

Note

The Lost Founder: James Wilson in American Memory

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INTRODUCTION: THE LOST FOUNDER

“How is it that I, poor ignorant I,” John Adams asked late in his life, “must stand before Posterity as differing from all the other great men of the age?”¹ This concern—over securing one’s distinct spot in history—was widely and deeply felt among the key Founders of the Republic. “To have honor across space and time,” Gordon Wood has written, “was to have fame, and fame, ‘the ruling passion of the noblest minds,’ was what most of the founding fathers were after.”² The fame they sought, unlike the fame we think of when

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1. Letter from John Adams to Benjamin Rush (Aug. 17, 1812) in *OLD FAMILY LETTERS* 420 (Alexander Biddle, ed.) (1892), *quoted in* JOSEPH ELLIS, *FOUNDING BROTHERS* 215 (2000).

2. GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 207 (1991).

we say the word today, was to be found in the future rather than the present—fame not so much among adoring fans as in the history books. Each of the elite set of key architects of America pursued this kind of fame, and each of them got it.

Each, that is, but one. Imagine that there exists a Founding Father—call him Founder X—whose contribution to the framing of the nation was of comparable significance to that of many famous founding-era Americans—men like James Madison, Alexander Hamilton, and John Marshall. Only, unlike these other figures, whose names have always permeated American history texts, Founder X has languished, and overwhelmingly continues to languish, in obscurity. Unless you are a law professor, American historian, or an especially attentive student of either, you have probably never heard of him. In his day, however, Founder X was a famous and noteworthy man. In a pamphlet written but left unpublished in 1768, Founder X, long before others were doing so, and at the young age of twenty-six, spelled out the basic argument for separation from England that Whig patriots would later employ in moving for independence. After reading it, Thomas Jefferson copied passages of Founder X's pamphlet in his commonplace book—passages that bear a distinct resemblance to some of the key language in the Declaration of Independence. In the ensuing decade, as the Revolutionary war drew to a close and the new nation took shape, Founder X grew to be recognized as the best lawyer in the country. As a delegate to the Constitutional Convention, Founder X, whose opinions carried immense weight in the conclave, gave more speeches than Madison—and indeed than *anyone*, save his notoriously long-winded fellow Pennsylvanian Gouverneur Morris. Among the top historians of the Convention, there is little dispute that, if Founder X was second to anyone in his importance at the Convention, he was second only to Madison.

In his remarks from that summer in Philadelphia, Founder X consistently took stances that strike us today as startlingly modern. In a time when most members of the ruling class considered commoners inherently inferior—Adams once characterized them as “the Common Herd of mankind”³—Founder X advocated placing as much power as was feasible with the people themselves; he helped attain proportional representation in the House of Representatives, and vigorously tried, and failed, to win it in the Senate, too; he helped ensure that the presidential election was vested not in the federal legislature, where many of his colleagues wanted it placed, but in an admittedly imperfect Electoral College, which would give the people more of a direct say in the matter. (Had Founder X had his way, the president—ill-advised as the suggestion sounded to his colleagues—would have been elected by a simple national majority vote.)⁴ Many major parts of the

3. WOOD, *supra* note 2, at 27.

4. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 68 (Max Farrand ed., rev. ed., 1966)

Constitution—including the Treason Clause⁵ and the document's creation of one president rather than a committee of multiple executives—have long been attributed to Founder X. Often overlooked, even among constitutional scholars, is X's central role in literally writing the Constitution itself. The earliest drafts of the document are in his handwriting.⁶

In and out of the Convention, Founder X proved himself, on issue after issue, to be decades—often centuries—ahead of his time. Founder X viewed the United States—or united States, as it was both spelled and understood at the time⁷—not as a loose confederation of autonomous governments, but as a unitary entity in which federal citizenship decisively trumped state citizenship. He also longed to see slavery eradicated from the country's soil. America would not catch up to him on these points until the 1860s. Founder X advocated the popular election of Senators; America would not catch up with him here until passage of the Seventeenth Amendment in 1911. Founder X was the only founder of any consequence who asserted the “one man, one vote” principle—certainly one of the most crucial principles in American political history—which would not truly be embraced until the Civil Rights Movement in the 1960s. He was, if not a feminist (feminism was a very young concept in his lifetime), a decidedly pro-woman Founder. As an immigrant to America himself, X was a resolutely pro-immigration voice at the Constitutional Convention, where he fiercely drew attention to his own immigrant status to lower the number of years of residency required before an immigrant could serve in federal office.⁸ Indeed, on some of the political structures Founder X fought for—direct popular election of the President, proportional representation in the Senate as well as the House—the country has yet to catch up with him. History has vindicated Founder X so many times, showing him to have been startlingly ahead of the curve on issue after issue in a way that no other Founder ever was, that, anachronisms aside, it is not unreasonable for modern Americans to think of Founder X as something of a prodigy of his times. He was a political Leonardo da Vinci.⁹

(hereinafter CONVENTION RECORDS) (June 1) (“Mr. Wilson said he was almost unwilling to declare the mode [of electing the executive] which he wished to take place, being apprehensive that it might appear chimerical. He would say however at least that in theory he was for an election by the people.”).

5. “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.” U.S. CONST. art. III. § 3.

6. See William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 983 (2008); Lorianne Updike Toler, *Missing Documents and Constitutional Treasures: (Re)Discoveries in Volume 2 of James Wilson's Papers at the Pennsylvania Historical Society* 5 (2010) (unpublished manuscript, on file with the Yale Journal of Law and the Humanities).

7. AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 22-23 (2005).

8. *Id.* at 70. See also 2 CONVENTION RECORDS, *supra* note 4, at 237 (Aug. 9) (“Mr. Wilson said he rose with feelings which were perhaps peculiar; mentioning the circumstance of his not being a native, and the possibility, if [long residency requirements were implemented,] of his being incapacitated from holding a place under the very Constitution which he had shared in the trust of making.”).

9. Leaving aside his artistic achievements and focusing merely on his role as an engineer, Leonardo da

This is an essay about Founder X in American memory. Its primary purpose is to explain how it can be that Founder X's name—James Wilson—means nothing to virtually every living American. It is an essay addressing who this constitutional colossus from the Revolutionary Era was, why he has been forgotten, *how* he has been forgotten, and, ultimately, why it so deeply matters that he has been forgotten. Its four parts address each of these questions in turn. Part I familiarizes the reader with who Wilson was, what he accomplished, and what he believed. Part II accounts for why Wilson, instead of being canonized like his peers, instead vanished from American consciousness almost immediately upon his death. Part III traces how he has been remembered in the past—when he has remained outside of our American public memory (the rule), when he has been thrust up to the forefront of it (exception to the rule), what has been said of him when he has been roused from the dead, and how Americans' memories of Wilson have influenced and been influenced by their own historical circumstances. Finally, Part IV addresses the question why our Wilson amnesia matters—why Wilson's absence from the Pantheon of Founders does a disservice not only to him, but to the American People and the government that serves them.

In his book on the Civil War in American memory, *Race and Reunion*, David Blight opens by quoting Robert Penn Warren. "Somewhere in their bones," Warren writes, most Americans have a storehouse of "lessons" drawn from the Civil War.¹⁰ "Exactly what those lessons should be," Blight goes on, "has been the most contested question in American historical memory since 1863."¹¹ Though perhaps less contested, the question of which lessons to draw from the Founding is an equally—indeed, likely more—important issue in American historical memory. And as I mean to show below, the regnant, Wilson-less narrative of the Founding—along with the lessons drawn from it—is deeply inadequate. First, we must find this Lost Founder. Then we must revive him.

PART I: WHO WAS JAMES WILSON?

Who was James Wilson? Even to those relatively familiar with him, he is a shadowy figure—a Pennsylvanian at the Constitutional Convention, or the creator of the ignominious Three-Fifths Clause, or a relative no-namer on the first Supreme Court, or even the indecisive featherweight who can't bring himself to sign the Declaration in the 1960s hit musical *1776*. Wilson has been remembered in these ways, and—as we will see below—in countless others. That Wilson's life story has been told elsewhere—although with

Vinci (1452-1519) conceptualized a helicopter, a tank, concentrated solar power, and a calculator centuries before their manufacture would be technologically feasible. See ANTONINA VALLENTIN, LEONARDO DA VINCI: THE TRAGIC PURSUIT OF PERFECTION 81, 313-14 (1952).

10. DAVID BLIGHT, *RACE AND REUNION* 1 (2001).

11. *Id.*

astounding infrequency¹²—may make it seem redundant to recount his biographic details here. To appreciate why our Wilson amnesia matters, however—why Americans *should* care that they have never heard of James Wilson—we must first briefly familiarize ourselves with who Wilson was, and what he believed. I explore these twin topics below, first providing an overview of Wilson’s life that suggests why we should care about it, and then calling attention to some elements of his thinking that have been neglected in the past. As will be shown later in the Paper, some of the biographic details explored in this Part, especially those surrounding his final years, matter for the additional reason that they go a large way toward explaining why Wilson was forgotten.

A. Life

1. Pre-Convention

James Wilson was born in Ceres, a small village near the east coast of Scotland, in 1742, to a religious household of modest means—means modest enough to render Wilson one of the few truly poor kids who would later make it to the Convention.¹³ His parents, farmers, hoped to see their firstborn son end up in the ministry, and thus ensured that James received a high quality classical education—both in grammar school, and after he had excelled there, at St. Andrews. There, Wilson was exposed to the commonsense philosophy pioneered by Thomas Reid that was the rave in Scottish academic circles at the time—a philosophy highly influential in shaping Wilson’s deep intellectual faith in the class of common folk from which he had himself arisen. As Wilson himself explained the idea,

This philosophy will teach us that first principles are in themselves apparent; that to make nothing self-evident is to take away all possibility of knowing anything; that without first principles, there can be neither reason nor reasoning; that discursive knowledge requires intuitive maxims as its basis; that if every truth would admit of proof, proof would extend to infinity; that, consequently, all sound reasoning must rest ultimately on the principles

12. Only one full-length biography has ever been written on Wilson. See PAGE SMITH, *JAMES WILSON, FOUNDING FATHER, 1742-1798* (1956). One of the three books published on Wilson since Page Smith’s, Geoffrey Seed’s *James Wilson*, contains an abridged version of Wilson’s life. See GEOFFREY SEED, *JAMES WILSON* (1979). Almost needless to say, the scholarly attention lavished on Wilson’s biography is, especially alongside that paid to lives of the other Founders, underwhelming. Smith’s book was his doctoral dissertation at Harvard, and Seed’s book is under 200 pages.

13. See CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787*, at 279 (1986) [hereinafter COLLIER]. The other delegates of genuinely humble origins at the Convention included Alexander Hamilton, William Paterson, Roger Sherman and Luther Martin. Wilson, however, had far more faith in the people than did these other men. *Id.* (“[R]isen men tended to have no high opinion of the people.”).

of common sense—principles supported by original and intuitive evidence.¹⁴

The philosophy was distinctive by mid-eighteenth century standards, in that it was stoutly egalitarian. If one believed, as men like Wilson did, that a butcher had no less access to moral truths than a banker—or, indeed, a philosopher—one was far more inclined to put faith in the commoner's capacity for sound political decisionmaking than were many in the eighteenth century. Wilson admired, Mark David Hall has written, "the realization that the common person could know truth, particularly that of a moral nature, without the aid of expert jurists, priests, or philosophers."¹⁵ Many Wilson scholars attribute Wilson's distinctly democratic approach to American political problems to his grounding in this school of thought during his college years at St. Andrews.¹⁶

For ambitious young Scottish men at the time with dreams of wealth, power, or—most prized of all—fame, and the ability to make the journey, America loomed large.¹⁷ Fortunate enough to have a cousin there already, Wilson immigrated in 1765, at age twenty-three. In the second half of his life, which started the year he set foot on American soil, he would never forget his status as an immigrant. (Later, at the Constitutional Convention, he would fight hard to make the Constitution as immigrant-friendly a document as he could push the other delegates to go along with, speaking passionately of the "degrading discrimination" that would befall "worthy foreigners" if an "illiberal" Constitution, with long residency requirements, was passed.¹⁸)

Upon arrival, Wilson went promptly to America's major metropolis of the time, Philadelphia, which would soon become his permanent home. After a brief stint as a tutor at the College of Philadelphia, he began a legal apprenticeship under one of America's leading lawyers of the time, the patriot and future delegate to the Constitutional Convention John Dickinson.¹⁹ After only one year of intensive, meticulous study, at which he excelled, Wilson moved to the countryside to get his career started. From the very start of his professional life, Wilson was a frenetically busy man. Following his first case, a murder trial, he built up a diverse practice, much of which revolved around land disputes. His clients in these cases gave him the opportunity to become

14. 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 213 (Robert G. McCloskey ed., Belknap Univ. Press 1967) (1804) [hereinafter McCloskey], *quoted in* SEED, *supra* note 12, at 17.

15. MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON* 77 (1997).

16. SEED, *supra* note 12, at 4-5 ("[T]he Scottish view of civil and ecclesiastical government, with its powerful democratic overtones, made almost self-evident to Wilson political concepts which in America seemed impractical or even dangerous to others.").

17. "Reputation and fame were at all times Wilson's deepest desire." SEED, *supra* note 12, at 30.

18. See CONVENTION RECORDS, *supra* note 4, at 237 (Aug. 9). See also AMAR, *supra* note 7, at 70 (2005) (in the debate over immigrant eligibility for federal office, "Wilson spoke with special passion on the immigrant issue"). 2 CONVENTION RECORDS, *supra* note 4, at 237 (Aug. 9). See also AMAR, *supra* note 7 at 270.

19. SEED, *supra* note 12, at 5. The brilliant and conservative Dickinson, whose role as a mentor to Wilson has been somewhat exaggerated, was only ten years his senior.

involved—like many of the Founders²⁰—in land speculation, which, over the course of his life, would come to occupy much of his time and energy. Wilson's faith in American land appeared boundless. "Already in his early days," Seed writes, "his rapidly growing wealth was largely on paper: much of what he earned, or could borrow, he invested."²¹ As he started to invest in his late twenties, Wilson could have had little idea what havoc his land speculation would ultimately wreak on his future.

From Wilson's years as a young lawyer came some of his first political writings. Unquestionably the most interesting of these is a pamphlet published in 1774, entitled *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*. The pamphlet made cogent Whig arguments, typical of the mid-1770s, against British dominion over the colonies. In it Wilson argued that, while the Crown could still conceivably claim some relationship with the colonies, any claim that Parliament somehow represented them was indefensible and must be rejected. The substance of Wilson's case was that Americans could not possess adequate political rights unless they had sufficient control over the policy of government in matters that affected their interests, and that no supposed safeguard for their rights would suffice unless it was grounded in recognition of the idea that all legitimate power was derived from the people. The pamphlet also argued that Britain had no authority to regulate American trade. Though Wilson judged it conceivable that the Crown could still play a role in America's governance, the extent to which he truly meant this is, as Seed has noted,²² questionable, as his speeches from the Revolutionary years made it reasonably clear that he did not believe the King could play any legitimate role in actually framing policy.

The pamphlet was widely hailed upon publication, and initially—no doubt flatteringly—taken to be the work of Ben Franklin.²³ Jefferson was so taken with it that he transcribed various paragraphs from it into his commonplace book—paragraphs that bear an eerie resemblance, as a few scholars have noted, to passages in the Declaration of Independence Jefferson penned two years later.²⁴ Still, in the political climate that prevailed in the run-up to 1776,

20. Washington was notoriously enthusiastic about this form of investment. See, e.g., COLLIER, *supra* note 13 at 208.

21. SEED, *supra* note 12, at 6.

22. See SEED, *supra* note 12, at 10.

23. See HALL, *supra* note 15, at 12.

24. See *id.* at 13. Specifically, Jefferson transcribed major segments of a five-paragraph passage from Wilson's essay. See THE COMMONPLACE BOOK OF THOMAS JEFFERSON 39-44 (Gilbert Chinard ed., 1926). The first paragraph, which Jefferson copied in full, describes the widely held belief that, because the British Constitution's supreme power resides in the King, Lords, and Commons, acts of Parliament have a binding force upon the English colonies. *Id.* at 39-40. The second paragraph, also copied in full, accepts the importance of that sovereignty principle but argues that it can only hold insofar as it furthers the end of government. *Id.* at 40. The third and fourth paragraphs were not transcribed by Jefferson, but they nonetheless resemble much of the language in the Declaration. In these, Wilson argues that, because all men are "by nature, equal and free," "[a]ll lawful government is founded on the consent of those, who are subject to it," and the "happiness of the governed" is "the First Law of every government"—anticipating much of the

Wilson's arguments, though superbly executed, fit neatly with their times, and were not earth-shattering.²⁵ Remarkable, however, and largely unknown, is the fact that Wilson completed the pamphlet not in 1774, when it was published, but in 1768—when its revolutionary views were highly unorthodox, and when Wilson was only twenty-six.²⁶ He chose not to publish at that time because, after showing it to Dr. Francis Allison, one of his senior colleagues from the College of Philadelphia, Allison advised him that its stance was far too radical for the times, and might damage his reputation.²⁷ Only after the political climate had ripened did Wilson go to press. Thus one of the key documents of the American Revolution—a document that may well have had a significant influence on the Declaration of Independence—was put together by a young Scot in the 1760s, well before any of the views it expressed had been accepted or even clearly articulated.²⁸ This would be the

famous language on "life, liberty, and the pursuit of happiness" that would appear in Jefferson's Declaration. *Id.* Without a security that a Legislature will observe this rule, Wilson argues, all men "are, every moment, exposed to slavery," *id.* at 40-41—again foreshadowing the Declaration's rhetoric on royal oppression.

Jefferson also copied down the first sentence of Wilson's fifth paragraph: "Let me now be permitted to ask—Will it ensure and encrease the happiness of the American Colonies, that the Parliament of Great Britain should possess a supreme irresistible uncontrolled authority over them?" *Id.* at 41. Later, the Declaration would use justifications almost identical to Wilson's in making its case for dissolving the colonies' bond with Britain. See THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (arguing that the people were exercising their right "to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness").

Striking as the parallels may be, they do not establish beyond a doubt that Wilson was a major influence upon the Declaration. One Many sources influenced the writing of Jefferson's Declaration, including many third parties who influenced Wilson and Jefferson alike. As Jefferson himself explained of the Declaration,

Neither aiming at originality of principles or sentiments, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind. . . . All its authority rests on the harmonizing sentiments of the day, whether expressed in conversation, in letters, in printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

COMMONPLACE BOOK, *supra* at 44. Furthermore, there is no evidence confirming that Jefferson read Wilson's pamphlet before July of 1776.

Still, there is good reason to believe Wilson's pamphlet was a direct influence on Jefferson's Declaration. The parallels in content are striking, and Wilson's pamphlet, published in 1774, was a prominent enough revolutionary document that it seems unlikely Jefferson would have ignored it for two years. It is possible Jefferson failed to acknowledge his debt to Wilson because, among the many revolutionary writers Jefferson was reading at the time, he simply forgot to. He might also have judged it unnecessary. According to one of the few scholars who has looked into the parallels, "there is no reason why Jefferson should cite Wilson, who was comparatively unknown, when there were so many other authorities who would bear more weight in argument." Herbert L. Ganter, *Jefferson's "Pursuit of Happiness" and Some Forgotten Men*, 16 WM. & MARY Q. 558, 584 (1936).

25. When they discuss Wilson's pamphlet, historians generally group it with the many others being published at the time. See, e.g., JOSEPH ELLIS, THOMAS JEFFERSON: AMERICAN SPHINX (1997) ("The timing of [Jefferson's] pamphlet was also exquisite. Several other colonial dissenters—John Adams in Massachusetts and James Wilson in Pennsylvania—were simultaneously reaching the same conclusion about Parliament's lack of authority in the colonies.").

26. See SEED, *supra* note 12, at 7, 192. Major disputes with Britain were of course festering by the time Wilson wrote his pamphlet in 1768. They revolved, among other things, around legislation such as the Quartering Acts, which empowered the British army to appropriate private housing, and the Townshend Acts, which, seeking both to raise revenue for local British officials and to punish colonists for their refusal to comply with the Quartering Acts, imposed taxes on imported goods.

27. HALL, *supra* note 15, at 12.

28. See SEED, *supra* note 12, at 7 ("[Wilson] can justly claim to have helped to pioneer what became a fairly conventional view.").

first of countless times Wilson would be forced to wait for the political zeitgeist to catch up to him.

Though at the very forefront of the *intellectual* movement toward Independence, Wilson, who promptly rose to represent Pennsylvania in the Continental Congress, was not at the *political* forefront. He stood opposed to independence through the spring of 1776, switching sides only in early summer. Much of his opposition was attributable to the fact that his home state demanded it. By the time separation from England became a serious possibility in 1775 and early 1776, the Pennsylvania Assembly had not yet freed its delegates—including Wilson, Franklin, and Dickinson, among others—to vote for Independence.²⁹ Through his speeches, Wilson nonetheless hinted at support for independence in subtle ways. On February 13, 1776, for instance, Wilson proclaimed “We are *desirous* to continue subjects; But we are *determined* to continue freemen.”³⁰ Still, Wilson had his own reservations, and did not yearn for an immediate split with the passion some others did. Unlike Franklin, who, despite his obligations to his state’s Assembly, openly advocated separation, Wilson, like many other members of Congress, was genuinely uneasy about it—not because he thought Americans needed the British to govern them, but rather because he feared what the immediate political consequences of independence would be in Pennsylvania. He worried that anarchy would come with the dissolution of Pennsylvania’s existing government, and, in a state with a large population of radicals, feared the prospect of a revolutionary junta.³¹ He had confidence that conditions would settle, and pave the way for a separation; but as early summer arrived in 1776, Wilson—his political hands still bound by his legislature—refused to sign on to the revolutionary cause, outraging many of his opponents.³²

With his hands untied, however, Wilson soon changed course. After Pennsylvania granted its delegates permission to support independence in mid-June, Wilson switched his vote in favor of independence within a matter of days. The Pennsylvania delegation remained opposed to independence, however, with two men Wilson knew very well—his teacher John Dickinson and his friend Robert Morris—standing eloquently in its way. On July 1st, the Pennsylvania delegation voted against independence 4-3, with Dickinson and Morris in the loyalist camp and Franklin and Wilson supporting independence. The following day, Wilson’s friends Dickinson and Morris, though in attendance, conspicuously never took their seats—enabling the

29. See SMITH, *supra* note 12, at 78. The Assembly’s instructions of November 7, 1775, were unequivocal: “We strictly enjoined you, that you, in behalf of this Colony, dissent from and utterly reject any propositions, should such be made, that may cause or lead to a separation from our Mother Country, or a change in the form of this Government.” *Id.*

30. JAMES WILSON, *An Address to the Inhabitants of the Colonies*, in 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 58 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter WORKS].

31. *Id.* at 79.

32. For more on the fallout from this stance, see Part II, *infra*.

Pennsylvania delegation to swing in favor of independence 3-2.³³ Pennsylvania's conversion in turn nudged the other holdouts promptly into line, paving the way for the signing of America's first famous charter two days later. In the end, Wilson paved not only the theoretical road to independence; he was likely a pivotal figure in delivering its declaration as well.³⁴

In the decade following America's independence, Wilson established himself both professionally and politically. On the former front, Wilson became one of his new country's greatest lawyers—and probably the greatest legal thinker of his day.³⁵ Wilson's capacities as a legal thinker were gaining recognition in the nation's most prominent circles by 1775, when John Adams, after watching young Wilson in Congress, declared him a man “whose fortitude, rectitude, and abilities too, greatly outshine his master's”³⁶—his master being America's eminent attorney at the time, John Dickinson.³⁷ Later, in the midst of the Revolutionary War, when the French Government required an American attorney to advise it on its role in the conflict, it retained Wilson—until it determined that it could no longer afford his fees.³⁸ By the time, in 1782, when George Washington's nephew Bushrod—a future Supreme Court Justice—aspired to become an attorney, it was only natural for Washington to send him to Wilson for law lessons.³⁹

Politically, Wilson also made great strides in these times, even in the face of considerable adversity. His reluctance to sign the Declaration had severely tarnished his name among Pennsylvania's many ardent revolutionaries, and he brought further enmity upon himself by opposing Pennsylvania's first state constitution, a singularly radical document that, Wilson thought, established a deeply inadequate separation of powers. Still, from 1775 to 1787, he served various terms in the Continental Congress—from 1775 to 1777, from '82 to '83, and from '85 to '87.⁴⁰ He was an enthusiastic and ambitious member of this body, taking on as many responsibilities as he could in the hopes of earning a name for himself at the top levels of his new country's government.⁴¹ Most of his political efforts revolved around two seemingly

33. “Before Congress convened [on July 2nd], the Pennsylvania delegation must have done some soul-searching. Wilson, closer to Morris and Dickinson than were Franklin or Morton, may have employed his eloquence to dissuade those two dissenters from voting against the Declaration.” SMITH, *supra* note 12, at 87.

