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The Spirit of the Natural Law: Receptions of Cicero in the Works of Justice James Wilson

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## Abstract

### The Spirit of the Natural Law: Receptions of Cicero in the Works of Justice James Wilson By Bradley Bennett

After obtaining a strong background in the classics while growing up in Scotland, James Wilson emigrated to America, where he apprenticed with the prominent Philadelphia attorney John Dickinson, wrote pamphlets advocating for American independence, signed both the Declaration of Independence and the Constitution, and became one of the first Justices on the Supreme Court of the United States. Many of Wilson's extensive contributions to the United States government can be traced back to ancient Rome—specifically Cicero.

Wilson uses Cicero's natural law theory as the foundation of his framework for the American legal system. He meticulously models his own natural law philosophy after Cicero's and cites Cicero's essential philosophic works each step along the way. Going beyond merely parroting Cicero's philosophy, Wilson uses his own logic to extend it to three mainstays of his own political thought: popular sovereignty, the common law, and the abolition of slavery.

Natural law and legal theory are not the only areas in which Wilson employs Cicero. Wilson also looks to Cicero for direction on social matters, including social class representation in government, the components of a proper education, and the role of women—making clear that Wilson looked to Cicero not only for inspiration in American law, but for the structure of American social order as well.

This thesis employs as primary evidence Wilson's *Lectures on Law*, which he delivered in Philadelphia starting in 1790. Examined as well are his influential *State House Yard Speech* and his landmark opinion in *Chisholm v. Georgia*. Rather than relying on eighteenth century sources, special attention is given to Cicero's own writing, namely *De Officiis* and *De Re Publica*. Understanding where Wilson's quoting of Cicero either matches or diverges from Cicero's own philosophy demonstrates where Wilson is echoing Cicero's thought, and where he is giving voice to his own ideas inspired by antiquity.

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When she was asked to describe her life in one word, my Mema said, “lucky.” I would use the same word to describe the past four years at Emory. It seems fitting to pause and thank those who have contributed to my personal and intellectual growth.

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To those not yet sufficiently recognized, I offer my most genuine thanks.

*Atque etiam in secundissimis rebus maxime est utendum consilio  
amicorum iisque maior etiam quam ante tribuenda auctoritas.*

—Tully, *De Officiis* I.91

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## Introduction: A Founder Forgotten

*“Let us consult the sentiments as well as the history of the ancients.”*

—James Wilson, *Of the General Principles of Law*

A Barnes and Noble, or any other American bookseller, is incomplete without a substantial section dedicated to United States history. It seems there is a great market for books detailing past American heroics—with a particular emphasis on America’s beginning. The history of the American founding is of particular interest for readers, and new books are published each year providing fresh interpretations of the already well-documented era. Three of Barnes and Noble’s ten *Best History Books of 2021* focus on the American founding.<sup>1</sup> Similarly, three of Amazon’s twenty-one best history books of the year have the same topic.<sup>2</sup> The recurrence of eighteenth-century America on such lists certainly demonstrates a heightened preoccupation with the time.

This popular passion for America’s founding, however, parallels an infatuation with a handful of well-known and already celebrated figures. Lists of best-selling books on the era are crowded with familiar names—George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, Alexander Hamilton, and James Madison.<sup>3</sup> The reduction of the American Revolution down to a handful of names necessarily excludes several other founders.

A significant omission made by popular literary culture is James Wilson. He was one of six individuals to sign both the Declaration of Independence and the Constitution of the United States, and he was also the second-most-frequent speaker during the Federal Convention of

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<sup>1</sup> See Barnes and Noble’s *Best History Books of 2021*, and Barnes and Noble’s *Best Books of 2021*.

<sup>2</sup> See Amazon’s 2021 *Best Books of the Year—History*.

<sup>3</sup> Examine both Barnes and Noble’s 2021 best sellers in *18<sup>th</sup> Century United States History—American Revolution* and Amazon’s 2021 best sellers in *US Revolution & Founding History*.



1787.<sup>4</sup> Wilson went on to serve as one of the first Justices on the Supreme Court of the United States. During his career in public service, Wilson best communicated his vision for the new republic in his *Lectures on Law*—the first of which was delivered to President Washington, Vice President Adams, Congress, and the Governor and legislature of Pennsylvania in Philadelphia in 1790. It is here that Wilson made clear his dedication to two underpinnings of the founding: natural law and popular sovereignty.

The legacy of Wilson is one that remains largely unnoticed. Classical receptions scholars have only included Wilson as a small component of much larger studies, and American intellectual historians have focused almost solely on the influence of the Enlightenment on Wilson's thought—particularly with respect to natural law. While academic scholarship largely parallels the trends seen in popular literary culture, Wilson has become a burgeoning subject of research and political activity in the past two decades—he was even mentioned about a dozen times in the evidentiary record for President Trump's January 2020 impeachment proceedings.<sup>5</sup> With classical receptions work on Wilson still in its infancy, it is necessary to examine both articles on Wilson himself and classical receptions literature about the American founding in a broader sense.

Classical receptions literature for several decades has been sculpted as a response to the American historian Bernard Bailyn. In his 1967 Pulitzer Prize-winning book, *The Ideological Origins of the American Revolution*, Bailyn claimed that despite myriad mentions of the classics by the founders, the ideas of antiquity were “not determinative of thought.”<sup>6</sup> Such a dismissive

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<sup>4</sup> Mark Hall, "Justice, Law, and the Creation of the American Republic: The Forgotten Legacy of James Wilson" (2009). Faculty Publications - Department of History, Politics, and International Studies. Paper 1.

<sup>5</sup> U.S. Congress, House of Representatives, *Impeachment of President Donald John Trump: The Evidentiary Record Pursuant to H. Res. 798*, 116<sup>th</sup> Cong., 2d sess., 2020, H. Doc. 116–95. <https://www.govinfo.gov/content/pkg/CDOC-116hdoc95/pdf/CDOC-116hdoc95-vol11-pt5.pdf>

<sup>6</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution*. Cambridge, MA: The Belknap Press of Harvard University Press, 2017, 328. Fiftieth anniversary edition. Originally published in 1967.

view of ancient Greece and Rome in the founding was the dominant perspective until the late twentieth century.<sup>7</sup> Understanding the profuse emphasis that twentieth century historians placed on Enlightenment thought, at the expense of classical thought, is essential in comprehending the response to such reasoning.

Classical reception scholars have sought to refute decisively Bailyn's claim, and to establish that the American founders thoughtfully engaged with classical writing. In direct opposition to Bailyn, the historian Carl J. Richard published *The Founders and the Classics: Greece, Rome, and the American Enlightenment*. He argues that "there is abounding evidence that Thomas Jefferson, John Adams, James Madison, James Wilson, John Dickinson, Patrick Henry, and numerous other founders read and interpreted classical works for themselves."<sup>8</sup> Richard also notes that Bailyn and his contemporaries fail to recognize that Enlightenment thought, or Whig thought, does not exist in a vacuum; it is the product of a lengthy intellectual tradition and was influenced by the ancient thinkers of Greece and Rome.<sup>9</sup>

Other contemporary historians have taken a similar approach to that of Richard. In her book, *The Culture of Classicism: Ancient Greece and Rome in American Intellectual Life, 1780–1910*, Caroline Winterer furthers the work of Richard and argues that classicism, alongside Christianity, was the "central intellectual project" during the American founding.<sup>10</sup> She also notes the striking absence of contemporary classicists in the debate over the classics' influence in the founding era.<sup>11</sup> Winterer's work makes not only a noteworthy contribution to this debate, but

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<sup>7</sup> Jonathan Grant Feld, "Cradle of Libertas: Reception of the Roman Republic in Post-Revolutionary Philadelphia." Princeton University, 2018. <http://arks.princeton.edu/ark:/88435/dsp01sx61dq02m>.

<sup>8</sup> Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment*. Cambridge etc.: Harvard University Press, 1996, 2–6.

<sup>9</sup> *Ibid.*, 2–6.

<sup>10</sup> Caroline Winterer, *The Culture of Classicism: Ancient Greece and Rome in American Intellectual Life, 1780–1910*. Baltimore: Johns Hopkins University Press, 2002, 1.

<sup>11</sup> *Ibid.*, 1.

also does an excellent job framing its current state: a discourse about “the degree to which classical ideals shaped the ideology of the American Revolution.”<sup>12</sup>

While these recent additions to reception literature are admirable, they are also severely limited in scope. The response to Bailyn’s work has created a one-dimensional continuum that debates how seriously, if at all, the founders engaged with ancient thought, with Bailyn’s “window dressing” view at one extreme and Winterer’s “central intellectual project” view at the other. Such research seeks to answer just this one limited question, and the lack of classicists in this discussion, as Winterer hints, limits the scope of reception research on the American founding. Current research addressing classical receptions in the American founding focuses on mere engagement that the founders had with ancient thought.

To study fully the influence of the classics on early American political thought, one must consult, in addition to eighteenth century sources, the classical writings themselves. In addition to examining which founders cite which classical writers, one must examine the actual classical texts. This approach is utilized here, studying the receptions of Cicero in Wilson’s writings by examining not only Wilson’s *Lectures on Law*, but also several of Cicero’s foundational works—*De Officiis*, *De Legibus*, and *De Re Publica*.

Such an approach yields complex results that go beyond research of mere engagement; it demonstrates how Wilson employed Cicero in several different ways. Wilson received a strong classical education in Scotland, where he read Cicero before teaching classics in Philadelphia, and then applied Cicero’s philosophy in American politics and in his law lectures. Wilson particularly depends on Cicero’s natural law thought at the beginning of his lecture series, where he uses Cicero’s philosophy as his own model. His frequent use of Cicero demonstrates clear

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<sup>12</sup> Ibid., 1.

engagement with classical natural law thought—something distinctly different from Enlightenment natural law theory as put forth by social contract theorists.

In his later discussion of natural law, Wilson employs Cicero’s natural law and further applies it to topics that Cicero never discussed. He uses Cicero’s natural law model to justify popular sovereignty, the common law, and the abolition of slavery. Cicero, in fact, made little mention of any of these three topics in any of his work. If anything, he held opposing views.

The final way that Wilson employs Cicero is unrelated to natural law. Wilson looks to Cicero for inspiration when discussing America’s social organization. He specifically cites him to argue for mixed government, for a broad liberal arts education, and for women to have a similar role in American family life that they had in ancient Rome.

Even other Romans canonized Cicero, making him a hero and figure synonymous with virtue.<sup>13</sup> According to Plutarch, Octavian Caesar himself referred to Cicero as “a learned man and a lover of his country.”<sup>14</sup> Wilson continues this ancient tradition, although he admittedly neglects to focus on Cicero’s death in the same manner as the Romans.

Examining the reception of Cicero in Wilson’s works is a targeted, focused undertaking distinguished from recent broad endeavors in the field. While its analysis is centered on just one figure from the American founding era, its implications are broad; this research touches classical and Enlightenment philosophy, Scottish universities, the United States Constitution, and the Supreme Court of the United States. An understanding of classical receptions rooted in both eighteenth century history and classicism serves to enrich our understanding of the American founding and create additional focus on founders like Wilson—ones who have been forgotten.

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<sup>13</sup> Robert A. Kaster, *Becoming ‘CICERO’*. In: *Style and Tradition: Studies in Honor of Wendell Clausen*, ed. P. E. Knox and C. Foss. Stuttgart: B. G. Teubner; 1998.

<sup>14</sup> Plutarch, *Lives*, Volume VII: Demosthenes and Cicero. Alexander and Caesar. Translated by Bernadotte Perrin. Loeb Classical Library 99. Cambridge, MA: Harvard University Press, 1919.

## Chapter I: Wilson's Classical Background

*“When some future Xenophon or Thucydides shall arise to do justice to their virtues and their actions; the glory of America will rival—it will outshine the glory of Greece.”*

—James Wilson, *Of the Study of the Law in the United States*

Scholarship on James Wilson focuses overwhelmingly on his contributions to the Constitution. It is understandable why—Wilson was the second-most-frequent speaker at the Federal Convention of 1787, and he made several tangible contributions to the structure of American government.<sup>15</sup> Scholars focus on a handful of contributions that Wilson made. Daniel McCarthy describes Wilson as, “the single most important author of Article II” when describing Wilson’s influence in structuring the executive branch and creating a unitary presidency.<sup>16</sup> Nicolas Pedersen claims that Wilson is responsible for proportional representation in the House of Representatives.<sup>17</sup> He also notes that if Wilson had his way, seats in the Senate would be apportioned proportionally as well, and the president would be elected by a simple majority of American voters.<sup>18</sup> Interestingly enough, Wilson is also responsible for defining treason against the United States in the Constitution’s Treason Clause.<sup>19</sup> And of course, Wilson made a handful of contributions to the judicial system as one of the first Justices on the Supreme Court of the United States. Scholars tend to focus on these tangible contributions that Wilson made to American government, at the expense of his overarching political philosophy and classical background.

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<sup>15</sup> Mark Hall, "Justice, Law, and the Creation of the American Republic: The Forgotten Legacy of James Wilson" (2009). Faculty Publications - Department of History, Politics, and International Studies. Paper 1.

<sup>16</sup> Daniel J. McCarthy, “James Wilson and the Creation of the Presidency.” *Presidential Studies Quarterly* 17, no. 4 (1987): 689–96.

<sup>17</sup> Nicholas Pedersen, "The Lost Founder: James Wilson in American Memory," *Yale Journal of Law and the Humanities* 22, no. 2 (Summer 2010): 257-338, 259.

<sup>18</sup> *Ibid.*, 259.

<sup>19</sup> *Ibid.*, 260. The Treason Clause is found in the U.S. Constitution. Article III, Section 3, Clause 1, and reads, “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

Wilson's politics were, for eighteenth century standards, very progressive. He wished to see slavery eradicated in all the states in the Union. As an immigrant from Scotland himself, he was decidedly pro-immigration. He was also an ardent supporter of women.<sup>20</sup> While some of Wilson's views seem to fit well into contemporary American politics and culture, not all of his views can be construed as modern; Wilson created the notorious Three-Fifths Clause, which was the compromise that resulted from fierce debate between supporters of slavery and their opponents.<sup>21</sup> Such are the facets of Wilson's life that are most frequently studied.

Wilson's background has not been the subject of a significant amount of scholarship. What little scholarship there is focuses on his engagement with the Scottish Enlightenment. Little attention is paid to the strength of Wilson's education in the classics. Before examining in depth Wilson's application of Cicero when forming the American government, it is useful to see briefly how he earlier engaged with classical thought.

Unlike many of the other founders, Wilson was an immigrant. He was born in Carskerdo, Scotland in 1742. His parents intended for him to be a minister when he was born, so he was afforded a strong education that was uncommon to others in his social class.<sup>22</sup> Wilson received a "fine classical education" at Cupar Grammar School, in Cupar, Scotland, before attending the University of St. Andrews.<sup>23</sup>

Martin Clagett examines Wilson's Scottish childhood in detail, and he makes several contributions to smaller details of Wilson's life, including details about the occupation of

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid., 260. The Three-Fifths Clause is found in the U.S. Constitution, Article I, Section 2, Clause 3, and reads, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

<sup>22</sup> Mark Hall, "Justice, Law, and the Creation of the American Republic," 1.

<sup>23</sup> Ibid. Mark Hall refers to the institution as "Culpar grammar school." James Wilson grew up three miles from the town Cupar, Scotland, and Martin Clagett refers to the same institution as, "Cupar Grammar School."

Wilson's father. He notes that Wilson's father was a tenant farmer, and not a minister as previous scholars had thought.<sup>24</sup> He also comments on Wilson's time at the Cupar Grammar School, saying, "The curriculum in the grammar school likely included writing, English, arithmetic, church music, and Latin, which prepared the students for college."<sup>25</sup> Clagett lists Cato, Horace, Sallust, and Virgil as figures that were likely influential for Wilson from his time at Cupar. He also lists Ovid as a significant author that Wilson would have read.

Cicero is likely a glaring omission from this list. His writings to this day remain customary works of advanced Latin taught in classics departments at colleges and universities. Cicero rivals the virtue of Cato and the patriotism of Virgil's Aeneas. And there exists the fact that Cato was largely a figure. Only one letter written by his hand survives. Cicero, alternatively, has an expansive list of surviving work for Wilson to read. There is no reason to believe that Wilson was significantly influenced by Ovid; he wrote stories such as his *Metamorphoses* and love poems like his *Ars Amatoria* that have little to do with moral or political thought. Cicero, on the other hand, wrote extensive philosophic works on law and justice, and has several known works of oratory that also address the many facets of statecraft. If Wilson received as strong of an education in Latin as Clagett suggests, he certainly would have been very familiar with Cicero.

Clagett and Hall both note that Wilson enrolled at St. Andrews after his time at Cupar Grammar School.<sup>26</sup> Wilson won a bursary—now called a scholarship—to St. Andrews after completing trials in the Latin language. In the late 1700s, when the other elite colleges and

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<sup>24</sup> Martin Clagett, "James Wilson—His Scottish Background: Corrections and Additions." *Pennsylvania History: A Journal of Mid-Atlantic Studies* 79, no. 2 (2012): 158.

<sup>25</sup> *Ibid.*, 160.

<sup>26</sup> Clagett refers to the University of St. Andrews as the "United College of St. Andrews" which formed after two institutions—St. Leonard's and St. Salvator's—merged into one institution. This institution today is known as the University of St. Andrews.

universities of Scotland were transitioning to provide an education rooted in science, St. Andrews remained a school rooted in the classics. In just about every way, St. Andrews fell behind the elite institutions at Glasgow and Edinburgh.<sup>27</sup> Their efforts to excel in science and mathematics simply did not keep up with their peers. Still, St. Andrews was an authority in classical education; it was the first Scottish institution to require its student learn Greek. Classical education was certainly thriving at St. Andrews throughout the early and mid-eighteenth century.

The state of the libraries at St. Andrews likely played a role in this. In 1744, the library at St. Salvator's—one of the colleges that makes up St. Andrews—had around 1,100 volumes. Only seven were published after 1700. The entire university library in 1695 only had about 2,000 titles.<sup>28</sup> Such volumes were then likely classics, and when Wilson was at the library in St. Andrews, he most likely continued the classical education he began in Cupar.

