ideals and human traditions, lest the concept itself become mere theory without connected practice or authority. In his understanding of the rule of law in America as ultimately metaphysical, moral, and, finally, biblical, in nature, Wilson's rule of law theory possesses a bite that Publius's lacks, which makes it perhaps uniquely suited for recovery in the modern era. The proceeding sections of this essay outline Wilson's fusion of natural law and popular sovereignty in his theory of the rule of law, his grounding of this theory in the bible, and implications for a revival of Wilsonian rule of law theory in the modern United States.

Natural Law and Popular Sovereignty in Wilson's Rule of Law

Born a Scotsman in 1742, Wilson grew up and was educated among the giants of the Scottish Enlightenment at St. Andrews. Though originally trained as a clergyman, the young Wilson

forewent the church and traveled to America in 1761, where he settled in Pennsylvania.[2] Wilson signed both the Declaration of Independence and the Constitution (one of only six men to do so) and served as one of Pennsylvania's delegates to the Constitutional Convention *and* one of the members of the Pennsylvania state ratifying convention (the only of the Pennsylvanian delegation to do both). At Convention, Wilson was one of the most prominent voices and is often viewed as second only to James Madison with regards to authorship of the Constitution. In 1789, Wilson became a justice of the first U.S. Supreme Court, and simultaneously began a position as a professor of law at the University of Pennsylvania, during which time he delivered his *Lectures on Law*, perhaps the most important theoretical treatise ever written on American jurisprudence.

Perhaps the most significant influence on Wilson's political and legal thought was, unsurprisingly, the Scottish Enlightenment. As William Ewald noted that, "He experienced the Scottish Enlightenment first hand; the others, only derivatively."[3] The common-sense school, in which Wilson was educated, emerged among Scottish academics as a response to David Hume's philosophy, which encouraged doubt of the senses, necessitating empirical validation of all things subject to human perception.[4] Alternatively, instead of demanding empirical evidence for the reality of the material world, God, and the human soul, the common-sense school determined that a collection of moral instincts—a "common sense"—validated the existence of the metaphysical. Wilson reflected this idea when he wrote of the natural law as "that law, which God has made for man in his present state; that law, which communicated to us by reason and conscience, the divine monitors within us."[5] Wilson also wrote that "moral sense, from its very nature, is intended to

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[2] William Ewald, "James Wilson and the Scottish Enlightenment," *U. Pa. J. Const. L.* 12 (2009): 1065.
[3] Ewald, "James Wilson and the Scottish Enlightenment," 1060.
[4] Arnaud B Leavelle, "James Wilson and the Relation of the Scottish Metaphysics to American Political Thought," *Political Science Quarterly* 57, no. 3 (1942): 396.
[5] James Wilson, *Collected Works of James Wilson*, ed. Kermit L. Hall and Mark David Hall, 2 vols. (Indianapolis: Liberty Fund, 2007), 498.

regulate and control all our other powers."[6] In this way, Wilson describes the moral sense as a guide that reacts in lockstep with perception and reason, directing humans naturally toward a kind of moral equilibrium.[7]

If the principle of the rule of law asserts that the laws ought to reign supreme, then a corollary theory of natural law instructs as to what sorts of laws these ought to be. Rightful human laws—articulated through the channeling of moral sense and reason—were, in Wilson's view, partial codifications of the natural law. With regard to who should create these human laws, Wilson held with the likes of Publius that "the truth is, that the supreme, absolute, and uncontrollable authority *remains* with the people."[8] To this effect, Wilson spent much of his lecture entitled "Of the General Principles of Law" detailing the nature of sovereignty within his rule of law theory. In it, Wilson drew stark boundaries between the authority of God within natural law and the authority granted by human laws. Natural law, per Wilson, is promulgated by a single ultimate authority—God, the "allgracious Author."[9] Comparatively, human laws are partial, imperfect attempts prescribe the vast natural law, and as such cannot imbue any human lawgiver with such authority. No one, per Wilson, is destined by rightful human law to rule or to be ruled.

The people, collectively understood as those ruled by human law, were to be the rightful sovereigns over that human law. Good governance need not rest in the hands of the blessed few, but in Wilson's view might be placed in the hands of the whole given each man's natural moral sense for the good. The people are sovereign, said Wilson, but the people are governed by the moral sense that attaches them to the natural law and their duties as men and citizens.[10] To maintain the rule of

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[6] Wilson, *Collected Works of James Wilson*, vol. 1, 512.
[7] Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742-1798* (University of Missouri Press, 1997); James R Zink and Michelle Schwarze, "James Wilson's Science of Politics and the Moral Psychology of American Constitutionalism," *American Political Thought* 7, no. 4 (2018).
[8] Wilson, *Collected Works of James Wilson*, vol. 1, 213, 441.
[9] Wilson, *Collected Works of James Wilson*, vol. 1, 471.
[10] Wilson, *Collected Works of James Wilson*, vol. 1, 532.

law, the people must have rightful sovereignty over their own laws, but also, individually and collectively, must be bound by an inherent moral sense to create just and wise laws.