34. For the full story of Wilson's role in the wrangling over independence, see SMITH, *supra* note 12, at 78-89.

35. McCloskey, *supra* note 14, at 2 (Wilson was “the most learned and profound legal scholar of his generation”). COLLIER, *supra* note 13, at 252 (“James Wilson was [in 1787] considered perhaps the leading legal thinker in the United States.”).

36. E.C. BURNETT, 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 175 (1921).

37. Though Adams may well have been jabbing at Dickinson, an enemy of his, Wilson's objectively exceptional abilities—later widely recognized—suggest this was not all that was going on.

38. SMITH, *supra* note 12, at 140.

39. *Id.* at 169.

40. SEED, *supra* note 12, at 26.

41. *Id.* at 30.

contradictory priorities: strengthening the people's influence over their own governance, and centralizing power in the federal government. This distinctive blend of nationalism and democracy emerged in Wilson's earliest days in the Continental Congress. Even under the Articles of Confederation—understood almost unanimously as comprising a loose confederation of sovereign entities—Wilson held the unorthodox view that America should be considered “one undivided, independent nation.”⁴² His emphasis on greater popular control emerged early on as well; under the Articles, he and John Adams labored to establish proportional representation in Congress—the mark of popular rather than state sovereignty—as early as 1777.⁴³ Wilson denied that the twin aims of efficient centralization and the liberty of the people were in any way incompatible.⁴⁴ Rather, the two went hand in hand. The people, he argued, should be brought to consider themselves “as the sovereign as well as the subject; and as receiving with one hand what they paid with the other.”⁴⁵ So long as the people had a direct say in their federal government, he argued, their fear of a strong centralized power organ could never grow out of hand. Indeed, as they grew to control it, they would grow to identify themselves with rather than against it.

In addition to his centralization and democratization efforts, Wilson played a large role in putting America on sound economic footing in post-Declaration, pre-Constitution America. He was intimately involved in the creation and, later, operation of the Bank of North America. When opponents of centralization challenged the idea of a national bank, Wilson penned a sophisticated defense of it that, it has been forcefully argued, incorporated all of the later arguments that Hamilton would use when he wrote his famous *Report on a National Bank*.⁴⁶ The bank, Wilson argued, was especially important to a new country poised for rapid economic growth: it would provide an adequate medium of circulation as well as all-important credit facilities. Wilson himself had a stake in this fight: his own reliance on credit facilities—along with his faith in their ability to open up the seemingly endless world of wealth to be found in American land—was, by his late thirties and early forties, growing dangerously limitless. As he generated consistent, hefty revenues from his law practice, he promptly shoveled them into Western land schemes. He also started borrowing money to send it into such schemes. Many of the Founders, including kindred souls like Robert Morris but also such prudent, prominent figures as Franklin and Washington, caught land speculation fever in varying degrees.⁴⁷ But no one was infected like Wilson. Indeed, Wilson's investment behavior displays various traits that

42. *Id.* at 41. This, of course, is what America would become.

43. *Id.* at 26.

44. *Id.* at 27.

45. *Id.*

46. See HALL, *supra* note 15, at 18.

47. See COLLIERS, *supra* note 13, at 208.

suggest it may have been pathological.⁴⁸ It bled, for instance, into his statesmanship. Seed has found considerable evidence that Wilson tried to use his seat in Congress to influence government policy, including even military policy, in a way that would benefit his own commercial interests.⁴⁹ In 1775, for instance, Wilson encouraged Congress, then pondering an invasion of Canada, to organize a targeted attack on Detroit, whose accession would have redounded to the financial benefit of Wilson and his business associates.⁵⁰

Given his prominent work in the Continental Congress and his position at the summit of the American legal community, it may seem as though Wilson's election to the Constitutional Convention was a foregone conclusion. The damage done to his reputation by his temporary role as an opponent of Independence in 1776, however, along with his role in his home state as the leading opponent of its first constitution, imperiled his candidacy. In fact Wilson barely made the cut, as the sixth of seven men elected to the Pennsylvania delegation. Pennsylvania's decision to include one of the country's most gifted legal minds in its delegation—a decision that could easily have come out the other way—is a barely noticed but crucial event in American history. Wilson's attendance at the conclave would have a profound impact on the charter that was produced there—and on the nation that grew out of it.

2. *The Convention*

The importance of Wilson's role at the Constitutional Convention cannot be underestimated. Wilson came in as one of the true luminaries present. "Wilson," writes Rossiter, "was regarded on all sides as a very special person."⁵¹ Georgia delegate William Pierce wrote that "Mr. Wilson ranks among the foremost in legal and political knowledge No man is more clear, copious, or comprehensive"⁵² Pennsylvania's own Benjamin Rush described Wilson's mind as "one blaze of light."⁵³ And he lived up to his reputation during the Summer in Philadelphia. The traditional view held by scholars who have devoted serious time to the convention is that Wilson was the second most important person there.⁵⁴ Though Farrand referred to Madison as "unquestionably the leading spirit" of the Convention and the

48. For more on this point, see *infra* Part II.

49. SEED, *supra* note 12, at 11.

50. *Id.*

51. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 104 (1966).

52. THE FOUNDERS ON THE FOUNDERS (John P. Kaminski ed., 2008).

53. CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 179 (1966).

54. Max Farrand was the first major expert on the Convention to rank the Founders in importance. His top four, in descending order, were: James Madison, James Wilson, George Washington, and Gouverneur Morris. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 196 (1913). When Clinton Rossiter released his rankings fifty-three years later, his top four was exactly the same. See ROSSITER, *supra* note 51, at 248. Others classifying Wilson as at least number two include James Bryce, Randolph G. Adams, and Robert McCloskey. See generally HALL, *supra* note 15, at 21.

“masterbuilder of the Constitution,” he wrote that Wilson was “[s]econd to Madison and almost on a par with him”—and also “[i]n some respects . . . Madison’s intellectual superior.”⁵⁵ Echoing Farrand, Clinton Rossiter has written that Wilson was “[s]econd only to Madison—and an honorable second.”⁵⁶ In some regards, Wilson was the more active of the two: he gave more speeches at the Convention than did Madison—and indeed than anyone else, save his colleague from Pennsylvania Gouverneur Morris.⁵⁷ More importantly, recently unearthed documentary evidence from the Convention, which had not been closely examined in a century, suggests that Wilson, who, unlike Madison, served on the Committee of Detail responsible for producing the first working draft of the Constitution, appears to have written this draft almost singlehandedly.⁵⁸ The researcher who discovered the papers has arrived at the startling conclusion that Wilson, “in effect, wrote the bulk of the Constitution as we know it today.”⁵⁹ In light of Wilson’s other traditionally underestimated impacts on the document, this new evidence calls into question whether we should reconsider Madison’s traditionally unquestioned status as the “Father of the Constitution.” It may, in short, be time to conduct a constitutional paternity test.⁶⁰

Ultimately, however, it is not the quantitative but the qualitative measure of Wilson’s impact on the Constitution that makes it so remarkable. That summer in Philadelphia, Wilson, more than any other delegate, consistently advocated placing as much power as was feasible with the people themselves—giving them as direct a control as was possible over operation of the federal government’s machinery. To this end, he helped attain proportional representation in the House of Representatives. With Madison, he tried, and failed, to win it in the Senate, too—arguing that any government built on popular sovereignty demanded proportional representation. Also to this end, Wilson took the stance that the President should be elected by a direct national majority vote, an idea that would still have struck his peers as absurd even had it not been entirely unfeasible at the time.⁶¹ Wilson thus pushed through the most populist presidential election apparatus he could, ensuring that the presidential election was vested not in the federal legislature, where many of his colleagues wanted it put, but in an entity Wilson invented called the Electoral College, which would give the people more of a direct say

55. See FARRAND, *supra* note 54, at 197.

56. ROSSITER, *supra* note 51, at 247-48.

57. Specifically, the numbers were: Morris 173, Wilson 168, and Madison 161. ROSSITER, *supra* note 51, at 249. These three were in a voluble league of their own; the next highest three were Sherman at 138, Mason at 136, and Gerry at 119.

58. See Toler, *supra* note 6, at 5.

59. *Id.*

60. I will leave this test for another article.

61. See AMAR, *supra* note 7, at 155 (citing three primary factors—information barriers, federalism, and slavery—that rendered direct election of the president impossible in the Founding era).

in determining who would stand at the helm of the federal government.⁶² Citing his own status as an immigrant, Wilson helped convince fellow delegates to implement short residency requirements before immigrants could serve in Congress.⁶³ Drawing again from his personal experience, this time representing defendants accused of treason in the wake of Independence, Wilson fought for, and secured, a liberty-friendly treason clause in the Constitution.⁶⁴ More than anything, however, Wilson believed in basing the new federal government upon the people themselves—an idea many of Wilson's fellow delegates thought highly imprudent. "This," Farrand wrote, "was the principal thing for which he contended in the convention, and with a great measure of success."⁶⁵ Wilson alone, who wielded his formidable intellect on behalf of democracy throughout the Convention, is a major part of the reason why the Constitution ended up as democratic a document as it did.

3. *Post-Convention Life and Death*

Wilson's towering role in the creation of the Constitution was matched by his similarly instrumental role in getting it ratified. His State House Yard Speech on October 6, 1787, presented the first public defense of the Constitution, arguing, among other things, that the Constitution posed no threat to the states and that the tax powers it conferred were necessary to national security, and insinuating that its opponents were largely self-interested beneficiaries of the status quo. "Every person," he said, "who either enjoys, or expects to enjoy, a place of profit under the present establishment, will object to the proposed innovation; not, in truth, because it is injurious to the liberties of his country, but because it affects his schemes of wealth and consequence."⁶⁶ The speech was widely reprinted, and certainly more widely read than the *Federalist*—which in fact borrowed some of Wilson's arguments.⁶⁷ It quickly became an indispensable weapon in the Federalists' arsenal, upon which constitutionalists in every state would rely in crafting arguments in favor of ratification. As Bernard Bailyn has written, "it was not so much the *Federalist* papers that captured most people's imaginations as James Wilson's speech of October 6, 1787, the most famous, to some the most notorious, federalist statement of the time."⁶⁸ Gordon Wood, Bailyn's one-time student, was more blunt: according to him, the speech was nothing

62. See, e.g., COLLIER, *supra* note 13, at 286 ("[Wilson] pushed for election of the executive by the people, not by the legislators, and thus became the inventor of our electoral college"); Ewald, *supra* note 6, at 1001 ("[T]here is reason to believe John Dickinson . . . played a crucial role in persuading the Committee to adopt Wilson's idea of indirect election via an electoral college.").

63. See note 18, *supra*.

64. See *id.* at 242-45.

65. FARRAND, *supra* note 54, at 196.

66. 1 WORKS, *supra* note 30, at 176.

67. See HALL, *supra* note 15, at 23.

68. BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 328 (1992).

short of “the basis of all Federalist thinking.”⁶⁹ Using the arguments therein, along with a host of others, Wilson pushed the Constitution through to ratification in Pennsylvania—a crucial victory that delivered the Constitution’s supporters their first large state, and help set in motion the political forces that ultimately brought the document—and the new nation—to life. Thus, it was as much his role in the fall of 1787 as in its summer that made him so instrumental to the document’s successful birth.

As the new Republic was being established, Wilson, who had long aspired to hold a place of prominence in the civic life of his new nation, had good reason to expect he would soon possess one. He had been a leading architect of the new Constitution, and no superior legal mind was known in the land. Though Wilson had long served in Congress, that was something of an unnatural role for a man of such a bookish bent. What he truly wanted was to be Chief Justice of the first Supreme Court—to be for the judicial branch what Washington was to be for the executive. Given Wilson’s abilities and his stature, it was thoroughly reasonable for him to desire, even expect, to receive the post. And so, in a display of his confidence and also, possibly, his lack of social graces, he wrote a letter to Washington requesting the position.⁷⁰ He did so in terms that, in Seed’s words, “would reduce rather than enhance his chances.”⁷¹ Though Washington did appoint Wilson to the first Supreme Court, he gave the Chief Justice spot to John Jay, an author of a handful of the *Federalist* papers and relative legal mediocrity. Then—heartbreakingly for Wilson—when the spot opened up two additional times in the Court’s first few years, Washington passed up Wilson twice more. By this time, another barrier had arisen between Wilson and the position—a barrier that, unlike his social limitations, was, as his friends at the time realized, insurmountable: his disastrous investments.⁷²

Wilson had been furiously investing in land deals all his life, even before he married into money and came to head a lucrative law practice. After he had done these things, of course, he had easy access to capital, which enabled him to throw nearly all of the money he could get his hands on into land speculation. When he ran out of cash for investments, he could—and did—capitalize on his apparent creditworthiness to borrow money and invest in yet more land.⁷³ The combination of means and madness was powerful; Wilson

69. GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 530 (1998).

70. SEED, *supra* note 12, at 210. “I commit myself,” Wilson wrote, “to your Excellency without reserve, and inform you that my aim rises to the important office of chief justice of the United States. . . . But how shall I proceed? Shall I enumerate reasons in justification of my high pretensions? . . . You will think and act properly on the occasion, without my saying anything.”

71. *Id.* at 141. Smith, however, points out that Wilson was not the only aspiring politician to write Washington requesting a position in the new federal structure. Indeed, Washington was deluged with such requests. See SMITH, *supra* note 12, at 304.

72. SEED, *supra* note 12, at 141.

73. As I suggest in detail later in the paper, I think the evidence is overwhelming that Wilson’s speculation habits—wildly imprudent for a man so otherwise smart and sane—were pathological. See Part II, *infra*.

came buy an astonishing four million acres of America—an area larger than Connecticut, “worth on paper almost any amount that could be dreamed of, and under the circumstances, as likely to vanish as quickly as the dream.”⁷⁴ Vanish, of course, is precisely what it did when the economy soured in the mid 1790s, a few years into Wilson’s job on the Supreme Court. With Philadelphia businesses collapsing left and right, Wilson’s creditors, who cared very little about his role as architect of the nation, started to come after the Justice. After a time spent “riding circuit,” when Wilson was in fact evading local sheriffs in search of a jurisdiction where he could hide in peace, Wilson was tracked down and thrown into debtor’s prison in New Jersey. Upon release, Wilson—both a Supreme Court Justice of the United States, and, stunningly, a fugitive of the law—fled South, eventually holing up in a tavern in rural Edenton, North Carolina, near property owned by his friend Justice Iredell’s family.⁷⁵ In the early summer of 1798, his wife joined him there to find him gaunt, threadbare, and determined to avoid debtor’s prison. Weeks later, around the Fourth of July, Wilson caught malaria and nearly died. After a brief convalescence through late summer, during which he turned his thoughts to his dire economic situation, Wilson suffered a stroke that critically impaired his cognitive function, leaving him, in the words of his biographer, “to rav[e] deliriously about arrest, bad debts, and bankruptcy.”⁷⁶ Deeply troubled, and haunted by recurrent visions of jail, Wilson passed away on August 21st, 1798, an utter disgrace. He was buried in a plot on the Iredell family estate in a tiny, quiet ceremony.⁷⁷

B. What Wilson Believed

Wilson’s life achievements were abundant and, though unnoted, truly noteworthy. Equally if not more noteworthy, however, were Wilson’s beliefs on a wide range of political and social issues. Many of these—his singular commitment to the idea of popular sovereignty, and role as its primary spokesperson; his abiding faith in the people, unrivaled among any of the major founders, and manifested in his commitment to proportional representation, including direct election of Representatives, Senators, and the President alike; his enthusiastic defense of the rights and interests of immigrants; his commitments to procedural fairness manifested in the Treason Clause, and to federal authority and citizenship over state authority and citizenship—are discussed above and in the tiny body of existing Wilson literature, which focuses overwhelmingly on his political thought.⁷⁸ Before

74. COLLIER, *supra* note 13, at 284.

75. SMITH, *supra* note 12, at 382-85.

76. *Id.* at 388.

77. *Id.*

78. With the exception of Smith’s biography, every book about Wilson has focused on his political philosophy. Virtually every article on him focuses its attention on the philosophy rather than the philosopher as well.

moving on to Part II, however, it will be useful to discuss some of Wilson's scarcely discussed stances on a small group of issues that, if not fundamental to the political discussion of his times, would be fundamental to the discussion later: slavery, expansion of the franchise, and women.

1. Slavery

Wilson was among the most antislavery of the key Framers of the Union. The American antislavery movement, born when Americans started getting serious about Independence, was still relatively young by the time Wilson was crafting the Constitution. America's first antislavery society, a tiny coalition of Quakers, had not been formed until the Spring of 1775.⁷⁹ Still, in the dozen years between then and the birth of the Constitution, various leaders in the North had started to come out against slavery. Wilson was not in the vanguard of thinking on slavery in the way that he was on many other questions of equality. He would make no impassioned denunciations of the institution at the Constitutional Convention, as would his fellow Pennsylvanian Gouverneur Morris. He was not a lifelong, outspoken opponent of human bondage, as was John Adams. Indeed, for much of his life in America, Wilson himself owned one domestic slave, whom he later freed. Wilson was nonetheless a diligent, if not always consistent, opponent of slavery. His public criticism of the institution dates at least as far back as his time in the Continental Congress, when, in the debate over how to structure the Articles of Confederation, the issue arose of whether southern states should be taxed for their slave populations. Wilson fervently maintained that they should—not only on economic grounds, but moral ones as well, arguing that slavery hurt all of society.⁸⁰ At the Constitutional Convention, slavery was of course a major point of contention, as manifested in the debate over the Three-Fifths Clause (another provision to which Wilson was instrumental). Virtually all of the antislavery delegates present, however, intent on maintaining the comity necessary for constructing a desperately needed new federal governance apparatus, kept quiet about their positions.⁸¹ Wilson, along with his fellow opponent of slavery Ben Franklin, fell into this quiet camp. As Seed has written, Wilson “was motivated by a desire neither to offend his own people in Pennsylvania by equating slaves with free citizens for purposes of representation, nor to alarm southern delegates to the point of opposing

79. 2 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA 455-56 (Julius P. Rodriguez ed., 2007).

80. SEED, *supra* note 12, at 30-31.

81. The exception was Gouverneur Morris, who gave an impassioned speech declaring that slavery was “a nefarious institution . . . the curse of Heaven on the states where it prevailed,” and a violation of “the most sacred laws of humanity.” See COLLIER, *supra* note 13, at 229 (“Morris may have been taking an extreme position for bargaining purposes, or just exhibiting some of the rhetorical flamboyance for which he was noted”). For a discussion of why Morris, though a good contender for the Top Forgotten Founder position, loses it to Wilson, see Part IV, *infra*.

adequate federal authority, by taking in these matters a stand on principle.”⁸² Still, he made what small antislavery efforts he could in the conclave. When South Carolinians proposed the addition of a fugitive slave clause, Wilson made a successful objection to it on technical grounds—delaying, if only very briefly, the clause’s inclusion.⁸³ And once at Pennsylvania’s ratifying convention, Wilson was more upfront on his stance. There, while voicing his disappointment that the Constitution was not able to go further toward demolishing slavery, he stressed his conviction that the charter had laid the foundation for “banishing slavery out of this country”:

With respect to the clause restricting Congress from prohibiting the migration or importation of such persons as any of the states now existing shall think proper to admit, prior to the year 1808, the honorable gentleman says that this clause is not only dark, but intended to grant to Congress, for that time, the power to admit the importation of slaves. No such thing was intended. But I will tell you what was done, and it gives me high pleasure that so much was done. Under the present Confederation, the states may admit the importation of slaves as long as they please; but by this article, after the year 1808, the Congress will have power to prohibit such importation, notwithstanding the disposition of any state to the contrary. I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania. It is with much satisfaction I view this power in the general government, whereby they may lay an interdiction on this reproachful trade: but an immediate advantage is also obtained; for a tax or duty may be imposed on such importation, not exceeding ten dollars for each person; and this, sir, operates as a partial prohibition; it was all that could be obtained. I am sorry it was no more; but from this I think there is reason to hope, that yet a few years, and it will be prohibited altogether; and in the mean time, the new states which are to be formed will be under the control of Congress in this particular, and slaves will never be introduced amongst them.⁸⁴

82. SEED, *supra* note 12, at 83.

83. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 81-82 (1996).

84. 2 JONATHAN ELLIOT’S *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION* 452 (James McClellan, M.E. Bradford, eds., 1989).

Statements like these assured Wilson, as we will later see, a spot in the abolitionists' pantheon of antislavery Founders. His consistent rhetorical opposition to slavery notwithstanding, however, Wilson did own a slave, Thomas Purcell, for a quarter century—from 1768 until 1794, when he married his second wife, Hannah Grey.⁸⁵ A devout Quaker, she may have helped convince Wilson to free Purcell, which he did two months after his wedding—on New Year's Day, 1794.⁸⁶ Some scholars have faulted Wilson for his speeches against slavery and simultaneous ownership of a slave, calling attention to the hypocrisy.⁸⁷ His defenders point out that Wilson's possession of one domestic slave⁸⁸ was nowhere near as reprehensible as what, say, Jefferson, Madison, and Washington, who owned agrarian chattel slaves in large numbers, were guilty of.⁸⁹ Though this point is obviously undermined by the fact that Wilson was an urban lawyer rather than a farmer, and thus had considerably smaller demand for physical labor on his property, it seems odd, to say the least, to question one Framer's commitment to freedom because of his possession of one slave, whom he freed, even as we lionize men like Jefferson and Madison, both of whom were deeply implicated in chattel slavery and never freed their hundreds of slaves.⁹⁰ "There is no doubt," Seed has written, "despite the fact that for a time he owned a slave, that Wilson was a convinced opponent of slavery."⁹¹ Whatever his own shortcomings on the issue, Wilson unquestionably ranked among the most antislavery of the key Framers—and was far more consistent in his personal practices than most of slavery's other purported opponents. On slavery, as on so much else, Wilson was ahead of the curve.

85. SMITH, *supra* note 12, at 367.

86. *Id.* Though some give Grey almost full credit for this, there is no firm evidence upon which to do so. Wilson's decision to free Purcell may have been entirely unrelated—although the timing of the marriage, along with Hannah's strident antislavery stance, suggests that she likely did play a role.

87. These scholars are discussed in HALL, *supra* note 15, at 33.

88. Purcell was a domestic servant in charge of running "the rather unwieldy Wilson household." SMITH, *supra* note 12, at 367.

89. See HALL, *supra* note 15, at 33.

90. Washington, too, of course, was deeply implicated in chattel slavery; like any leading Virginian plantation owner, he owned dozens of slaves. Washington's conduct on the slavery front nonetheless stands apart from that of Jefferson and Madison in important ways. Though indifferent on the question of slavery early on, Washington grew to be an opponent of slavery later in life. See JOSEPH ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* 163, 263 (2005). In the words of one authority, this later Washington "hated slavery and declined to participate in its most seamy aspects." FINKELMAN, *supra* note 80, at 112. Unlike Jefferson and Madison, Washington refused to traffic in slaves, managing his finances very carefully so that he was never forced to buy or sell a slave, "as you would do cattle at a market." *Id.* Jefferson, by contrast, sold at least eighty-five slaves between 1784 and 1794 alone. *Id.* at 107. Also unlike Jefferson and Madison, Washington arranged for his slaves to be freed upon his wife's death, providing tenancy and apprenticeships for the able-bodied, and lodging and pensions for the old. Far from a last-minute change of the will, this was an act for which Washington had meticulously prepared, and coming as it did from George Washington—far and away the most admired and influential person in the country—it made a major public statement. See, e.g., AMAR, *supra* note 7, at 148 ("It was a poignant, if terse, reminder to his country of the redemptive work that remained to be done . . .").