After briefly returning to Cupar, Clagett notes something that other scholars have previously missed: Wilson studied the law in Scotland, apprenticing with William Robertson.<sup>29</sup> This is particularly notable, as Wilson would therefore have received an education in Scots law—not just English law in his apprenticeship in Philadelphia. Scottish law in the 1700s was in part influenced by Roman civil law; where there were gaps in their own customary law, the Scottish lawmakers in the early 1700s supplemented it with Roman law.<sup>30</sup> From his education rooted in the classics and his apprenticeship that exposed him to Scots law, Wilson would

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<sup>27</sup> Roger L. Emerson, "THE UNTOLD STORY." In *Academic Patronage in the Scottish Enlightenment: Glasgow, Edinburgh, and St Andrews Universities*, 441. Edinburgh University Press, 2008.

<sup>28</sup> *Ibid.*, 447.

<sup>29</sup> Clagett, "James Wilson—His Scottish Background," 163. Clagett notes that the William Robertson with whom Wilson apprenticed is not the same as the William Robertson who was a historian at the University of Edinburgh.

<sup>30</sup> A. Dewar Gibb and James Irvine Smith, "Scottish Law." *Encyclopedia Britannica*, February 15, 2017.



therefore have an intimate knowledge of Roman culture, literature, and law before emigrating to America.

Wilson also studied briefly at the University of Glasgow—where he may have taken a class with Adam Smith. This is unconfirmed, and the only class in which Wilson surely enrolled was a course in natural philosophy.<sup>31</sup> This marked the end of Wilson's education in Scotland, except for a small time in Edinburgh studying accounting. After an additional stint as a tutor in Cupar and his time studying in Edinburgh, Wilson went to New York armed with his education from St. Andrews, Glasgow, and his legal apprenticeship.

Wilson arrived in New York in 1765 and immediately then went to Philadelphia. He spent one year as a tutor at the College of Philadelphia, teaching both Greek and Latin.<sup>32</sup> Benjamin Franklin published in 1749 his *Proposals Relating to the Education of Youth in Pensilvania*, where he outlines his goals for the College. Franklin wanted his college to provide a strong education in both the religious and civil customs of the ancients, as well as their monuments.<sup>33</sup> Most classical works that Franklin selected for students to study were works in translation. Franklin famously portrayed himself as a folksy commoner despite his many personal successes, and this is also seen in his disdain for classical languages. He rather believed that almost all education ought to take place in the English language, and he ironically looks to ancient Rome as an example explaining why students ought to be taught in the common language of the people.<sup>34</sup> This makes Wilson's employment at the Academy of Philadelphia particularly interesting, and likely means that his duties teaching Latin and Greek placed a heavy

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<sup>31</sup> Clagett, "James Wilson—His Scottish Background," 166.

<sup>32</sup> Hall, "Justice, Law, and the Creation of the American Republic," 2. The College of Philadelphia has been called the University of Pennsylvania since 1791.

<sup>33</sup> Benjamin Franklin, "Proposals Relating to the Education of Youth in Pensilvania." University Archives and Records Center, May 16, 2019.

<sup>34</sup> *Ibid.*

emphasis on Greek and Roman culture. And of course, Cicero is a mainstay in Roman culture; Wilson likely taught at least one of his works.

Wilson taught at the Academy for only one year before leaving to pursue another legal apprenticeship, this time with John Dickinson. As one of the most prominent attorneys in Philadelphia, Dickinson helped catapult Wilson's rise through the legal profession.<sup>35</sup> Dickinson was born to a colonial aristocrat and was a stalwart conservative who could not bring himself to sign the Declaration of Independence. His fondness for stability in an era of revolution did not stem from any difference in education; he received an elite education in history designed to fashion him into an elite lawyer.<sup>36</sup> Dickinson's education in history did have a large focus on English history and English common law—an understandable emphasis for an aspiring lawyer of the eighteenth century. He also, however, read a significant amount of Roman history, and was particularly fond of the Roman historian Tacitus, and even cited him in his writings.<sup>37</sup> Cicero was also among the writers whom Dickinson often read.<sup>38</sup> Dickinson was also recognized for his skilled rhetoric; interestingly enough, Voltaire called him the "American Cicero."<sup>39</sup>

Such was Wilson's education. His background is one steeped in the classics, as he developed an excellence in Greek and Latin language and culture in Scotland before emigrating to America. With Dickinson, he likely continued to study the Romans—at least indirectly. The prevalence of the classics, and ancient Rome in particular, in Wilson's background make Robert

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<sup>35</sup> Hall, "Justice, Law, and the Creation of the American Republic," 2.

<sup>36</sup> H. Trevor Colbourn. "John Dickinson, Historical Revolutionary." *The Pennsylvania Magazine of History and Biography* 83, no. 3 (1959): 271.

<sup>37</sup> *Ibid.*, 280.

<sup>38</sup> *The Political Thought of John Dickinson*, 39 *DICK. L. REV.* 1 (1934). Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol39/iss1/1>. 3.

<sup>39</sup> Charles J. Stillé, and Henry Flanders. "The Life and Times of John Dickinson, 1732-1808. By Charles J. Stillé, LL.D." *The Pennsylvania Magazine of History and Biography* 15, no. 1 (1891): 12

Aitken's claim very plausible.<sup>40</sup> It seems likely that Wilson himself sought to become an American Cicero.

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<sup>40</sup> Robert Aitken. "James Wilson: A Lost American Founder." *Litigation* 29, no. 4 (2003): 61.

## Chapter II: Wilson, the Champion of Ciceronian Natural Law

*“That 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.”*

—James Wilson, *Of the Law of Nature*

Chisholm v. Georgia, decided in 1793, was the first significant case argued before the Supreme Court of the United States. Alexander Chisholm was the executor of the late South Carolina merchant Robert Farquhar, who was owed money by the state of Georgia. Chisholm sued the state of Georgia in the Supreme Court, hoping to compel payment.<sup>41</sup> The case was mired with controversy; Georgia did not recognize the Court’s authority and refused to even appear to argue the case, and the decision was later made irrelevant by the ratification of the eleventh amendment just two years after.<sup>42</sup> Wilson, while writing the opinion of the Court, was tasked with answering a monumental question: who is sovereign—the people or the state?<sup>43</sup> He leaned heavily on his own philosophy in the Court’s opinion—specifically his concept of a God-given natural law, writing, “Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.”<sup>44</sup> This occurrence is just one salient application of natural law; Wilson engages with the philosophy—particularly Cicero’s construction—in much greater depth in his *Lectures on Law*.

Natural law is surprisingly difficult to define. Different philosophies of natural law have been prevalent throughout history, from antiquity to present day; the varying nature of these

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<sup>41</sup> Editors of Encyclopedia Britannica. "Chisholm v. Georgia." Encyclopedia Britannica, January 17, 2019. <https://www.britannica.com/event/Chisholm-v-Georgia>.

<sup>42</sup> Ibid.

<sup>43</sup> Randy E. Barnett, “The People or the State?: Chisholm V. Georgia and Popular Sovereignty,” Virginia Law Review, Vol. 93, Georgetown Public Law Research Paper No. 969557.

<sup>44</sup> James Wilson, “James Wilson’s Opinion in Chisholm v. State of Ga., 2 U.S. 419 (1793), 453–466.” Essay. In *Collected Works of James Wilson I*, edited by Kermit L Hall and Mark David Hall, 1:351–66. Carmel, IN: Liberty Fund, 2007. All works written by Wilson used can be found in this volume.

different philosophies, all labeled as natural law thought, makes defining the ideology a complex task. In its broadest sense, natural law is a school of ethical thought; any philosopher's natural law theory has at least some tangential relation to the philosophy of Thomas Aquinas.<sup>45</sup> Any theory of natural law contends that there is a system of justice that applies to all humans separate from the laws that humans have made themselves.<sup>46</sup> There are two specific groupings of natural law thought that were particularly important to the American founders: classical natural law (otherwise known as classical-traditional natural law), and Enlightenment natural law.

Enlightenment natural law is best represented in the American founding by the thought of Thomas Hobbes and John Locke. While they both have diverging views on human nature—with Hobbes being especially pessimistic in his sentiments towards the human experience—the two thinkers created natural law theories that shared several traits. Locke's theory of natural law stems from his belief in the state of nature, which is an imagined state on Earth before any political or social organizations existed.<sup>47</sup> Locke writes of natural law,

The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for our's. Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.<sup>48</sup>

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<sup>45</sup> Mark Murphy, "The Natural Law Tradition in Ethics." Stanford Encyclopedia of Philosophy. Stanford University, May 26, 2019. <https://plato.stanford.edu/archives/sum2019/entries/natural-law-ethics/>.

<sup>46</sup> Britannica, T. Editors of Encyclopedia. "natural law." Encyclopedia Britannica, September 30, 2021. <https://www.britannica.com/topic/natural-law>.

<sup>47</sup> John Locke, "Second Treatise of Government," Indianapolis, IN: Hackett, 1980.

<sup>48</sup> Ibid.

Of particular interest here is the source of Locke's natural law; while he makes a fleeting reference to a deity, he does not argue that natural law is given by God. Its source is rather human reason. Another distinguishing factor of Locke's natural law is its focus on self-preservation; he claims an individual ought to place the preservation of themselves above the preservation of mankind. Hobbes' argument parallels Locke's, with one distinction; he argues that the state of nature is synonymous with a state of war, and in it the life of an individual is, "solitary, poor, nasty, brutish, and short."<sup>49</sup> He, like Locke, focuses on reason as the source of natural law, and views self-preservation as the highest priority for the individual. Such are the defining features of Enlightenment natural law.

Classical natural law is distinguished from Enlightenment natural law in several key ways. It is, of course, accredited to thinkers of antiquity.<sup>50</sup> Most notable among the substantive differences is the concept of divine providence; classical natural law theorists posit that natural law is a system of ethics prescribed by a deity.<sup>51</sup> Thomas Aquinas and Aristotle are commonly associated with this view.<sup>52</sup> Scholars have not entirely neglected the influence of this sort of natural law on the American founding. Robert S. Barker, while denouncing Enlightenment natural law theory as "deracinated" and "counterfeit," discusses how several founders engaged with classical natural law.<sup>53</sup> While Barker focuses much of his discussion on high-profile examples of classical natural law thought in the American founding, such as the Declaration of

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<sup>49</sup> Thomas Hobbes, "Leviathan," Edited by C. B. Macpherson. Harmondsworth: Penguin, 1985.

<sup>50</sup> See Gregory Bruce Smith's chapter, "Cicero on Politics," in his book "Political Philosophy and the Republican Future: Reconsidering Cicero," for more information on how Cicero's natural law relates to that of the ancient Greeks. For particulars on Cicero, Stoicism, and natural law, see Margaret Graver's chapter, "Cicero and the Perverse: The Origins of Error in *De Legibus* 1 and *Tusculan Disputations* 3," Tad Brennan's "Reasonable Impressions in Stoicism," and "The Stoic Life: Emotions, Duties, and Fate," and Brad Inwood's "Goal and Target in Stoicism."

<sup>51</sup> Murphy, "The Natural Law Tradition in Ethics."

<sup>52</sup> Ibid.

<sup>53</sup> Robert S. Barker, "Natural Law and the United States Constitution." SSRN Electronic Journal, 2011, 144.

Independence, the Constitution, and Federalist No. 10, he does quickly identify—in one paragraph—Wilson’s engagement with the natural law theory of Cicero.<sup>54</sup>

Cicero’s natural law theory is a comprehensive one. His natural law is present through several of his philosophical works, including notably *De Officiis*, *De Legibus*, and *De Re Publica*. While elements of his natural law are discussed often in his works, Cicero summarizes his own views on the subject best in a section of *De Re Publica*:

Law in the proper sense is right reason in harmony with nature. It is spread through the whole human community, unchanging and eternal, calling people to their duty by its commands and deterring them from wrong-doing by its prohibitions. When it addresses a good man, its commands and prohibitions are never in vain; but those same commands and prohibitions have no effect on the wicked. This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded. We cannot be exempted from this law by any decree of the Senate or the people; nor do we need anyone else to expound or explain it. There will not be one such law in Rome and another in Athens, one now and another in the future, but all peoples at all times will be embraced by a single and eternal and unchangeable law; and there will be, as it were, one lord and master of us all—the god who is the author, proposer, and interpreter of that law. Whoever refuses to obey it will be turning his back on himself. Because he has denied his nature as a human being he will face the gravest penalties for this alone, even if he succeeds in avoiding all the other things that are regarded as punishments.<sup>55</sup>

It may at first glance appear that Cicero’s natural law is inconsistent, stemming at the same time from both God and from reason. Fernando Alonso resolves this apparent discrepancy by explaining that in Stoicism—a philosophy which Cicero followed—God, nature, and reason are all the same.<sup>56</sup> Alonso also rightly ties Cicero’s natural law with a cosmopolitan humanism, together creating obligations that humans have for each other on an international scale.<sup>57</sup> From here it is clear that there are five defining features of Cicero’s natural law: natural law is given by

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<sup>54</sup> Ibid.

<sup>55</sup> Cicero, *De Re Publica*, III, 22, 33. Cicero, Marcus Tullius. *The Republic and The Laws*. Edited by Jonathan Powell. Translated by Niall Rudd. Oxford: Oxford University Press, 2008.

<sup>56</sup> Fernando H. Llano Alonso, “Cicero and Natural Law.” *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 98, no. 2 (2012): 159.

<sup>57</sup> Ibid.

God, natural law is unchanging, natural law is above the laws created by humans, natural law is universal, and natural law creates obligations that humans have to one another.

Existing scholarship about Wilson and natural law largely dismisses his engagement with Cicero, and instead focuses on the influence of Enlightenment natural law. Daniel N. Robinson relies on Wilson's Scottish heritage and his *Chisholm* opinion—neglecting his *Lectures on Law* and his education—to demonstrate a significant relationship between the Scottish Enlightenment and Wilson's judicial thought. He writes that, “one is able to locate the rich amalgam of the discipline of law and that Scottish Common Sense philosophy committed to a naturalistic, no-nonsense empiricism resistant to linguistic sources of confusion and idle invention.”<sup>58</sup>

Examination of the *Lectures on Law* would, yes, demonstrate to Robinson Wilson's engagement with Scottish Enlightenment thinkers—he cites them several times—but also engagement with Cicero's natural law thought that ultimately mirrored his own ideas on the matter.

In his study focused solely on Wilson and natural law, Eduardo Velásquez also attributed Wilson's natural law thought exclusively to Enlightenment thinkers. He writes,

the law of nature is for Wilson, as for Thomas Hobbes, firmly rooted in the passions, not least of which is the ubiquitous desire for self-preservation. Reason is thus an instrument in the service of fundamental feelings. Examining the character of Wilson's natural law shows the extent of his indebtedness to the modernity of Hobbes and John Locke.<sup>59</sup>

Velásquez, quoting extensively from the *Lectures on Law*, manages to dismiss Wilson's consistent discussion of Cicero, and only mentions him once. Even Wilson's focus on humanity and good works are attributed by Velásquez not to Cicero's cosmopolitan natural law, but again to Hobbes, Locke, and the Scottish Enlightenment thinkers.<sup>60</sup> Velásquez examines Wilson's

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<sup>58</sup> Daniel N. Robinson, “The Scottish Enlightenment and the American Founding,” *The Monist* 90, no. 2 (2007): 174–175.

<sup>59</sup> Eduardo A. Velásquez, “Rethinking America's Modernity: Natural Law, Natural Rights and the Character of James Wilson's Liberal Republicanism,” *Polity* 29, no. 2 (1996): 195–196.

<sup>60</sup> Velásquez, “Rethinking America's Modernity,” 208.



*Lectures on Law* in great detail at first glance, but he neglects Wilson's references to Cicero and other classical thinkers in favor of Enlightenment thinkers—Hobbes in particular.

Wilson has no such preoccupation with Hobbes as Velásquez suggests. He begins his seventh lecture *Of Man, as a Member of Society*, with a paragraph-long strong condemnation of Hobbesian individualism, which merits being examined in its entirety. He writes,

‘It is not fit that man should be alone,’ said the all-wise and all-gracious Author of our frame, who knew it, because he made it; and who looked with compassion on the first solitary state of the work of his hands. Society is the powerful magnet, which, by its unceasing though silent operation, attracts and influences our dispositions, our desires, our passions, and our enjoyments. That we should be anxious to share, and, by sharing, to divide our afflictions, may, to some, appear by no means to be strange, because a certain turn of thinking will lead them to ascribe this propensity to the selfish rather than the social part of our nature. But will this interested solution account for another propensity, equally uniform and equally strong? We are no less impatient to communicate our pleasures than our woes. Does self-interest predominate here? No. Our social affection acts here unmixed and uncontrolled.<sup>61</sup>

Wilson's rejection of certain aspects of Hobbesian thought is also seen much later in his lectures, in his lecture *Of the Judicial Department*. Wilson, in a forceful repudiation of Hobbes' philosophy, says,

The political principles of Mr. Hobbes are well known. Such an abhorrence he contracted for popular government, and the principles of freedom, that he was anxious to see both extirpated from the face of the earth. In order to obtain this consummation, in his perverted judgement so devoutly to be wished, he recommends it to princes to destroy the Greek and Latin authors. ‘By reading them,’ says he, ‘men have, under a false show of liberty, acquired a habit of favouring tumults, and of licentiously controlling the conduct of their sovereigns.’<sup>62</sup>

Hobbes' focus on self-interest through self-preservation is strongly and passionately rejected here by Wilson; this is not to say that Wilson does not engage with Enlightenment thought at all, but rather that he does not have a consistent obsession with Hobbesian thought as Velásquez suggests.

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<sup>61</sup> Wilson, *Of Man, as a Member of Society*, 621.

<sup>62</sup> Wilson, *Of the Judicial Department*, 907, and Lev. P. 2. C. 21. I. Shaft. Char. 88.

James Zink, in his examination of Wilson's constitutionalism, also neglects to address Wilson's frequent engagement with Ciceronian thought. He writes, "In contrast to the natural law tradition, Wilson's view of political life is grounded in an account of the origins of politics, much like those of Hobbes and Locke before him."<sup>63</sup> Zink's analysis of Wilson's thought is cast in a Jeffersonian mold; he lists instances in the *Lectures on Law* where Wilson said things in support of "the rights to life or self-preservation", "liberty," "and the pursuit of happiness."<sup>64</sup> This is the very same language that Jefferson used when listing his "certain unalienable Rights" in the Declaration of Independence.<sup>65</sup> Such an approach is inappropriate, as it neglects the extensiveness of Wilson's original thought and seemingly dismisses his work as mere rhetoric used to prop up Jefferson's vision of constitutionalism. Zink's disregard for Wilson's frequent engagement with Cicero's writing demonstrates a lack of understanding of antiquity; Wilson engages and promotes all five components of Cicero's natural law.