Wilson's Biblical Point of Departure

This is all very lovely theory indeed, and, if Wilson's many allusions to God were merely rhetorical, and his articulation of the law as God-given merely metaphorical, then theory it would remain. A hypothetical God dispensing hypothetical law can have no sway over men's hearts and minds, practically speaking. However, Wilson's dependence on explicit biblical principles to furnish his grounding for certain legal theories shows he meant to imbue his sense of the rule of law with a legitimate religious (and specifically Christian) authority.[11] Wilson maintained that humans could ascertain the natural law (alternately described by Wilson as "the will of God") in three ways: "by our conscience, by our reason, and by the Holy Scriptures."[12] The last of these he viewed as no less authoritative than the first two.

Along with the conscience, Wilson viewed Scripture as paving the way toward first-order moral truths, or the "first principles of morality." Comparatively, reason played a secondary role in Wilson's theoretical framework as the path to only deductive, not inductive, moral reasoning. Reason alone could only "allow us to arrive at principles that fall into the second category of moral truths, or those secondary principles that are derived from the first principles of morality."[13] While conscience and Scriptures provide the firm foundation upon which the laws specific to time, place,

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[11] As Mark David Hall notes, this reading of Wilson as earnest in his mention of religion, as opposed to merely rhetorical, is not an uncontroversial one. This essay, however, joins Hall, William F. Obering, Mary Christopher Querin, and Mary Delahanty in viewing Wilson's Christian commitments as too obvious and explicit to dismiss as mere flourishes. See Hall, *The Political and Legal Philosophy of James Wilson, 1742-1798*, 35-38; Wlliam F Obering, *The Philosophy of Law of James Wilson* (Washington, D.C.: Catholic University of America Press, 1938); Mary Christopher Querin, *The Political Theory of James Wilson* (Saint Louis University, 1961); Mary T Delahanty, *The Integralist Philosophy of James Wilson* (Pageant Press, 1969).

[12] Wilson, *Collected Works of James Wilson*, vol. 1, 509.

[13] Zink and Schwarze, "James Wilson's Science of Politics and the Moral Psychology of American Constitutionalism," 595.

and circumstance might be built, these particular laws were usually products of secondarily-derived principles via reason. As such, within the context of determining particular and specific laws, Wilson wrote of the Christian scriptures that:

> They present the warmest recommendations and the strongest inducements in favour of virtue: they exhibit the most powerful dissuasives from vice. But the origin, the nature, and the extent of the several rights and duties they do not explain; nor do they specify in what instances one right or duty is entitled to preference over another. They are addressed to rational and moral agents, capable of previously knowing the rights of men, and the tendencies of actions, of approving what is good, and of disapproving what is evil.[14]

When Wilson makes mention of the Scriptures in his writing, then, readers ought to pay attention, because his doing so indicates the articulation of a first-order moral truth—not a time-and-place bound legal fiction, but a part of God's will as expressed through the natural law. When Wilson invokes the Scriptures, he does so to alert Americans to the bedrock concepts of their legal order, to which they owe not merely the respect due to human laws, but the reverence due to divine authority. Across Wilson's legal writings, such three invocations of Scripture stand out as particularly pertinent: one regarding a legal right, another a legal process, and the third a legal institution.

First, in his essay entitled "On the History of Property," Wilson anchors the concept of property to the Genesis story, and he does so contra many of his contemporaries. "Concerning the origin and true foundation of property," Wilson writes, "Mr. Paley declares, that the real foundation of it is municipal law. Others consider property as a natural right; but as a right, which may be extended or modified by positive institutions." For Wilson, though, "the general property of man in animals, in the soul, and in the productions of the soil, is the immediate gift of the bountiful Creator of all."[15] Wilson goes on to quote Genesis 1:27-28 and Genesis 9:1-3 as the basis for his argument. The definition and purpose of property originate in God's gift to humanity. All other suppositions and reasonings about property are only secondarily derived from this revealed, Scriptural truth.

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[14] Wilson, *Collected Works of James Wilson*, vol. 1, 522.
[15] Wilson, *Collected Works of James Wilson*, vol. 1, 387.

There is a finality to this for Wilson; for him, no further inquiry into property's origins is necessary. This is his axiomatic basis for understanding property as a legal right.