91. SEED, *supra* note 12, at 117. Seed importantly qualifies this characterization by noting that "there was no fervor in his [antislavery] conviction," that Wilson "rarely committed himself on this issue, which does not seem to have concerned him deeply, but when he did he took a strong antislavery line." *Id.*

2. *Expansion of the Franchise*

Wilson fought throughout his political career to expand the franchise to as broad a swath of the populace as was feasible. Because man was, in his view, by nature a benevolent animal—and uneducated men were no less likely to know moral truth than social elites were—a broad franchise was a sound tool for good government, in elections of both executive and legislative branches.⁹² Specifically, Wilson believed that the boundary of suffrage should be “extended as far as considerations of safety and order will possibly admit.”⁹³ Any man whose circumstances did not render him dependent on the will of another should be able to vote.⁹⁴ “The right of suffrage,” he declared in 1789,

properly understood, properly valued, properly cultivated, and properly exercised, is a rich mine of intelligence and patriotism. . . . [I]t is an abundant source of the most rational, the most improving, and the most endearing connection among the citizens . . . [and] a most pleasing bond of union between the citizens and those whom they select for the different offices and departments of government.⁹⁵

The wide suffrage net Wilson advocated casting over as much of the populace as was feasible was, like so many of his political ideas, deeply unorthodox in his day. Following the Constitution’s ratification, when state legislatures determined who would be allowed to vote in the new federal elections, many continued to impose property qualifications on voters and candidates alike.⁹⁶ This restriction of voting rights was seen as sound policy for various reasons, partly because staunch protectors of property rights like James Madison thought it a necessary protection of property rights against leveling legislation,⁹⁷ and partly because it was seen as ensuring that participants in government were committed to the public good. Later, of course, Wilson’s inclusive approach to suffrage would be vindicated many times over. Indeed, the expansion of the franchise advocated by Wilson would, as John Hart Ely noted in *Democracy and Distrust*, prove to be *the* defining trend in American constitutionalism over the nineteenth and twentieth centuries.⁹⁸

92. *Id.* at 17-18.

93. *Id.* at 23.

94. *Id.*

95. *Id.* at 22-23.

96. See AMAR, *supra* note 7, at 65-69.

97. JACK RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 223-29 (3d ed. 2007).

98. “Excluding the Eighteenth and Twenty-first Amendments, . . . six of our last ten constitutional amendments,” Ely wrote in 1980, “have been concerned precisely with increasing popular control of our government. And five of those six . . . have extended the franchise to persons who had previously been denied it.” JOHN HART ELY, *DEMOCRACY AND DISTRUST* 7 (1980). The five include the Fifteenth

His fierce advocacy of broader suffrage, however, was not the only sign that Wilson's stance on voting was ahead of its times. Wilson was the only major Framers who articulated a belief in the related principle of one man, one vote.⁹⁹ "[A]ll elections," Wilson argued,

ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of representatives and of the constituents will remain invariably the same.¹⁰⁰

Even under the Articles of Confederation, a charter that explicitly reserved sovereignty to the member states, Wilson, along with his ally John Adams, was a major proponent of using proportional representation to allocate power among the various states—a somewhat eccentric interpretation of a charter that put every state on a sovereign's equal footing.¹⁰¹ At the Constitutional Convention, Wilson's push for proportional representation in both the House and the Senate was one of his hardest fought battles. And he carried the principle through to its logical conclusion, advocating equal electoral districts on the local as well as the national level. Wilson was, as Seed has written, "an ardent advocate of equal electoral districts, in order that the assembly elected would reflect fairly the whole society."¹⁰²

3. *Wilson and Women*

Finally, it is worth calling attention to one part of Wilson's worldview quite neglected by scholars: his deep respect for women. Like virtually all eighteenth century American men, Wilson did not view women as true equals; he came far closer, however, than most. Early in Wilson's professional life, before his law practice had attracted much business, he and a friend, Billy White, collaborated to write a column in the *Pennsylvania*

Amendment (eliminating race-based limitations on voting), Nineteenth Amendment (eliminating sex-based limitations on voting), Twenty-third Amendment (granting residents of Washington, D.C., representation in the Electoral College), the Twenty-fourth Amendment (prohibiting poll-tax driven restrictions of voting rights), and Twenty-sixth Amendment (guaranteeing all citizens eighteen and over the right to vote). Though Wilson's pro-democratic hand is all over the constitutional developments Ely so eloquently describes in his book, Wilson's name appears only twice in *Democracy and Distrust*—once in a block quote written by another author, and again in a tiny citation crammed into an endnote at the back of the book. See *id.* at 39, 238 n.55. In one of saddest demonstrations of Wilson amnesia on record, Professor Ely failed to devote even a single sentence of his influential masterpiece of constitutional theory to Wilson, arguably the Framers most relevant to his argument.

99. See McCloskey, *supra* note 14, at 1 ("[Wilson] unquestionably did believe in what is now called the principle of 'one man, one vote'; and he seems to be the *only* important founding father who expressed himself unequivocally to this effect."); see also SEED, *supra* note 12, at 22. Wilson's closest ally on the issue was probably John Adams, who argued "equal interests among the people should have equal interests" in the legislatures. WOOD, *supra* note 69, at 170.

100. McCloskey, *supra* note 14, at 1.

101. See AMAR, *supra* note 7, at 25-29.

102. *Id.* at 23.

Chronicle under the pseudonym "The Visitant." The column was widely read by Pennsylvanians, men and women alike. From the column's inception, however, the Visitant, though a man, spoke in an emphatically pro-woman voice. "One particular . . . in my disposition I must mention," he wrote in his first column, "because it is a particular, on which I value myself—I prefer the conversation of a fine woman to that of any philosopher."¹⁰³ Women, observed Wilson behind the column's veil of anonymity, were all too often condemned to play the role of mere accessories to men, their intelligence obscured by guises they assumed to please male companions.¹⁰⁴ Without question, the gender dynamics in the Visitant columns strike us as archaic today; at one point Wilson and his co-author wrote, for instance, about how coquettes were traitors to their sex.¹⁰⁵ Far from weighty calls for gender equality—which were, after all, supremely difficult to find at the time—the Visitant's columns were light as air. But the women of the times, for their part, appreciated the Visitant, whoever he was.¹⁰⁶ They recognized, even in this light-hearted setting, a male voice that approached them on more equal footing—a man whose "sentiments," in one woman's words, "bespeak a noble heart."¹⁰⁷

Evidence abounds that the stance Wilson took in *The Visitant* was no mere guise. The column reflected an abiding respect for women that Wilson would display throughout his life. As a rule, "Wilson felt himself more at home with women than with most men."¹⁰⁸ He liked them not simply as sexual playthings or amorous companions—as they were often viewed at the time, including by many of the Founders—but platonically, as individuals. In a major law lecture he would later give at the pinnacle of his career, he reserved

103. SMITH, *supra* note 12, at 32.

104. *Id.* at 33. If the message sounds merely like something women wanted to hear, it is worth remembering that as an anonymous writer, Wilson could expect no personal gain from disingenuous flattery.

105. *Id.*

106. Speculation as to the Visitant's true identity was rampant. *See id.* at 35 ("The names of half-a-dozen of the literary lights of the Province were whispered about as the anonymous author.").

107. In the playful spirit of the column, she wrote her thanks to the Visitant in verse:

Hail candid, gen'rous man, whoc'er thou art;
Thy sentiments bespeak a noble heart. . . .
You, Sir, with better sense, will justly fix
Our faults on *education*, not on *sex*;
Will shew the source which makes the female mind
So oft appear but puerile and blind. . .
How many would surmount stern custom's laws,
And prove the want of genius not the cause;
But that the odium of a *bookish fair*,
Or *female pedant*, or "*they quit their sphere*,"
Damps all their views, and they must drag the chain,
And sigh for sweet instruction's page in vain.

Id.

108. SMITH, *supra* note 12, at 202 ("[T]o women . . . [Wilson] was courtly and attentive, valuing, as he had written in earlier years, the conversation of an intelligent and gracious woman more than that of a philosopher.").

an entire section to address the women in the audience—a move somewhat stunning in itself.¹⁰⁹ Viewed from one angle, his remarks to them were mere creatures of their times. Wilson said, for instance, that despite their equivalent intelligence and wisdom, their proper domain was the home.¹¹⁰ The very fact that he found it necessary to address the issue, however—instead of merely taking it for granted, as his contemporaries did—makes one suspect that the woman issue was causing his courageously free-thinking mind some cognitive dissonance, that in the pages of his remarks one can see Wilson protesting too much. His speech's statement that "Your sex is neither less honest, nor less virtuous, nor less wise than ours,"¹¹¹ among other affirmations of equality, suggest the possibility of a man ill at ease with the status quo he was defending. Wilson's statements in the speech, like those made throughout Wilson's life, are those of a man inching toward, though falling far short of, a recognition of woman's equality. For his times—against which he must, of course, be judged if he is to be judged at all—Wilson was, here as virtually everywhere else, well ahead of the curve.

PART II. WHY HAS NOBODY HEARD OF JAMES WILSON?

How can it be that a figure so crucial to America's Founding—a man who beat Jefferson to the Declaration, Hamilton to the National Bank, Marshall to judicial review, and America to the principles behind the Thirteenth, Fourteenth, Sixteenth, Seventeenth, Nineteenth, Twenty-second, Twenty-third, Twenty-fourth and Twenty-sixth amendments—is an unknown name? How can it be that no one has heard of James Wilson?

Part of the answer, as will be shown in Part III, is posthumous, stemming from how subsequent generations have treated—or rather mistreated—the Founder. But much of the reason why Wilson is neither a household nor even a classroom name can be traced to details of his own life. Various explanations present themselves, the most obvious of which is the disgraceful circumstances of his death. In truth, however, it was a perfect storm of biographical details that coalesced to erase James Wilson from American memory. Eight major factors stand out: (1) his delay in embracing independence; (2) his tendency to be despised by Tories and radicals alike, leaving him few friends and many enemies; (3) his failure to attain a major public position in the newly minted federal government, as most of the famous Founders did; (4) his demeanor, which came off as cold and aloof to most who did not know him well; (5) his sporadic letter-writing, which left a

109. For any major speech to touch upon the subject of women—let alone address those present—was extraordinary. As one authority on feminism has observed of Wilson's speech, it was given "under circumstances that had never before seemed to call for commentary on women." MARY BETH NORTON, *LIBERTY'S DAUGHTERS* 247 (1980).

110. See *WORKS*, *supra* note 66, at 451-55. "If nature evinces her designs by her works; you were destined to embellish, to refine, and to exalt the pleasures and virtues of social life.." *Id.* at 453.

111. *Id.* at 451.

paucity of extant materials providing a window into his life; (6) his early death at age fifty-five; (7) the fifty-year delay before the Convention's notes were made public; and (8) his pathological land speculation habit, which more than any other factor ruined the man and his memory. Ultimately, of course, it was no single one of these factors, but the confluence of all of them, along with a host of posthumous factors discussed in Part III, that consigned Wilson to the dustbin of American history. Below, I proceed through these factors in turn.

Three major political factors helped doom Wilson's reputation. First among these was the role he played in the Continental Congress over the summer of 1776. As noted above, Wilson arrived at the ideas that would justify independence as a young man in the 1760s, well ahead of his peers. In the first half of 1776, however, Wilson still harbored doubts about the wisdom of a hasty, immediate split from England, and his willingness to share as much cost his reputation dearly.¹¹² In late spring of 1776, with pressure for rebellion building in radical quarters, Adams and his revolutionary cohorts proposed adding to a congressional resolution a preamble that would declare all existing governments disbanded, and call for the colonies immediately to assume all the powers of government.¹¹³ Wilson opposed the preamble, first pointing to orders from Pennsylvania forbidding him to support independence.¹¹⁴ Wilson was likely being genuine here. At that time, the only way for the Pennsylvanian people to have any say over their own affairs was through their State Assembly; if one took popular sovereignty seriously, as no Founder did more than Wilson, one had to follow the State Assembly's instructions. But he also confessed his personal reservations about the forces a premature declaration of independence might unleash in his home state. "[I]f that preamble passes," he told the Congress,

there will be an immediate dissolution of every kind of authority; the people will be instantly in a state of nature. Why then precipitate this measure? Before we are prepared to build the new house, why should we pull down the old one, and expose ourselves to all the inclemencies of the season?¹¹⁵

Wilson's perfectly sensible stance, however, did enormous damage to his reputation, sparking a firestorm of vilification. The reputation suffered more when, in June, he remained an opponent of independence based on his concern that the people of the middle colonies "were not yet ripe for bidding

112. For more on this, see Part I, *supra*.

113. "[I]t is necessary," the preamble read, "that the exercise of every kind of authority under the said Crown should be totally suppressed, and all the powers of government exerted under the authority of the people of the colonies." SMITH, *supra* note 12, at 82.

114. *Id.*

115. *Id.* at 83.

adieu to the British connection . . . though they were fast ripening.”¹¹⁶ The outrage directed his way from radical quarters was so intense that famous delegates to the convention, along with others, had to sign a “Defense of Wilson” to confirm his patriotism and shield him from radical fury.¹¹⁷ Though the Defense briefly helped mitigate the wrath of the radicals,¹¹⁸ Wilson remained an official opponent of independence well into June, and was thus despised in many quarters. Then, once Philadelphia gave the green light to Pennsylvania’s delegation, Wilson, as was noted above, played a pivotal role in pushing independence through.¹¹⁹

Ultimately, however, the Declaration debates did major, lasting damage to Wilson’s reputation. Despite his early—indeed, singularly early—enunciation of the political argument relied upon to justify separation from England; despite the considerable efforts to which he went to spread enthusiasm for the idea; despite the fact that, for most of the debate over independence in the first half of 1776, his state had forbidden him to support independence, and shortly after his legislature freed him to support it, he did; despite the integral role he played in convincing the Pennsylvania delegation to push independence through—despite all these things, Wilson emerged from the debate over independence a demon in the eyes of many American patriots.¹²⁰ Wilson’s stance in these months branded him, for many, an enemy of liberty—to be placed not alongside, but at the opposite end of the spectrum from figures like Jefferson or Washington. This was the first major political blow to Wilson’s reputation in American memory.¹²¹

Second, Wilson’s worldview tended to estrange both of the dominant political camps in place in the 1780s. On one side—the side the Federalists would primarily have to contend with in pushing through the Constitution—were the Jeffersonians. In post-revolutionary America, where the distance separating Georgia from Philadelphia was not so different, both practically and psychologically, from the distance separating Georgia and London, many Americans, including the Jeffersonians, understandably associated the centralization of power in a distant, elite-run federal government with England and the dangers of the Crown. Many Americans presumed freedom

116. SEED, *supra* note 12, at 13.

117. *Id.* at 83. The defense was signed by twenty-two delegates, including many whose revolutionary credentials were beyond dispute, such as Sam and John Adams, John Hancock, and Thomas Jefferson. See Seed, *supra* note 12, at 14.

118. For text of the document, see Lucien Hugh Alexander, *James Wilson, Nation Builder*, 19 GREEN BAG 1, 8 (1907). See also SMITH, *supra* note 12, at 83. Judging from subsequent press coverage of Wilson, however—and, indeed, from popular depictions of Wilson’s role in the Continental Congress in the twentieth century—the exculpatory document he had his fellow Framers sign did little to clear his name.

119. See Part I, *supra*.

120. See SMITH, *supra* note 12, at 83, 87.

121. As we will see below, subsequent depictions of Wilson at the signing of the Declaration are brutally unfavorable. A famous painting from 1856 depicts him as the unhappiest man in the room as the Declaration is being pushed through, and a prominent musical from 1969 depicts him as a lily-livered toady of opponents of independence. See *infra* Part III.

was to be found in self-governance, liberty in localism; they trusted majority rule, so long as it was *local* majority rule—the rule of local majorities over local affairs. Their opposing camp, more Hamiltonian in its thinking, which included many of Wilson’s Federalist friends, having observed “excesses” of democracy in the decade following independence and the threat that majority rule could pose to property rights, believed that commoners could not be left in charge of society, and that it was the job of a central set of elites to watch over the “herd.”

Wilson’s political views—a blend, highly incongruous at the time, of advocacy for both radical democracy and centralization of power—ingratiated him to neither side of this political divide.¹²² Wilson was difficult to classify—an intellectual maverick whose stances on a number of issues outraged Jeffersonians and Hamiltonians alike. His home state of Pennsylvania was notorious for its radical politics, and, following independence, organized itself under the most radically democratic state constitution in America, with a unicameral legislature whose members served only one-year terms and a twelve-member executive committee instead of a governor.¹²³ For Wilson, a proponent of separation of powers and a robust executive branch, a constitution like Pennsylvania’s was a travesty—his pre-Independence nightmare come true. Though he admired the animating democratic force behind its structure, in practice he thought the state’s constitution a dangerous thing, and became the leading anticonstitutionalist in Pennsylvania, earning even more hostility from many of the state’s radical quarters than he had already enjoyed.

The hostility was intensified through guilt by association. For Wilson, despite his radical stance on various questions of democracy, had many conservative friends, including his mentor John Dickinson, who opposed independence to the end, and Robert Morris, another relatively conservative Founding Father. When, following independence, some Pennsylvanian citizens accused of cooperating with the British were put on trial for treason—an offense punishable by death—Wilson arose to defend them.¹²⁴ Despite the efforts of America’s greatest lawyer, most of these men were put to death, to Wilson’s deep dismay.¹²⁵ His passionate defense of them, however, rendered him even more despised in his home state’s radical quarters. His advocacy

122. For more on the general political dichotomy, and Wilson’s uneasy spot in it, see McCloskey, *supra* note 14, at 4-5.

123. See WOOD, *supra* note 2.

124. See generally SEED, *supra* note 12, at 186-87; SMITH, *supra* note 12, at 118-23. In his role as a brilliant academic, an attorney who defended controversial clients, and a highly respected political thinker reviled by liberals and conservatives alike, one may liken Wilson to today’s Alan Dershowitz.

125. It was these trials, both his biographers believe, that led him to champion such a narrow definition of treason in the United States Constitution. The result was a provision with the Constitution’s only “only” in it; under the Constitution, treason consists “only” in “levying war . . . or in adhering to . . . enemies, giving them aid and comfort.” U.S. CONST. art. III, § 3. See AMAR, *supra* note 7, at 243. Wilson would later tell his law students that the United States had made a great leap against tyranny in narrowing the definition of treason. See SMITH, *supra* note 12, at 123.

also helped foment the Fort Wilson Riot, a stunning event in 1779 during which a band of homicidal radicals, drunkenly wielding clubs and guns, stormed Wilson's home. Wilson, along with twenty friends, barricaded the house and fought off the mob as best they could, until city troopers arrived and the aggressors dispersed. Fort Wilson marked the first time that Wilson's politics—or, more accurately, misperceptions of Wilson's politics—almost got him killed. It was not, unfortunately, the last.¹²⁶ Remarkably, even after two mobs tried to murder him, Wilson never lost faith in the people, and continued, throughout his life, to fight for democratic structures that would best serve their interests.¹²⁷

Also crucial to Wilson's obliteration was his failure to attain a position of prominence in the new federal government established by America's Constitution. "Wilson expected," a biographer has written, "that after the adoption of the federal Constitution he would be appointed to one of the major offices in the new government."¹²⁸ Given his eminence not only at the Constitutional Convention, but in America's entire community of lawyers, it was wholly natural for him to expect such a position, and, as noted above, he quickly set his sights on the one he coveted most: the Chief Justiceship of the Supreme Court. In certain quarters at least, his appointment to the post was thought to be a sure thing. One Pennsylvania newspaper went ahead and printed a story congratulating him on his appointment to the post, announcing its "singular pleasure" in the honor conferred upon "[t]his worthy citizen [who] has shared in every toil and danger of the revolution."¹²⁹ Had Wilson been crowned the first Chief Justice of the Supreme Court, he could well have occupied the spot Justice John Marshall, a Wilson disciple, now occupies in American memory—of the country's first great judge, who established judicial review and stationed the judiciary in the framework of the new nation. Wilson almost did this even without the Chief Justiceship, Hall has pointed out, by authoring an opinion that nearly missed being the first case to annul federal legislation on constitutional grounds—a case that would, in short, have been the first *Marbury v. Madison*.¹³⁰ But as things turned out, Wilson failed to write that historic opinion or to win the head position he so desired. He ended up languishing in relative obscurity on the Court, drafting only one opinion of central importance to American history, *Chisholm v. Georgia*,¹³¹ a colossal failure of a decision that was subsequently overturned by a

126. Shortly after Wilson convinced his fellow Pennsylvanians to ratify the Constitution, a similar gang of murderous antifederalists, this one brandishing clubs, located and rushed him. "When Wilson fought back they knocked him down and began to beat him as he lay. He would have been killed, it was said, had not an old soldier thrown himself on Wilson's body and taken the blows." BOWEN, *supra* note 53, at 277.

127. See, e.g., HALL, *supra* note 15, at 17.

128. SEED, *supra* note 12, at 141.

129. PHILA. FED. GAZETTE, Mar. 9, 1789, reprinted in Kaminski, *supra* note 52, at 531.

130. Hall was the first to discuss the *Hayburn* case. See HALL, *supra* note 15, at 27.

131. 2 U.S. (2 Dall.) 419 (1793).

constitutional amendment.¹³² This failed opinion fairly epitomizes Wilson's entire career on the Court.¹³³ Due primarily to reasons discussed below, the most important of which was his increasing entanglement in his disastrous finances, Wilson did not have an impressive career on the Court, authoring a set of opinions low in quantity and quality alike. Despite his peerless judicial potential, he did not end up being the kind of judicial performance that seals a judge a spot in history.

Less important than the factors above, but crucial nonetheless, was Wilson's demeanor. As his writings convey, and by the accounts of most who knew him, Wilson was brilliant: his mind was, as Benjamin Rush put it, "one blaze of light."¹³⁴ But as his writings and the testimonials convey with similar clarity, he was no charmer. He possessed a demeanor that rubbed many people the wrong way. Tall, stout, and bespectacled, and speaking with a Scottish accent he never lost,¹³⁵ Wilson came off to very many people as haughty, aloof, and elitist.¹³⁶ When Wilson's portrait is viewed alongside those of his contemporaries, even the modern eye comes away with this impression. One historian has gone so far as to suggest that Wilson's prim appearance alone accounts for much of his absence from American history.¹³⁷ Wilson's demeanor was especially repugnant to common folk, who saw him, one historian has written, "as aloof, reserved, even arrogant—the classic snob holding his skirts above the mud in which ordinary men labored."¹³⁸ The

132. In the case, Alexander Chisholm, Robert Farquar's executor, sued the state of Georgia in federal court for failing to reimburse Farquar for arms he had supplied the state during the Revolutionary War. Georgia, citing its status as a sovereign, refused to show up in court. The Supreme Court held that Article III, Section 2 of the Constitution had abrogated the states' sovereign immunity, and granted federal courts the power to hear disputes like this one, between private citizens and states. Wilson, in an enormous, pedantic opinion, embraced popular sovereignty as tightly as ever, emphasizing once again that it was *the people* who were sovereign and bluntly asserting that "[a]s to the purposes of the Union . . . Georgia is NOT a sovereign State." *Id.* at 457. Americans were not ready for such a radical subordination of the state governments, however, and the decision quickly resulted in passage of the Eleventh Amendment, which undid the decision. For a thorough discussion of the decision, and Wilson's role in it, see JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 73-75 (2007). Though *Chisholm* was without question a failure, it can be viewed as yet another instance of Wilson's thinking simply being apart from—and ahead of—its times. Not until the Civil War would American catch up to him in firmly repudiating the idea that the states were still sovereign.

133. Oddly enough, it is for this failed decision alone that Wilson is remembered in law schools today. Though Wilson, who set up a department of law at the University of Pennsylvania while sitting on the Supreme Court, was the very founder of the American legal academy, for many law students today, a brief excerpt from *Chisholm* provides their first and last encounter with him in law school.

134. BOWEN, *supra* note 53, at 179.

135. Smith provides a more complete physical description of Wilson: of a "tall, solid man, thick-muscled, inclining a little to stoutness, with a ruddy complexion, a neat white wig, and thick-lensed glasses. There was an unbending stiffness in his manner. With strangers he was generally ill-at-ease, and this shyness cloaked itself under an aloofness that was attributed by his enemies to arrogance." See SMITH, *supra* note 12, at 202.