### 1. Natural Law is Given by God

Wilson discussed at length his belief that there is a natural law prescribed by God. The God he was referring to was, of course, the Christian one, which is not surprising due to the centrality of Christianity both in eighteenth century America and in the founders' philosophical project.<sup>66</sup> Despite Cicero's indisputable lack of Christian influence, Wilson cites Cicero and engages with his natural law philosophy at length in his *Lectures on Law*.

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<sup>63</sup> James R. Zink, "The Language of Liberty and Law: James Wilson on America's Written Constitution," *The American Political Science Review* 103, no. 3 (2009): 442–55. <http://www.jstor.org/stable/27798515>, 443.

<sup>64</sup> Zink, "The Language of Liberty and Law," 444

<sup>65</sup> Thomas Jefferson, et al, July 4, Copy of Declaration of Independence. -07-04, 1776.

<sup>66</sup> Winterer, *The Culture of Classicism*, 1.

Wilson's engagement with Cicero's natural law is evident as early on as in his third lecture, *Of the Law of Nature*. He discusses the divine nature of natural law, quoting Cicero in both Latin and English in a footnote.<sup>67</sup> Wilson writes, "Having thus stated the question—what is the efficient cause of moral obligation?—I give this answer—the will of God. This is the supreme law."<sup>68</sup> He then quotes Cicero in his footnote, saying, "That first and final law, they used to say, is the mind of God, who forces or prohibits everything by reason."<sup>69</sup> Here it is clear that Wilson inherits a belief from Cicero that distinguishes his own beliefs from Enlightenment thinkers: natural law is a source of moral obligation that extends from God. This also makes clear that Wilson views natural law as more than a basic explanation of the beginning of political society, as Velásquez and Zink suggest.

In this same lecture, Wilson further mirrors Cicero's natural law by linking natural law to morality. He specifically argues that every individual has a duty to obey the natural law, and this duty stems from their own innate moral sense; one's sense of morality leads them to obey the will of God, and the will of God is to obey the natural law.<sup>70</sup> Wilson describes this chain of obligation by saying, "[God's] just and full right of imposing laws, and our duty in obeying them, are the sources of our moral obligations . . . Morality, like mathematicks, has intuitive truths, without such we cannot make a single step in our reasonings upon the subject."<sup>71</sup>

An assumption is made by Wilson here. He posits that every individual has an innate moral sense, and from that assumption he builds his argument that everyone has an obligation to obey the natural law. To justify this assumption, Wilson does not turn to Scripture. This is

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<sup>67</sup> Wilson, *Of the Law of Nature*, 508. Mark David Hall writes that Bird Wilson, James Wilson's son who compiled the lectures, was a "faithful editor" who "was faithful to the substance of the original text. He rarely altered his father's prose, eliminated passages, elaborated on them, or inaccurately described handwriting. . . ." in *Ibid.* 407.

<sup>68</sup> *Ibid.*, 508.

<sup>69</sup> *Ibid.*, as written in Cic. *De leg.* 1. 2. C. 4.

<sup>70</sup> *Ibid.*, 508.

<sup>71</sup> *Ibid.*

particularly notable; his natural law project depends largely on obligations given to individuals by the Christian God. He instead cites Cicero again in another footnote by quoting *De Natura Deorum*: “What nation, what species of man is there which does not have, without teaching, some sort of foreknowledge, that is, a certain image of the thing conceived beforehand by the mind, without which nothing can be understood, investigated, or discussed?”<sup>72</sup> Wilson’s use of Cicero again here demonstrates that Wilson’s natural law was derived from, and made in accordance with, Cicero’s own philosophy. While the lack of mention of the Bible in Wilson’s discussion certainly does not prove that Biblical canon was not influential, it does demonstrate that Wilson engaged thoroughly with Cicero’s philosophy while crafting his own.

Richard has done extensive research on Wilson and his use of the Stoic philosophical model of natural law—Cicero’s in particular. He correctly identifies that several founders use Cicero as a source of natural law philosophy. There is something, however, which he overlooked. Richard did not discuss how Cicero’s model is the source of the relationship between God and the obligation to follow the natural law, as discussed specifically in Wilson’s lectures.

Richard’s discussion of Cicero and Wilson is focused only on the existence of natural law, without a similar in-depth discussion about its characteristics. He cites very quickly several instances where Wilson mentioned Cicero in his lectures, but he still overlooked the fact that Cicero’s natural law framework mirrors Wilson’s own argument in its entirety; Richard only discusses the source of obligation in an abstract sense, discussing all the founders at once, and he attributes the source of this argument to Enlightenment thought.<sup>73</sup> He specifically pivots away from Wilson when discussing the source of moral obligation, saying,

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<sup>72</sup> Ibid., as written in Cic. de nat. Deor. 1. 1. C. 16.

<sup>73</sup> Richard, *The Founders and the Classics*, 176.

The founders shared the Stoic belief that both intuition and reason were necessary to understand natural law. Often citing Cicero, the founders spoke of the existence of a ‘moral sense.’ Having read and copied the Stoics long before he became familiar with Scottish moral philosophy, Jefferson believed that everyone possessed a ‘moral sense,’ which God had implanted in humans to ensure the preservation of their race . . .<sup>74</sup>

Richard here by no means contradicts the notion that Wilson was influenced by Cicero’s thought—he confirms it. But by leaving out the specific link between Wilson and Cicero with respect to the source of obligation, Richard fails to demonstrate the extent to which Wilson’s natural law philosophy mirrors Cicero’s.

Some scholars favor exclusively the idea that Wilson’s natural law is a Christian enterprise. Justin Buckley Dyer argues that Wilson’s natural law is strictly a continuation of the Christian natural law tradition, and he leans on Wilson’s arguments regarding the divinity of natural law as evidence.<sup>75</sup> The lack of even any mention of the Bible, and myriad references to Cicero’s work, make clear that at the very least, Wilson employed Cicero’s philosophy alongside Christian thought when crafting his own natural law philosophy. There is no decisive way to quantify the influence of classicism and Christianity in Wilson’s natural law thought. One thing, however, is clear. Cicero’s writings were certainly a fundamental element of Wilson’s larger natural law program. This provides broad support for Winterer’s claim that both classicism and Christianity were the central intellectual projects in the American founding era.<sup>76</sup> Cicero’s philosophy is largely compatible with Christian doctrine, but the specific relationship between the two schools of thought is beyond the scope of this project in particular.<sup>77</sup>

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<sup>74</sup> *Ibid.*, 177.

<sup>75</sup> Justin Buckley Dyer, “Reason, Revelation, and the Law of Nature in James Wilson’s Lectures on Law.” *American Political Thought* 9, no. 2 (2020): 264–84.

<sup>76</sup> Winterer, *The Culture of Classicism*, 1.

<sup>77</sup> Mark D. Jordan, “Cicero, Ambrose, and Aquinas ‘On Duties’ or the Limits of Genre in Morals.” *The Journal of Religious Ethics* 33, no. 3 (2005): 485–502.

## 2. Natural Law is Unchanging

Wilson, in continuation of his Ciceronian description of natural law, argues that the natural law is unchanging. His discussion of this maxim is uncharacteristically short, but it merits being examined in full:

The law of nature is immutable; not by the effect of arbitrary disposition, but because it has its foundation within nature, constitution, and mutual relations of men and things. While these continue to be the same, it must continue to be the same also. The immutability of nature's laws has nothing in it repugnant to the supreme power of an all-perfect Being. Since he himself is the author of our constitution; he cannot but command or forbid such things as are necessarily agreeable or disagreeable to this very constitution. He is under the glorious necessity of not contradicting himself. This necessity, far from limiting or diminishing his perfections, adds to their external character, and points out their excellency.<sup>78</sup>

The brevity of Wilson's discussion here, just one brief paragraph, prohibits any mention of any thinker—ancient or otherwise.

A close examination of this passage, however, reveals several ways through which Wilson's argument parallels Cicero's own reasoning with respect to natural law. When Cicero discusses the characteristics of natural law in the *Somnium Scipionis*, he, too, is brief when it comes to the constancy of natural law. "This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded," is almost the full extent of what Cicero says on the subject when laying out his entire natural law philosophy.<sup>79</sup> He briefly reiterates this point two sentences later, saying, "There will not be one such law in Rome and another in Athens, one now and another in the future, but all peoples at all times will be embraced by a single and eternal and unchangeable law. . .", though even this sentence is not completely dedicated to the lasting character of natural law.<sup>80</sup>

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<sup>78</sup> Wilson, *Of the Law of Nature*, 523.

<sup>79</sup> Cic. *De Re Publica*, III, 22, 33.

<sup>80</sup> *Ibid.*

Upon further examination, it is clear that Wilson’s discussion of natural law in his third lecture, *Of the Law of Nature*, mirrors Cicero’s depiction of natural law in *De Re Publica*—specifically in the *Somnium Scipionis*, where Cicero’s holistic account of natural law is located. Wilson dedicates very little time to discussing the lasting disposition of natural law, just as Cicero made only a fleeting claim. Just as Cicero places an emphasis on the divine origins of natural law and its morality, Wilson focuses on the God-given quality of natural law and its accompanying moral obligation; even in his brief paragraph on the immutability of natural law he places a remarkable, passionate emphasis on its divine nature, using phrases like, “the supreme power of an all-perfect Being.”<sup>81</sup> The very emphasis on the divine nature of natural law here, in a paragraph not focused on God-given rights, is characteristic of Cicero’s natural law theory and distinctly separate from Enlightenment thought.

In his examination of Wilson, Cicero, and natural law, Richard makes no mention of the immutability of Cicero’s natural law—despite it being a significant component in Cicero’s philosophy. Richard writes a handful of lengthy paragraphs where he examines how Wilson received ideas from Cicero, but he only mentions instances where Wilson quoted Cicero or mentioned him by name.<sup>82</sup> In this approach Richard thus focused almost exclusively on eighteenth century sources, while leaving unexamined texts of antiquity. By neglecting to examine Cicero’s own writing, Richard failed to notice that Wilson also likely structured his argument on the immutability of natural law around Cicero’s own ideas and style—despite never mentioning him by name.

### **3. Natural Law is Above the Law Created by Humans**

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<sup>81</sup> Wilson, *Of the Law of Nature*, 523.

<sup>82</sup> Richard, *The Founders and the Classics*, 176–77.

The supremacy of natural law is yet another component of Cicero’s natural law that is mirrored by Wilson. Just as Wilson links the immutability of natural law with its divinity, he also links its supremacy with its divine origins as well. He says in his third lecture, “Having thus stated the question—what is the efficient cause of moral obligation?—I give this answer—the will of God. This is the supreme law.”<sup>83</sup> Right after so plainly claiming that the law of nature is supreme to all other laws, Wilson then quotes Cicero, saying, “That first and final law, they used to say, is the mind of God, who forces or prohibits everything by reason.”<sup>84</sup>

Wilson’s link of natural law supremacy to Cicero is almost self-evident. Just as it was important to note Cicero’s Stoic understanding of divine providence when examining Wilson’s coupling of natural law with God, it is also important to do so here. In his writing, Cicero is conflating God, or any divine being, with reason—making Wilson’s quote of Cicero much easier to understand. He quotes one simple sentence from Cicero, saying that God, who is synonymous with reason, gives us the first and final natural law.

There are several other locations where Wilson employs Cicero to make his claims about the supremacy of natural law. Also in his third lecture, Wilson quotes a lengthy passage written by Cicero, saying,

This [natural] law, or right reason, as Cicero calls it, is thus beautifully described by that eloquent philosopher. ‘It is, indeed,’ says he, ‘a true law, conformable to nature, diffused among all men, unchangeable, eternal. By its commands, it calls men to their duty: by its prohibitions, it deters them from vice. To diminish, to alter, much more to abolish this law, is a vain attempt. Neither by the senate, nor by the people, can its powerful obligation be dissolved. It requires no interpreter or commentator. It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations: for God, who is its author and promulgator, is always the sole master and sovereign of mankind.’<sup>85</sup>

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<sup>83</sup> Wilson, *Of the Law of Nature*, 508

<sup>84</sup> *Ibid.*, as written in Cic. de leg. 1. 2. C. 4.

<sup>85</sup> *Ibid.*, as written in Cic. de Rep. 1. 3.



This passage is recognizable as a smaller portion of the very passage in the *Somnium Scipionis* where Cicero lays out his natural law philosophy so clearly. The passage, “Neither by the senate, nor by the people, can its powerful obligation be dissolved,” particularly demonstrates again the claim that natural law is supreme to both the people and any laws or institutions that they create. Wilson’s beliefs that natural law is both unchanging and given by God is also evident here again.

Richard, who provides what might be the most comprehensive account of Wilson’s employment of Cicero when describing his natural law theory, notes the above passage in his work.<sup>86</sup> In fact, the very presence of this lengthy quotation, which he treated as two separate passages, makes up perhaps the most significant segment of his argument; he implies that such a lengthy quote from Cicero suggests that Wilson seriously engaged with the text. What Richard neglects to address, however, is the significance of this passage in Cicero’s own work. This passage represents an exceptional summary of Cicero’s complete natural law framework; to quote it almost in its entirety is a deliberate undertaking by Wilson. By reciting this particular section in his lecture on the characteristics of natural law, Wilson is demonstrating his commitment to furthering Cicero’s thought; he goes beyond merely engaging with Cicero’s work in a superficial manner.

Wilson also briefly mentions the supremacy of natural law in a lecture that is not specifically about natural law. In his tenth lecture, *Of Government*, when discussing the necessity of law in civil society, Wilson briefly alludes to the necessity of law in a much broader sense. Wilson quotes Cicero, saying, “Without authority neither any house, nor state, nor nation, nor the whole human race can stand, nor physical nature, nor the very universe itself.”<sup>87</sup> This

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<sup>86</sup> Richard, *The Founders and the Classics*, 176.

<sup>87</sup> Wilson, *Of Government*, as written in Cic. de leg. 1. 3. C. 1.

sentence by Cicero, from the same work where he outlined his broader natural law philosophy, suggests again that there is in existence a natural law above mankind governing the entire universe itself. Wilson's employment of this passage here demonstrates a remarkable consistency in his thought and commitment to Cicero's natural law philosophy.

#### 4. Natural Law is Universal

One of the most significant elements of Wilson's natural law philosophy is its universality. Wilson employs Cicero again to take a very strong stance about the cosmopolitan essence of natural law; it is not confined to any one state. While this notion is evident in several of Wilson's lectures, it is first evident in his third lecture focused on the law of nature. Examine again this selection from Wilson's third lecture and its accompanying section of the *Somnium Scipionis* that we have already considered in connection with the supremacy of natural law:

This [natural] law, or right reason, as Cicero calls it, is thus beautifully described by that eloquent philosopher. 'It is, indeed,' says he, 'a true law, conformable to nature, diffused among all men, unchangeable, eternal. By its commands, it calls men to their duty: by its prohibitions, it deters them from vice. To diminish, to alter, much more to abolish this law, is a vain attempt. Neither by the senate, nor by the people, can its powerful obligation be dissolved. It requires no interpreter or commentator. It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations: for God, who is its author and promulgator, is always the sole master and sovereign of mankind.'<sup>88</sup>

Note in particular the sentence where Cicero wrote, "it is not one law at Rome, another at Athens . . ." Given Cicero's worldview at the time—one centered around the Mediterranean Basin—this shows a dedication to the idea that natural law is universal. The presence of this argument in his lecture focused on natural law shows that Wilson gives this idea serious weight, and his employment of Cicero to make such an argument, along with several other components of his

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<sup>88</sup> Wilson, *Of the Law of Nature*, 523, as written in Cic. de Rep. 1. 3.

natural law, demonstrates that Wilson seriously engaged with and furthered Cicero's philosophy, applying it to a very different historical context.

Wilson expands his discussion on the international character of natural law in his following lecture. His fourth lecture, titled *Of the Law of Nations*, focuses specifically on relations between sovereign states. The very title of Wilson's lecture is notable; his use of the phrase "law of nations" to describe international relations is a translation of the Latin term *ius gentium*—a term the Romans used to describe the same topic.<sup>89</sup>

In this fourth lecture, Wilson again employs Cicero and furthers his conception of the natural law. He again utilizes a rather lengthy quote from Cicero, and it again merits being examined in its entirety, along with its following sentence of analysis:

To the same purpose is the sentiment of Cicero, in his beautiful treatise on the nature and offices of friendship. 'In tracing the social laws of nature,' says he, 'it seems evident, that man, by the frame of his moral constitution, is supposed to consider himself as standing in some degree of social relation to the whole species in general; and that this principle acts with more or less vigour, according to the distance at which he is placed with respect to any particular community or individual of his kind.' This principle of benevolence and sociability, which is not confined to one sect or to one state, but ranges excursive through the whole expanded theatre of men and nations, instead of being always acknowledged and always recommended, as it ought to have been, has been altogether omitted by some philosophers: by some, its existence seems to have been doubted or denied.<sup>90</sup>

There are several notable observations to be made here. First, Wilson employs Cicero to argue that each individual must observe themselves as merely one person with a relationship to "the whole species in general." This is a notable selection for Wilson to utilize; it highlights the obligations that everyone has to humanity as a whole. If Wilson had wanted to focus on the sovereign state here while still quoting Cicero, he certainly could have; Cicero wrote myriad passages praising the majesty of the state—some passages of which Wilson actually quotes in

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<sup>89</sup> See Paul J. Du Plessis' sixth edition of *Borkowski's Textbook on Roman Law* for more information.

<sup>90</sup> Wilson, *Of the Law of Nations*, 543, with a selection as written in Cic. *De Amicitia* C. 5.

other lectures about the importance of the state.<sup>91</sup> Wilson’s deliberate decision to employ Cicero here makes two things very clear: Wilson has a strong commitment to an international cosmopolitanism, and Wilson has a clearly demonstrated interest in furthering Cicero’s entire natural law enterprise.