Second, Wilson invokes Scripture when he discusses the nature of legal evidence in court proceedings. Establishing that, when evidence of the external senses is presented, touch is most compelling proof of the evidence, followed by sight and then by sound, Wilson draws a parallel to the resurrected Christ in conversation with his disciples. First, Christ spoke to them. Then, he held out his punctured hands, and finally he allowed the doubting Thomas to touch his wounds. "In the sacred history of the resurrection," Wilson wrote, "a beautiful and emphatical reference is had to this distinct but corresponding and reciprocally corroborating evidence of the senses, by him, by whom our nature was both made and assumed."[16] Standards for evidence, per Wilson, are no mere conventions of time, place, and circumstance. As it turns out, standards for evidence are aligned with first-order moral principles and revealed to us through not just Scripture, but through the actions of Christ himself.

Third, Wilson invokes the Scriptures when he discusses the legal institution of marriage, which he agreed with Cicero is "the first bond of society…the next, our children."[17] The value of marriage, Wilson wrote, was appreciated even in societies as far back as the ancient Israelites, wherein, "by the law of Moses, a man, during one year after his marriage, was exempted from publick burthens, and from going to war."[18] Further, Wilson wrote of the various ways in which marriage had been maligned and desecrated across human history, but notes that, within an especially debaucherous Roman world, "by the precepts of Christianity, and the practice of the Christians, the dignity of marriage was…restored."[19] The wisdom of biblical teaching and Christian

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[16] Wilson, *Collected Works of James Wilson*, vol. 2, 800.
[17] Wilson, *Collected Works of James Wilson*, vol. 2, 1076.
[18] Wilson, *Collected Works of James Wilson*, vol. 2, 1069.
[19] Wilson, *Collected Works of James Wilson*, vol. 2, 1071.

experience reveals the necessity of marriage for a flourishing community, Wilson averred. This legal institution was not merely a product of invention or convenience, but of that richer natural law revealed through Scripture and conscience. Marriage, then, ought to be respected in a religious sense as a product of the natural law, and not merely as an institution of human laws.

Considering the Rulership of the Laws

The moral agnosticism espoused by the authors of the *Federalist Papers* might have sown the seeds of their own undoing. In attempting to make laws reign over men by manipulating their vices, instead of inducing their reverence, this model for the American rule of law is empty at its center. It provides no safeguards for the rule of law should institutions of government decay. Wilson, alternatively, provided a vision for American rule of law that required a powerful core of moral conviction, connected to religious practice, among the American people. It is no secret that Wilson's theory of the rule of law lost out in American consciousness to that of Publius, but one wonders what an America under a Wilsonian rule of law might have looked like. By locating the promulgation of the rule of law not in institutions, but in a moral and metaphysical authority, might Wilsonian rule of law have held up better over time?

Of course, there's no way of answers such a question with any real certainty. There is, however, the open question as to whether Americans ought to consider Wilson today when understanding the rule of law in the American context. To revive Wilsonian rule of law in the modern day would necessitate viewing laws not simply as human inventions, but as subject to a higher metaphysical authority. It would demand the articulation of first principles within the legal context, and an unflinching adherence to these principles as legal dogma. It would require the moral education of citizens to understand and participate in the creation of good laws within this context. Such a vision of politics could not rest on the assumption of men's vices, but would require their

aspirations toward virtue. In locating the purpose and authority of government outside the sphere of human influence, Wilson's understanding of the rule of law carries relies upon the habits of the heart practiced by the people, not merely their self-interest.

Bibliography

Delahanty, Mary T. *The Integralist Philosophy of James Wilson*. Pageant Press, 1969.

Ewald, William. "James Wilson and the Scottish Enlightenment." *U. Pa. J. Const. L.* 12 (2009): 1053.

Hall, Mark David. *The Political and Legal Philosophy of James Wilson, 1742-1798*. University of Missouri Press, 1997.

Leavelle, Arnaud B. "James Wilson and the Relation of the Scottish Metaphysics to American Political Thought." *Political Science Quarterly* 57, no. 3 (1942): 394-410.

Obering, Wlliam F. *The Philosophy of Law of James Wilson*. Washington, D.C.: Catholic University of America Press, 1938.

Querin, Mary Christopher. *The Political Theory of James Wilson*. Saint Louis University, 1961.

Tamanaha, Brian Z. *On the Rule of Law: History, Politics, Theory*. Cambridge University Press, 2004.

Wilson, James. *Collected Works of James Wilson*. Edited by Kermit L. Hall and Mark David Hall. 2 vols. Indianapolis: Liberty Fund, 2007.

Zink, James R, and Michelle Schwarze. "James Wilson's Science of Politics and the Moral Psychology of American Constitutionalism." *American Political Thought* 7, no. 4 (2018): 588-613.