136. One Otto, the perceptive French charge d'affaires, called Wilson "haughty" and "aristocratic," but added that he was "intrepid, energetic, eloquent, profound, and artful." See *id.* at 202.

137. See BOWEN, *supra* note 53. "Wilson has not been much described by historians. The narrow shoulders and dark clothes, the scholar's spectacles low on his nose, the plump chin and cheeks—these do not invite description in the grand manner." *Id.* at 179.

138. COLLIER, *supra* note 13, at 281-82.

irony of this antipathy is apparent: The Framers with more faith in the common man than any other was more *reviled* by the common man than any other. Even among his fellow lawyers and politicians, Wilson was not well liked outside his circle of close friends. A secretive man who made free-thinking proposals that, though they would make deep sense to future generations, often sounded quixotic or dangerous to those around him, Wilson was mistrusted. "Throughout his life," Seed has observed, "Wilson was, in his political actions, a frequent victim of mistrust which was usually unwarranted."¹³⁹ And even among those who knew there was nothing sinister about him, as the other key Founders certainly did, there was a distance—a key sense in which Wilson was not one of the boys. Washington, Madison, Jefferson, Adams, Hamilton—these men had their bickerings and occasional fallings out, but they were friends. Wilson, however, was not one of their friends; indeed, their letters say almost nothing about him.¹⁴⁰ Part of why figures like Washington are so well remembered is that, in addition to their accomplishments, they were deeply loved—not only by other prominent men, but by the People.¹⁴¹ Wilson, though much respected, was not much loved—by either class of individuals. This fact played no small role in his annihilation from American history.

Wilson's place in the history books was further damaged by a simple factor that had nothing to do with his importance to his country or his virtues as a person: his failure to maintain steady, substantive correspondence with friends and associates. Wilson was, throughout his life, a frenetically busy man. He was a person who, as a young man, was single-handedly responsible for an enormous percentage of the trials in Carlisle, Pennsylvania; who, as a member of Congress, served on every committee he possibly could; who moved from this industrious political career to a twin job as an academic and Supreme Court Justice; who set out, during this phase of his career, on a wildly ambitious and ultimately unsuccessful project to become America's Blackstone, and write a treatise on all of American law; who had a large family to attend to and a busy family life, which set him far apart from most of the other major Founders—only two of whom, intriguingly, had families with children like Wilson;¹⁴² and who, throughout this time, was deeply

139. SEED, *supra* note 12, at 29.

140. For more on Wilson's ostracism with regards to the other Founders, see Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 POLI. SCI. Q. 1 (1897).

141. See generally ELLIS, *supra* note 1. John Adams was somewhat akin to Wilson in that he rubbed many the wrong way, and espoused what was, by standards of the times, a curious mix of conservatism and radicalism. Unlike Wilson, however, he managed not only to become President, but also to grow old penning letters that sealed his enshrinement in the national imagination.

142. The two other family men were Adams and Hamilton. The other famous Founders—Washington, Jefferson, Madison, Franklin, and Paine—did not have to contend with unruly households of children. (There were some close calls: Dolly Madison's son from her prior marriage, John, who was two years old when James and Dolly Madison married; Franklin's illegitimate son William, who grew up to become a Loyalist and flee to England; Jefferson's children with Sally Hemmings—all of these children were parts of their (step)fathers' lives in one way or another. But neither Madison, Franklin, or Jefferson bore anything close to

immersed in land speculation schemes that sucked up considerable time and energy. A life of this sort did not leave much room for contemplative letter writing—the kind of letter writing that the Founders who led more solitary, leisurely lives were able to engage in. In fact, any kind of correspondence was a struggle for Wilson; his friends complained of the infrequency of his letters.¹⁴³ His shoddy correspondence likely played a key role in perpetuating his neglect from historians. The paucity of letters—“the lifeblood of biographers”¹⁴⁴—ensured that, for subsequent generations of academics, and for the public as well, he would remain a shadowy figure.

Another factor intimately entwined with the paucity of Wilson’s correspondence also likely played a role in ensuring his different treatment: the fact that, as one of Wilson’s few nineteenth century admirers put it, “the life of this wise, able, excellent man was comparatively short.”¹⁴⁵ With the exception of Alexander Hamilton, whom Burr’s bullet struck down in his late forties, the famous Founders we remember today lived to remarkably old ages—especially by the standards of their time, when the average lifespan was 67. Only Washington, who died at exactly that age, failed to beat the average. The rest did so comfortably: John Adams died at 90, James Madison at 85, Ben Franklin at 84, and Thomas Jefferson at 83. Wilson, by contrast, died a few weeks shy of his fifty-sixth birthday.¹⁴⁶ Part of the reason Wilson’s early death put him at a disadvantage in the memory context was that it left him less time to achieve great things. He did not have the luxury, enjoyed by some of the men from the era, of making his major mark relatively late in life.¹⁴⁷ Probably more important, however, is that whereas the others grew old penning letters to each other that self-consciously began the process of their enshrinement in American history,¹⁴⁸ Wilson was never given this chance.¹⁴⁹

the familial responsibilities a man like Wilson did.)

143. SEED, *supra* note 12, at 178-9.

144. *Id.*

145. GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 464-65 (1854) (“The life of this wise, able, and excellent man was comparatively short.”).

146. Wilson was born on September 14, 1742, and died August 21, 1798. Wilson was one of only eight signatories of the Constitution to die in his fifties. See Data on the Framers of the Constitution, The U.S. Constitution Online, <http://www.usconstitution.net/constframedata.html> (last visited Jan. 25, 2010) (documenting that 15-16 of the delegates died in their seventies; 20-21 in their sixties; eight in their fifties, and five in their forties).

147. Wilson’s death at fifty-six not only deprived Wilson of fame; it also, in the opinion of some scholars, deprived America of a man who, had he been able to serve on the Court into old age, would have been a brilliant, formative justice. “[I]t will always be a cause for regret,” one historian has put it, “that death at the age of fifty-six, when he had sat for nine years only, should have deprived the young Republic of those elucidations of the meaning of the Constitution which no one, not even Jay or Marshall, could have delivered with more authority.” See Randolph G. Adams & James Bryce, *James Wilson: An Appreciation* by James Bryce, 60 PA. MAG. OF HIST. & BIOGRAPHY 358-61 (Oct. 1936).

148. John Adams and Benjamin Rush, for instance, crafted a self-glorifying correspondence to each other that “shared,” Joseph Ellis has written, “anecdotes in a kind of ‘Adams and Rush in wonderland’ mode.” ELLIS, *supra* note 1, at 215.

149. Oddly enough, Wilson’s memory may well have been damaged by another tragically premature death: that of Robert G. McCloskey, a prominent professor at Harvard, in 1969, at approximately Wilson’s

As our first presidents, Washington, Adams, Jefferson, and Madison would have been major figures to us even without the letters they penned as they grew old. But they would without question be considerably hazier figures. Wilson, for all his brilliance, was more cut out for designing a nation than running one, and unlike the other major Founders,¹⁵⁰ he never had the opportunity to get his affairs in order before he passed away. Though the prematurity of his death may not have played a role in triggering his erasure from American consciousness, it has played an important role in perpetuating it.

Wilson was also forgotten because of a crucial but easily missed factor: the thick veil of secrecy shrouding the events of the Convention, both during and long after the summer of 1787. The delegates had always known they would meet behind closed doors; but at the start of the convention they further agreed that “nothing spoken in the House,” would “be printed, or otherwise published or communicated without leave.”¹⁵¹ Even after the Convention had disbanded, its official minutes, and Madison’s notes, were not to be released to the public. Though Washington would make the minutes public during his presidential administration,¹⁵² it would be a half century before Madison allowed his comprehensive notes from the Convention to be published. The notes emerged in 1840, four years after Madison’s death and a full fifty-three years after the document had been written. The result of the prolonged secrecy, rarely remembered today, is that the first generations of Americans had only very vague ideas about what had occurred in the Constitutional Convention. Another result of the policies, of course, was that Wilson’s enormous contributions to the writing of the Constitution, as William Ewald recently observed, “long remained a secret.”¹⁵³ By the time Madison’s notes were at long last published, however, Wilson had been dead and forgotten for a good forty-two years, and “the attention of the nation was focused on the looming conflict between North and South.”¹⁵⁴ For Madison and the many other delegates who had already cemented their reputations when they passed away, the fifty-year delay had no discernable influence on their place in American memory. For Wilson, however, who had not managed to get his affairs in order before dying, the delay created a lag in national recognition from which he never recovered.

age. McCloskey, who edited Wilson’s works before he died, was among the most eminent academics to focus at length on the neglected Founder, and he seemed poised to publish additional scholarship on Wilson when he abruptly passed away. For more on McCloskey, see notes 328-330, *infra*, and accompanying text.

150. The exception, of course, was Hamilton, who is similar to Wilson in that, despite being a vastly important Federalist, he was never a president—but also very dissimilar in that, despite his early death, he *has* been remembered. The difference in treatment is likely attributable in large part to the circumstances of their early deaths.

151. See RAKOVE, *supra* note 96, at 62-63.

152. GARRY WILLS, JAMES MADISON 42-43 (2002).

153. See, e.g., Ewald, *supra* note 6, at 915 (2008).

154. *Id.*

Ultimately, of course, it was not merely the age at which he died, but the disgraceful circumstances of his death, that doomed Wilson to obscurity.¹⁵⁵ And the driving force behind these disastrous circumstances was his land speculation habit. Many elements of Wilson's speculation habit suggest that he had what modern medicine would classify as a compulsive gambling disorder.¹⁵⁶ The line separating speculation from gambling can, as people have long recognized, be a fine one. And when, as in Wilson's case, the speculation is conducted in the face of what reasonable, informed people of the time recognized as great uncertainty, the line becomes fuzzy. When, on top of that, the speculation is pursued with Wilson's relentless, irrational zeal, the line becomes difficult to make out at all. "Problem gambling," as today's psychologists define it, is "characterised by many difficulties in limiting money and/or time spent on gambling which leads to adverse consequences for the gambler, others, or for the community."¹⁵⁷ Wilson's rapacious investing exhibited many of the symptoms of this disorder: he lost considerable time from work due to it; it made his home life unhappy; it severely damaged his reputation; it decreased his efficiency; it caused him remorse; he tried to dig his way out of debts incurred through it by engaging in more of it; he borrowed from friends to do more of it; he did all this to the point of bankruptcy.¹⁵⁸ His habit reduced America's greatest legal thinker, a Supreme Court Justice, to a fugitive from the law—surely the sole time in America's history that a man has doubled as both a justice of the nation's highest court and runaway. Clearly, this was a gravely serious problem—and, given its reckless intensity, a problem hard to ascribe to mere greed or financial ambition.¹⁵⁹ Whatever its cause, however, its consequences were clear: a harried, disgraceful death, followed by an immediate distancing from his Federalist friends and acquaintances, followed ultimately by an annihilation of his memory. After his death, Wilson was "a stench, misshapen, and he was hustled offstage as quickly as possible, and allowed to disappear from history."¹⁶⁰

155. See COLLIERS, *supra* note 13, at 286 ("Why has Wilson fallen through the sieve of history? The answer lies in the fact that he died in disgrace.").

156. Robert McCloskey was the first scholar to suggest as much. McCloskey, *supra* note 14, at 19 ("[L]and was his passion, and [Wilson] plunged in [sic] his land speculations with the rashness, optimism, and growing desperation of a compulsive gambler.").

157. GAMBLING RESEARCH AUSTRALIA, PROBLEM GAMBLING AND HARM: TOWARDS A NATIONAL DEFINITION (2005), available at [http://www.gamblingresearch.org.au/CA256902000FE154/Lookup/GRA_Reports_Files1/\\$file/NatDefis_ExecSum.pdf](http://www.gamblingresearch.org.au/CA256902000FE154/Lookup/GRA_Reports_Files1/$file/NatDefis_ExecSum.pdf).

158. For more on pathological gambling, see Brian K. Unwin et al., *Pathologic Gambling*, AM. FAMILY PHYSICIAN, Feb. 2000, available at <http://www.aafp.org/afp/20000201/741.html>.

159. Wilson was not the only brilliant Founder who appears to have had a serious psychological disorder. Some have suggested Madison had an anxiety disorder—which may well have accounted for much of his distinctive political science. See COLLIERS, *supra* note 13, at 72 ("Diffident, unassertive with women, prevented by imagined illnesses from hunting, whoring, and fighting, he was worried by power and he fought it everywhere."). Wilson's condition was obviously the far more serious of the two.

160. COLLIERS, *supra* note 13, at 288.

PART III. HOW HAS HE BEEN REMEMBERED IN THE PAST?

The circumstances of his death fail to account entirely for why no one has heard of Wilson. Also crucial has been his treatment by subsequent generations. This Part traces the variegated memories of Wilson that have prevailed as American history has unfolded. Rather than a simple professional historiography, it aims to tell the story of how not only scholarly but *public* memories of Wilson have (d)evolved over the course of American history. Vast stretches of this history, we will see, are a Wilsonian wasteland. At times, however, Wilson has returned to the forefront of American consciousness—only to recede back into obscurity again. Though this Part aims to be more informative than anything else, it also aims to demonstrate that when Wilson has been resuscitated, it has tended to be when the circumstances of his times demanded him—when America was immersed in reform aiming to bring itself closer to Wilson’s vision. As we will see, this was true of four eras in particular: the abolitionist era, federal consolidation under Teddy Roosevelt at the turn of the century, the New Deal, and the Civil Rights movement. Whether in or outside these time periods, however, the story of Wilson’s memory is fascinating—and much in need of telling.

A. 1798-1839: *Annihilation*

For all of the reasons discussed above, the memory of Justice Wilson died—initially, at least—with the man. A disgrace to his country and his Federalist colleagues, Wilson was promptly swept under the rug. He remained under the rug for over forty years. During this first phase of American history, discussion of the Founder was at a lower ebb than it would ever be in subsequent periods. This first period, in short, witnessed the annihilation of James Wilson, from which his memory has forever been trying to recover.

Following his demise in 1798, it was not until 1804, when his son Bird Wilson published a three-volume edition of his works,¹⁶¹ that Wilson briefly re-entered the public consciousness. In his Preface to his father’s *Works*, Bird Wilson sought to account for why his father’s lectures were left unfinished at the time of his death by blaming his father’s wildly ambitious attempt to prepare a digest of all Pennsylvania law.¹⁶² (He made no reference to a more plausible explanation for the failure: the land speculation that consumed so much of Wilson’s time in his final years.) Bird Wilson’s hope that the lectures “will not be thought unworthy, either in style or sentiment, of the reputation of their Author” suggests that James Wilson continued to enjoy a good

161. JAMES WILSON, *THE WORKS OF JAMES WILSON* (Bird Wilson ed., Philadelphia, Lorenzo Press 1804).

162. The specific goal was “to revise and digest the laws of the commonwealth [of Pennsylvania]; to ascertain and determine how far any British statutes extended to it; and to prepare bills, containing such alterations, additions, and improvements as the code of laws, and the principles and forms of the [state] constitution . . . might require.” *Id.* at iv. This Herculean task did occupy much of Wilson’s time in his final years. See SEED, *supra* note 12.

reputation—but Bird’s personal perspective was probably enhancing his father’s reputation. If scholarly attention is any guide, Wilson was not held in high regard in this time—or any discernable regard at all. When Wilson’s edition of his father’s works went to press, it was the last time any book by or on Wilson would be published for over ninety years. On the scholarly front, as on many others, the nineteenth century was a Wilsonian wasteland.

Other early sources suggest that some of the unfavorable myths tarnishing Wilson’s reputation in his lifetime had indeed managed to stick. The most vivid of these is John Trumbull’s *Declaration of Independence*, an 1819 painting that now sits in the United States Capitol Rotunda, and is also displayed on the reverse side of the two-dollar bill.¹⁶³ The painting depicts Jefferson, Adams, Franklin, and others presenting Jefferson’s *Declaration* to John Hancock, the president of Congress. Though Wilson is consigned to the background, his placement within it makes him a pivotal figure in the painting nonetheless. Positioned dead-center, at the back of the room, he sits in a location that appears to symbolize the decisive, tie-breaker’s role he played in pushing the Pennsylvania delegation—and thus the colonies—to a break with England.¹⁶⁴ The depiction of Wilson himself, however, quickly puts to rest any suspicion that Trumbull’s depiction will be either accurate or favorable. First, there is his apparent age. Trumbull, who did no small amount of homework for this painting, has been careful to present accurate depictions of the other key Founders, whose portrayals in the painting accurately reflect the men’s actual ages in 1776. But although Wilson was only thirty-three in the summer of 1776, the Wilson of the painting appears to be pushing sixty. This suggests that only twenty-three years after he passed away, Wilson had already become a sufficiently shadowy figure that Trumbull, in a painting aspiring to historical accuracy, nearly doubled his age. Hoariness aside, Wilson’s facial expression precludes any possibility that the light in which he is here portrayed is intended to be favorable. His gaze focused on Jefferson and Adams as they present the document to Hancock, Wilson scowls in apparent disgust. Indeed, Wilson’s facial consternation puts him in a class almost to himself; he looks even less happy with the proceedings than many pictured men who refused to sign the Declaration in 1776—including his erstwhile mentor, John Dickinson, whose face, like that of most men in the room, betrays no strong emotion. The painting presents strong evidence that over forty years after Pennsylvania radicals branded Wilson as a loyalist opponent of Independence, his reputation as such had endured.¹⁶⁵

In the two decades after Trumbull painted his *Declaration*, which included

163. Trumbull, John. *Declaration of Independence*. United States Capitol Rotunda, Washington D.C., available at http://upload.wikimedia.org/wikipedia/commons/1/15/Declaration_independence.jpg.

164. See *supra* notes 32-34 and accompanying text.

165. If the 1969 hit musical *1776* is any guide, the rumor would stick much longer than this. See notes 331-35 *infra* and accompanying text.

the semicentennials of the Declaration and the Constitution, Wilson—whose contributions to the creation of the latter would, until the publication of Madison's *Notes* in 1840, remain a secret—remained a faceless member of the band of men who had crafted the new nation. At the semicentennial, newspapers published sketches of most, and sometimes all, of the signatories of the Declaration. The sketches, whose purpose was not so much to describe the American Founders as to honor them, were uniformly complimentary. So the facts that Wilson was included in these sketches, and that the things said about him in them were generally favorable, are neither surprising nor particularly illuminating of how (un)favorably he was viewed in the early nineteenth century. In the months surrounding the semicentennial, the *Christian Secretary* published a series of hagiographic character sketches of the signatories to the Declaration of Independence. Wilson's read as follows:

James Wilson of Pennsylvania: a lawyer of rare capacity, and of surpassing faculties as a speaker and writer: an efficient political essayist; the principal advocate of the Constitution of 1787, in the Pennsylvania convention; professor of law; one of the judges of the Supreme Court of the United States. His biography [is] replete with valuable information, and political anecdote.¹⁶⁶

Favorable as all this sounds, Wilson's account was underwhelming when placed alongside those of his peers. Madison's reputation as a constitution-maker consistently overshadowed Wilson's in public reminiscences of the Founding in the 1830s.¹⁶⁷ And even Wilson's friend Robert Morris—another resident of debtors' prison and hardly a treasured Founding Father—was described as “the unrivalled financier of the Revolution [and] pecuniary soul of the cause.”¹⁶⁸ The semicentennial commemorations to Wilson, extremely

166. *Memoranda of some of the signers of the Declaration of Independence*, CHRISTIAN SECRETARY, Aug. 11, 1827.

167. The remarks of one Mr. Dallas, from 1833, are representative on this point:

Mr. Dallas (Mr. D.): [I]n every one of the sovereign conventions, it was avowed to be, and called, a national government, of a compound nature, for specified purposes, whose constitution and laws were to be paramount and supreme. This was the definition and representation of all who advocated its establishment; and this was the sense in which it was every where adopted. I turn, [said Mr. D.], in proof of what I say, to three leading examples—the discussions in the conventions of Pennsylvania, South Carolina, and Virginia; and I select the views of those statesmen who are known to have led to the conclusion attained in each. James Wilson and Thomas McKean, in Pennsylvania, Pinckney and Rutledge, in South Carolina, and Madison in Virginia; and I cannot even mention the name of this last eminent man, [said Mr. D.], without accompanying it with the expressions of an abiding belief that, for purity of heart, lucidness of intellect, integrity of purpose, wise and patriotic forbearance, and unflinching firmness of truth, our country has not furnished his superior in walks of public or private life. He will go down to our most distant posterity as the best model we have yet had of what an American statesman should be.

See *Debate in the Senate*, Jan. 22, Part 12, NILES, Feb. 25, 1833.

168. *Id.*

few in number, established him in a role he would occupy through most of American History, and indeed currently occupies today: that of a background founder with impressive achievements but no fame. And so he remained until the antislavery movement gained momentum.

B. 1839-1862: The Abolitionist Era

From the 1830s through to the Civil War, a small group of idealistic reformers dug Wilson up, polished him off, and seized upon him, among others, as their ally in the reform. The group was the perhaps most consequential coalition of reformers in American History: the abolitionists. They cited the words of Wilson, along with a handful of other antislavery founders, to lend originalist weight to their arguments against slavery. This constituted the first of many times Wilson's name would be invoked to move the country forward on a major social and moral issue.

The Constitution occupied a conflicted spot in abolitionist thinking. To sway public opinion, the abolitionists of the early nineteenth century leveled a bundle of arguments against slavery, many of which centered on the country's founding charter. The constitutional arguments fell into two main categories. The abolitionists' first main constitutional position, the anticonstitutionalist view, argued on behalf of "disunion." This idea held the U.S. Constitution to be an inherently slavocratic document—a "covenant with Death," as abolitionist William Lloyd Garrison famously called it. The Constitution had enshrined the legality of the slave trade, enabled chattel slavery to thrive, and also failed to provide a modicum of protection to escaped slaves—or indeed abolitionists themselves—once they had become the focus of persecution.¹⁶⁹ The best route to the abolition of slavery, by this view, was through the repudiation of the Constitution, and abolition of the Union formed under it. The second abolitionist constitutional argument took a different tack entirely—an originalist approach, which sought to use some Founders' antislavery statements as evidence that slavery conflicted with American ideals—and with the Constitution's spirit, if not its text.

It was in the context of this latter category that Wilson, one of the key antislavery Framers,¹⁷⁰ became an important figure. In an 1839 letter published in the *Anti-Slavery Examiner*, abolitionist Gerrit Smith argued that,

169. See GERALD SORIN, *ABOLITIONISM: A NEW PERSPECTIVE* (1972). As Sorin explains, Disunion was based on the idea that the U.S. Constitution was a proslavery document. The Constitution allowed slavery in the states; it also contained a fugitive-slave clause and a three-fifths clause, indirectly recognizing the right to hold slaves. Several American leaders, including John Quincy Adams, had maintained as early as 1820 that the Constitution was proslavery, and the followers of John C. Calhoun had for a long time articulated this interpretation. Garrisonians came to their proslavery interpretation only in the 1840s, after they realized that the slave interests had no indication of allowing constitutional guarantees of liberty to be enforced—for slaves, for free blacks, or for abolitionists. As Universalist clergyman Adin Ballou said, it was not until abolitionists "themselves were outlawed, mobbed and murdered, in shameless violation of every guarantee to liberty contained in the federal and state constitutions, that they were gradually driven to denounce the Constitution and Union as hopelessly sold to proslavery." *Id.* at 74.