The second notable observation to be made here has to do with morality; Wilson, after quoting Cicero, uses the phrase “benevolence and sociability” to link together this cosmopolitan character of natural law with the “moral sense” that he described at length in his previous lecture—where he also employed Cicero to further his argument.

Only two pages later, Wilson again employs an exceptionally lengthy passage by Cicero—this time from *De Officiis*. He says,

How beautiful and energetick are the sentiments of Cicero on this subject. ‘It is more consonant to nature,’ that is, as he said a little before, to the law of nations, ‘to undertake great labours, and to undergo the severest trouble, for the preservation and advantage of all nations, if such a thing could be accomplished, than to live in solitary repose, not only without pain, but surrounded with all the allurements of pleasure and wealth. Every one of a good and great mind, would prefer the first greatly before the second situation in life.’ ‘It is highly absurd to say, as some have said, that no one ought to injure a parent or a brother, for the sake of his own advantage; but that another rule may be observed concerning the rest of the citizens: such persons determine that there is no law, no bonds of society among the citizens, for the common benefit of the commonwealth. This sentiment tends to dissolve the union of the state. Others, again, admit that a social regard is to be paid to the citizens, but deny that this regard ought to be extended in favour of foreigners: such persons would destroy the common society of the human race; and if this common society were destroyed, the destruction would involve, in it, the fate also of beneficence, liberality, goodness, justice. Which last virtue is the mistress and the queen of all the other virtues.’ By justice here, Cicero clearly means that universal justice, which is the complete accomplishment of the law of nature.<sup>92</sup>

This lengthy passage, along with Wilson’s own short clarification about universal justice, furthers the argument Wilson already began to make in this lecture: natural law extends beyond sovereign boundaries to the entirety of humanity, and natural law protects morality on the global

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<sup>91</sup> See Wilson’s opinion in *Chisholm v. Georgia*.

<sup>92</sup> Wilson, *Of the Law of Nations*, 545–546, with a selection as written in Cic. de off. 1. 3. C. 5. 6.

stage. Wilson’s own words here make this abundantly clear: universal justice, and the virtue that comes alongside it, are products of natural law.

This specific component of Wilson’s natural law has been largely unexplored. Even Richard, in his thorough investigation of Wilson’s employment of Cicero, did not mention that Wilson’s discussion of natural law—along with his use of Cicero—continued outside his lecture dedicated to the topic. It is nevertheless evident that the universality of natural law is something to which Wilson has a particularly strong commitment.

### 5. Natural Law Creates Interpersonal Obligations

The last component of Cicero’s natural law has to do with the duties that are imposed on any one individual for the sake of another. In his paragraph laying out his natural law philosophy, Cicero writes near the beginning, “It is spread through the whole human community, unchanging and eternal, calling people to their duty by its commands and deterring them from wrong-doing by its prohibitions.”<sup>93</sup>

Wilson directly engages with this final element of Cicero’s natural law philosophy at length, albeit outside his lecture on natural law. In his seventh lecture, *Of Man, as a Member of Society*, Wilson writes,

‘Take away society, and you destroy the basis, on which the preservation and happiness of human life are laid. There is nothing more certain,’ says Cicero, ‘than the excellent maxim of Plato—that we are not intended solely for ourselves; but that our friends and our country claim a portion of our birth. Since, according to the doctrine of the stoicks, the productions of the earth are designed for men, and men are designed for the mutual aid of one another; we should certainly pursue the design of Nature, and promote her benign intention, by contributing our proportion to the general interest, by mutually performing and receiving good offices, and by employing our care, our industry, and even our fortune, in order to strengthen the love and friendship, which should always predominate in human society.’<sup>94</sup>

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<sup>93</sup> Cic. *De Re Publica*, III, 22, 33.

<sup>94</sup> Wilson, *Of Man, as a Member of Society*, 631–632, with a selection as written in Cic. *De off.* 1. I. C. 7.

Cicero's discussion of interpersonal obligations here expands upon his shorter mention of them in *De Re Publica*. He argues that everyone has an obligation to provide for the larger benefit of their entire society. Even Wilson's sentence leading into his lengthy quote from Cicero reveals his very passionate stance on the subject; not only an individual's preservation—but their happiness—depends on the common good for society. It is also notable that Wilson here quotes Cicero quoting Plato; he does not just simply state Plato's famous maxim "not only for ourselves alone."<sup>95</sup> By employing Cicero here rather than Plato—which would certainly have been the less verbose option, especially for an audience listening to his argument rather than reading it—Wilson makes it clear that he is not simply engaging with Ciceronian thought, but rather furthering Cicero's entire natural law enterprise. His translation of the word "Nature" with an upper-case letter alludes to the stoic belief that nature, reason, and God are all the same entity and further shows his commitment to promoting, rather than merely engaging with, Cicero's philosophy.

Just two paragraphs later in the same lecture, Wilson again quotes Cicero at length to highlight his claim that people naturally owe things to each other, saying,

Our social affections and operations acquire still greater importance, in another point of view: they promote and are necessary to our happiness. 'If we could suppose ourselves,' says Cicero, who knew so well how to illustrate law by philosophy—'if we could suppose ourselves transported by some divinity into a solitude, replete with all the delicacies which the heart of man could desire, but excluded, at the same time, from every possible intercourse with our kind, there is not a person in the world of so unsocial and savage a temper, as to be capable, in these forlorn circumstances, of relishing any enjoyment.' 'Nothing,' continues he, 'is more true, than what the philosopher Archytas is reported to have said: If a man were to be carried up into heaven, and see the beauties of universal nature displayed before him, he would receive little pleasure from the wonderful scenes, unless there was some person, to whom he could relate the glories, which he had viewed. Human nature is so constituted, as to be incapable of solitary

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<sup>95</sup> See Plato's *Epistle to Archytas* 9.358a for more information.

satisfactions. Man, like those plants which are formed to embrace others, is led, by an instinctive impulse, to recline on those of his own kind.’<sup>96</sup>

Wilson uses this second lengthy passage by Cicero here to make his argument very clear:

humans depend on one another, and because of that they gravitate towards each other. Wilson’s quote of the sentence about human nature further ties this to Cicero’s fifth component of natural law.

While these passages were not employed in Wilson’s lecture on natural law itself, they must still be understood to contribute to his larger natural law argument. Even Richard, the scholar who has delved most deeply into Wilson’s employment of Cicero, did not discuss these passages when examining Wilson’s natural law. These passages nevertheless are significant; they demonstrate Wilson’s belief that humans possess, to some degree, a need of one another and an obligation to one another—the very claim Cicero makes when laying out his natural law theory. This demonstrates clearly that Wilson went beyond merely engaging with Cicero’s writing on natural law; he sought to further the Ciceronian argument that humans naturally possess obligations to each other.

## 6. Broader Implications on Wilson’s Thought

Wilson’s engagement with Cicero is something that cannot be denied. It is very clear that Wilson read Cicero’s several foundational works, including *De Officiis*, the *Somnium Scipionis* from *De Re Publica*, and *De Amicitia*, as he used salient passages that he found important from each of these works throughout his lectures.<sup>97</sup> Perhaps the most notable of Wilson’s selected passages was a selection from the *Somnium Scipionis* where Wilson described his entire natural

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<sup>96</sup> Wilson, *Of Man, as a Member of Society*, 632, with a selection as written in Cic. De Amic. 23.

<sup>97</sup> The *Somnium Scipionis* was the only extended section of *De Re Publica* known to exist during Wilson’s lifetime.

law philosophy in one concise paragraph. While some scholars in the past few decades downplayed the importance of such references, they are significant. Several scholars have noted this significance; Richard, in particular, listed several—but not all—of these Ciceronian quotations on natural law. This in-depth examination certainly supports contemporary classical receptions scholars who claim that the founders thoughtfully engaged with the classics, as Wilson clearly did with Cicero.

More observations, however, are made here. Wilson goes beyond merely engaging with, or thinking about, Cicero's natural law philosophy. He champions Cicero's natural law. Wilson argues that each of Cicero's five components of natural law—that natural law is given by God, that natural law is unchanging, that natural law is above laws created by humans, that natural law is universal, and that natural law creates interpersonal obligations—must together form the basis of the American political system. For every single one of Cicero's five components of natural law, Wilson both supports the claim in his own words and quotes a passage of Cicero to further defend his argument. Naturally, Cicero's philosophy on natural law was most prevalent in Wilson's lecture, *Of the Law of Nature*. This lecture mirrors Cicero's passage about natural law in the *Somnium Scipionis*; what Cicero emphasizes, Wilson emphasizes, and what Cicero discusses quickly—like the immutability of natural law—Wilson discusses quickly as well. With remarkable consistency, Wilson continued to discuss elements of Cicero's natural law in some of his other lectures and focused particularly on the ethics and obligations. The three lectures where Wilson actively promoted Cicero's natural law thought, *Of the Law of Nature*, *Of the Law of Nations*, and *Of Man, as a Member of Society*, compose Wilson's own version of *De Re Publica*, where he actively champions Cicero's natural law theory and bring the philosophy from Rome to the United States.



### Chapter III: Extensions, Applications, and Divergence from Cicero

*“Permit me to mention one great principle . . . The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large . . .”*

—James Wilson, *Of the Study of the Law in the United States*

It is clear that Wilson not only engaged with, but actively promoted, Cicero’s theory of natural law in the burgeoning American republic. In his advancement of Cicero’s philosophy, Wilson was remarkably faithful to Cicero’s own thought; he deviated very little from Cicero’s beliefs laid out in *De Re Publica*. He goes further, however, than just copying Cicero’s philosophy as footing for the American legal system.

Wilson applies Cicero’s natural law theory to three main concepts that lie outside of Cicero’s theory. They are: popular sovereignty, common law, and ending slavery. These concepts are foreign to Cicero’s philosophy and characteristic of Enlightenment thought. It is thus understandable why contemporary scholars attribute Wilson’s discussion of these ideas to Enlightenment philosophers. This, however, is not actually the case; Wilson rather uses Cicero’s natural law framework and extends its principles to each of these areas. This is evident in both Wilson’s quoting of Cicero directly in his law lectures and his *Chisholm* opinion, as well as in his broad philosophical justifications of his arguments; he leans on Cicero’s reasoning, not that of the Enlightenment.

This inevitably leads to the following question: how can Wilson at the same time faithfully promote Cicero’s natural law philosophy and extend it to topics about which Cicero never spoke? The answer is simple. While Wilson faithfully and accurately champions Cicero’s natural law philosophy as the basis for American legal thought, he also applies Ciceronian thought in a way that is foreign to Cicero’s thinking. Wilson’s applications in these three areas—popular sovereignty, common law, and freedom from slavery—thus naturally make up a

separate category of Ciceronian receptions: one where Wilson misrepresents Cicero's philosophy, or applies it to issues far beyond Cicero's own horizon.

### **1. Popular Sovereignty as a Ciceronian Policy**

To understand popular sovereignty as a philosophy, it is important to first understand sovereignty as a broader concept. Simply put, sovereignty is a political concept which refers to the supreme authority in any given territory.<sup>98</sup> Sovereignty can be understood on three main dimensions—the holder of sovereignty, the absoluteness of sovereignty, and the internal and external dimensions of sovereignty.<sup>99</sup> When examining popular sovereignty, the most relevant of those dimensions is the holder of sovereignty. The reasoning is self-evident; popular sovereignty asserts that no human-made law is legitimate unless its source rests, directly or indirectly, with the people ruled by the law. The origins of popular sovereignty as a philosophy date back to the social contract theorists of the Enlightenment, long after the era of Cicero and the Stoics. The original champions of popular sovereignty, in addition to Jean-Jacques Rousseau, were none other than Thomas Hobbes and John Locke—the very philosophers to whom contemporary scholars attribute Wilson's natural law thought.<sup>100</sup>

Wilson's dedication to popular sovereignty is well-documented. He is responsible, in fact, for changing the phrase "We the people and the states," to "We the people of the United States" in the preamble of the Constitution, showing his clear belief that the power of the government flows from the people.<sup>101</sup> Without going as far as using the term popular

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<sup>98</sup> "Sovereignty," Legal Information Institute. Cornell Law School. Accessed 2022. <https://www.law.cornell.edu/wex/sovereignty>.

<sup>99</sup> Daniel Philpott, "Sovereignty," Stanford Encyclopedia of Philosophy. Stanford University, June 22, 2020. <https://plato.stanford.edu/entries/sovereignty/>.

<sup>100</sup> Ibid.

<sup>101</sup> Aitken, "James Wilson: A Lost American Founder," 63

sovereignty, Mark Hall recognizes in Wilson's remarks at the Federal Convention of 1787 several arguments made to promote the political power of the common people.<sup>102</sup> Wilson opposed property qualifications for voters, argued for direct election of members of the House of Representatives, Senators, and the President, believed that members of both the House and the Senate should be elected from proportionally sized districts, and opposed any term or age limit requirements since the people should be free to elect whomever they choose.<sup>103</sup> These proposed policies, some of which were adopted, all seek to maximize the power and influence of the American voter, necessarily leaving sovereignty in their hands.

James Madison, in his notes on the Federal Convention of 1787, recorded several instances where Wilson spoke on popular sovereignty. Madison wrote on May 31, 1787,

Mr. Wilson contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for the reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people. In a republican Government this confidence was peculiarly essential.<sup>104</sup>

On June 6, 1787, Madison wrote of Wilson's remarks,

He wished for vigor in the Government, but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The Government ought to possess not only first the *force*, but secondly the *mind or sense* of the people at large. The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively.<sup>105</sup>

Later that day, he wrote about Wilson's comments,

If we are to establish a national Government, that Government ought to flow from the people at large. If one branch of it should be chosen by the Legislatures, and the other by

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<sup>102</sup> Mark Hall, "Justice, Law, and the Creation of the American Republic: The Forgotten Legacy of James Wilson" (2009). Faculty Publications - Department of History, Politics, and International Studies. Paper 1.

<sup>103</sup> Ibid. United States Senators were elected by state electors until the ratification of the 17<sup>th</sup> Amendment in 1913, which established the direct election of Senators. See Cornell Law School's *Legal Information Institute* and their page on the 17<sup>th</sup> Amendment for more information.

<sup>104</sup> James Madison, "Remarks of James Wilson in the Federal Convention, 1787." Essay. In *Collected Works of James Wilson* 1, edited by Kermit L Hall and Mark David Hall, 1:82–83. Carmel, IN: Liberty Fund, Inc., 2007.

<sup>105</sup> Ibid., 90–91

the people, the two branches will rest on different foundations, and dissensions will naturally arise between them. He wished the Senate to be elected by the people as well as the other branch, and the people might be divided into proper districts . . .<sup>106</sup>

These notes make clear that Wilson was certainly a champion of popular sovereignty; he spoke several times in support of the concept at the Convention. With Madison's notes on the Convention, however, come limitations. Since Madison paraphrased the words of Wilson each time he spoke, his words were necessarily not written down exactly as they were said. Wilson's style, which often includes myriad references to historical figures and matches Cicero's own rhetorical style, was not recorded. Even if Wilson did reveal his inspiration for popular sovereignty at the Convention, Madison did not write those remarks down.

In his famous *State House Yard Speech*, delivered in 1787, Wilson spoke in support of the proposed Constitution by addressing several objections to the document. While his response to objections, such as a lack of protection for the press, were targeted, he alluded to popular sovereignty several times. He specifically refers to Congress as "a faithful representation of the people."<sup>107</sup> The significance of this speech is without question. Within three months of Wilson making this speech, it had been reprinted in thirty-four newspapers across twelve states and had been circulated across the colonies as a pamphlet.<sup>108</sup> Just as with Wilson's remarks in the Federal Convention, however, he does not reveal the source of inspiration for his popular sovereignty philosophy, and he does not engage any thinkers—ancient or otherwise—in his speech.

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<sup>106</sup> Ibid., 92

<sup>107</sup> Wilson, *James Wilson's State House Yard Speech October 6, 1787*, 173.

<sup>108</sup> Ibid., 171. See Kermit L. Hall's and Mark David Hall's introduction to Wilson's speech. They also mention that Bernard Bailyn argued that the *State House Yard Speech* was more influential than the *Federalist Papers* in winning support for the Constitution.

Contemporary scholars nonetheless attribute Wilson's belief in popular sovereignty to Enlightenment philosophers. Stephen A. Conrad, in his examination of Wilson's popular sovereignty, argued that Wilson's idea of popular democracy mirrored Locke's, both in its content and in its "ambiguous" and "self-contradictory" nature.<sup>109</sup> He also argued that Wilson, with this philosophy, was executing a vision in line with that of Montesquieu.<sup>110</sup> Zink viewed Wilson's argument that the people possess a "natural sovereignty" through a modern, Lockean lens.<sup>111</sup> Daniel N. Robinson took a slightly different approach while examining Wilson's *Chisholm* opinion, and claims that Wilson's popular sovereignty philosophy stems from Scottish Enlightenment thought.<sup>112</sup> James H. Read, in his chapter on Wilson and popular sovereignty, contrasts Wilson with Jefferson. For Jefferson, popular sovereignty was a reason for a limited national government; for Wilson, a justification for an energetic federal government.<sup>113</sup> Read also supports the view on Conrad, in part, and argues that Wilson's popular sovereignty only makes sense with a "very high level of abstraction."<sup>114</sup>

Eduardo Velásquez provides a particularly illuminating representation of current scholars' views on the subject. Velásquez, in his section discussing the consent of the governed, again attributes Wilson's popular sovereignty to John Locke and Thomas Hobbes.<sup>115</sup> To do this, he selects a section of Wilson's lecture, *Of Man, as a Member of Society*—the very same lecture where Wilson uses selections from Cicero to argue that natural law is universal, and that natural

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<sup>109</sup> Stephen A. Conrad, "The Rhetorical Constitution of Civil Society at the Founding: One Lawyer's Anxious Vision," *Indiana Law Journal* 72, no. 2 (Spring 1997): 369

<sup>110</sup> Stephen A. Conrad, "Metaphor and Imagination in James Wilson's Theory of Federal Union." *Law & Social Inquiry* 13, no. 1 (1988): 1–70.

<sup>111</sup> Zink, "The Language of Liberty and Law," 444.

<sup>112</sup> Robinson, "The Scottish Enlightenment and the American Founding, 171.

<sup>113</sup> James H. Read, "James Wilson and the Idea of Popular Sovereignty," In *Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson*. University of Virginia Press, 2000: 90.

<sup>114</sup> *Ibid.*, 116.

<sup>115</sup> Velásquez, "Rethinking America's Modernity," 195.

law creates interpersonal obligations. Velásquez quotes a selection from the following paragraph to justify his claim:

In order to constitute a state, it is indispensably necessary, that the wills and the power of all the members be united in such a manner, that they shall never act nor desire but one and the same thing, in whatever relates to the end, for which the society is established. It is from this unions of wills and of strength, that the state or body politick results. The only rational and natural method, therefore, of constituting a civil society, is by the convention or consent of the members, who compose it. For by a civil society we properly understand, the voluntary union of persons in the same end, and in the same means requisite to obtain that end. This union is a benefit, not a sacrifice: civil is an addition to natural order.<sup>116</sup>

Wilson makes clear here that popular sovereignty is an extension of “natural order”—the natural order that stems from Cicero’s natural law. Velásquez, however, argues that we should not be “misled by the play on words.”<sup>117</sup> He writes, “But the ‘addition’ is a product of the ‘convention or consent of its members.’ Civil society may be said to be ‘by nature’ only if it is clear about what Wilson means ‘by nature.’”<sup>118</sup> Wilson is remarkably clear and consistent in his description of nature: it is governed by Ciceronian natural law. By Velásquez’s own reasoning, it necessarily follows that the body politic, drawing its power from the united will of its members, is an extension of natural law.

More evidence that Wilson’s popular sovereignty is an extension of Cicero’s natural law is in the same lecture—just three paragraphs prior to the one Velásquez examines. This passage, while lengthy, merits being examined in its entirety; Wilson not only quotes Cicero, but also dismisses Enlightenment thought. Wilson writes,

Society may be distinguished in two kinds, natural and civil. This distinction has not been marked with the accuracy, which it well merits. Indeed some writers have given little or no attention to the latter kind; others have expressly denied it, and said, that there can be no civil society without civil government. But this is certainly not the case. A state of civil society must have existed, and such a state, in all our reasonings on this

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<sup>116</sup> Wilson, *Of Man, as a Member of Society*, 635. See Velásquez 214–215 for his abridged use of this paragraph.

<sup>117</sup> Velásquez, “Rethinking America’s Modernity,” 215.

<sup>118</sup> *Ibid.*

subject, must be supposed, before civil government could be regularly formed and established. Nay, 'tis for the security and improvement of such a state, that the adventitious one of civil government has been instituted. To civil society, indeed, without including in its description the idea of civil government, the name of *state* may be assigned, by way of excellence. It is in this sense that Cicero seems to use it, in the following beautiful passage. 'Nothing, which is exhibited on our globe, is more acceptable to that divinity, which governs the whole universe, than those communities and assemblages of men, which, lawfully associated—*jure sociati*—are denominated states.'<sup>119</sup>

There are several notable observations in this passage. First, Wilson writes that some writers have not given enough attention to civil society—not to civil government. He clearly is referring to Locke and Hobbes; their social contract theories conflate the formation of any sort of community with a body politic.<sup>120</sup> Wilson is necessarily criticizing the Enlightenment thinkers, and he hardly is leaning on their philosophy as a justification for popular sovereignty.

Second, Wilson's assertion that civil society exists before civil government is distinctly classical in nature. The idea is perhaps best championed by Aristotle, who famously writes, “. . . it is evident, then, that the city belongs among the things that exist by nature, and that man is by nature a political animal.”<sup>121</sup> The idea is also upheld by Cicero, who writes,

But as Plato so nobly put it, we are not born for ourselves alone . . . and again, as the Stoics have it, all that the earth produces is created for men's use, and men have been begotten for men's sake to be of service to each other. Therefore we should follow nature as our guide in this sense of making available shared benefits by exchange of our obligations, by giving and receiving, and in this way binding the community and its individuals closely together by our skills, our efforts, and our talents.<sup>122</sup>

Here, Cicero argues that humans, by nature, have a social affability that creates interpersonal obligations—a civil relationship that precedes the existence of civil government. Wilson recites

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<sup>119</sup> Wilson, *Of Man, as a Member of Society*, 634–635, with a selection as written in Cic. Somn. Scip. C. 3.

<sup>120</sup> Locke argues that in his state of nature, individuals are restricted by the law of nature from harming others needlessly and without cause. This, however, is not the same type of positive, cosmopolitan obligation that Cicero promotes. Locke also argues that individuals enter civil society when they leave the state of nature. See the second chapter on the law of nature in Locke's *Second Treatise* for more information.

<sup>121</sup> Aristotle. *Aristotle's Politics*. Edited by Carnes Lord. 2nd ed. Chicago, IL: The University of Chicago Press, 2013. 4, 1253a.

<sup>122</sup> Cicero. *On Obligations*. Translated by P G Walsh. Oxford: Oxford University Press, 2008, 9–10.

this passage in the very same lecture, *Of Man, as a Member of Society*—just two pages before his discussion of popular sovereignty.<sup>123</sup>

Finally, Wilson’s employment of a Ciceronian quote makes it very clear that he arrives at popular sovereignty by way of Cicero’s own philosophy. An understanding of Cicero’s five components of natural law is essential when examining this particular instance that Wilson employed Cicero. The notion that civil society existed before human-made institutions is supported by the principle that natural law is universal. The claim that this sort of natural civil society is agreeable with a “divinity, which governs the whole universe” is necessarily supported by the principles that natural law is given by God and that natural law is universal. Cicero’s quote itself here is thus very reminiscent of his own natural law theory, and Wilson’s employment of such a passage here makes very clear that he is using Cicero’s natural law as a justification of a naturally occurring society. Wilson’s employment of Cicero here, paired with the paragraph noted by Velásquez only three paragraphs later, make it clear that Wilson’s popular sovereignty is rooted not in Enlightenment thought, but in Cicero’s natural law.

There are several other instances where Wilson employs Cicero to promote popular sovereignty. In his fifth lecture, *Of Municipal Law*, Wilson makes a fleeting reference to Cicero while quoting him in Latin. Wilson says, “‘Natura juris a natura hominis repetenda est,’ is the judgement of Cicero.<sup>124</sup> It is a judgement, not more respectable on account of the high authority, which pronounces it, than on account of its intrinsic solidarity and importance.”<sup>125</sup> The

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<sup>123</sup> Walsh’s translation differs slightly from Wilson’s translation of the same passage. The passages nevertheless have the same content.

<sup>124</sup> This passage is translated by Wilson in his own footnote as: “The nature of the law is to be sought from the nature of man himself.” He does not cite which work of Cicero he used to find this quote, but it is found in *De Legibus* I.17.

<sup>125</sup> Wilson, *Of Municipal Law*, 583–584.



significance of this passage is self-evident; Wilson employs Cicero to argue that human-made laws must be made with the humans being governed in mind.

While popular sovereignty is particularly evident throughout Wilson's work, it is perhaps best championed in his landmark opinion in *Chisholm v. Georgia*—where he also cites Cicero to support the idea. Wilson discusses both natural law and popular sovereignty in his opinion, writing,

In doing this, I shall have occasion incidently to evince, how true it is, that States and Governments were made for man; and, at the same time, how true it is, that his creatures and servants have first deceived, next vilified, and, at last, oppressed their master and maker.

Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance. When I speak of a State as an inferior contrivance, I mean that it is a contrivance inferior only to that, which is divine: Of all human contrivances, it is certainly most transcendantly excellent. It is concerning this contrivance that Cicero says so sublimely, 'Nothing, which is exhibited upon our globe, is more acceptable to that divinity, which governs the whole universe, than those communities and assemblages of men, which, lawfully associated, are denominated States.'

Let a State be considered as subordinate to the People: But let every thing else be subordinate to the State. The latter part of this position is equally necessary with the former. . .<sup>126</sup>

Most notable here is Wilson's claim that any government acquires its importance, and therefore its power, from the worth of humans, presumably the very people who compose the state over which the government presides. In the same paragraph where Wilson makes this claim, he also quotes not the social contract theory of Locke and Hobbes, but Cicero—and the very same passage of the *Somnium Scipionis* he quoted in his lecture, *Of Man, as a Member of Society*. In addition to his quotation of Cicero, Wilson also again mentions several components of Cicero's natural law: his mention of an "all perfect Creator" alludes to the principle that natural law is

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<sup>126</sup> Wilson, *Opinion in Chisholm v. Georgia*, 353.

given by God, and of course, again, the principles that natural law is universal and that it creates interpersonal obligations.

While Wilson uses his own logic to extend Cicero's natural law and justify popular sovereignty, this concept is not actually representative of Ciceronian thought. Cicero actually holds an opposing viewpoint and believes that a sort of overall excellence qualifies one to make governmental decisions—not the consent of the governed. Cicero believes that those who are qualified and excellent have not only a right, but a duty to govern, and he places little faith in the people. He writes, "Indeed, the man who is reliant on the false assumptions of the ignorant mob is not to be numbered among the great."<sup>127</sup> He later writes,

But men whom nature has endowed with the resources for conducting public business should renounce all hesitation, seek entry to public office, and administer the state. In no other way can a city-state be governed, or greatness of spirit be made manifest. Statesmen no less than philosophers—perhaps I should say even more than philosophers—should display the greatness of spirit and that indifference to human considerations to which I repeatedly refer, and in addition mental tranquility and freedom from anxiety, if they are to avoid the stresses and strains, and adopt a sober and unswerving course in life.<sup>128</sup>

Cicero clearly believes those who lead the state ought to be the best members of society—but not necessarily representative of society. They rather must be unmoved by the passions of the many and unaffected by the conditions which trouble most people. It is this excellence, not the consent of the people, which Cicero believes qualifies individuals to govern a state and make decisions in the people's best interest; it necessarily is at odds with Wilson's popular sovereignty. Wilson, therefore, uses his own logic to extend Cicero's natural law to justify popular sovereignty—and goes beyond echoing Cicero in doing so.

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<sup>127</sup> Cicero. *On Obligations*. Translated by P. G. Walsh. Oxford: Oxford University Press, 2008, 23–25, 1.65.

<sup>128</sup> 26, 1.72 in *Ibid*.

## 2. Common Law as an Extension of the Natural Law

Wilson also demonstrates a steadfast commitment to the common law and dedicates one of his law lectures to this topic. While common law is characteristic of the British legal system, Wilson does not advocate for its implementation in the United States merely because it was already in use before the country gained its independence. Wilson's devotion to the common law rather stems from his steadfast belief in popular sovereignty and natural law, and he ultimately uses Ciceronian natural law as his justification for implementing the common law in America.

Common law is law that is derived from previously made judicial decisions, rather than from statutes.<sup>129</sup> Most of the common law is uncodified; precedents set in previous legal decisions determine the outcomes of future cases.<sup>130</sup> This system is distinctly different from the only other foundational legal system in the world—civil law. Sovereign states that use civil law systems are continuously updating legal codes that are comprehensive.<sup>131</sup> Ancient Rome was a civil law society; civil law got its name from the Latin term *ius civile* and the Romans themselves invented civil law.<sup>132</sup> While Cicero is certainly best known for his natural law framework that he put forth in his philosophical works, he did, of course, participate in Rome's civil law system. The common law system adopted in the United States shares much more with the original common law framework brought about in England during the Middle Ages than it does with the Roman legal system, or the legal system of any other civil law society.

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<sup>129</sup> "Common Law." Legal Information Institute. Cornell Law School Legal Information Institute, May 2020.

<sup>130</sup> "The Common Law and Civil Law Traditions." The Robbins Collection. University of California, Berkeley, School of Law, 2010.

<sup>131</sup> *Ibid.*

<sup>132</sup> Barry Nicholas. "Ius Civile." Oxford Classical Dictionary. Oxford University Press, December 22, 2015. See Paul J. Du Plessis' sixth edition of *Borkowski's Textbook on Roman Law* for more information on *ius civile*.

Contemporary scholars of Wilson recognize his commitment to implementing the common law in the United States. They do not usually, however, spend a great deal of time examining Wilson's thought on the subject; they rather assume that he inherits his commitment to common law from the British legal system. Perhaps the earliest recognition of common law in Wilson's work comes from Randolph C. Adams, who writes, "Wilson could not regard statutory enactment as the only, or even the principle, species of law. That English Common Law, 'founded on long and general custom,' which in turn can be founded on nothing but free and general consent, is the principal connotation which the word 'law' had for him."<sup>133</sup> William Ewald recognizes that Wilson's lectures began with the "broadest philosophical principles" and briefly mentions common law alongside natural law and the law of nations.<sup>134</sup> In Stephen A. Conrad's examination of Wilson's devotion to the "proverbially antique, Anglo-Saxon" common law, he discusses Wilson's high regard for the common law tradition at length, and ties this philosophy to thinkers such as Sir Edward Coke or William Blackstone.<sup>135</sup> Mark Hall also briefly mentions Wilson's affection for common law in a section that discusses the will of the people.<sup>136</sup>

All of these scholars acknowledge only the most basic form of Wilson's argument: since common law is based on custom, the consent of the people governed by common law is implied and the principle of popular sovereignty elevates the common law to the highest form of human-made law. It is true—this is Wilson's argument, and it creates striking implications about what Wilson's views would be on modern constitutional law, which is conventionally considered to be

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<sup>133</sup> Randolph C. Adams, "The Legal Theories of James Wilson." *University of Pennsylvania Law Review and American Law Register* 68, no. 4 (1920): 349.

<sup>134</sup> William Ewald, "James Wilson and the Drafting of the Constitution" (2008). Faculty Scholarship. Paper 988.

<sup>135</sup> Stephen A. Conrad, "James Wilson's 'Assimilation of the Common-Law Mind'" (1989), 866.

<sup>136</sup> Mark Hall, "Justice, Law, and the Creation of the American Republic," 1.

the highest law in the United States. Contemporary scholars fail, however, to recognize the source of Wilson's common law thought beyond the Anglo-Saxon law tradition.

The origins of Wilson's common law philosophy are in the Roman legal system, and Wilson once again employs Cicero when justifying the use of common law in the United States. This is seen through two separate ways: through Wilson's extension of popular sovereignty to the common law and through direct references to Cicero in his lecture on common law. First, since it has already been shown that Wilson uses his own logic to extend Cicero's natural law philosophy to justify popular sovereignty, and contemporary scholars rightly identify Wilson's common law as an extension of popular sovereignty, Cicero's natural law likely influenced the origin of Wilson's steadfast commitment to common law. Second, Wilson engages with Cicero's thought in his lecture about common law. Together, this reasoning and this evidence makes clear that the source of common law, for Wilson, was Cicero and ancient Rome.

Wilson engages with Cicero directly several times when arguing in favor of common law, and this is best seen in his lecture, *Of the Common Law*. He introduces a lengthy quote from Cicero with a discussion of human reason and the law, arguing that no individual should be wiser than the law because the best laws stem from the collective reason of humanity. It is worth noting here that Cicero, along with the Stoics, viewed reason as a divine entity—the entity from which natural law originates. Wilson then continues to discuss Cicero, saying,

To those, who enjoy the advantages of such a law as has been described, I may well, address myself in the words of Cicero, 'Believe me, a more inestimable inheritance descends to you from the law, than from those who left, or may leave you fortunes. A farm may be transmitted to me by the will of any one: but it is by the law alone that I can peacefully hold what is already my own. You ought, therefore, to retain the publick patrimony of the law, which you have received from your ancestors, with no less assiduity than you retain your private estates; not only because these are fenced and protected by the law; but for this further reason, because the loss of a private fortune

affects only an individual, whereas the loss of the law would be deeply detrimental to the whole commonwealth.’<sup>137</sup>

This passage is notable; Wilson connects his commitment to the common law with Cicero and the broader Roman legal system. The pairing of Cicero’s discussion of the “public patrimony” with a reminder of the divine origins of reason and law make clear that Wilson employs not only Cicero’s rhetoric, but also his natural law philosophy: he is connecting the common law with natural law. Wilson’s common law must therefore be understood as a direct extension of Cicero’s natural law philosophy, and of course as an extension of popular sovereignty—a concept Wilson also derived from Cicero.

Wilson’s usage of Cicero is particularly notable here, as it is not representative of the ancient legal system in which Cicero argued. The passage is not from any of Cicero’s well-known philosophical works, but rather from one of his speeches: *Pro Caecina*. In this speech, Cicero argued on behalf of his friend, Aulus Caecina, who claimed that a farm was taken from him by force.<sup>138</sup> The use of such a speech here is peculiar, as the jurists deciding this case were charged with “scientifically” applying the law as it was written and organized—not with simply following custom.<sup>139</sup> Wilson nevertheless employs Cicero’s words separate from the civil law context in which they were originally spoken, and uses Cicero to advance the institution of the common law.

Wilson works in several other instances to distance the common law from the British legal tradition, and in its stead, he argues that the common law has its roots in ancient Rome. He writes in this same lecture, “The common law, as it respects contracts and personal property,

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<sup>137</sup> Wilson, *Of the Common Law*, 779–780, with a selection as written in Cic. *Pro Caecina*.

<sup>138</sup> Mark Remete, “An Analysis of Cicero’s *Pro Caecina*: Piso’s Argument From A Statutory Interpretation Perspective.” *Revista Jurídica*, 2018.

<sup>139</sup> Bruce W. Frier, “Urban Praetors and Rural Violence: The Legal Background of Cicero’s *Pro Caecina*.” *Transactions of the American Philological Association* (1974-) 113 (1983): 224.

discovers evident traces of the Roman jurisprudence. It has been the opinion of some, that those parts of the common law have been borrowed from the civil law . . . when Roman jurisprudence predominated England.”<sup>140</sup> Wilson also praises customary law in the Roman legal tradition, saying, “I have observed that, in the free and happy periods of the Roman commonwealth, great regard was paid to customary law. Even so late as the time of Justinian, the unwritten law constituted one of the two great divisions, into which the system of Roman jurisprudence was thrown.”<sup>141</sup>

Wilson’s employment of Justinian here is another intriguing choice; Justinian commissioned an overhaul of Roman law, which led to a handful of men choosing to discard centuries of customary law as they condensed the law into the *Corpus Iuris Civilis*—the Body of Civil Law.<sup>142</sup> Justinian’s codification of the civil law thus seems at odds with Wilson’s vision for the common law—one where unwritten precedent supersedes even the highest forms of written law.