170. For a more detailed exploration of Wilson's stance on slavery, see Part I, *supra*.

but for the many pro-slavery state and federal laws enacted in the nineteenth century “in flagrant violation of the letter and spirit and obvious policy of the Constitution,” slavery would have disappeared.¹⁷¹ He went on:

Such was the view of the Federal Constitution taken by James Wilson, one of its framers, that, without, as I presume, claiming for Congress any direct power over slavery in the slave States, he declared that it possessed “power to exterminate slavery from within our borders.” It was probably under a like view, that Benjamin Franklin, another of its framers, and Benjamin Rush, a signer of the Declaration of Independence, and other men of glorious and blessed memory, petitioned the first Congress under the Constitution to “countenance the restoration to liberty of those unhappy men,” (the slaves of our country).¹⁷²

Wilson was here placed in the esteemed company of outspoken abolitionist Framers like Benjamin Franklin and Benjamin Rush. This was hardly the last time that Wilson’s prestige as a Framer would be brought to bear on slavery. The abolitionist William Goodell, in a pamphlet penned in the 1840s, pointed to the Declaration of Independence, the antislavery pledge of the Continental Congress of 1774, the antislavery testimony of Jefferson in his *Notes on Virginia*, and the antislavery writings—and efforts—of Benjamin Rush, John Jay, Alexander Hamilton, and Benjamin Franklin. “We might mention, too,” Goodell added, “the statement of Judge Wilson, one of the members of the Convention that framed the Constitution, which he made in the Pennsylvania Convention for its ratification, the same year that the Federal Constitution had ‘laid the foundation for banishing slavery from this country.’”¹⁷³

In 1845, debate over slavery’s permissibility on the Western frontier roiled the nation. In an “Address to the People of the United States,” the Southern and Western Liberty Convention of Cincinnati stated its conviction that slavery is “inconsistent with the fundamental principles of Republicanism, of Religion and of Humanity.”¹⁷⁴ In proving their point, these abolitionists invoked “the recorded opinions of the Patriots and Sages of the Revolutionary Era,” “almost all [of whom] looked forward to its final removal.”¹⁷⁵ After noting the opposition of Jefferson, Washington, and others, as well as Luther Martin’s staunch opposition to slavery, the Convention noted that Wilson

171. *Letter from Gerrit Smith to Henry Clay*, in THE ANTI-SLAVERY EXAMINER, Feb. 1, 1839, at 70.

172. *Id.*

173. WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY 104-05 (Jackson & Chaplin, 1844), reprinted in THE INFLUENCE OF THE SLAVE POWER WITH OTHER ANTISLAVERY PAMPHLETS (1970). For another example of Goodell’s originalist argumentation—including the invocation of antislavery statements made by Jefferson, William Pinckney, and John Jay, but not Wilson—see *id.* at 11.

174. Southern and Western Liberty Convention of Cincinnati, *Address to the People of the United States*, June 11, 1845, reprinted in CINCINNATI WEEKLY HERALD AND PHILANTHROPIST, June 25, 1845.

175. *Id.*

signed the Constitution, taking a very different view of its provisions bearing upon slavery from that of Mr. Martin [an abolitionist who refused to sign the Constitution partly on the grounds that it was a proslavery document], but agreeing with him entirely as to slavery itself. In the Ratification of Pennsylvania, speaking of the clause relating to the power of Congress over the slave-trade after twenty years, he said: "I consider this clause as laying the foundation for banishing slavery out of this country."¹⁷⁶

In the coming years, as not only activists but politicians took up the mantle against slavery, political figures also employed Wilson in leveling their arguments against slavery.¹⁷⁷ The collective abolitionist invocations of Wilson constituted the first of many times that Wilson would be dug up and beheld on behalf of social reform. Eighteen years after the Cincinnati convention, when abolitionists got their wish, the nation would take a step closer to its most foresighted Framers.

Intriguingly, some of what little scholarly attention Wilson received in the run-up to the Civil War came from the lawyer-historian George T. Curtis, a Harvard-trained attorney and ardent abolitionist who had served as co-counsel on *Dred Scott v. Sandford*,¹⁷⁸ the landmark slavery case, in which Justice Benjamin Curtis—George's brother—was one of the two vigorous dissenters. In a constitutional history first published in 1854, George Curtis not only discussed Wilson—a rarity in itself for the nineteenth century—but recognized him as the foremost proponent of what he considered the noble idea of "proportionate representation"¹⁷⁹—what we would now call proportional representation, or one person, one vote—and commended him as a "wise, able, and excellent man."¹⁸⁰ Written, as they were, by an abolitionist's pen, these words were likely genuine. So as not to besmirch the character of the Founder his book had praised, Curtis neatly whitewashed the story of Wilson's death: "In 1789, he was appointed by Washington a Judge of the Supreme Court. While on a circuit in North Carolina, in the year 1798, he died at Edenton, at about the age of fifty-six."¹⁸¹ Part of this white-glove treatment, no doubt, was simply a reflection of the founder worship so prevalent among historians in the nineteenth century. Curtis's treatment of

176. *Id.* The paper went on to quote from Wilson's speech at length.

177. In an antislavery speech, the aptly named Congressman James Wilson cited his forerunner as one of many Founders who, rather than being "perpetualists," were open to social progress such as abolition. *The Fathers of the Constitution Not Perpetualists*, CHRISTIAN REGISTER, Mar. 24, 1849, at 1.

178. 60 U.S. (How. 19) 393 (1857).

179. 1 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 464-65 (New York, Harper & Brothers 1854) ("This great idea of a representative government was in fact the aim of all Mr. Wilson's exertions and when the Constitution was formed he enforced this idea in the Convention of Pennsylvania with singular power.").

180. *Id.* at 465.

181. *Id.*

Wilson was also, however, part of a tradition of Wilson appreciation begun by abolitionists in the Antebellum Era. In this time period it was not historians, but abolitionists like Curtis and Goodall, mining deep into the American Founding for antislavery allies, who consistently brought Wilson back to life.

Outside of the abolitionist movement, however, Wilson remained a minor figure in the run-up to the Civil War. The constitutional artwork from the era, along of course with the scholarship (from which Wilson is almost entirely absent), reflects this reality. In the next major painting to depict the Founding Fathers after Trumbull's *Declaration of Independence*,¹⁸² Junius Brutus Stearns's *Washington as Statesman at the Constitutional Convention* (1856),¹⁸³ Wilson has been transformed from an odious character in the Continental Congress to a very minor character at the periphery of the Constitutional Convention. Washington stands on a dais, literally above all others present, and emits a quasi-celestial light; he is a luminous figure with everyone's eyes upon him. Hamilton, Rutledge, and Clymer stand facing him at the painting's center, with Franklin and Madison seated in a front row of chairs behind them. Standing behind them, but still in the painting's foreground, are two Pennsylvanians—Gouverneur Morris and John Dickinson.¹⁸⁴ Standing well behind these two, in the far corner of the room, in the back row, and entirely by himself, is Wilson. With the exception of Washington, who faces everyone, all of the famous founders—Madison, Franklin, Hamilton—have their backs to Wilson. Despite his fundamental role at the Convention, Wilson has been consigned to the outskirts of the conclave. The painting nicely demonstrates what little impact the release of Madison's notes in 1840 made on the public memory of Wilson. Seventy years after the famous summer in Philadelphia, and sixteen years after America gained access to Madison's notes from it, Wilson continues to be seen as a minor figure in the conclave which, in large part, he ran.¹⁸⁵ The painting thus reflects the reality that, outside the abolitionist sphere, Wilson had been all but expunged from America's history books and its consciousness as the Civil War approached.

C. 1861-1865: Civil War

Wilson's relegation to a distant corner of Stearns's painting nicely epitomizes the position he would hold in American memory throughout the

182. See note 163 and accompanying text.

183. My thanks go to Dr. Suzanne Freeman of the Virginia Museum of Fine Arts, where Stearns's painting resides, for sending me information on the piece.

184. Curators have never definitively identified the obscured figure next to Morris, but they have—quite reasonably—deduced that it is likely Dickinson.

185. Other parts of the painting's hierarchy are similarly curious. The painting's second most central figure is Alexander Hamilton, who stands at the center of the painting's activity despite his fairly minor role at the Convention. Conversely—and, indeed, perversely—Madison is sitting and observing the activity rather than actively participating. No pictorial representation in the painting, however, is more at odds with participatory reality than Wilson's.

Civil War. In this period, there are some hints of a continuation of the Wilson revival started above. Picking up where their forbearers left off, the abolitionists of the era—now considerably larger in numbers—continued to invoke Wilson. In *An Historical Research Respecting the Opinions of the Founders of the Republic of Negroes as Slaves, as Citizens, and as Soldiers*, Massachusetts abolitionist George Livermore, before quoting Wilson's antislavery speech from the Pennsylvania Ratification Convention, took a deeply reverent view of the Justice:

Pennsylvania was the second State to adopt the Constitution. The remarks of James Wilson, in the Ratification Convention, must not be omitted. Mr. Wilson was one of the signers of the Declaration of Independence, and was for several years a member of Congress. He was not only an eloquent orator and ready debater, but may be regarded as one of the first jurists in the country. Washington appointed him a Judge of the Supreme Court of the United States the year after the adoption of the Constitution; and he held the office until his death, which occurred in 1798. The opinions of such a man are entitled to great consideration.¹⁸⁶

There was a natural affinity here: the abolitionists—by nature independent-minded people—dredged up the independent-minded Wilson for their cause, and made him a part of their antislavery pantheon. That *they* managed to revive him, however, does not mean that other Americans did the same. By and large, other Americans of the Civil War era did not.

This was true even of the political and intellectual heavyweights advocating the Union cause during Civil War and Reconstruction. The major political issues swirling around the conflict—the triumph of federal power over state, of national citizenship over state citizenship, of freedom over slavery—were each distinctly Wilsonian. Indeed, the principles vindicated by the war arguably belonged more to Wilson than they did to any other major Founder. And yet, even as the principles he enunciated at the Founding were being nationally affirmed, near no one appears to have been aware of Wilson or his ideas. After his brief revival in the pages of American newspapers during the antebellum abolitionist era, Wilson, with a few exceptions, receded from their pages toward the war's end.¹⁸⁷ Though the odd legal publication would quote him for his views on a topic like federal-state sovereignty,¹⁸⁸ even in these

186. George Livermore, *An Historical Research Respecting the Opinions of the Founders of the Republic of Negroes as Slaves, as Citizens, and as Soldiers*, 6 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 154-55 (1862-63).

187. See, e.g., *Some Points Which May Come Up on the Trial of Mr. Davis*, OLD GUARD, Mar. 1866, at 135 (discussing many Founders but mentioning Wilson only once, briefly and in passing).

188. See, e.g., G.S.H., *On American Secession and State Rights*, MONTHLY LAW REPORTER, May 1864, at 371 (citing Wilson's major achievements and his view that the states, "[w]ithin their proper orbits . . . must still be suffered to act, for subordinate purposes, for which their existence is made essential by the great extent of our country.").

publications he was all but absent. Nor was he a presence in the books printed immediately before and after the war. Illustrious historian George Bancroft's 1858 history of the American Revolution barely mentioned Wilson—either the significance of his 1774 pamphlet or his role in pushing the Declaration through.¹⁸⁹ Many other histories from the era, even extensive histories of the United States, failed to include any discussion of Wilson at all.¹⁹⁰

American ignorance of Wilson was not confined to the major history books of the time, however. It extended to the very top of the American political hierarchy as well. The most significant constitutional players in the Civil War and its aftermath—the Radical Republicans who set out to reconstruct the Union after the shattering experience of the Civil War—were neither students of, nor apparently aware of, Wilson. Even Lincoln, an immensely learned man and the most significant constitutional lawyer of the Civil War, was not directly influenced by Wilson in any meaningful or even discernable way. He never cited Wilson in his speeches. When he sought to lend originalist weight to his political arguments, he quoted from Madison and Jefferson instead—men whose stances on federal power and slavery hardly meshed with Lincoln's views as well as Wilson's did.¹⁹¹ Even when arguing against the state-compact theory embraced by the secessionists, and making a wide range of deeply Wilsonian points against it,¹⁹² Lincoln appears never to have mentioned the Founding Father whose vision of America—both what it was and what it should be—so closely aligned with his own. The same goes for other crucial Framers of the new, radically different Reconstruction Constitution.¹⁹³ It is as remarkable as it is true: During the agonizing conflict that vindicated Wilson's nationalist, antislavery stance—a stance no other key Framers took to the extent he did—Wilson remained as invisible to the nation as ever.

189. Bancroft's book mentioned him only once—in passing. See 4 GEORGE BANCROFT, *THE AMERICAN REVOLUTION* 333 (Boston, Little, Brown & Co. 1858).

190. See, e.g., EMMA WILLARD, *HISTORY OF THE UNITED STATES* (New York, A.S. Barnes & Co. 1852).

191. See, e.g., Abraham Lincoln, Speech at Carlinville, Illinois (Aug. 31, 1858), in *LINCOLN ON RACE AND SLAVERY* 144 (Henry Louis Gates ed., 2009) ("There is no allusion to slavery in the constitution—and Madison says it was omitted that future generations might not know such a thing ever existed—and that the constitution might yet be a 'national charter of freedom.'"); Abraham Lincoln, Speech at Columbus, Ohio (Sept. 16, 1859), in *id.* at 182 ("[Judge Douglas] ought to remember that there was once in this country a man by the name of Thomas Jefferson In contemplation of this thing [slavery], we all know he was led to exclaim, 'I tremble for my country when I remember that God is just!'").

192. These included arguments that state governments were in no position to claim sovereignty, and that the now-united American people's federal government was far better positioned to do so. See 2 MICHAEL BURLINGAME, *ABRAHAM LINCOLN: A LIFE* 51 (2008) ("Lincoln's constitutional arguments . . . were sound. He was part of a nationalist tradition expounded by Madison, . . . Wilson, and others.").

193. Tom Donnelly recently argued that these men, much like Wilson, deserve the title "Forgotten Founders." See Thomas Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 *YALE L.J.* 948-1002 (2009). Tom provided helpful guidance on this paper's discussions of textbooks.

D. 1866-1896: Beginnings of a Renaissance

Like the Civil War, Reconstruction appeared to demand Wilson's resuscitation. Wilson was one of the loudest and ablest trumpeters of the notion that a powerful federal government and the citizens' liberty were not at odds with one another, but in fact went hand in hand. This was a controversial idea in the 1780s, when common political thinking tied liberty to localism.¹⁹⁴ Reconstruction, however, reflected America's recognition that there was such a thing as federal liberty—that localism could be as much a threat to liberty as a guarantor of it, and that there was a place for the federal government in protecting citizens—in this specific instance, black citizens of the south—where local governments either could not or would not.¹⁹⁵ After the early nineteenth century's expansion of the franchise to include virtually all white men, and the Emancipation Proclamation, the federal liberty epiphany reflected in Reconstruction was the next major vindication of Wilson's political beliefs.

The truth, however, is that—just as in the Civil War—Wilson played an utterly marginal role in the political discourse of Reconstruction. Far from playing the useful historical role he could have—as a source of authority for Republicans in their quest to forge a more federal, freer Union—Wilson's ideas were instead cited, with almost stunning perversity, to support the Confederate cause. In the years immediately following the Civil War, some Confederate sympathizers took up the ambitious task of demonstrating that Wilson was a states-righter. One easy way to do this was by quoting him out of context. On April 10, 1869, for instance, almost four years to the day after Lee's surrender, one B.J. Sage took issue with the prominent historian George T. Curtis, who in the first volume of his *History of the Constitution* had presented what Sage acknowledged as "15 large pages" of materials on Wilson demonstrating the Founder's understanding that sovereignty was located in the people. To refute the evidence, Sage seized upon a tiny quotation from Wilson, for which he provided no context, stating that "[t]he business of the Federal Convention" had been to devise a system for "thirteen independent sovereignties." To Sage the statement was proof that, Curtis's evidence notwithstanding, Wilson had in fact understood sovereignty to reside in the *states*.¹⁹⁶ What Sage ignored, of course, was the obvious explanation for his quotation: that Wilson had been describing the task before the Convention *when it first met*. Neither Wilson nor anyone else disputed the thirteen states were indeed sovereign entities when the Convention started. The relevant issue, however, was where Wilson understood sovereignty to reside *after* the

194. See AKHIL AMAR, *THE BILL OF RIGHTS* (1998).

195. "[A]ntebellum, Civil War, and early Reconstruction experiences," Amar has written, "taught Americans that various states could be just as tyrannical as many Americans at the Founding had feared the federal government might be." *Id.* at 380.

196. See B.J. Sage, Letter to the Editor, *Curtis on Webster and the Constitution*, *ROUND TABLE: A SATURDAY REV. OF POL., FIN., & LITERATURE*, Aug. 22, 1868, at 119.

Convention. And on this Wilson's stance was—as Curtis recognized—clear as day.

Similarly, the following year, as former Confederate President Jefferson Davis faced charges for treason, one of his counsel published a piece that sought to determine from the Founders' own writings where they believed sovereignty to reside. Davis's counsel provided quotations from Hamilton, Jay, Madison, Washington, and Wilson that repeatedly established that these men believed sovereignty to reside in the *people*. "The absolute sovereignty never goes from the people,"¹⁹⁷ Wilson's quotation read. After establishing that the Framers believed in popular sovereignty, he proceeded to conflate the Framers' conception of popular sovereignty with the popular sovereignty championed by the Confederates, which held that the state governments were the only vehicles for this sovereignty. (The states were, in his words, "the sole sources of power."¹⁹⁸) This curious—indeed, courageous—argument, transmuting popular sovereignty into state sovereignty, conveniently ignored the fact that for the Founders, popular and state sovereignty were mutually exclusive entities. Indeed, the popular sovereignty championed most ably by Wilson, and embraced by the Federalists who pushed through the Constitution, provided the theoretical justification—and, just as crucially, the political palatability—for transferring sovereignty *out of the states* and *into the people* of the entire United States. Like Sage's argument before it, this attempt to employ Wilson's ideas in support of the Confederacy's interpretation of the Constitution did a disservice to its proponents and—more importantly—to Wilson.

Overall, the Wilson coverage in the historical literature of this period is extremely limited. True to form, favorable mentions of Wilson were particularly few and far between. Still, an important landmark in Wilson scholarship came in 1870, when the author of a book review of selected recent works of political philosophy identified Wilson as Franklin's "celebrated colleague," and credited Wilson—for perhaps the first time in American history—as being well ahead of his times. Wilson predicted, the *Review* wrote, "that the sovereignty of the people would prove a panacea in politics; a cure for all the disorders of society"—a sentiment "not predominant in the Convention of 1787; but . . . destined soon, not only to gain the entire ascendancy in the country at large, but also to overwhelm with absolute and despotic sway all opposing sentiments and opinions."¹⁹⁹ Ultimately, however, the *Review* judged Wilson to be a starry-eyed populist whose views, like Franklin's, were in the end "extravagant."²⁰⁰ By the end of the 1870s, Southerners were comprehensively rolling back the Radical Republicans'

197. *Davis and Lee; Or, The Republic of Republics*, ROUND TABLE: A SATURDAY REV. OF POL., FIN., & LITERATURE, Apr. 10, 1869, at 229.

198. *Id.* ("To keep his oath, then, [Grant] must regard the states as his sovereigns.")

199. See 8 S. REV. 15 (July 1870).

200. *Id.*

efforts to protect blacks' rights in the South—a period in American History known to Southerners at the time, and, unfortunately, to everyone since, as “the Redemption.” As Reconstruction—and the Wilsonian principles it embodied—ended overwhelmingly in failure, Wilson was appropriately absent from American political discussion. If his spirit was not in the times, his thinking was nonetheless relevant to them: As the infamous *Slaughterhouse Cases*²⁰¹ amply demonstrated, America was coming to appreciate the distinctness of state and federal citizenship—a topic on which Wilson was the great Founding authority. But even in this opinion, the Court did not cite Wilson.

The 1880s, however, witnessed an uptick in positive attention from prominent historians. As would be increasingly true in subsequent generations, academics of the very highest caliber began to recognize Wilson as a crucially important figure, even if no one else did. In his 1882 history on the formation of the American Constitution, for instance, George Bancroft paid Wilson extensive attention, praising him as the “most learned civilian” at the Convention.²⁰² Though, in Bancroft’s telling, Madison won the most attention by far, Wilson received more in-depth coverage than any other member of the Convention—Washington included.²⁰³ Though Bancroft’s book made no explicit call for a reappraisal of Wilson, it would be the first of many works by authoritative scholars establishing that Wilson’s role at the Convention was second only to Madison’s.²⁰⁴ Later that decade, James Bryce, an influential Scottish historian, described Wilson in his *The American Commonwealth* (1888) as “one of the deepest thinkers and most exact reasoners among the members of the Convention of 1787,” and credited Wilson for perceiving early on how unprecedented the American union was in world history.²⁰⁵ The extent of scholarly attention Wilson received from historians in the 1880s should not, however, be overstated. None of the books that mentioned Wilson at this time called for his revival, and Bryce’s discussion of Wilson occurred in footnotes alone. Still, Bancroft, Bryce and Curtis were oft-read—and oft-quoted—historians, and their favorable mentions would be cited many times in subsequent Wilson scholarship.²⁰⁶ As if to cement this reawakening, the United States Supreme Court cited Wilson

201. 83 U.S. 36 (1873).

202. Bancroft’s description of Wilson placed him alongside Rufus King, “the most eloquent orator,” and Madison, “the most careful statesman.” 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 58 (New York, D. Appleton & Co. 1882).

203. Specifically, Madison is mentioned 141 times, Wilson 77, Mason 74, Washington 69, Sherman 65, Ellsworth 51, Hamilton 44, and Franklin 24. *See id.*

204. *See* note 54, *supra*.

205. “Wilson had perceived that the two famous confederations of modern Europe did not supply a model for America.” 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 20-21 (New York, Macmillan 1888). *See also id.* at 28 (“The novelty of written constitutions is dwelt upon with great force by Wilson.”); *id.* at 351.

206. *See, e.g.,* BOWEN, *supra* note 53, at 56 (“A century later, Lord Bryce would describe Wilson as one of the Convention’s ‘deepest thinkers and most exact reasoners.’”).

for the first time since 1800, in a case on the appropriate methods of choosing electors.²⁰⁷ Without question, Wilson had a ways to go if ever he was to emerge from obscurity.²⁰⁸ Still, nearly one hundred years on, Wilson was at very long last starting to be seen as a major player in the history of the Convention.

E. 1896 – 1907: Wilson Revival

Wilson's true renaissance did not get started until the close of the nineteenth century. Pioneered by academics, it lifted off in 1896, when James De Witt Andrews, a law professor who taught at Northwestern and the University of Chicago, republished Wilson's *Works* for the first time since Bird Wilson's 1804 edition.²⁰⁹ It was the first time Wilson had been paid close scholarly attention in almost a century. In Andrews's Preface, he noted it was incredible that, one hundred years on, Wilson still languished in oblivion. Andrews also noted, as Wilson scholars have done ever since, that Wilson was well ahead of his time on a wide range of political issues.²¹⁰ Andrews's materials display the hagiographic tendencies for which history in the nineteenth century is well known: the brief "Memoir" at the start of Andrews's volume, which recounts Wilson's biography, completely skips over the disgraceful details of the Founder's death.²¹¹

If an aim of Andrews's book was to refocus attention on Wilson, it was clearly a success. The republished *Works* won Wilson immediate attention in the popular press. The *Nation*, for instance, in its review of the book, recognized Wilson as a Founder whose name "has almost lapsed into oblivion," "[n]otwithstanding the important part played and the high position held by [Wilson] in public affairs."²¹² Though the magazine criticized Andrews for writing anachronistic annotations—which, it held, "are calculated to produce the erroneous impression that Wilson's views of jurisprudence are those of modern scholars"—it went on to praise Wilson as a man "in advance of" his times.²¹³ Finally, the *Nation's* editors shared their favorable impression of Wilson, while owning up to the fact that they, like

207. See *McPherson v. Blacker*, 146 U.S. 1 (1892) (noting that, in the debate over how Americans should select their president, "James Wilson and Gouverneur Morris were strongly in favor of popular vote"). The prior Supreme Court case touching on Wilson, disgracefully enough, was not one he authored, but one that concerned his disastrous posthumous land holdings. See *Pennsylvania v. Cox*, 4 U.S. 170 (1800) (over a land dispute involving the Holland Company and James Wilson).

208. For instance, an extensive 1890 magazine article on "the leaders of the old bar of Philadelphia"—a piece one would expect to focus in large part on a Philadelphia lawyer as eminent as Wilson—contained no description of him. See Horace Binney, *The Leaders of the Old Bar of Philadelphia*, 14 PENN. MAG. HIST. & BIOGRAPHY 1-27 (Apr. 1890).

209. See JAMES WILSON, *THE WORKS OF JAMES WILSON, ASSOCIATE JUSTICE OF THE SUPREME COURT* (James De Witt Andrews ed., Chicago, Callaghan & Co. 1896).