It is worth noting that Wilson does not merely attribute common law to Rome while passively ignoring the British roots that contemporary scholars insist exist. He rather denounces British law as the source of common law altogether, saying, “The dependence of the colonies in America on the parliament of England seems to have been a doctrine altogether unknown and even unsuspected by the colonists who emigrated, and by the princes with whose consent their emigrations were made. It seems not, for a long time, to have been a doctrine known to the parliament itself.”<sup>143</sup> Wilson’s words may be performative here; he may be merely attempting to

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<sup>140</sup> Wilson, *Of the Common Law*, 770.

<sup>141</sup> Wilson, *Of the Common Law*, 758.

<sup>142</sup> “Roman Legal Tradition and the Compilation of Justinian.” The Robbins Collection. University of California, Berkeley, School of Law, 2007. <https://www.law.berkeley.edu/wp-content/uploads/2019/08/romanlaw.pdf>.

<sup>143</sup> Wilson, *Of the Common Law*, 787.

distance his affinity for common law from the empire that America had recently thrown out. What he does say here, paired with his mention of reason in a divine context and his lengthy quote from Cicero, suggests that he sees the foundations for American common law in ancient Rome.

Just as he misappropriated Cicero when arguing in favor of popular sovereignty, Wilson misrepresents Cicero in his discussion of common law. He uses a public speech Cicero made in favor of customary law, but the primary purpose of that speech was to win a case. In his philosophical work *De Legibus*, Cicero praises the sort of civil law structure that Rome had, and in doing so necessarily dismissed custom in favor of magistrates. He writes in Book Three,

In fact it is true to say that a magistrate is a speaking law, and law a silent magistrate . . . Magistrates, then, are a necessity. Without their good sense and close attention there can be no state. In fact the whole management of a country depends on the apportionment of their functions. Not only must their authority be clearly delimited; the same applies to the citizens' duty to obey them.<sup>144</sup>

Cicero's expansive view of magistrates shows that he believes there are sources of law beyond custom. His argument that citizens must obey magistrates contradicts Wilson's claim that customary law, or common law, is the highest form of human-made law in existence. This of course does not affirm that customary law has no place in Cicero's legal philosophy; it rather demonstrates that customary law is not the highest source of law for him, as Wilson seems to suggest. Wilson thus uses his own logic to extend Cicero's natural law theory to the common law, just as he did with popular sovereignty.

### **3. Natural Law as a Tool for Abolition**

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<sup>144</sup> Cicero, *The Republic and The Laws*. Translated by Niall Rudd. Oxford: Oxford University Press, 2008, 150–151.



Slavery, or perhaps more specifically, its abolition, was a delicate topic for the American founders. While many founders were certainly in favor of its abolition, they often opted not to push for such an outcome in what may be considered an approach to ratify the Constitution. John Adams's disdain for slavery is well-known; he prided himself on never having enslaved people on his farm. Yet the issue of slavery never received his public attention.<sup>145</sup> Thomas Jefferson, who enslaved almost two hundred men, women, and children when he drafted the Declaration of Independence, wrote in private letters that slavery was unlawful.<sup>146</sup> Such a view was never expressed by Jefferson publicly. Alexander Hamilton, who believed that natural law philosophy—and not Enlightenment thought—demanded the abolition of slavery, was perhaps the only high-profile founder whose public issue of slavery in the United States has been studied at length and noted in popular historical culture.<sup>147</sup>

Wilson fits the pattern demonstrated by the other founders. He is particularly comparable to Adams; his private views made him a staunch abolitionist, but he rarely spoke publicly about the issue of slavery. In the federal convention, Wilson observed that the protection of the trade of enslaved people was the primary factor keeping both South Carolina and Georgia from joining the Union, which, while inconclusive, signals his likely approach to ratifying the Constitution by not debating slavery.<sup>148</sup> Contemporary scholars neglect to examine the few spots that Wilson does argue for abolition. While Mark Hall discusses many of Wilson's ideas, such as natural law and popular sovereignty, in depth, he neglects to discuss the abolition of slavery.<sup>149</sup> Robert Aitken devotes five sentences in his overview of Wilson's life to discussing his views on slavery

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<sup>145</sup> John R. Howe, "John Adams's Views of Slavery." *The Journal of Negro History* 49, no. 3 (1964): 201.

<sup>146</sup> William Cohen, "Thomas Jefferson and the Problem of Slavery." *The Journal of American History* 56, no. 3 (1969): 503.

<sup>147</sup> Michael D. Chan, "Alexander Hamilton on Slavery." *The Review of Politics* 66, no. 2 (2004): 207–31.

<sup>148</sup> Madison, *Remarks of James Wilson in the Federal Convention, 1787*, 153.

<sup>149</sup> Hall, "James Wilson: Democratic Theorist and Supreme Court Justice," 126–54  
See also Hall, "Justice, Law, and the Creation of the American Republic."

and merely states that he assumed Congress would rightly not allow slavery to exist in the United States.<sup>150</sup> In his examination of Wilson and natural law, Eduardo Velásquez neglects to discuss Wilson's abolitionist thought.<sup>151</sup> Jonathan Feld, in his classical receptions study of post-revolutionary Philadelphia, neglects Wilson's abolitionist ideas in favor of his natural law thought.<sup>152</sup> While contemporary scholars dismiss Wilson's abolitionism as a topic for study, there is certainly abundant evidence to be examined.

Classical reception scholars who focus on the American founding era also have surprisingly little to say about classical receptions and the abolition of slavery. Richard briefly identifies a handful of founders that used slavery in Greece and Rome as an antimodel for the United States. Among them were George Mason, John Dickinson—the man with whom Wilson apprenticed—and Thomas Jefferson.<sup>153</sup> Left out from Richard's work is Wilson. Richard's examination of Jefferson is particularly interesting; he argues that “the lesson Jefferson drew from Roman slavery is dubious at best.”<sup>154</sup> He goes on to discuss how Jefferson's failure to understand the differences in treatment between Roman slaves and American slaves limits his overall argument for the abolition of slavery and the creation of a colony for former slaves in Africa.<sup>155</sup> Richard's examination here offers a unique glimpse into the misappropriations of classical figures and institutions made by American founders.

Receptions of Greece and Rome were also used in the pro-slavery south not as an antimodel, but as a justification. Richard notes that pro-slavery southerners relied on Athens, rather than Rome, as their model society; they believed that slaves in Athens enabled a thriving

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<sup>150</sup> Aitken, “James Wilson: A Lost American Founder,” 64.

<sup>151</sup> Velásquez, “Rethinking America's Modernity,” 193–220. \.

<sup>152</sup> Jonathan Grant Feld, “Cradle of Libertas: Reception of the Roman Republic in Post-Revolutionary Philadelphia,” Princeton University, 2018.

<sup>153</sup> Richard, *The Founders and the Classics*, 95–6.

<sup>154</sup> *Ibid.*, 97.

<sup>155</sup> *Ibid.*

leisure class.<sup>156</sup> Caroline Winterer also discusses how southerners in the founding era rely on Athens as their model society. She writes that southerners engaged in “more studied defenses of slavery” after Nat Turner’s rebellion in 1831.<sup>157</sup> Turner’s rebellion, of course, happened decades after the founding of the United States. Most classical receptions scholarship that examines slavery focuses on the Antebellum period and does not place such an emphasis on the eighteenth century.<sup>158</sup>

Despite scholars’ lack of focus on classical receptions and slavery in the American founding—with Wilson in particular—Wilson argues for both the abolition of slavery and better treatment for the enslaved. He uses Cicero’s natural law theory and popular sovereignty to justify his argument.

Wilson’s first argument against slavery is seen not in his law lectures, but in his earlier work titled *An Address to the Inhabitants of the Colonies*, which he published in 1776. Wilson portrayed all the colonies as slaves of the British Parliament. It was in this way that he was cleverly able to denounce slavery in America while also stoking national unity. Wilson uses both natural law and popular sovereignty to justify his argument against slavery, and his careful phrasing merits being examined in full:

The Sentence of universal Slavery gone forth against you is; *that the British Parliament have Power to make Laws, WITHOUT YOUR CONSENT, binding you in ALL Cases whatever.* Your Fortunes, your Liberties, your Reputations, your Lives, every Thing that can render you and your Posterity happy, all are Objects of the Laws: All must be enjoyed, impaired, or destroyed as the Laws direct. And are you the Wretches, who have Nothing that you *can* or *ought* to call *your own*? Were all the rich Blessings of Nature, all the Bounties of indulgent Providence poured upon you, not for your own Use; but for the Use of those, upon whom neither Nature nor Providence hath bestowed Qualities or Advantages superior to yours?

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<sup>156</sup> Ibid., 241.

<sup>157</sup> Winterer, *The Culture of Classicism*, 74.

<sup>158</sup> See John Barnard’s *Empire of Ruin: Black Classicism and American Imperial Culture* and Carl J. Richard’s chapter, “Slavery,” in his book, *The Golden Age of Classics in America: Greece, Rome, and the Antebellum United States* for more information.

From this Root of Bitterness numerous are the Branches of Oppression that have sprung. Your most undoubted and highest-priz'd Rights have been invaded: Heavy and unnecessary Burthens have been imposed on you: Your Interests have been neglected, and sometimes wantonly sacrificed to the Interests, and even to the Caprice of others.<sup>159</sup>

Here, Wilson uses both natural law and popular sovereignty—which has already been shown to be an extension of natural law itself—to argue against the concept of slavery. Elements of Cicero's natural law are evident, and his references to individuals' God-given liberties are particularly Ciceronian in nature. His emphasis on consent refers to popular sovereignty, or consent of the governed—something he very clearly emphasizes. Even though Wilson dances around the issue of slavery in America here by referring to an abstract “universal Slavery” rather than the tangible, institutionalized slavery that plagued America, he still argues against the conception of slavery itself by using Cicero's natural law theory and popular sovereignty.

What might be Wilson's best rebuttal of slavery is seen in his lecture, *Of the Natural Rights of Individuals*. Wilson connects common law and natural law to argue against the morality of slavery. He writes,

Slavery, or an absolute and unlimited power, in the master, over the life and fortune of the slave, is unauthorized by the common law. Indeed, it is repugnant to the principles of natural law, that such a state should subsist in any social system. The reasons, which we sometimes see assigned for the origin and the continuance of slavery, appear, when examined to the bottom, to be built upon a false foundation. In the enjoyment of their persons and of their property, the common law protects all.<sup>160</sup>

There are several things to notice here. First, Wilson argues that slavery is a violation of the common law. What is notable is that he does not cite any case law to support his claim; he rather refers to the common law in an abstract sense—the very same way that he refers to natural law. This is particularly significant because, as already demonstrated, Wilson arrives at his common

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<sup>159</sup> Wilson, *Address to the Inhabitants of the Colonies*, 48.

<sup>160</sup> Wilson, *Of the Natural Rights of Individuals*, 1077.

law thought through his natural law philosophy. Second, Wilson refers to natural law and common law interchangeably here. He argues that slavery is “repugnant to the principles of natural law”—not common law. This is further evidence that Wilson’s affection for common law stems from his natural law philosophy, and directly demonstrates how he uses natural law—which is inspired by Cicero—to argue for the abolition of slavery. Finally, it is notable that Wilson applies Cicero’s philosophy here without ever mentioning him by name.

The only time that Wilson mentions Cicero directly when discussing slavery is when examining the topic of mistreatment and torture. Wilson, speaking with great passion, quotes Cicero in both Latin and English, saying,

In the times of the republick, torture was known at Rome; and this, it must be owned, was too much to be known any where. It was confined, however, to the slaves. The whole torrent of Cicero’s eloquence was poured indignant upon the infamous Verres, because he had the audacity as well as cruelty to torture a Roman citizen, with his eyes turned towards Rome. ‘Caedebatur virgis in medio foro Messanae civis Romanus, iudices; cum interea nullus gemitus, nulla vox alia istius miseri, inter dolorem crepitumque plagarum, audebatur, nisi haec, civis Romanus sum.’—‘O nomen dulce libertatis! O jus eximium nostrae civitatis! O lex Porcia, legesque Semproniae! O graviter desiderata, et aliquando reddita plebi Romanae tribunicia populi Romani, in oppido faederatorum, abreo qui beneficio populi Romani fasces et secures haberet, deligatus in foro virgis caederetur? Quid, cum ignes aredentesque laminae caeterique cruciatus admovebantur?’—‘Non fuit his omnibus iste contentus. Spectet, inquit, patriam: in conspectus legum libertatisque moriatur.’<sup>161</sup>

This passage, of course, does not address slavery directly. That does not mean it is not significant; it demonstrates two things. It first illustrates Wilson’s affinity for Cicero’s style, as he quotes such a lengthy passage in his lecture in its original Latin. Second, it is actually the

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<sup>161</sup> Wilson, *Of Steps for Apprehending Offenders*, 1189, with a selection as written in Cicero’s *In Verrem*. Wilson translated this Latin passage as, “A Roman citizen, Judges, was scourged with whips in the middle of the forum of Messana. When all the while no other groan, not other word, was heard from that poor wretch amid the pain and noise of the lashes but this: I am a Roman citizen”—“O sweet name of liberty! O most excellent law of our state! O porcian Law and the Sempronian Laws! O power of the tribunate, urgently longed for and finally restored to the Roman People! Have then all things regressed to this point, that a Roman citizen, in a province of the Roman People and in a town of the allies, should be bound and lashed in the forum by a man who held the insignia of office by the beneficence of the Roman People? And what about when fires, burning plates, and other tortures were brought to bear?”—“But he [i.e., Verres] was not content with all this. He will, he says, gaze upon his Fatherland; may be die in the gaze of her laws and liberty!”

place where Wilson's mention of slavery is most similar to Cicero's own thought. It is true that slavery was commonplace in Roman society, and Cicero made no issue of its practice; in none of his writing did Cicero call for slavery's abolition. One of the only mentions of slavery that Cicero makes is in *De Officiis*, where he writes, "We must remember that justice is to be observed even to the lowliest in society. Slaves represent that lowliest condition and status. The advice of those who recommend that we treat them as hired hands is reasonable enough: make them work, but give them what is their due."<sup>162</sup> Wilson's comment about mistreatment of individuals—not even only slaves in particular—is thus most representative of Cicero's own thoughts on slavery. This is notable; it is the place where Wilson is weakest in his arguments for the abolition of slavery.

Wilson's incongruency with Cicero, once again, does not stop him from employing Cicero when making his arguments. Just as with popular sovereignty and common law, Wilson again uses his own logic to extend Cicero's natural law theory to the issue of American slavery. Wilson's discussion of slavery is certainly more limited than his discussion of popular sovereignty and common law, but the reason for this lack of emphasis may not be lack of interest; Wilson, like Adams, likely took a pragmatic approach to ratifying the Constitution and shepherding stability into the young republic. Wilson's abolitionist thought, while ignored by most contemporary scholars, ought to be taken seriously and seen as yet another extension of Ciceronian philosophy.

#### 4. Misrepresentation and Wilson's Original Thought

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<sup>162</sup> Cicero, *De Officiis*, I.41, 16.

Wilson went further than merely stating Cicero's natural law philosophy in his earliest lectures. Very often he uses components of Cicero's natural law to make arguments about things which Cicero rarely discusses. In each of these cases, Wilson takes out of context—or even directly misrepresents—Cicero's writing.

When it comes to popular sovereignty, Wilson employs Cicero often. Popular sovereignty is a hallmark of Wilson's vision for America, and it is a topic often explored by contemporary scholars. These scholars rightly identify popular sovereignty as, overall, a modern idea. What they fail to recognize is the source of Wilson's argument for popular sovereignty—Cicero. Wilson uses Cicero's natural law to justify popular sovereignty, even though Cicero did not believe that rulers gain their power from the consent of the governed. He rather believed that those best qualified to lead ought to make decisions on behalf of the whole, with or without their consent. Wilson, seemingly deliberately, chooses quotes out of context to make it appear that Cicero believed in rule by the people, rather than only rule for the people.

With common law, there are understandable motives for Wilson to portray Rome as its site of origin. Arguing to maintain the British system of law after gaining independence from the British empire is undoubtedly a difficult argument. Arguing to use a system of law that originated in Rome is likely much easier. Wilson, for reasons we admittedly do not know, chooses the latter option, and portrays the common law as a Roman creation—even though the Romans created the civil law system, which is the only other major law system. He, of course, uses Cicero as a justification for maintaining common law, and confuses any mention of custom in a legal context as customary law, as if any law system in the world is not influenced by the customs of its creators. Such confusion is undoubtedly a misrepresentation of the entire Roman legal system, and an altered account of the system in which Cicero argued.

When discussing slavery and its immorality, Wilson again turns to Cicero's natural law. He argues that both natural law, and the common law justified by natural law, prohibit slavery. This extension of Cicero's philosophy is accompanied by a reference to one of Cicero's speeches. While Wilson's argument that all people including the enslaved ought to be treated humanely is largely in line with Cicero's opinions on the subject, his argument that slavery is immoral is one largely unknown to Cicero's writing. Cicero never demonstrated his belief in any moral crisis caused by the existence of slavery. While Wilson appears to appeal to Cicero's moral authority when arguing against slavery's morality, he actively misrepresents what Cicero actually thought about the subject.

Each of these topics must therefore be considered a misrepresentation of Cicero's thought. Wilson misrepresented Ciceronian thought. With this misleading information, however, comes a significant finding. Each of these misapplications and divergences from Cicero's writing represents an instance of Wilson's own original thought—places where he uses his own logic to craft his own argument. While Wilson's writing is full of references to myriad historical figures—ancient and modern—the areas where he diverges from the philosophy of his exempla are areas where his thoughts must certainly be attributed to him.



#### Chapter IV: Idealistic Principles and Receptions of Cicero Beyond Natural Law

*“What are the qualities in government, necessary for producing laws, properly designed, properly framed, and properly enforced? Goodness should inspire and animate the intention: wisdom should direct and arrange the means: power should render the means efficacious . . .”*  
—James Wilson, *Of Government*

Until now, the examination of Cicero’s thought as received by Wilson has been confined to natural law theory. A bulk of Wilson’s writing certainly focuses on the setting up of the American judiciary, so it is understandable that many Cicero receptions have to do with American law. Even Wilson’s applications of Cicero’s natural law theory—to popular sovereignty, to the common law, and to the freedom from slavery—are at the very minimum law-adjacent.

Contemporary scholars and researchers tend to focus on Wilson’s contributions to American law, lending them weight and authority often at the expense of Wilson’s other ideas. In his recent study of receptions of the Roman republic in post-revolutionary Philadelphia, Jonathan Feld does just this. He writes, “In the world of high politics, elites reference Rome most frequently in the areas of their expertise. For instance, Founders who were most interested in law, like James Wilson, most frequently drew from the past in this context.”<sup>163</sup> He later writes, “Among these Roman legalists, Wilson was particularly fond of Cicero.”<sup>164</sup> Feld’s claim about Cicero, though not based on in-depth analysis, is largely correct. His argument that Wilson most often relied on Rome to make arguments about the law may also technically be correct; that is the topic on which Wilson most often focused. This claim, though, is also misleading. It dismisses Wilson’s many receptions that were not about American law and beyond natural law.

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<sup>163</sup> Feld, *Cradle of Libertas*, 17–18.

<sup>164</sup> *Ibid.*, 38.

Wilson's law lectures were certainly not only about the law. He provides in them a comprehensive philosophical structure and his clear vision for the young American republic. Wilson's bold condemnation of slavery in his lectures has already made clear that he, with an idealistic disposition, aims to share his goals for American society—not just American law. While he does use legal theory to justify his stance on slavery, there are several other areas where Wilson does not use natural law at all to justify his stances. He still does, of course, use Cicero. Wilson employs Cicero to argue for mixed government, to advocate for expansive education, and to discuss familial structure in the United States.

### **1. Ciceronian Mixed Government in the American Era**

Wilson's tenth lecture, *Of Government*, makes a significant contribution to his political theory. This contribution is notable, as it is perhaps one of the only major components of his political vision for America that does not have its roots in natural law theory. Wilson nevertheless employs Cicero's work to justify a mixed regime. His use of Cicero here is much broader than the targeted and systematic method that he used when applying Cicero's natural law theory.

There are two ways through which to define mixed government. The first is perhaps better thought of as separated government. This is the idea that the powers of government—the legislative, executive, and judicial powers—ought to be separated from each other rather than placed in the control of one individual or institution. The separation of powers argument is a component of Enlightenment philosophy, usually attributed to the French thinker Charles-Louis de Secondat, Baron de La Brède et de Montesquieu.<sup>165</sup> The influence that Montesquieu has on

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<sup>165</sup> James T. Brand, "Montesquieu and the Separation of Powers," *Oregon Law Review* 12, no. 3 (April 1933): 175-200

American constitutionalism is well-documented.<sup>166</sup> The best-known manifestation of Montesquieu's separation of powers argument is written not by Wilson, but by Madison. In the fifty-first Federalist Paper, he takes a cynical view of human nature that is characteristic of Enlightenment thought and writes "ambition must be made to counteract ambition" as a pragmatic defense of the Constitution.<sup>167</sup> Wilson certainly agrees with Madison's sentiments; in his *State House Yard Speech* he describes his "admiration" for "so perfect a system" as the one created in the Constitution.<sup>168</sup> It is worth noting that Bernard Bailyn describes Wilson's speech as "the most famous, to some the most notorious, federalist statement of the time."<sup>169</sup> Wilson therefore must be seen as a proponent of the separation of powers argument, as he provided what was in the late eighteenth century its most famous defense.

Wilson's idea of mixed government, however, is not merely a duplicate of the separation of powers argument. It stems from classical political thought, and its perennial question of the best regime. Aristotle provides a prominent account of the different types of regimes, all focusing on who rules: the one, the few, or the many.<sup>170</sup> The classical idea of mixed government is one where the government has separate components that are each administered by a different group. One of the first references to the mixed regime is found in Thucydides; and the champion of this classical school of thought, Polybius.<sup>171</sup> Cicero also gives voice to his own philosophy of a mixed regime in *De Re Publica*. He identifies the three same basic forms of government as Aristotle, saying,

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<sup>166</sup> Paul Merrill Spurlin, and Maurizio Valsania. "Montesquieu and the American Constitution." In *The French Enlightenment in America: Essays on the Times of the Founding Fathers*, 86–98. University of Georgia Press, 1984.

<sup>167</sup> Alexander Hamilton, John Jay, and James Madison. "Federalist No. 51." Essay. In *The Federalist: The Gideon Edition*, edited by George W. Carey and James McClellan, 267–72. Liberty Fund, 2001.

<sup>168</sup> Wilson, *James Wilson's State House Yard Speech October 6, 1787*, 173.

<sup>169</sup> Bailyn, *The Ideological Origins of the American Revolution*, 328.

<sup>170</sup> Aristotle, *Politics*, III.11.

<sup>171</sup> Jed William Atkins, *Cicero on the Mixed Regime* (2011). APSA 2011 Annual Meeting Paper, Available at SSRN: <https://ssrn.com/abstract=1902886>

When the supreme authority is vested in one man, we call him a king, and the government of that state is a monarchy. When it is vested in a select group, that state is said to be ruled by the power of an aristocracy. The state in which everything depends on the people is called a democracy . . . any of these three types may be, not indeed perfect, nor in my view the best, but at least tolerable, though one may be preferable to another.<sup>172</sup>

This is remarkably similar to Aristotle’s philosophy, although one thing is here emphasized—none of these regime types are the best. Cicero writes of the best regime, “a fourth kind of government is to be judged the best; that is, a carefully proportioned mixture of the first three described above.”<sup>173</sup> Cicero’s view of mixed government is thus consistent with other classical definitions of a mixed regime, as it calls for a government that is balanced in terms of social classes while largely ignoring the modern concept of separation of powers.

The importance of mixed constitutionalism to the founders is well documented. Richard in his chapter on antiquity and the United States Senate describes how the founders lean on ancient Greece and Rome to argue for a mixed regime.<sup>174</sup> He particularly looks at Thomas Jefferson and argues that the House of Representatives was designed to be the democratic component of the federal government; and the Senate, the aristocratic one.<sup>175</sup> While Richard looks broadly to antiquity, he makes little reference to any one figure in particular. He correctly attributes Roman mixed government theory to Polybius, but he makes only a fleeting reference to Cicero. Further, Richard neglects to mention Wilson altogether.

Wilson’s arguments for mixed government are largely ignored. One facet is, however, addressed by current scholars: his argument for a unitary executive. Daniel McCarthy calls Wilson “the single most important author of Article II” and links his arguments for a strong,

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<sup>172</sup> Cicero, *De Re Publica*, I.42.

<sup>173</sup> *Ibid.*, I.44.

<sup>174</sup> Carl J. Richard, “Classical Antiquity and Early Conceptions of the United States Senate.” Essay. In *Classical Antiquity and the Politics of America: From George Washington to George W. Bush*, edited by Michael Meckler, 29–39. Waco, TX: Baylor University Press, 2011.

<sup>175</sup> *Ibid.*, 29.

unitary executive to the Scottish Enlightenment via his Scottish heritage.<sup>176</sup> Robert Aitkin also notes that Wilson favors a unitary executive rather than a triumvirate, supposedly because one executive is less likely to devolve to tyranny than three.<sup>177</sup> Christopher Yoo discusses Wilson's affection for a unitary executive at length and examines his remarks at the Convention in depth. He only, however, identifies justifications of a unitary executive that arise from Enlightenment thought. Noteworthy among these justifications is the idea that a unitary executive can be more energetic than a plural one.<sup>178</sup> This mirrors closely Locke's argument in his *Second Treatise*, where he uses the example of an executive tearing down an innocent man's house to keep the fire in an adjacent house from spreading as a justification for an energetic executive and what he calls prerogative.<sup>179</sup> While there is certainly a congruency between Enlightenment thought and Wilson's reasoning, Yoo's work addresses neither classical thought nor any other branches of government besides the executive. Moreover, he leans almost exclusively on Wilson's remarks at the Federal Convention and neglects Wilson's law lectures.

Wilson's arguments for a strong, unitary executive ought not be examined in a vacuum. His conceptual political philosophy must not be confused with his remarks at the Federal Convention, and not his beliefs with its outcomes. In his law lectures, Wilson argues that each branch of government manifests the traits of one sort of regime, effectively implementing mixed constitutionalism. Wilson looks not to Enlightenment thought, but rather Cicero's mixed constitutional theory as inspiration for the new republic's branches of government. David J.

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<sup>176</sup> Daniel J. McCarthy, "James Wilson and the Creation of the Presidency." *Presidential Studies Quarterly* 17, no. 4 (1987): 690.

<sup>177</sup> Aitken, "James Wilson: A Lost American Founder," 63.

<sup>178</sup> Christopher S. Yoo, "James Wilson as the Architect of the American Presidency." *The Georgetown Journal of Law and Public Policy* 17, no. 5 (2019): 55.

<sup>179</sup> Locke, *Second Treatise of Government*, 84.

Bederman notes that Wilson looks to antiquity when arguing for an energetic and unitary executive, but he does not specifically discuss Wilson's employment of Cicero.<sup>180</sup>

Wilson directly addresses Cicero's mixed government theory in his tenth lecture, *Of Government*. He says,

In a monarchy, there are strength and vigor; but there is danger, that they will not be employed for the happiness and prosperity of the state. A democracy is best calculated to direct the end of the laws; an aristocracy, to direct the means of attaining that end; a monarchy, to carry those means into execution.

The ancients considered all other species of governments as either corruptions of these three simple forms, or as reducible to some one of them. They had no idea of combining all the three together, and of uniting the advantages resulting from each. Cicero, indeed, seems to have indulged a fond speculative opinion, that a government formed of the three kinds, properly blended and tempered, would, of all, be the best constituted. But this opinion was treated as visionary by his countrymen; and by Tacitus one of the wisest among them.<sup>181</sup>

It is evident that Wilson believes in Cicero's mixed government theory; he addresses the weaknesses of each form of government and argues that a blend of the three different types of classical regime types is the best form of government. What is more notable is Wilson's divergence from Cicero—he believes such a government is possible. Wilson claims here that the Constitution creates a “properly blended and tempered” mixed government about which Cicero only theorizes. Wilson's argument here is also remarkably simple; each of the three branches of the American government embodies one sort of regime. The executive acts as the monarchical branch with its unitary head; the legislative, the democratic branch; and the judiciary, the aristocratic branch. This is notable; Richard argues that the founders viewed the Senate as the aristocratic branch of government, but Wilson views the judiciary as this sector.

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<sup>180</sup> David J. Bederman, “Constitution-Making and Ancient History,” Chapter. In *The Classical Foundations of the American Constitution: Prevailing Wisdom*, 149. Cambridge: Cambridge University Press, 2008.

<sup>181</sup> Wilson, *Of Government*, 711. Wilson attributes Cicero's thought here to a fragment of *De Re Publica*.

The argument for a unitary executive takes on a new meaning when examined through this broader framework. Rather than being seen as a manifestation of Enlightenment thought, with an energetic executive capable of exercising prerogative, it is the embodiment of monarchy in the American manifestation of Cicero's mixed regime.

Wilson's reasoning on the legislative branch is very visible. Citizens vote for their representatives to carry out the will of the people. His devotion to popular sovereignty, which he views as an extension of the natural law, is also completely compatible here; the electoral system drawn up in the Constitution is a practical way for the citizens of a geographically large nation to carry out their own will. The legislature is, in Wilson's view, the manifestation of democracy in the American government.

The judicial branch is the one which requires the most attention. Wilson argues that the judicial branch is the materialization of aristocracy, albeit rather vaguely. He says an aristocracy is best suited "to direct the means of attaining that end [determined by the legislative branch]."<sup>182</sup> The best interpretation here, in more modern terms, is to say that the role of the aristocracy ought to be to interpret the laws created by the democracy. To interpret the law is the role undertaken by the judiciary.

Wilson also does not describe here who ought to make up this aristocratic, judicial class. His arguments for that are found elsewhere in his lectures—notably with one of his only criticisms of the Roman legal system. He says in his lecture on juries, "Among the Romans, too, any one of the citizens was permitted to prosecute a publick offence. With all our predilection, however, for those celebrated republicks, we must admit, that these regulations were extremely injudicious, and produced mischiefs of very dangerous, though of very opposite kinds."<sup>183</sup>

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<sup>182</sup> Ibid.

<sup>183</sup> Wilson, *Of Juries*, 993.

Wilson here again suggests that those trusted to try cases ought to be of a certain sort, and he is again rather vague with who, in his opinion, can be trusted to be a lawyer. He does provide some insight into his views on this topic in his introductory lecture—where he once again looks to ancient Rome and to Cicero. He says of the legal profession,

In the most shining periods of the Roman republic, men of the first distinction made the science of law their publick profession, and taught it openly in their houses as in so many schools . . . Even Cicero himself, after he had been consul of Rome, after he had had kings for his clients, projected this very employment, as his future ‘honour and ornament.’<sup>184</sup>

In this same lecture Wilson also argues that those trusted to be judges and lawyers need a certain, though unspecified, amount of education—altogether arguing that this judicial aristocracy ought to be composed of the most educated and virtuous individuals in America.

Wilson’s argument for a unitary executive cannot be examined separate from his arguments about the other two branches of American government. When looked at alone, one might mistakenly view Wilson’s argument as having been inspired by Enlightenment thought rather than classical civilization—even the Roman republic had two consuls, rather than one unitary executive. When looked at alongside his discussion of the other branches of government, however, Wilson’s conceptualization of the American republic is clearly a display of mixed government that Cicero theorized in *De Re Publica*.

## 2. Cicero as an Educational Icon

The role that the classics had in early American education is undeniably great. The Greek and Latin languages were integral at every college that existed in the American founding era. Cicero was required reading in every elite American education, but his role is far greater

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<sup>184</sup> Wilson, *Of the Study of the Law in the United States*, 451, with a selection as written in *De orat.* 1. I. C. 45.



than required reading: he is synonymous with a good education. Wilson vigorously continues this trend and leans on Cicero to portray what he believes a well-educated American should be.

William Ziobro, in his examination of education in early America, notes the emphasis that colonial education places on learning Greek and Latin.<sup>185</sup> The ability to translate works of Cicero was specifically required for entry to any college in colonial America. This naturally demonstrates the high regard in which the colonial elite held Cicero's oratory and morality. It also demonstrates that the ability to read Cicero in Latin was perhaps the single greatest trait used to distinguish an educated individual in early America.

Cicero was not merely an entry requirement for colonial colleges; he was also an iconic orator. Ziobro also notes that Cicero's treatises were required reading for learning oratory. Both Thomas Jefferson and John Adams looked to classical languages and culture to inspire education in the United States, with Adams being particularly moved by Cicero's "legal and political engagements."<sup>186</sup> Sandra Gustafson, too, notes that Cicero was used as a figure of oratory in early American education—not just as a figure of morality and politics.<sup>187</sup> Cicero's role as a figure of oratory persisted into the nineteenth century, when John Quincy Adams modeled his *Lectures on Oratory and Practice* (1810) on Cicero and eventually earned the nickname "Old Man Eloquent" late in his life.<sup>188</sup> Winterer notes the prominence of Cicero's *De Oratore*—his work on rhetoric—in colonial colleges.<sup>189</sup> Richard argues that Cicero, alongside Demosthenes, was used in the founders' education as an example of proper political debate.<sup>190</sup> Bernard Bailyn

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<sup>185</sup> William J. Ziobro, "Classical Education in Colonial America." Essay. In *Classical Antiquity and the Politics of America: From George Washington to George W. Bush*, edited by Michael Meckler, 13–28. Waco, TX: Baylor University Press, 2006, 14.

<sup>186</sup> *Ibid.*, 25, 14.

<sup>187</sup> Sandra M. Gustafson, *Imagining Deliberative Democracy in the Early American Republic*. Chicago, IL: University of Chicago Press, 2011, 82.

<sup>188</sup> *Ibid.*, 74.

<sup>189</sup> Winterer, *The Culture of Classicism*, 12.

<sup>190</sup> Richard, *The Founders and the Classics*, 13.

is perhaps the best-known critic of the idea that classical receptions in the American founding were indicative of engagement with classical thought. Even he notes that “silver-tongued” Cicero was at the very least an admired figure of oratory with whom the founders compared themselves.<sup>191</sup>

Lorraine Smith Pangle and Thomas L. Pangle also both recognize that Cicero was in particular a figure of oratory excellence in early American education.<sup>192</sup> Pangle and Pangle also note Wilson’s employment of Cicero as an educational icon, though they hardly explore the idea.<sup>193</sup> Aitken, similarly, notes that Wilson himself models his own rhetoric after Cicero’s—but he does not examine how Wilson employs Cicero as a model to teach rhetoric to others.<sup>194</sup> It is thus clear that while Cicero’s presence as an icon of education and oratory in early America is undeniable, Wilson’s engagement with Cicero—and his larger educational philosophy—remains unexplored.

While Wilson largely maintains his own arrangement of alluding to Cicero to make salient parts of his argument, he does not fit the broader pattern of the founders by employing Cicero only as a figure of oratory. He rather uses Cicero as a model of a well-educated individual in its broadest sense, advocating for a strong and well-rounded education to be provided in America.

Wilson’s discussion of education is largely limited to his introductory lecture, *Of the Study of Law in the United States*, where he outlines the plan for his lectures. As the title of the lecture suggests, Wilson in this lecture is primarily concerned with a legal education—an

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<sup>191</sup> Bailyn, *The Ideological Origins of the American Revolution*, 26.

<sup>192</sup> Lorraine Smith Pangle and Thomas L. Pangle. *The Learning of Liberty: The Educational Ideas of the American Founders*. Lawrence, KS: University Press of Kansas, 1995, 46.

<sup>193</sup> *Ibid.*, 208.

<sup>194</sup> Aitken, “James Wilson: A Lost American Founder,” 61.

education that makes a good lawyer. He defines this education in its broadest possible sense and views a well-rounded education in the liberal arts as necessary for a jurist to obtain. Such an education is not confined to only rhetoric. Wilson looks to Cicero's work on rhetoric and education, *De Oratore*, to argue that rhetoric alone makes for an insufficient education. He says while quoting the Scottish philosopher Lord Henry Home Kames,

‘A lawyer now is nothing more, I speak of ninety nine in a hundred at least’ (the proportion in this country, I believe, is much smaller) ‘to use some of Tully’s words, ‘nisi liguleius quidam cautus, et acutus praeco actionum, cantor formularum, auceps syllabarum.’ but there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons.<sup>195</sup>

What Wilson does here is clever: he cites Cicero's work on rhetoric to argue that rhetoric alone provides an insufficient education. A broader education in the liberal arts, that includes philosophy and history, is necessary. Wilson here breaks the pattern created by his contemporaries; they look to Cicero as a reason to teach rhetoric, while Wilson looks to Cicero as a reason to teach not only rhetoric.