210. *Id.*

211. *Id.*

212. See *THE NATION*, June 25, 1896, at 493-498.

213. They outlined many of the areas in which Wilsonian ideas had come to prevail—including judicial review, evidence law, the Dartmouth College cases, and the fusion of law and equity. *Id.* The list, already incomplete, was destined to grow longer with time.

everyone else, knew very little about him. "A kindly and humane wisdom," they observed, "marks every line that he wrote."²¹⁴

More marked, however, and more important for Wilson's future, was the response in the academic community. Early in 1897, Professor Andrew McLaughlin, a rising star in the academy,²¹⁵ wrote an article in the *Political Science Quarterly* that began, "The work of James Wilson as a framer of the constitution seems not to have received its just recognition."²¹⁶ Though he had received general praise from "careful historians" of the Constitution, "[n]o one, has attempted to isolate him, to show with some definiteness what were his ideas . . . to discover what were his contributions to the wisdom and statesmanship of the Philadelphia Convention."²¹⁷ McLaughlin moved on to characterize Wilson's mind ("he was above all a political scientist");²¹⁸ his contributions to the Convention ("above all but one or two men of the convention");²¹⁹ his thinking, especially on principles vindicated only after the Civil War;²²⁰ his singular faith in the people ("He was not patronizing to the populace or condescending—quite the reverse");²²¹ and attempted, briefly, to account for how a man this important could have gone so unnoticed for so long, attributing it mainly to Wilson's deficient social skills: "He seems not to have won men strongly by his personality. He does not seem to have made and retained personal friends among the men whose correspondence we have."²²²

The time was ripe for observations such as these. The transition into the twentieth century witnessed an unmistakable movement towards national cohesion. The proliferation of railroads had literally forged the nation together, and the federal government's regulation of them—and, increasingly, many other businesses—was unifying it legally. The federal government's prominent antitrust initiatives reinforced this sense of unification. The united States (plural) was giving way to the United States (singular)—quite literally, as the *New York Times* reported in May of 1901.²²³ The period's social and

214. *Id.*

215. Trained as a lawyer, McLaughlin went on to become an eminent historian who both served as President of the American Historical Association and won the Pulitzer Prize for his *A Constitutional History of the United States* (1936), which gave very favorable attention to Wilson. The son of Scottish immigrants, McLaughlin shared a characteristic with many of the Wilson enthusiasts to follow, namely, Scottishness. Bryce, Seed, McLaughlin, Andrew Carnegie—all were either Scots or Scotch-Americans.

216. Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 POL. SCI. Q. 1, 1 (Mar. 1897).

217. *Id.*

218. *Id.* at 2.

219. *Id.* at 1.

220. *Id.* at 13.

221. *Id.* at 16.

222. *Id.* at 20.

223. In a *Times* article on whether "United States" should be considered a plural noun, as it was for many in the Founding era, or a singular one, James Wilson was aptly invoked as an authority for the singular stance. "Probably the one member of the convention of 1787 who best comprehended the significance of the

legal terrain was fertile for a Wilson Renaissance. And that is precisely what there was.

This post-*Works* effort was spearheaded by academics other than Andrews. In 1905, for instance, Hamilton's letters to Wilson were published.²²⁴ The professor most responsible for digging Wilson out of obscurity at the turn of the century, however, was Burton A. Konkle. Konkle, a history professor at Swarthmore College, dedicated his life, as one later historian noted, "to rehabilitating neglected heroes of the Keystone state,"²²⁵ including Wilson, among many others. Having learned that Wilson's remains still resided, nearly unmarked, in Edenton, North Carolina, Konkle launched an effort to have them exhumed and placed alongside those of Wilson's wife in Philadelphia's Christ Church—where many of the founders, including Franklin and Wilson's old friend Robert Morris, were likewise buried.²²⁶ Konkle, a well-connected man, helped organize a James Wilson Memorial Committee, composed of lawyers, judges, and other public officials.²²⁷ The list of notables Konkle enlisted on behalf of the effort was strong in both quantity and quality, boasting such figures as the U.S. Attorney General, Senators and Congressman; Pennsylvanian heavy hitters including the state's Governor, Attorney General, and Chief Justice, along with the Mayor of Philadelphia; many in the academy, including the Presidents of the American Philosophical Society and the University of Pennsylvania; and many prominent lawyers on the national and state level.²²⁸ With such backing, Konkle helped launch a coordinated effort to win federal backing for a disinterment of Wilson in North Carolina and a reburial in Philadelphia. The effort won Wilson considerable attention—and support—in the scholarly community, the press, and the government.

Unquestionably the most significant such attention came from President Teddy Roosevelt himself. A major peak in the early twentieth century's Wilson Renaissance came on the rainy October day in 1906 when Roosevelt,

work of that body," the paper writes, "was James Wilson of Pennsylvania, and he declared in the debates that 'by adopting this Constitution we shall become a Nation.'" John Foster, *Are or Is?*, N.Y. TIMES, May 4, 1901, at BR7 (siding with Wilson by arguing that the Civil War, among other things, had rendered the plural usage unnecessary). Foster announced that the

result of my examination is that, while the earlier practice in referring to the 'United States' usually followed the formula of the Constitution, our public men of the highest authority gave their countenance, by occasional use, to the singular verb and pronoun: that since the civil war the tendency has been toward such use: and that to-day among public and professional men it has become the prevailing practice.

Id. See also AMAR, *supra* note 7, 22-23 (on the shift in spelling from "united States" to "United States").

224. *Letters of Hon. Alexander Hamilton and Rev. William Smith, D.D., to Hon. James Wilson*, 1789. 29 PENN. MAG. HIST. & BIOGRAPHY 210-215 (1905).

225. See HALL, *supra* note 15, at 2.

226. See Burton Alva Konkle, *James Wilson and the Constitution: The Opening Address in the Official Series of Events Known as the James Wilson Memorial* [hereinafter *Memorial Address*](1907), available in THE MAKING OF MODERN LAW 3 (2009).

227. *Id.*

228. See Burton Alva Konkle, *The James Wilson Memorial*, 55 AM. L. REG. 1, 4 (1907).

in the middle of a speech he was delivering at the dedication of the new Pennsylvania State Capitol, spoke on Wilson at length.²²⁹ Roosevelt began his speech by praising Pennsylvania for the key role it had played in the nation's history, noting the state's tendency to be on the right side of every major crisis in the nation's history. Turning to the pressing issues at hand, the President lashed out against the "evils springing from the very material success of which we are so proud"²³⁰—evils of child labor and ravenous, self-interested corporations, which, Roosevelt argued, demanded eradication and regulation, respectively. While some of the policing could be done by states, most, he argued, required federal oversight—and increased federal powers. Turning from state to the nation, he addressed the topic of Wilson. His opening remarks are worth quoting at length:

So much for the state. Now for the nation; and here I can not do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson. Wilson's career has been singularly overlooked for many years, but I believe that more and more it is now being adequately appreciated; and I congratulate your state upon the fact that Wilson's body is to be taken away from where it now rests and brought back to lie, as it should, in Pennsylvania soil. He was a signer of the Declaration of Independence. He was one of the men who saw that the Revolution, in which he had served as a soldier, would be utterly fruitless unless it was followed by a close and permanent union of the States; and in the Constitutional Convention, and in securing the adoption of the Constitution and expounding what it meant, he rendered services even greater than he rendered as a member of the Continental Congress, which declared our independence; for it was the success of the makers and preservers of the Union which justified our independence.

He believed in the people with the faith of Abraham Lincoln; and coupled with his faith in the people he had what most of the men in his generation who believed in the people did not have; that is, the courage to recognize the fact that faith in the people amounted to nothing unless the representatives of the people assembled together in the National Government were given full and complete power to work on behalf of the people. He developed even before

229. See *Check Forces of Greed—Roosevelt: There Must Be Just Treatment Alike for Capital and Labor: National Control of Corporations Necessary*, HARTFORD COURANT, Oct. 5, 1906.

230. See THEODORE ROOSEVELT, *At the Dedication Ceremonies of the New State Capitol Building at Harrisburg, PA.*, reprinted in 5 *PRESIDENTIAL ADDRESSES AND STATE PAPERS* 827 (1910).

Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of this Nation) that an inherent power rested in the Nation, outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several States and was a power ordinarily exercised by sovereign nations.²³¹

Particularly admiring of Wilson's role in pioneering this last conception of the Union, the President endorsed Wilson's opinion that "whenever the States can not act, because the need to be met is not one of merely a single locality, then the National Government, representing all the people, should have complete power to act."²³²

Having seized upon Wilson's sound constitutional principles, Roosevelt moved on to weave together a Wilsonian justification for his current campaign for federal regulation of corporations. Roosevelt argued that, as in the Founding era, the national government was the only vehicle through which the people could exert their sovereignty to reel in abuses:

It is only by acting in this spirit that the national judges, legislators, and executives can give a satisfactory solution of the great question of the present day—the question of providing on behalf of the sovereign people the means which will enable the people in effective form to assert their sovereignty over the immense corporations of the day. Certain judicial decisions have done just what Wilson feared; they have, as a matter of fact, left vacancies, left blanks between the limits of actual national jurisdiction over the control of the great business corporations. It is the narrow construction of the powers of the National Government which in our democracy has proved the chief means of limiting the national power to cut out abuses, and which is now the chief bulwark of those great moneyed interests which oppose and dread any attempt to place them under efficient governmental control.²³³

What a world it would be, the President moved on to say, if only more lawyers and judges approached the Constitution as Wilson did, with a willingness to turn to federal solutions when state solutions are inadequate:

Many legislative actions and many judicial decisions which I am confident time will show to have been erroneous and a damage to the country would have been

231. *Id.* at 831-32.

232. *Id.* at 833 ("It was in the spirit of Wilson," Roosevelt went on, "that Marshall construed the law.").

233. *Id.*

avoided if our legislators and jurists had approached the matter of enacting and construing the laws of the land in the spirit of your great Pennsylvanian, Justice Wilson—in the spirit of Marshall and of Washington. Such decisions put us at a great disadvantage in the battle for industrial order as against the present industrial chaos. If we interpret the Constitution in narrow instead of broad fashion, if we forsake the principles of Washington, Marshall, Wilson, and Hamilton, we as a people will render ourselves impotent to deal with any abuses which may be committed by the men who have accumulated the enormous fortunes of to-day, and who use these fortunes in still vaster corporate form in business.²³⁴

This brought Roosevelt's remarks on Wilson to a close. As in the abolitionist era, Wilson had been invoked once again to promote that distinct Wilsonian blend of federalization (here of corporate regulation) and liberty (here of children). Though American presidents have always cited the famous Founders on behalf of their policy initiatives, Roosevelt's speech marked the first—and apparently the last—time that a President argued for an initiative on the grounds that James Wilson would have approved it.

Wilson, however, had still higher to climb. The following month, Professor Konkle's dream of exhuming Wilson and placing him alongside other Founders in Philadelphia was realized, in a series of ceremonies in the late Fall of 1906 referred to as the James Wilson Memorial.²³⁵ On November twentieth, a group of dignitaries—government representatives, judges, and lawyers—dug Wilson out of obscurity, figuratively and literally. As a large crowd looked on, Wilson was, in the most symbolic moment in the history of Wilson memory, disinterred from his dilapidated grave on the outskirts of the small southern town in which he had hidden out for his final, disgraceful days.²³⁶ It was a formal and, by all accounts, dignified ceremony.²³⁷ James Bryce, the Scottish historian who was one of the first to pay Wilson any attention in the late nineteenth century, would later describe the disinterment as “not less solemn and imposing than the rites which in the Middle Ages accompanied and consecrated the . . . body of a Saint.”²³⁸ Even Wilson's transportation to Philadelphia was about as regal as American ceremonies can

234. *Id.* at 833-34.

235. The most thorough narrative account of the ceremonies was provided by Konkle himself, acting in his capacity as a historian. *See* Konkle, *supra* note 227.

236. *See* Memorial Address, *supra* note 217, at 3-4 (1906) (“The ceremonies in connection with the removal and the reinterment of the remains were of a most impressive and solemn character.”).

237. A photograph of the ceremony taken shortly before the disinterment shows a group of thirty men gathered solemnly around Wilson's grave, with an American flag waiting. *See id.* at 12.

238. *See* Randolph G. Adams & James Bryce, *James Wilson: An Appreciation by James Bryce*, 60 PENN. MAG. HIST. & AND BIOGRAPHY 358-61 (Oct. 1936) (publishing an essay Bryce penned but left unpublished in 1904).

be; the U.S.S. *Dubuque*, a navy vessel, carried Wilson's body to Philadelphia, where it briefly lay in state, flanked by guards, at Independence Hall. On the twenty-second, an escort consisting of Philadelphia's First City Troop, Supreme Court Justices and other jurists, and others "prominent in official life," carried Wilson to Christ Church. The group included, among other luminaries, Supreme Court Justice White and Andrew Carnegie. At the cemetery, Wilson was reburied in a plot alongside his wife's. Photographs from the burial ceremony depict a courtyard with priests at the center, surrounded by a circle of dignitaries, with members of the public stretching well off into the distance.²³⁹ Standing in the cemetery shortly before the reburial, many of the eminent men present gave tributes to Wilson.

Pennsylvanian Governor Samuel Pennypacker opened his speech colorfully. "Nations," he said, that fail to recognize the Framers of their institutions "either still linger within the trammels of barbarism or are moving on the downward path toward decadence."²⁴⁰ Noting Wilson's special status—indeed, unique status—as a signer of the Declaration, crafter of the Constitution, and member of the hallowed Charter's first Supreme Court, Pennypacker observed that Wilson was, "in a certain sense . . . the creator of the nation as we know it today."²⁴¹ Discussing the document's early ratification in Pennsylvania, which ensured its passage in the United States, and was thus a momentous event for America—and, indeed, for the world—the Governor pointed out that this ratification was attributable to Wilson. "Let American men and women who are today reaping the benefit of [Wilson's] mature and intelligent thought," he said in closing, "see to it that his memory be kept green throughout the centuries yet to come."²⁴²

Following many of the distinguished guests was one of America's foremost titans of industry, Andrew Carnegie. Carnegie, a fellow Scotch-American and indeed a native, like Wilson, of Fife, spoke generally about how crucial Americans of Scottish heritage were in winning American Independence, and also about how formative Wilson's early years in Scotland had been upon his political thinking, which had obviously had enormous ramifications for the United States. Wilson "was nursed in his youth," Carnegie observed, "at St. Andrew's University upon democratic ideas."²⁴³ In his capacity as Scottish ambassador to the proceedings, Carnegie mentioned, in a passage more aspirational than accurate, that Wilson was honored in both of his countries:

Distinguished Americans have today paid their tributes to James Wilson and expressed the profound gratitude felt for him by the Republic. It remains for me to say in behalf of Scotland and the Scottish-American element, that they also

239. See Memorial Address, *supra* note 225.

240. See Pennypacker et al., *Tributes Delivered at the Memorial Services*, 55 AM. L. REG. 12 (1907).

241. *Id.*

242. *Id.* at 13.

243. *Id.* at 24-25.

bow their heads reverently yet proudly in memory of this noble patriot whose record sheds luster upon both his native and adopted lands.²⁴⁴

Both countries, Carnegie vowed, invoking the same verdant imagery as Pennypacker, “will keep his memory green in lasting and honored remembrance.”²⁴⁵

Carnegie then stepped aside for Alton Parker, the President of the American Bar Association. In his capacity as one of the foremost lawyers in the nation, Parker described Wilson in his brief address as “the man who laid the cornerstone of constitutional interpretation in this country upon deep and solid foundations.”²⁴⁶ Parker portrayed Wilson as a steadying hand in an unsettled era when legal foundations had been uprooted, and mistrust of both the judiciary and the executive branches of government was deep-seated. He went on to re-emphasize Wilson’s foresight, particularly in the federal-state relations that had stood at the heart of legal debates surrounding the Civil War: Wilson’s “prescience in foreseeing the result of a controversy between the Federal and State governments must, in the light of a century’s history, be pronounced remarkable.”²⁴⁷ In Wilson, Parker observed, “we recognize the work of a forerunner, one whose duty and privilege it was to prepare the way, to make the paths straight.”²⁴⁸ Then, after paving the way for the following speaker with a brief set of kind remarks on the Supreme Court, Parker made way for Justice White.

White’s speech was longer and drearier than most of the others. He spoke not so much on Wilson as on the Constitution itself, if anything downplaying Wilson’s role in crafting the document by emphasizing the obvious fact that the Constitution was a collaborative enterprise, the product of wrangling and compromise by many delegates rather than the product of a couple of great minds.²⁴⁹ He proceeded to platitudes about the debt of gratitude the millions of free Americans across the country owed to the Constitution’s Framers.²⁵⁰

The last of the tributes before the burial was delivered by an ardent Wilson enthusiast, U.S. Attorney General William H. Moody, who attended as a “special representative of the President” and assured the crowd that Roosevelt himself had expressed “his sympathy with the feeling which has prompted you to bring home the body of your dead.”²⁵¹ The Wilson Memorial they were enacting, Moody said, was “long delayed justice.”²⁵² Recounting how he

244. *Id.* at 25.

245. *Id.*

246. *Id.* at 26.

247. *Id.* at 27.

248. *Id.*

249. *Id.* at 27-29.

250. *Id.* at 30.

251. *Id.* at 32.

252. *Id.*

had first been introduced to Wilson in Madison's *Notes of the Convention*, Moody expressed his stupefaction as to why Wilson enjoys no place in the history books. "[W]hy his fame has not kept pace with his service," Moody said, "is one of the mysteries of history, which I have not been able to solve."²⁵³ Ticking off Wilson's democratic bona fides—his faith in the people, his support for popular election of the president, and direct election of congressmen to both houses of Congress (still unrealized at the time)²⁵⁴—Moody hailed Wilson as "the first man . . . in all our history" who paired and indeed fused democracy with nationalism, as Americans had come to do by the twentieth century.²⁵⁵ He closed by thanking the men responsible for the memorial for seeking, through services, "to impart the lessons which he taught to the nation to whose existence and firm establishment he so potently contributed."²⁵⁶

The most interesting meditation on Wilson and memory at the memorial, however, was delivered by a local authority on Wilson, a Pennsylvania lawyer named Lucien Hugh Alexander. Alexander's address outlined many of the ways in which Wilson was an intellectual pioneer, noting that he had espoused views on federal-state relations and international law that Americans had not come accept until well after his death.²⁵⁷ Wilson died, as Alexander put it in a splendid display of whitewashing, "in service to his nation."²⁵⁸ He also made some fairly extravagant counterfactual claims—suggesting that, had Wilson's proposal to outline state and national powers only been accepted, Wilson might have fended off the Civil War.²⁵⁹ Mainly, however, Alexander expressed relief that, at long last, important American figures, including jurists, academics, and journalists, had come to recognize Wilson's importance—and he then shared many of the nice things they had to say about him.²⁶⁰ In Alexander's spirited conclusion, he envisioned a statue of Wilson that would both protect Wilson's position in posterity, and stand as an implicit rebuke to prior generations for their amnesia:

Perchance, ere many years have passed, there will loom
in bronze within the shadow of the Capitol at Washington,
erected by 'the people of the United States,' the giant
form of Wilson, near that of Marshall, and in his hand a
quill and scroll with 'Constitution' inscribed thereon—
"*Lest we forget, lest we forget.*"²⁶¹

253. *Id.* at 32.

254. *Id.* at 33 ("He would have had the President elected by the majority of the people; he would have had the members of both legislative bodies elected by the people divided into equal constituencies.").

255. *Id.*

256. *Id.* at 34.

257. *Id.* at 10.

258. *Id.* at 18.

259. *Id.* at 6.

260. *Id.* at 10-11.

261. *Id.*

No attention of this kind had ever been lavished upon Wilson before. With praise like this, it no doubt appeared that Wilson had, at long last, been welcomed into the fold of American memory. The speeches made by the luminaries present made clear their expectations of great Wilson tributes to come—a long-overdue biography, a statue in the Capitol.²⁶² And so Wilson's latter-day admirers—an incredibly powerful coalition of people, the kind of people unaccustomed to the idea that their efforts could go to waste—reburied him. They had little reason to expect that, just as their disinterment two days prior had possessed immense symbolic value, so would their reburial of Wilson that day in Philadelphia. Not long afterwards, Wilson would lapse back into oblivion, albeit in a more prominent tomb.

Wilson's reversion to obscurity was not, of course, immediate. The Memorial created slight ripples in the academic pond, a few of which even splashed into the popular press. "The widespread attention now directed to Wilson as a statesman," wrote William MacLean a few months later, "has brought him hosts of admirers."²⁶³ Two months after Roosevelt's speech, businessman and philanthropist Andrew Carnegie delivered a speech at the Civic Federation in which he came out against an income tax and in favor of an inheritance tax. Taking Roosevelt's lead, Carnegie invoked Wilson, whom as a fellow Scot he clearly admired. Responding to Samuel Gompers' argument, Carnegie spoke at length on "that great old Scotchman Wilson, whom the President spoke about, [who] said, 'In addition to the powers enumerated in our Constitution, there resides in the body of the people all powers.'"²⁶⁴ Carnegie moved on to use Wilson as support for a populist appeal to the untrumpable power of popular sovereignty—and an expression of Carnegie's faith in it.²⁶⁵

As these speeches by two major figures—America's president and one of its great titans of industry—demonstrate, the picture of Wilson painted at his return to Philadelphia appeared to be gaining hold. Among those familiar with him, he was increasingly becoming recognized as a forward-thinking founder who seemed to have arrived at contemporary political viewpoints—on constitutional interpretation, on federal-state relations, on popular sovereignty—well before anyone else.

There are glimmers in the record suggesting that elites' new awareness of

262. *Id.*

263. *Id.* at 4

264. *Wealth Tax Views in Notable Talks*, N.Y. TIMES, Dec. 14, 1906, at 1.

265. As Carnegie said,

And the President at Harrisburg stated that, before Marshall, this Scotchman, James Wilson, first formulated that idea of the sovereignty, not of the Constitution, but of the representatives of the people who made that Constitution. And there are powers far beyond that. There is the power to do anything and everything that the people think right, and I for one am willing to take my chance that the democracy will never make a serious mistake.

Id.

Wilson had trickled down, to an extent, to lay people in these years as well. On December 27, 1907, the *Times* printed a brief revisionist history article entitled "New Light on our History," recounting one scholar's argument that the true "Father of the U.S. Constitution" was a Connecticut clergyman named Pelatiah Webster, who in 1783 wrote a pamphlet Madison later identified as highly influential in molding public thinking on an ideal form of government.²⁶⁶ The piece then followed Senator Philander Knox in suggesting that Benjamin Franklin deserved "credit" for the "germinal idea" that led to the Constitution.²⁶⁷ Wilson, however, won no notice from the article's author, sparking one reader, Arthur P. Will, to respond with the following letter:

Referring to your editorial "New Light on Our History" in this morning's issue of The Times, allow me to say that on reading Webster's pamphlet some years ago I was struck with the faithfulness with which many of his suggestions were reproduced in the Constitution. However, the man who was responsible more than any other for the Constitution in the form in which it was adopted was neither Webster nor Franklin, but James Wilson. Wilson was also a Philadelphian.²⁶⁸

Instead of marking the beginning of a new phase of Wilson consciousness, however, observations like Will's instead marked the end of one. The bronze sculpture discussed at Wilson's memorial was never commissioned. Though two eminent scholars worked independently on biographies, neither was published. And letters to the editor like Will's—or, for that matter, any newspaper articles mentioning Wilson—disappeared. Without question, the flurry of activity in the past decade had put Wilson on academia's map in a way he never been there before. But the civic awareness of Wilson died young. Despite the high hopes entertained by Wilson devotees in the decade prior, 1908 was a terminus rather than a point of departure.

F. 1908-1932: Wilson Reversion

The quarter century following the Wilson Renaissance witnessed, as noted above, a reversion to the neglect that had prevailed in the century prior, albeit in mitigated form. Both scholarly and public media witnessed a precipitous decline in literature on Wilson. Presidents never invoked him in their speeches. A widely used textbook from 1920 made not a single mention of Wilson in its section devoted to the Constitutional Convention.²⁶⁹ Most of these conditions apply as much today, of course, as they did a century ago. In an important sense, we are still living in the Wilson reversion to obscurity that

266. *New Light on Our History*, N.Y. TIMES, Dec. 27, 1907, at 6.

267. *Id.*

268. See Arthur P. Will, Letter to the Editor, *Another Constitution Maker*, N.Y. TIMES, Dec. 29, 1907, at 8.

269. 3 WILLIAM J. JACKMAN, *HISTORY OF THE AMERICAN NATION* (1920).

set in during this period.

That said, there were a handful of exceptions to the neglectful rule. The most important of these, without question, was the scholarship of Max Farrand. In 1913, two years after publishing his seminal *Records of the Federal Convention of 1787*, Farrand drew from the knowledge he had gained in putting together the *Records* to publish a narrative history of the framing of the Constitution.²⁷⁰ The book would be the first in a distinguished line of works by truly eminent scholars from the early- to mid-twentieth century—many of whom are still considered the eminent authorities today—all of whom recognized the crucial role Wilson played at the Constitutional Convention. In a section briefly describing the delegates at the head of Farrand's book, the author wrote that "James Wilson was the strongest member of [the Pennsylvania] delegation and Washington considered him to be one of the strongest men in the convention. . . . At forty-five he was regarded as one of the ablest lawyers in America. . . . [H]e had won the respect of many but the affection of few."²⁷¹ Farrand apparently included himself in this few, as he lavished considerably more praise on members of the Pennsylvania delegation who certainly were not as important to the conclave as Wilson—including Gouverneur Morris ("probably the most brilliant member of the Pennsylvania delegation and of the convention as well") and Benjamin Franklin ("The American Socrates"). Still, Farrand did not shortchange Wilson. In his book, he saw fit to rank the top members of the Convention in decreasing order of importance. According to Farrand, Wilson ranked second only to Madison. His rankings were Madison, Wilson, Washington, Gouverneur Morris, and Charles Pinckney in the top group, followed by Rufus King, Charles Cotesworth Pinckney, John Rutledge, Nathaniel Gorham, and—though they didn't sign the document—Edmund Randolph and George Mason.²⁷² For a major authority on the Constitutional Convention to classify Wilson's role there as more important than even George Washington's constituted a significant break from traditional treatment of Wilson in histories of the Founding. In academia, anyway, Wilson was being uprooted from his seat in at the back of the Framers' bus, and placed in the front row.²⁷³

270. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1913).

271. *Id.* at 21.

272. *Id.* at 196ff. Franklin is not included on Farrand's list, he explains, because Franklin was too old to play a major role at the Convention. It was Wilson, touchingly enough, who read all of Franklin's speeches for him in the conclave.

273. Farrand's specific words about Wilson were as follows:

Second to Madison and almost on a par with him was James Wilson. In some respects he was Madison's intellectual superior, but in the immediate work before them he was not as adaptable and not as practical. Still he was Madison's ablest supporter. He appreciated the importance of laying the foundations of the new government broad and deep, and he believed that this could only be done by basing it upon the people themselves. This was the principal thing for which contended in the convention, and with a great measure of success. His work on the committee of detail

Ten dry years later, another member of the constitutional cognoscenti brought Wilson to the attention of the public at large. After the *Times* published an article quoting the Governor of New York as saying that the Niagara and St. Lawrence rivers belonged to the people of the state of New York, Thomas James Norton, author of a text on the Constitution, wrote in to reject that argument by invoking Wilson—both his life and his words—to make the case that all Americans were *American* citizens first, state citizens second. After quoting the citizenship clause of Fourteenth Amendment,²⁷⁴ Norton wrote:

That is, the citizens of New York are citizens of the United States also. As citizens of the nation their best interests may lie in the very development to which the Governor objects. James Wilson, a great Scotsman, who became a great Pennsylvanian after he had become a great American, said in the Constitutional Convention what the Fourteenth Amendment finally declared:

“A citizen of America is a citizen of the general government, and is a citizen of the particular State in which he may reside. In forming the general government we must forego our local habits and attachments, lay aside our State connections, and act for the general good of the whole. The general government is not an assemblage of States, but of individuals.”²⁷⁵

As the bonds tying together the Union grow stronger, Wilson was again put forth as the primary originalist authority for such federalization—for the notion that we are Americans first, Texans or Ohioans second.

In another demonstration of the high regard in which Wilson was held in certain limited circles, on March 9, 1930, twenty-three years after his momentous speech as a young academic at the Wilson revival, the great Wilson devotee Burton A. Konkle gave a brief lecture on Wilson at an event in honor of the founder at Dickinson College, in Carlisle, Pennsylvania, Wilson’s old home. Legal alumni from the College, virtually all of them fellow Pennsylvanians, commissioned the painting of a portrait, which was unveiled the day of the lecture.²⁷⁶ The painting, perhaps the largest of Wilson put to canvas, now lives out of sight, in the bowels of the college museum’s vault.²⁷⁷

was less conspicuous but was also of the greatest service.

Id.

274. U.S. CONST. amend. XIV (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

275. Thomas James Norton, *On Educating Governors*, N.Y. TIMES, Apr. 1, 1923, at XX8.

276. *Dickinson to Honor James Wilson*, N.Y. TIMES, Mar. 10, 1930, at 2.

277. My thanks go to a wonderfully helpful set of curators and archivists at Dickinson College—James Gerencser, Wendy Pires, and James Bowman—for tracking down the painting’s current location.

G. 1933-1939: *New Deal*

As historical circumstances had been ripe for a Wilson reappearance in the 1840s and at the turn of the century, so they were during the New Deal, when another Roosevelt sought—and, after a prolonged wrangling not altogether different in kind from that faced by the Founders in their attempts to expand federal power, attained—a mandate for considerably strengthened central powers to deal with current national crises. Wilson's resurgence in this time was identifiable in three sources: political rhetoric, the press, and in nominations to the National Hall of Fame.

Regarding the first of these, political awareness of Wilson, in the spring of 1933, an outraged Republican, Representative James M. Beck of Pennsylvania, fumed that the \$3.3 billion public works appropriation in the Industrial Recovery Bill was "the thirty pieces of silver by which the liberties of the American people are to be delivered," and decried the bill as unconstitutional.²⁷⁸ "Night is falling on our old constitutional government," Beck said. "We are now about to transform a democracy into a dictatorship."²⁷⁹ He went on to remark that if that transformation were made, it was high time the Constitution were remodeled. That work, he joked, should be done by replacing the Founders with three of the academics from FDR's Brain Trust—specifically, it should be done "with Professor Raymond Moley substituting for George Washington, Rex Tugwell for Benjamin Franklin, and Professor Mordecai Ezekiel for James Wilson."²⁸⁰ Here, in a sign of Wilson's rise to prominence in the era, he was one of only three Founders to make Representative Beck's list. No longer in the obscure company he found himself in the nineteenth century—that of, say, Robert Morris—he was now uttered in the same breath as Washington and Franklin.²⁸¹

Many of the books published in the run-up to the Constitution's sesquicentennial suggest that Beck was not alone in lionizing Wilson in this way. A review of Fred Rodell's book on the Convention's delegates, *Fifty Five Men* (1936), listed Hamilton, Wilson, Franklin, and Mason as leading theorists of the Founding whose knowledge of history and politics rivaled Madison's.²⁸² Earnest Sutherland Bates's *Story of the Supreme Court: A Readable Survey and Analysis of Its Activities* (1936), won Wilson similarly favorable attention; its *Times* review painted Wilson and Jay as laying the groundwork for Marshall in establishing the Supreme Court on an equal

278. See *Beck Leads Fight on Bill: Revolt on Tax Rise Hits Industry Bill* (A.P.), N.Y. TIMES, May 26, 1933, at 1.

279. *Id.*

280. *Id.*

281. Of course, that Representative Beck was from the state of Pennsylvania may have something to do with his selection of two Pennsylvanians here.

282. John Curbin, *The Fifty Five Americans Who Wrote the Constitution*, N.Y. TIMES, May 31, 1936.

footing with the other branches.²⁸³ Not all books were so favorable, of course. Various histories from the period continued severely to neglect Wilson; Hastings Lyon's 1936 book, *The Constitution and the Men Who Made It*—the title of which comfortably encompassed Wilson if it encompassed anyone at all—contained merely five mentions of him.²⁸⁴ And Morris L. Ernst's book, *The Ultimate Power* (1937), characterized Wilson as a reactionary who actually *opposed* the election of the President by the people. The *Times* reviewer, John Corbin, however, spotted Ernst's scholarly blunder and came to Wilson's defense, writing that "[t]he fact is that Wilson was a stout and prolonged advocate of popular election, as may be seen in Farrand's 'Records' . . . For this and other reasons, he has generally been acclaimed as among the most open-minded and far-sighted of the Fathers."²⁸⁵

In 1936, Lord James Bryce, whose brief mention of Wilson in his 1888 book had been cited by many times in the decades that followed, penned a homage to Wilson in the *Pennsylvania Magazine of History and Biography* which constitutes one of the most significant appreciations of the Founder ever put to paper.²⁸⁶ In it Bryce wrote that Wilson "had the courage of his logic, and was not afraid to maintain views that startled some of his contemporaries."²⁸⁷ He closed the article by writing that

The services which such a mind as Wilson's—broad, penetrating, exact, and luminous—can render to a nation can hardly be overestimated. In the long run, the world is ruled by ideas. Whoever gives to a nation, and most of all to a nation at the outset of its career, sound, just principles for the conduct of its government, principles which are in harmony with its character and are capable of progressive expansion as it expands, is a true benefactor to that nation, and deserves to be held in everlasting memory. Such a one was James Wilson.²⁸⁸

One of Europe's most penetrating scholars of American political philosophy, Bryce's strong scholarly support on behalf of Wilson would continue the tradition, begun by Bancroft and Farrand, of the best people in the field recognizing both the brilliance and importance of Wilson. Bryce would later be characterized as the "most appreciative of Wilson's latter-day

283. Joseph P. Pollard, *The Supreme Court's History From John Jay to Hughes*, N.Y. TIMES, Oct. 25, 1936, at BR3 ("From impotent beginnings, John Jay and James Wilson raised the court to a position of high authority in national affairs, with enormous potentialities of becoming the paramount branch of the Federal Government, which potentialities became realized under the majestic leadership of John Marshall.").

284. HASTINGS LYON, *THE CONSTITUTION AND THE MEN WHO MADE IT* (1936).

285. John Corbin, *The Supreme Court and Popular Will*, N.Y. TIMES, Jan. 24, 1937, at 92.

286. See James Bryce, *James Wilson: An Appreciation by James Bryce*, 60 PENN. MAG. HIST. & BIOGRAPHY 358-61 (Oct. 1936).

287. *Id.* at 360.

288. *Id.*

admirers."²⁸⁹

These endorsements of Wilson notwithstanding, the New Deal did not give rise to a Wilson Renaissance the way that the turn of the twentieth century did—especially outside the walls of the Academy. In 1935, Wilson was nominated for inclusion in the Hall of Fame for Great Americans—now an under-funded and defunct establishment, but once an effective tracker of American public memory. Naturally, the Hall of Fame made room for many of the nation's Founders. At its opening in 1900, the Hall added, among others, Washington, Franklin, Jefferson, John Marshall, and John Adams. In 1905, the Hall had added Madison; in 1915, Hamilton; and in 1920, Patrick Henry. In 1935, Wilson's name came up for consideration as a nominee. The nomination, however, never had the ghost of a chance. Of the seventy-six names put forward, only three were to be chosen, and when Wilson's name came up for consideration, only three of the admissions committee's twenty-one members supported it.²⁹⁰ Still, Wilson's nomination itself—an event that would have been inconceivable thirty-five years prior—suggests how far the Framer had come.

H. 1940-1959: *Slow Ascent*

Unlike in the prior Wilson renaissance, which burned brightly before quickly flaming out, the more measured revival begun in the New Deal had more staying power. Though this period was certainly not without its hostile treatment of Wilson,²⁹¹ it ushered in a steady stream of favorable treatment especially discernable in the nation's newspapers. One reader, pushed to write into the *Times* by an inspiring article, sent in a letter to the editor that simply quoted words of wisdom from Wilson's 1906 tombstone—a letter the *Times* later titled "A Principle to Cherish."²⁹² An article from five years later credited Wilson as the first delegate to propose direct popular election of the President.²⁹³ And when H.T. Carpenter, an artist and superintendent of

289. SEED, *supra* note 12, at 179. Harvard's Robert McCloskey would also prove himself an enormous fan.

290. See *Candidates Listed for Hall of Fame*, N.Y. TIMES, June 30, 1935, at N1. Ultimately, Grover Cleveland, William Penn, and astronomer Simon Newcomb were added that year. The Hall of Fame has since fallen out of use.

291. See, e.g., CLAUDE G. BOWERS, *THE YOUNG JEFFERSON, 1743-1789* at 133 (1945) (describing Wilson's reaction to the suggestion of independence as "a contrite wail. . . he hysterically shouted that . . . demand[ing] not a declaration of independence, but the most solemn declaration that the Americans had no thought of setting up an independent nation."). Hall has refuted these claims. HALL, *supra* note 15, at 33-34.

292. *A Principle to Cherish*, N.Y. TIMES, Aug. 13, 1941, at C16.

"That the Supreme Power, therefore, should be vested in the People is, in my judgment, the great panacea of human politics." Will those who really believe in the American way of life demand that the sound principle which these words convey shall stand? They were taken from the stone slab, in front of old Christ Church, Philadelphia, which marks the grave of James Wilson, "a signer of the Declaration of Independence; a maker of the Constitution of the United States; a Justice of the United States Supreme Court at its creation."

293. *Voters Follow 2,400 Year Usage*, N.Y. TIMES, Nov. 6, 1940, at 1 ("The various State Constitutions did not then call for the popular election of State Executives, except in New York, Massachusetts and New Hampshire. James Wilson of Pennsylvania was the first delegate to suggest the idea of election of the

Independence Hall, died in 1947, his obituary mentioned among Carpenter's achievements was a portrait of James Wilson—"known as 'The Father of the Constitution'."²⁹⁴

The 1940s paid tribute to Wilson not only on its printed pages, but also through living, breathing commemorations. At the University of Pennsylvania, where Wilson had taught law, a James Wilson Law Club was established that organized commemorative events, including a celebration of the anniversary of Wilson's birth.²⁹⁵ On September 15, 1944, two hundred and two years after Wilson was born in Fife, Lieutenant D. Barlow, of the U.S. Naval Reserve, spoke at a memorial in his honor held at his grave by Philadelphia's Christ Church. Wilson's ascent was visible on canvas as well. In the first major painting of the Constitutional Convention since the New Deal, Howard Christy's *Scene at the Signing of the Constitution of the United States* (1940), the depiction of Wilson is radically different.²⁹⁶ Unlike Washington, Madison, Franklin, and Hamilton, whose positions at the center of the affairs have gone untouched, Wilson has migrated from an obscure corner of the room well towards the center of activity. The Wilson of 1940 now sits immediately to Washington's left, with his hand on his chin, staring cerebrally into the distance. His positioning suggests that he is not a key player just yet: Washington faces away from him, toward the painting's focal point of constitutional activity, where Hamilton, Franklin and Madison sit at center-stage.²⁹⁷ Still, while Wilson may remain outside the influential circle of key Framers, here he is only just outside it, rather than far outside it, as in prior paintings. In solar system language, Wilson has been transformed from a Pluto to a Venus.

Among the more poignant of the Wilson stories from the 1940s was the death of Burton A. Konkle, the historian largely responsible for the James Wilson Memorial of 1906, in 1944. Konkle made it his life's work to resurrect obscure Founding Fathers from Pennsylvania, and over the course of his life he published a stunning twenty-one biographies of all kinds of Pennsylvanian founders—except James Wilson. When Konkle died, he left behind a massive two-volume biography on Wilson and four-volume collection of Wilson writings that, heartbreakingly for Wilson, and for unclear reasons, never went to print. The books have languished in a rare books collection, barely touched, for decades.²⁹⁸

President by the people, and the first proposal for popular Presidential elections before the convention was supported only by the Pennsylvania delegation."").

294. H.T. Carpenter, *Artist, Dies at 89*, N.Y. TIMES, May 21, 1947, at 25.

295. *Speaks at Wilson Memorial*, N.Y. TIMES, Sept. 15, 1944, at 19.

296. Like Trumbull's painting, Christy's sits in the U.S. Capitol. For an interactive graphic of Christy's painting, see <http://teachingamericanhistory.org/convention/christy/>. My thanks go to Dr. Donald R. Kennan of the U.S. Capitol Historical Society for guiding me through the *Scene*.

297. Here as before, Franklin and Hamilton are given disproportionately central placement despite the emphatically limited roles they played at the Convention.

298. BURTON ALVA KONKLE, *LIFE AND WRITINGS OF JAMES WILSON (1742-1798)*. The volumes are

The nineteen fifties—when one of the country's most ambitious federal initiatives was to build roads, and President Eisenhower launched a major crackdown in immigration from Mexico called "Operation Wetback"—were not a particularly Wilsonian time in spirit, and they witnessed a drop off in public attention to the Founder. Newspapers of the day ignored him, as did constitutional and American history texts. The Supreme Court turned a blind eye to Wilson in its opinions, with one exception: a case that quoted Wilson on the rationale behind Article 1, Section 6 of the Constitution—the provision guaranteeing legislators privilege from certain kinds of arrest, and shielding them from any extra-congressional "questioning" regarding statements made in legislative proceedings.²⁹⁹ Wilson was likewise neglected by the history texts of the time. The sole—and crucial—exception to this trend was the publication of Wilson's first, and to this day only, comprehensive biography. Charles Page Smith, a young historian with a freshly minted doctorate from Harvard, converted his dissertation into *James Wilson: Founding Father, 1742-1798* (1956). Smith, who gained access to Konkle's unpublished biography of Wilson,³⁰⁰ directed his considerable historical talents to telling Wilson's story. The book was judged important enough for a considerable review in the *New York Times*, which recognized it as "the first serious biography of one who is a major figure in our history."³⁰¹ The review praised not only Smith's work, but Wilson himself—"a propagandist for the patriot cause, a signer of the Declaration of Independence, a hard-working committeeman in the unrewarding Congresses, a leader in the framing of the constitution"³⁰² whose deeply democratic views, the review suggested, undermine his reputation as "a reputed aristocrat [with] a haughty bearing."³⁰³ Smith, however—in a trend common for professors who have spent time on Wilson—rather than churning out additional output on the obscure founder, took his scholarly talents elsewhere. His next book—a two-volume, 1200-page biography of John Adams³⁰⁴—won him the 1963 Bancroft Prize, and he never looked back, writing on Jefferson, Washington, and the other Founders later in his prominent academic life. Smith would never publish a book on Wilson again.

I. 1960-1985: Civil Rights and the Run-up to the Bicentennial

The 1960 presidential election was a dramatic contest in which Kennedy prevailed over Nixon by a razor-thin margin. Since the contest barely averted

available at Department of Rare Books and Special Collections of the Princeton University Library. Shortly after Konkle's death, Page Smith would draw upon these volumes while researching his biography of Wilson.

299. The first was *Tenney v. Brandhove*, 341 U.S. 367 (1951).

300. See SMITH, *supra* note 12, at xi.

301. William B. Hamilton, *Thinker and Doer*, N.Y. TIMES, Oct. 21, 1956 (book review).

302. *Id.*

303. *Id.* The review also made some brief remarks on Wilson historiography—noting Wilson's resuscitation at the end of the nineteenth century, and his subsequent revival led by Konkle and Adams.

304. PAGE SMITH, JOHN ADAMS (1962).

being the third time in American history when the man who lost the popular vote won the presidency, it sparked a renewed interest in the origins of the strange implement the Constitution uses to select the President. In a *New York Times* article on the up and downsides of the Electoral College, James Wilson was credited as its inventor.³⁰⁵ After discussing the impossibility of direct election in the late eighteenth century, the *Times* noted,

James Wilson, a Philadelphia lawyer who worked long and hard for independence, appears to have invented the Electoral College.

His idea: Let each state pick electors—one for each representative and senator. These men, who presumably would be leaders with judgment, then could meet and choose a president.

Whatever the criticisms now, it seemed like a good idea at the time.³⁰⁶

Here, as many times before, Wilson was remembered for something in which he did not believe and in fact fought against. While it is true that Wilson designed the Electoral College, he did so only because it was the most democratic mechanism he could persuade his aristocratic colleagues to accept.³⁰⁷ Like his frequent description as the inventor of the Three-Fifths Clause (he was antislavery), or an aristocrat (he was more pro-people than any major Framer), this description pegs him as the person responsible for the defective constitutional machinery employed to select presidents, instead of the earliest voice to speak out in favor of direct election by the people of their president. The man and his memory, as at so many times before, are day and night.

Despite this inauspicious beginning, however, the 1960s would in fact be a major decade for Wilson's legacy and public memory. Jurisprudentially and academically, the period was in many ways Wilson's most exciting re-emergence thus far. It was in the 1960s that his apportionment ideas were brought to fruition in the Civil Rights Movement's now famous Reapportionment cases. In these cases, most famously *Baker v. Carr*,³⁰⁸ *Wesberry v. Sanders*,³⁰⁹ and *Reynolds v. Sims*,³¹⁰ the Court ruled that districts for the United States House of Representatives, along with voting districts for all state legislative chambers—upper and lower—must contain approximately equal populations. The *Baker* line of cases required almost every state to

305. *Id.*

306. *Id.*

307. See Ewald, *supra* note 6, at 1004 ("Wilson himself favored direct popular election of the President, but proposed the electoral college as a second-best procedure for securing at least an indirect popular authority.").

308. 369 U.S. 186 (1962).

309. 376 U.S. 1 (1964).

310. 377 U.S. 533 (1964).

fundamentally restructure its districts in line with the ruling, resulting in an enormous transfer of political power from sparsely populated rural areas to urban centers. By bringing the political power of cities in line with their populations, the reapportionment decisions would have a profound impact on national politics.

The transformation was yet another vindication of Wilson's political thinking. "Wilson," as Seed has written and numerous scholars have observed,³¹¹ "was the only Founding Father of any consequence who asserted with conviction his belief in the principle of one man, one vote."³¹² As the Justices set about enshrining the principle as constitutional doctrine, they naturally found an ally in Wilson. Although *Baker v. Carr*, the landmark 1962 case that made way for the line of decisions by ruling that reapportionment disputes presented justiciable questions, invoked neither Wilson nor any of the Founders, the subsequent cases in the line cited Wilson heavily. In *Wesberry v. Sanders*,³¹³ the first decision to hold that congressional districts must be approximately equal in population, the Court's heavily originalist opinion drew deeply from convention debates on the issue and cited to Wilson six times.³¹⁴ "[A]s James Wilson of Pennsylvania put it," the Court wrote, "equal numbers of people ought to have an equal number of representatives. . . ' and representatives 'of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.'"³¹⁵ And in *Reynolds v. Sims*,³¹⁶ which held that state legislature districts had to be roughly equal in population on the grounds that any major differences in population fell short of the "republican form of government" required by the Constitution, the Court once again cited Wilson—this time from his law lectures:

[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.³¹⁷

Ultimately, the "one person, one vote" principle enunciated in these cases—a principle that belongs to Wilson if it can be said to belong to anyone at all—filtered down from the federal and state to the local level, permeating almost every tier of American governance.³¹⁸ Wilson's spirit was deeply a

311. See McCloskey, *supra* note 14, at 1; Ewald, *supra* note 6, at 61 ("Wilson [was] the only member of the Convention to endorse unequivocally the principle of one-person-one-vote.").

312. SEED, *supra* note 12, at 23.

313. 376 U.S. 1 (1964).

314. *Id.* at 10, 14, 17, 39.

315. *Id.* at 17.

316. 377 U.S. 533 (1964).

317. *Id.* at 564, quoting 2 THE WORKS OF JAMES WILSON 15 (James De Witt Andrews ed., 1896).

318. See *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989) (striking down a citywide governing body as

part of this development.