Wilson also uses Cicero as an education icon just eight pages earlier, where he employs him again in a similar manner. He says,

What intrinsically can be more dignified, than to assist in preparing tender and ingenuous minds for all the great purposes, for which they are intended! What, I repeat it, can intrinsically be more dignified, than to assist in forming a future Cicero, or a future Bacon, without the vanity of one, and without the meanness of the other!<sup>196</sup>

Interestingly enough, Wilson's acknowledgement of Cicero's vanity marks his only criticism of Cicero in any of his written work. This criticism notwithstanding, Wilson still employs Cicero as an icon here, using him as a celebrated figure to represent an extensive education for “all the

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<sup>195</sup> Wilson, *Of the Study of the Law in the United States*, 457, with a selection as written in Cic. *De Oratore*, I.16–20. Wilson translates this passage of Cicero as, “A lawyer is of himself nothing except a kind of cautious and cunning pettifogger, a mere announcer of cases, a reciter of procedures, a bird-catcher for syllables.”

<sup>196</sup> Wilson, *Of the Study of the Law in the United States*, 449.

great purposes” for which humans are capable. This necessarily extends beyond just oratory and demonstrates how Wilson has a remarkably expansive view of Cicero’s role in education.

Wilson in that section also places a significant emphasis on teaching. At yet another place in the same lecture, Wilson also mentions Cicero when discussing the greatness of teaching. He says,

In the most shining periods of the Roman republick, men of the first distinction made the science of law their publick profession, and taught it openly in their houses as in so many schools . . . Even Cicero himself, after he had been consul of Rome, after he had had kings for his clients, projected this very employment as his future ‘honour and ornament.’<sup>197</sup>

While this statement is admittedly self-serving—this was Wilson’s inaugural lecture on law, marking the beginning in his own career where he taught others the law—it does yet again show that Wilson’s view of Ciceronian education goes far beyond mere oratory. Rather, it is one where education, and educators, are largely praised for their extensive contributions to society.

### **3. The Role of Women as an Extension of the Roman Tradition**

While studies of the American founding era often focus mainly on men, women also played a large role in the era. They also greatly engaged with the classics. As Winterer points out, the classics were not just a “citadel of masculine knowledge,” but rather provided women with, “a world of reading and writing, getting and spending, aesthetics and experience.”<sup>198</sup>

Winterer uses the marriage of John and Abigail Adams to illustrate how men and women both employed the classics, although her analysis is understandably most applicable to the elites of the founding era. Her analysis is simple: men use classics in statecraft, and women teach the classics

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<sup>197</sup> Wilson, *Of the Study of the Law in the United States*, 450, with a selection as written in Cic. *De Orat.* 1. I. C. 45.

<sup>198</sup> Winterer, Caroline. *The Mirror of Antiquity: American Women and the Classical Tradition, 1750-1900*. Ithaca, NY: Cornell University Press, 2009, 2.

to their children, in translation if necessary. She writes, “Abigail, that is, had to pass Greek and Latin on to her children without knowing the languages herself.”<sup>199</sup> Winterer also recognizes that elite women in the early Republic era also looked to ancient Rome for role models. While men of the era were looking to Roman statesman and orators, women looked to the Roman matron as guidance on how to be a wife and mother.<sup>200</sup> Abigail Adams, in Winterer’s view, epitomizes the role of the Roman matron in the new republic—which is the role of raising her children and supporting her husband.<sup>201</sup>

The role of women teaching works of antiquity to their children fits within a larger framework of the Enlightenment era. James Melton writes that women went from being “violent, uncontrollable forces of nature” to being a “civilizing force that tempered the violent and destructive behavior of men.”<sup>202</sup> This coincides with Winterer’s argument—she argues that women in early America were tasked with teaching their children morality. It is notable that elite women in early America looked to the works of ancient Greece and Rome when teaching virtue, as the word virtue has its roots in the Latin word *vir*, meaning “man.” Indeed, writers of antiquity viewed virtue and morality as a masculine trait, and the fact that in early America women were entrusted to teach these values to their children signifies a remarkable shift in social order.

Of the American founders, Wilson is the only one who examines the role of women in depth. He, of course, examines their role through the lens of antiquity. Richard writes that, “Only James Wilson bothered to praise the women of antiquity.”<sup>203</sup> Nicholas Pedersen points

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<sup>199</sup> Ibid., 20.

<sup>200</sup> Ibid., 42.

<sup>201</sup> Ibid., 46.

<sup>202</sup> Melton, James Van Horn. *The Rise of the Public in Enlightenment Europe*. Cambridge: Cambridge University Press, 2008.

<sup>203</sup> Richard, *The Founders and the Classics*, 72.

out that Wilson has a “deep respect for women.”<sup>204</sup> Equally important is that he points out that “Wilson did not view women as equals; he came far closer, however, than most.”<sup>205</sup> Both Richard and Pedersen are largely correct, though their analyses lack nuance. Wilson again looks to Cicero to describe what he believes the role of women should be in American society. He argues that women ought to receive an education, which is certainly a progressive stance for the eighteenth century. He also, however, confines women to the domestic sphere, and praises the role that Abigail Adams plays in her family. While his views on women may be progressive for the eighteenth century, Wilson falls short of achieving modern standards for female empowerment.

In his introductory lecture where he discusses education, Wilson also employs Cicero to argue for the education of women. He specifically points to Laelia, the daughter of a Roman consul and “a lady, whose virtues and accomplishments rendered her one of the principal ornaments of Rome.”<sup>206</sup> Wilson quickly connects her to Cicero, saying, “Cicero was in the number of those, who improved by the privilege of her conversation. In his writings, he speaks in terms of the warmest praise concerning her singular talents. He also mentions the conversation of her daughters and grand daughters, as deserving particular notice.”<sup>207</sup> Wilson also connects Cicero to Cornelia Africana, an educated woman who refused many offers of marriage after her husband’s death to focus instead on her children’s education.<sup>208</sup> He says of Cicero and Cornelia, “Cicero had seen her letters: his expressions concerning them are very

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<sup>204</sup> Pedersen, "The Lost Founder: James Wilson in American Memory," 277

<sup>205</sup> Ibid.

<sup>206</sup> Wilson, *Of the Study of the Law in the United States*, 454. Wilson neglects to provide a specific quote or mention the location of his reference to Cicero here, but it was likely found in a selection from *De Oratore*

<sup>207</sup> Ibid.

<sup>208</sup> Cornelia Africana was the second daughter of the Roman general Publius Cornelius Scipio Africanus, who is best known for his role in defeating the Carthaginian general Hannibal at the Battle of Zama. Wilson notes that Cornelia was an educated woman of high esteem, and the mother of the Gracchi. After the death of her husband, she refused to remarry and instead focused on educating her children.

remarkable. ‘I have read,’ says he, ‘the letters of Cornelia, the mother of the Gracchi; and it appears, that her sons were not so much nourished by the milk, as formed by the style of their mother.’”<sup>209</sup> It is remarkable how Wilson here makes the discussion about women one about Cicero; he could very easily have left Cicero out entirely, focusing only on Laelia and Cornelia as *exempla* for educating women. This suggests that Wilson bases his vision for the American social order not only on ancient Rome, but on Cicero’s conceptualization of society in particular.

While Wilson’s support for women’s education might initially suggest that he has an expansive view of women in society, he actually supports the traditional, Roman family structure centered around paternal power. The Roman system of *patria potestas*, or “fatherly power,” allows a family’s patriarch expansive power. His children—regardless of age—could not own any property or enter any binding transactions while he was still alive.<sup>210</sup> Women had a very limited role in public life or public law in ancient Rome and were to varying degrees treated by Roman law as another child of their husbands. *Manus* marriage, named after the Latin word for “hand” treated women almost synonymously with children; the husband took the place of the father.<sup>211</sup> This form of marriage was rare by the late Republic period, and other forms of Roman marriage permitted women to own property and maintain the same legal status they possessed before entering their marriage.<sup>212</sup> But even in this type of marriage, a Roman woman still had no place in public law or public life, maintaining the system where Roman women were forced to occupy the private sphere.

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<sup>209</sup> Wilson, *Of the Study of the Law in the United States*, 455, with a selection as written in Cic. declar. orat. C. 58.

<sup>210</sup> Andrew M. Riggsby, *Roman Law and the Legal World of the Romans*. Cambridge: Cambridge University Press, 2012, 106.

<sup>211</sup> *Ibid.*, 166.

<sup>212</sup> *Ibid.*

Wilson relies heavily on this Roman social structure. In his lecture, *Of the Natural Rights of Individuals*, Wilson argues that the foundational unit of society is the family; the foundational relationship, marriage. He says, “‘Prima societas in ipso conjugio est,’ says Cicero in his book of offices; a work which does honour to the human understanding and the human heart.”<sup>213</sup> He says shortly thereafter, “The founder of Rome made, concerning marriages, a law, which, on many accounts, will deserve our particular attention. It was expressed in these words: ‘let every wife, who by the holy laws of marriage falls into the power of a husband, enter with him into a community of goods and sacrifices.’”<sup>214</sup> This demonstrates with remarkable certainty that Wilson relies on Cicero, and Rome in general, to support his view that the foundational unit of society is the family, and that every American father ought to possess *patria potestas*.

Wilson continues this line of reasoning and further expounds upon his vision for the American family. He says, “Cicero, after having said, as we have seen, ‘prima societas in ipso conjugio est,’ adds, ‘proxima in liberis.’ I consider, in the next place, the relation of parent and child.”<sup>215</sup> He goes on later in the same lecture, when describing the relationship between masters and servants, to say, “‘Id autem est’—says Cicero, in the fine and just passage already cited oftener than once—‘id autem est principium urbis, et quasi seminarium reipublicae.’ It is the principle of the community; it is that seminary, on which the commonwealth, for its manners as well as for its numbers, must ultimately depend.”<sup>216</sup> This is notable, as Wilson rejects slavery—as we have already seen. He nevertheless persists in arguing for the distinctly classical model of

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<sup>213</sup> Wilson, *Of the Natural Rights of Individuals*, 1068. Wilson translates this Latin as, “The first bond of society is marriage.”

<sup>214</sup> Wilson, *Of the Natural Rights of Individuals*, 1069.

<sup>215</sup> *Ibid.*, 1076. Wilson translates this Latin as, “The first bond of society is marriage, the next, our children.”

<sup>216</sup> *Ibid.*, 1081, with a selection as written in Cic. *De Officiis* 1. I. C. 17. Wilson translates this Latin as, “Moreover it is the beginning of the city, and the nursery, as it were, of the commonwealth.”



the family, where a father exercises significant power over all other members of the household—including servants.

Wilson expresses a great deal of respect for women, to whom he refers often as the “fair sex.” This distinguishes him from many of the other American founders. While such a view is certainly progressive for the early American republic, Wilson is in other aspects very conservative, advocating for a traditional family structure that is characteristic of antiquity. These ideas are not incompatible with each other; Abigail Adams certainly seems to model the vision for American women that Wilson has in mind. These ideas nevertheless seem anomalous when held together. Wilson employs Cicero to advance all of these ideas, which ties his vision for the American social order to that of ancient Rome.

#### **4. An Expansive Use of Cicero**

Wilson in his law lectures goes far beyond the discussion of law. He looks to Cicero when planning his blueprint for the three branches of government. He mimics Cicero’s idea of a mixed constitution, with each social class having representation in government. Instead of looking to the Senate as a display of aristocracy, Wilson believes that such a role is better suited for the courts.

Wilson also lays out his broad vision for American social organization—which has its roots in ancient Rome. To argue both for an expansive liberal arts education, he thoughtfully engages with Cicero’s writings on rhetoric and education. He also looks to Cicero to argue for a Rome-inspired role of women in America.

Wilson employs Cicero not only when making claims about the law. He also alludes to Cicero and his written works when examining the makeup of the branches of government, the

role and composition of education, and the structure of the American family. Such engagement shows that his law lectures portray Wilson's idealistic vision for American society—not just American law.

### Conclusion: Wilson's America as a Ciceronian Project

*“The jurisprudence of Rome was adorned and enriched by the exquisite genius of Cicero, which, like the touch of Midas, converts every object into gold.”*

—James Wilson, *Of the Common Law*

The previous three chapters have concerned themselves with what Wilson says—what he claims, the ideas he argues, and how he alludes to Cicero while doing so. Wilson's use of Cicero is undeniably expansive. He goes further than using Cicero as a mere icon and engages thoughtfully with his philosophic works. What was not discussed, however, is the works of Cicero with which Wilson did not engage. The *Catilinarian Orations*, some of Cicero's most famous speeches, in which he railed against Catiline for conspiring to overthrow the Roman republic, were not mentioned by Wilson once.

The omission of the *Catilinarians* was likely a deliberate one. In these speeches, Cicero denounces Catiline's audacity for daring to challenge the majesty of the state. It needs no explanation why Wilson, who supported the overthrow of British rule in the American colonies, did not look to these speeches for inspiration—and why he would not use these in attempt to appeal to an audience of Americans.

In their stead Wilson looked to Cicero's speeches and writings that were more compatible with the state of American affairs at the end of the eighteenth century. Notable among them is *In Verrem*. It is in this speech where Cicero's argument aligns with the circumstances in which early America found itself. Cicero was raging against Verres, a corrupt provincial governor who overstepped his governmental authority by torturing and killing Roman citizens. Just as the omission of the *Catilinarians* needs no explaining, it also needs to explanation why *In Verrem* would resonate much better with Wilson, who believed that the American colonies were treated unjustly by the British. It was this speech that Wilson quotes in Latin for several paragraphs

when arguing for the abolition of slavery. Such consistency suggests that Wilson likely did not quote by convenience; he did not just throw in shallow references to Cicero's most popular works to appear educated when speaking to an audience.

Wilson rather demonstrates deep and genuine engagement with Cicero's work. Most significant is his reception of Cicero's natural law philosophy. He remains remarkably faithful to the five components of Cicero's natural law: that natural law is given by God, that natural law is unchanging, that natural law is above humanmade law, that natural law is universal, and that natural law creates interpersonal obligations. Wilson touches on all five of these components in his philosophy very early on in his law lectures and applies them to what seems inherently fitting—to law, both domestic and international.

Wilson's engagement with natural law does not end there. He uses his own logic to extend Cicero's five principles to justify what is usually considered modern philosophy, and to address then-contemporary American problems. Such topics connect like links in a chain; Wilson uses Cicero's natural law to justify popular sovereignty, then popular sovereignty to justify the common law, and then common law to justify the abolition of slavery. And of course, Wilson cites Cicero several times each step along the way.

Not all of Cicero's appearances in Wilson's work tie him to natural law theory; his impact is expansive. Wilson employs Cicero to argue in favor of classical mixed government, to advocate for an expansive liberal arts education to be offered in the United States, and to discuss the role of women in the young republic. None of these topics relate directly to natural law, and the breadth of Wilson's references to Cicero demonstrate that his vision for America is distinctly Ciceronian. He looks to Cicero, and to ancient Rome more broadly, for inspiration not only for American law, but for American social order.

These findings are but a small piece of the larger jigsaw puzzle that is the study of classical receptions and the American founding. They are, however, a small piece that fits into the puzzle well. Wilson's evident use of Cicero as the starting point for large swaths of his political thought lends great support to Winterer's claim that classicism is a "central intellectual project" of the American founding. It also refutes significant claims that describe the founding as a modern project inspired almost exclusively by Enlightenment thought. For Wilson, the American project is a classical one.

This revelation about Wilson opens several new avenues for potential study. One significant one is the intersection of Christianity and Cicero in Wilson's natural law. Cicero's ethics and philosophy are remarkably compatible with Christian thought, and it is true that when Wilson says that natural law is given by God, he is referring to the Christian one and not a Roman deity. This opportunity is open now that it is clear that Wilson's natural law is classical; Enlightenment thought is broadly secular, leaving little room to examine the effect of Christianity on its display. Since classical natural law is not so rigidly at odds with religion, this allows for Christian thought to be influential alongside classicism.

There also exists an opportunity to further delve into Wilson's opinions on slavery. For a man whose philosophy is so comprehensive, consistent, and coherent, Wilson's views on slavery are at the very least hazy. In his law lectures, he provides as close as he can realistically come to a passionate, blistering condemnation of slavery. Yet in the Federal Convention, he was instrumental in the development of the Three-Fifths Clause—a manifestation of institutionalized racism that was instrumental for over a century after his death. Wilson's views and actions with respect to slavery appear to be at odds with each other, and his pragmatism, or perhaps lack thereof, is worthy of further study.

Conceivably the most interesting topic of potential study is one very closely related to this one. This study took targeted approach to studying Wilson's classical receptions; it focuses only on receptions of Cicero. But Wilson's allusions to the classics are numerous and confined to neither Cicero nor Rome. Wilson often mentions Plato, Aristotle, Thucydides, and Homer of the Greeks, and Justinian, Caesar, and even on a handful of occasions Ovid of the Romans. A broader study of Wilson's classical receptions is certainly now necessary.

The findings of this study constitute what is likely the most in-depth study dedicated to Wilson alone that is not centered around Enlightenment thought—either Scottish or English. What is perhaps more significant is the methodology used to find them. This is also one of a small number of works of American classical receptions research dedicated to the reception of just one classical figure. Moreover, only a few other studies look to the eighteenth century as well as antiquity. Such a technique is invaluable; it allows us to see which ideas of antiquity were compatibly received and portrayed, and which ideas attributed to figures of antiquity are actually original thoughts of modern thinkers that they choose to tie back to a character of antiquity.

In a modern political climate where the intentions of America's founders are often discussed, it is necessary to look to the intentions of all the founders—not just a select few. In a modern social climate where criminal justice and the judicial system are under ever-increasing scrutiny, it is useful to look to one of the most influential architects of the American judiciary. Looking at Wilson will show that the founders each have their own nuanced views, and that America's courts were inspired by those of ancient Rome. Further study of Wilson will undeniably be a fruitful endeavor—one of a man forgotten.

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