The sixties also witnessed an outpouring of attention to Wilson in the scholarly community. In her book *Miracle at Philadelphia* (1966), Catherine Drinker Bowen did not devote considerable attention to him, but gave due credit to his active role at the Convention, included a slim account of his biography, and even singled him out as “the unsung hero of the Convention.”³¹⁹ She also echoed Bryce in describing Wilson as “one of the Convention’s ‘deepest thinkers and most exact reasoners.’”³²⁰

Another major authority on the Constitution, Clinton Rossiter, paid very close attention to Wilson in his very well received 1966 book, *The Grand Convention*.³²¹ Like Farrand before him, Rossiter placed Wilson at the very forefront of the Constitutional Convention in importance. Placed behind only Washington (whose prestige conferred on the Convention indispensable legitimacy), and Madison (the “leading spirit” of the Convention³²²), Rossiter characterized Wilson, along with his ally Morris, as one of two principle architects of the constitution. Later, Rossiter characterized Wilson as the “chief spokesman” of the Pennsylvanians;³²³ described him and Madison as “forceful co-managers of the nationalist caucus”;³²⁴ and later described the two as taking up “their rightful positions at the center of affairs.”³²⁵ Rossiter was careful to establish how large Wilson’s reputation loomed as the conclave convened. “Wilson,” he wrote, “was regarded on all sides as a very special person. . . . No man had a higher reputation for legal and political learning in 1787, and he was expected to play a major role in the Convention.”³²⁶ Rossiter also, like Farrand, formally ranked the Framers in the importance—and far more comprehensively. His top four aligned precisely with Farrand’s, with Wilson ranking second only to Madison, and beating out Washington and Gouverneur Morris for spots three and four. As Rossiter said of Wilson,

Second only to Madison—and an honorable second—
was the learned, inventive, painstaking lawyer from St.
Andrews. As brother-in-arms to the Virginian in the cause
of reform-minded nationalism, Wilson debated, drafted,
bargained, and voted with unrelenting zeal. He did most
to give strength and independence to the executive, and to

unconstitutional on the ground that the city’s most heavily populated borough had no greater representation than its least populous borough). I say “almost” here because of the flagrant exception to the “one person, one vote” principle which was enshrined, despite Wilson’s best efforts, in the Constitution: the Senate. For more on this topic, see Part IV, *infra*.

319. BOWEN, *supra* note 53, at 178-79.

320. *Id.* at 56.

321. ROSSITER, *supra* note 51.

322. *Id.* at 247.

323. *Id.* at 173.

324. *Id.* at 181.

325. *Id.* at 210.

326. *Id.* at 104.

lay the foundations of the new government "broad and deep" upon the sovereign people of the United States.³²⁷

Building upon this momentum, in 1967 Harvard's prestigious Belknap Press published a revised edition of Wilson's Lectures, under the editorship of Harvard's famous Professor of Government Robert G. McCloskey. In his extensive introduction—which remains one of the best meditations on Wilson of all time—McCloskey made clear his view that Wilson demanded more attention and respect. Wilson was one of the "valuable characters in America [who] have been too little known." "[T]o their memories," he wrote, "justice should be done, as far as it can be done, by a just and grateful country."³²⁸ Like Page Smith's biography before it, McCloskey's revised *Works*—the first book a famous scholar devoted to Wilson—was a milestone in the history of Wilson scholarship. Eleven years later, one scholar would write that McCloskey's "brilliant" introduction had "helped to raise Wilson from the obscurity from which he has languished for so long."³²⁹ That such a major academic had taken such a keen interest in Wilson at a reasonably young age boded well for the neglected Founder; indeed, the palpable enthusiasm for Wilson in McCloskey's introduction suggests that the book was to be the debut, not the finale, of McCloskey's Wilson scholarship. Two years after his edition of the *Works* was published, however, McCloskey abruptly fell ill and died.³³⁰ At fifty-three, his death was even more premature than Wilson's, which came when the Founder was fifty-six. Thus, much as he had lost Konkle and McLeigh's biographies decades earlier, Wilson lost a proponent in the academic world who, had he only lived, may well have continued to shine a prominent light on the lost Founder.

Fortunately for Wilson, just as McCloskey passed away, an important young academic stepped in to fill the void. When Gordon Wood published his doctoral dissertation, *Creation of the American Republic, 1776-1787*, in 1969, it revolutionized American constitutional history.³³¹ The book, widely read by students of law and history alike, placed Wilson at the center of American constitutional affairs in a way that prior narratives of the Founding had not done, attributing Wilson, whose State House Yard Speech had been fundamental to the Federalists' ratification campaign, with responsibility for formulating "the basis of all Federalist thinking."³³² Wood's book introduced many to Wilson's indispensability in creating the modern American nation, and it also kept alive the tradition of the very best scholars—Bancroft,

327. *Id.* at 248. Rossiter's characterization of Wilson bears remarkable similarities to Farrand's description in his ranking system. *See supra* note 54.

328. McCloskey, *supra* note 14, at 71.

329. SEED, *supra* note 12, at vii.

330. *See* Robert G. McCloskey, *Professor of History at Harvard, is Dead*, N.Y. TIMES, Aug. 5, 1969, at 37.

331. *See* WOOD, *supra* note 69.

332. *Id.* at 530.

McLaughlin, Bryce, Farrand, McCloskey—appreciating Wilson’s significance.

The rarefied audience reached by McCloskey and Wood, however, was dwarfed by the mass of Americans that *1776*, the Broadway musical and motion picture, reached after it opened in 1969. The production immediately attracted wide critical acclaim. The *New York Times* recommended “without reservation” this “most striking, most gripping musical,”³³³ which went on to win the Tony award for best musical. Any portrayal of the Continental Congress that involves delegates bursting into song every few minutes can, of course, be expected to take broad liberties with historical accuracy, and *1776* did—whittling down the size of the delegations, and markedly magnifying the antislavery sentiment in the conclave. When it came to the personalities of the key historical figures involved, however, *1776* appeared to strive for some degree of accuracy: many of Franklin’s, Jefferson’s, and Adams’s lines in the script were direct transcriptions from their letters. Even when the script took liberties with a character, however, virtually all of the delegates—including even the southern slavocrats—were portrayed in a largely favorable light. Predictably, John Dickinson, the most impassioned opponent of independence, was cast as something of a villain. But at the film’s end, even he was allowed a graceful and heroic exit that allowed him to share in the valiance displayed by the other delegates. The only delegate who was not allowed to partake of this heroism was the third delegate from Pennsylvania—James Wilson.

1776 took extravagant liberties with Wilson’s character. Though the film is set in the Summer of 1776, Wilson is referred to throughout as “Judge James Wilson”—even though it would be another thirteen years before Wilson would accede to a spot on the bench, and then it would be as a Justice, not a Judge. Although Thomas McKean speaks with a thick Scottish accent in the story, Judge Wilson possesses none. Though Wilson was ten years younger than John Dickinson, in *1776* he is ten years *older*. The musical not only transforms Wilson into a milquetoast, but—even more pathetic—a milquetoast with seniority. More important than all these distortions, however, is the warping of Wilson’s character. In reality, Wilson was, as always, one of the most intellectually vigorous men in the room throughout the summer of 1776. The musical, however, paints him as John Dickinson’s obtuse and cowardly lapdog. In the film version, the first time Wilson appears on screen, he is literally standing in the shadow of John Dickinson. And there he figuratively remains, throughout the course of the film. “For once in your life, Wilson, take a chance,” John Adams exhorts Wilson early on. But Wilson resists the advice, following Dickinson always and sitting on the plot’s sidelines throughout. At the story’s climax, however, after all the other colonies have voted, the fate of the Declaration comes to rest in the hands of

333. Clive Barnes, *Spirited “1776,”* N.Y. TIMES, Mar. 17, 1969, at 46.

the three men in the Pennsylvania delegation. With Ben Franklin voting yea on independence, and John Dickinson nay, the entire decision comes to rest upon Wilson's shoulders. After much soul-searching, Wilson decides to part with his mentor and side with Franklin, thereby swinging the Pennsylvania delegation behind independence and breathing the Declaration to life.

The exigencies of this story's plot almost *require* the action Wilson takes at the story's climax to be heroic. The musical, however, does not allow Wilson even an inch of valor. Judge Wilson's decision to part with his master is motivated not by principle but by cowardice—and, fascinatingly, a conscious desire for annihilation, for erasure from American memory. It is worth quoting the relevant dialogue, which comes from Wilson's final speech in the play. At the musical's eleventh hour, when Wilson has learned he holds the fate of American Independence in his hands, Dickinson confronts his subordinate in exasperation:

Dickinson: James, you're keeping everybody waiting.
The secretary has called for your vote.

Wilson: Please, don't push me, John. I know what you want me to do. But Mr. Adams is correct about one thing.
I'm the one who'll be remembered for it.

Dickinson: What do you mean?

Wilson: I'm different from you, John. I'm different from most of the men here. I don't want to be remembered. I just don't want the—responsibility.

Dickinson: Yes, well, whether you want it or not James, there's no way of avoiding it.

Wilson: Not necessarily. If I go with them, I'll just be one among dozens. No one will ever remember the name of James Wilson. But if I go with you, I'll be the man who prevented American Independence. I'm sorry, John. I just didn't bargain for that.

Dickinson: And is that how new nations are formed? By a nonentity trying to preserve the anonymity he so richly deserves?

...

Wilson: I'm sorry, John. My vote is yea.³³⁴

For a production as consistently charitable to its characters as *1776*, the disfigurement of Wilson in the lines above is hard to explain. The real Wilson, of course, was anything but a nonentity, and, far from seeking out anonymity, he hungered for a place in history as intensely as any of his peers. *1776* played a nasty trick on this man. By transforming him into the dispositive figure on the question of Independence,³³⁵ *1776* appeared to open

334. *1776* (Columbia Pictures 1972).

335. Though Wilson may well have been the dispositive player in American Independence, if he

a door for Wilson to claim a favorable spot for himself in American public memory. With these lines, however, *1776* slammed it in his face. By making these lines Wilson's last words, the story assured that Dickinson's characterization of Wilson—as a “nonentity trying to preserve the anonymity he so richly deserves”—would be the one audiences took home. For the public memory of Wilson, this would be no small thing. Entertainment like *1776* is, after all, where many Americans go to be educated about their country's history. Theatrical productions of the musical still appear on stage, and the film, long admired for its purported historical accuracy,³³⁶ is still shown in many American History classrooms.³³⁷ For many Americans, including many graduate students in American History, if they know of James Wilson at all, they know him as the Judge James Wilson of *1776*.

The decade or so following *1776*'s release in 1969 produced similarly unfavorable depictions of Wilson—as either a negligible or repellant figure. From many historical accounts he was simply absent; others painted him in a deeply negative light. In a review of investigative reporter Bob Woodward's book on the Supreme Court,³³⁸ syndicated columnist James J. Kilpatrick, after painting the vast majority of Supreme Court Justices as “mediocrities,” designated a small group of them as “absolute losers.” Wilson was in this class:

The Supreme Court has seen 101 men on its bench. Perhaps 10 or 12 have been genuinely superior judges, giants of the law. The great bulk of them can be characterized simply as mediocrities. Fifteen or 20 have been absolute losers. William Cushing, Robert Grier and Steven Field, to mention only three, suffered from senility. *James Wilson was a deadbeat who spent his last years dodging his creditors.* John Rutledge went crazy. . . .³³⁹

Howard Zinn's best-selling *People's History of the United States* (1980) was similarly antagonistic to Wilson. Rather than recognizing him as the Founding Father who put the most faith in “the People,” Zinn, in the two very brief passages he devoted to Wilson, merely perpetuated the myth of the founder as an aristocratic enemy of them. “Wilson,” he wrote, “was a

filled this role, he did it behind the scenes. For more on Wilson's role in the summer of 1776, see Part II, *supra*.

336. COLUMBIA COMPANION TO AMERICAN HISTORY ON FILM: HOW AMERICAN MOVIES HAVE PORTRAYED THE AMERICAN PAST 154 (Peter C. Rollins ed., 2004) (“[F]ew [of *1776*'s inaccuracies] are very troubling.”).

337. Naomi Siegel, *Despite an Arduous Start, 1776 Educates and Entertains*, N.Y. TIMES, Apr. 23, 2009, at NJ14 (“Forty years after the show took Broadway by storm, *1776* remains a powerful teaching tool; a 1972 film version is a basic part of the curriculum for legions of American History 101 students.”).

338. BOB WOODWARD, *THE BRETHREN* (1979).

339. James J. Kilpatrick, *Few Surprises Surface in High Court Expose*, HARTFORD COURANT, Dec. 14, 1979, at 22 (emphasis added).

Revolutionary leader who opposed price controls and wanted a more conservative government than was given by the Pennsylvania Constitution of 1776.”³⁴⁰ In his other mention of Wilson, Zinn characterizes him as “oppos[ing] . . . the democratic constitution adopted by Pennsylvania in 1776”³⁴¹—as though he was some kind of enemy of democracy.³⁴² Zinn even paints the Fort Wilson Riot—an unsuccessful assault on Wilson’s life—as something of a noble effort that failed.³⁴³

The droves of books published in the run-up to the bicentennial, however, generally told a different story. In these, Wilson achieved fuller recognition, on average, than he had in prior constitutional histories. One of the most favorable bicentennial treatments of Wilson appeared in Christopher and James Collier’s *Decision in Philadelphia*, where they wrote, among many other favorable things, that Wilson “was one of America’s first great democratic theorists and he deserves more from the people whose cause he so eloquently served.”³⁴⁴ Indeed, the Colliers went as far as to suggest that Madison is undeserving of the title of “Father of Constitution,”³⁴⁵ and that Wilson may be more deserving contender for it.³⁴⁶ In 1987 Charles W. Meister wrote a book, *The Founding Fathers*, which took a more traditional line, lavishing praise on Wilson as a delegate second only to Madison in his importance at the Convention, and a legal theorist with “no match in his time.”³⁴⁷ The bicentennial books suggest that, though Wilson’s reputation had leagues to travel before it stood in line with his contributions, it had nonetheless come a long way.

Little can express this point better than a painting. At the bicentennial, the Daughters of the American Revolution commissioned the first major painting of the Constitutional Convention to appear since Christy’s painting in 1940.³⁴⁸ Louis Glanzman’s punctilious *The Signing of the Constitution* (1987), which

340. HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 70 (new ed. 2003).

341. *Id.* at 80.

342. Zinn quotes various derogatory descriptions of commoners the Founders made in their correspondence to each other—such as Hamilton’s observation that “our countrymen have all the folly of the ass and all the passiveness of the sheep.” *Id.* at 77. He finds no such statements from Wilson, however.

343. Zinn respectfully describes the band of drunken homicides who stormed Wilson’s home as a “militia.” *Id.* at 80. The men who saved Wilson’s life—one of whom died in the process—are described as “a silk stocking brigade” of well-off Philadelphia citizens.” *Id.* In his respectful treatment of the mob, Zinn was following the footsteps of others, such as John K. Alexander, *The Fort Wilson Incident of 1779: A Case Study of the Revolutionary Crowd*, 31 WM. & MARY Q. 589 (1974). After attention like this, little wonder that a modern alternative rock band, the leader of which read Zinn’s book, was inspired to name itself “Fort Wilson Riot” on account of the name’s “populist” undertones.

344. COLLIER, *supra* note 13, at 288.

345. *Id.* at 33 (“[I]n the end, the Convention fought off too many of Madison’s basic ideas for him to be called its father:”). The book’s dig at Madison was provocative and, predictably, controversial. The *Times*’s review of the book, for instance, was entitled “James Madison, Minus Halo.” See James Hutton, *James Madison, Minus Halo*, N.Y. TIMES, Mar. 2, 1986.

346. See COLLIER, *supra* note 13, at 285 (crediting Wilson as formulating the theory of popular sovereignty enshrined in the Constitution).

347. CHARLES W. MEISTER, THE FOUNDING FATHERS (1987).

348. See E-mail from Karie Diethorn to author, Apr. 13, 2009 (on file with the author).

currently hangs in the East Wing building next to Independence Hall, is regarded as the most accurate prominent painting of the Convention in American history—faithfully rendering delegates’ ages, facial features, even the color of the walls.³⁴⁹ Washington has remained at the painting’s center, but he is no longer the focus of everyone’s gaze, and no longer set in high relief—he is a mere mortal, like those around him. And unlike in prior paintings, he is depicted—quite as accurately—as removed from the convention’s work, which others are carrying out around him. Franklin sits at the painting’s center too, but is depicted—again accurately—as far too ancient and frail to be a part of the action. Surrounding Washington’s dais are such crucial figures as Gouverneur Morris and William Paterson. On the elevated ground of Washington’s dais stand four men: two minor figures—Jacob Broom, who huddles over the table with his back to us; and Nathaniel Gorham, who stands in a corner behind Washington—and two major ones. Holding one spot, to Washington’s left, is James Madison, the Father of the Constitution. Holding the spot to Washington’s right—huddled over the desk, with scroll in hand, at the nucleus of constitutional fission—is James Wilson. After circling toward the center of the Convention for two hundred years, Wilson finally arrived there at the bicentennial.

J. 1988-2009: Present Neglect

That Wilson received the pictorial recognition he was due at the bicentennial, however, did not signal his safe arrival in zone of American historical consciousness. In the past thirty years, only one book has been published on James Wilson.³⁵⁰ The number of articles written on him in that time is almost laughably small.³⁵¹ In the end, Wilson’s treatment by modern interpreters of the past can only be described as one of neglect. Though he has made inroads in some areas, for the most part he has remained out of sight and out of mind.

Wilson is also no more than a minor figure in the scholarly and popular literature of the past two decades—in law, history, and political theory alike. The sole book to have published on Wilson since the bicentennial—indeed, since a decade before the bicentennial—is Mark David Hall’s *The Political and Legal Theory of James Wilson* (1996), a lucid analysis of Wilson’s

349. For more on the painting’s accuracy, see Louis Glantzman *Signing of the Constitution*, <http://teachingamericanhistory.org/convention/glantzman/>.

350. See HALL, *supra* note 15.

351. What little has been written about Wilson in recent years, like almost everything written about him before, has appeared in rarefied scholarly books and journals. See, e.g., Gary Wills, *James Wilson’s New Meaning of Sovereignty*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* (1988); Arthur E. Wilmarth, Jr., *Evasive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Republic*, 72 *GEO. WASH. L. REV.* 113-93 (2003). See also JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* (2007). Almost uniformly, recent scholarship treats Wilson merely in his capacity as a thinker rather than as a historical figure. One refreshing exception is William Ewald’s article, which traces Wilson’s massive contribution to the Constitutional Convention in fine detail. See Ewald, *supra* note 6.

theories of humankind and human governance.³⁵² Hall's book notwithstanding, the nineties were an especially quiet decade for Wilson in both academic and popular literature.³⁵³ In popular history books, which touched on Wilson briefly if they touched on him at all, Wilson was no more than a favorable background figure. There is however more awareness of Wilson than in the past—both his basic story, and his disappearance. To explain the latter, one book came up with the curious thesis that “alcoholism” contributed to Wilson's disappearance from American memory.³⁵⁴

Even in the American legal academy, he was an emphatically minor figure. After the arrival of the bicentennial, a major milestone in Wilson scholarship was reached: law review articles started to be written about Wilson. Before this time, though Wilson had made his way into some political science publications, legal academics spent the twentieth century ignoring him. Aside from the odd book review here or there—of Oberon's book on Wilson in 1934,³⁵⁵ of Page Smith's in 1954³⁵⁶—nothing to speak of had appeared in legal publications since the Teddy Roosevelt Administration.³⁵⁷ The trickle of Wilson literature that seeped into the pages of the nation's law reviews after the bicentennial, however, was nonetheless underwhelming. Though various articles on constitutional law discussed him briefly, only a handful made Wilson or his philosophy their exclusive focus, among which one scholar, Stephen Conrad, was responsible for three.³⁵⁸ Even when the pool is expanded to include articles that merely focus on Wilson among other figures, this adds only a few additional articles, some of which are student notes³⁵⁹ or mere book reviews. Given the sheer volume of law review articles written on American constitutional law, the near total failure to recognize the man many of the greatest experts consider to be the father of this law—or one of its two main fathers—is simply astonishing.

352. See HALL, *supra* note 15.

353. See, e.g., STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* (1993). Early in their book, Elkins and McKittrick credit Wilson with best articulating the check-mate argument that the federalists used to defeat opponents of the new Constitution—that sovereignty really resided not in the state governments, but in the people. *Id.* at 12. For the remainder of their book's 900 pages, however, they ignore him. See also, e.g., OUR SACRED HONOR: THE STORIES, LETTERS, SONGS, POEMS, SPEECHES, AND HYMNS THAT GAVE BIRTH TO OUR NATION (William J. Bennett ed., 1997) (no mention of Wilson).

354. JOSEPH C. MORTON, *SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY* (2006) 301-07 (“[Wilson's] undistinguished nine years as an associate justice on the U.S. Supreme Court, his devastating financial woes, and the personal problems caused by apparent alcoholism have all tarnished his historical reputation to such an extent that today he is virtually unremembered.”).

355. Edward H. Levi, Book Review, 49 YALE L.J. 603 (1940).

356. Joseph P. Witherspoon, Book Review, 36 TEX. L. REV. 294 (1956).

357. See, e.g., Ewald, *supra* note 6, at n.54.

358. See Steven A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 L. & SOC. INQUIRY 1 (1988); Stephen A. Conrad, *James Wilson's “Assimilation of the Common Law Mind”*, 84 NW. U. L. REV. 186 (1989); Stephen A. Conrad, *The Rhetorical Constitution of “Civil Society” at the Founding: One Lawyer's Anxious Vision*, 72 IND. L.J. 335 (1997).

359. Jeremy M. Sher, Note, *A Question of Dignity: The Renewed Significance of James Wilson's Writings on Popular Sovereignty in the Wake of Alden v. Maine*, 61 N.Y.U. ANN. SURV. AM. L. 591 (2005).

The first decade of the new millennium has been less blind to Wilson than the one before it. Among eminent academics, Wilson has continued to be noticed—and recognized as underappreciated.³⁶⁰ Today's primary champion of Wilson, Akhil Amar, made frequent, favorable mention of Wilson in his significant book *America's Constitution: A Biography*. In an enthusiastic review of Amar's book in the *New York Review of Books*, Gordon Wood, one of the key historians to put Wilson on the map in 1960s, placed his prestige behind Amar's conclusions on Wilson by referring to Wilson as "an intellectually important framer who Amar correctly believes has been much neglected."³⁶¹ Beyond Amar's book and Wood's review, prominent scholars of constitutional and revolutionary history have largely placed their attention elsewhere. Wood's scholarship of the past few decades—including a recent book on the Founders written for a popular audience—has neglected Wilson.³⁶² The same is true of Bernard Bailyn's recent work on the founders.³⁶³ In the top-selling popular histories of the American founding in recent years, Wilson has received no different treatment. He is a background character at most, and usually not even that. David McCullough's *John Adams* (2001) touches upon Wilson in his debates over independence, where he came off to many at the time—and continues to come off—as something of a loyalist.³⁶⁴ McCullough's 2005 book, *1776*, omits Wilson and his role in America's independence entirely. And in Joseph Ellis's many books on the Founding Fathers—highly acclaimed works which proved that the stories of the Framers can be modern-era best sellers—James Wilson is barely a presence at all.³⁶⁵ The less prominent popular stories of the Founding written

360. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 99 (2004) (describing "posterity's inexplicable neglect of this crucially important Founder").

361. See Gordon S. Wood, *How Democratic is the Constitution?*, N.Y. REV. BOOKS, Feb. 23, 2006. That Amar and Wood are in agreement on this point demonstrates that, just as Wilson has consistently won the attention of the most eminent figures in American constitutional history in the past, he continues to do so today.

362. See GORDON WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2006). Wood's book devotes a chapter each to Washington, Franklin, Jefferson, Hamilton, Madison, Adams, Paine, and Burr. Where Wood devotes reams of attention to the lives of other Founders, his only references to Wilson as a person—rather than to an idea Wilson expressed or proposal he made—are to his immigrant status and the fact he ended up in debtors' prison. *Id.* at 11, 213 ("[The Founders] wanted wealth and position and often speculated heavily in order to realize their aims. Indeed, several of the most prominent founders, such as financier of the Revolution Robert Morris and Associate Justice of the Supreme Court James Wilson, ended up in debtors' prison.").

363. In Bailyn's recent book on the American Founders themselves, Wilson is given a paltry one mention. See BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* (2003).

364. DAVID MCCULLOUGH, *JOHN ADAMS* (2001).

365. JOSEPH ELLIS, *FOUNDING BROTHERS* (2000) (one mention in a 304-page book); JOSEPH ELLIS, *THOMAS JEFFERSON: AMERICAN SPHINX* (1997) (one mention in 365-page book); JOSEPH ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* (2004) (no mention); JOSEPH ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* (2007) (one mention). That a storyteller as gifted as Ellis completely omits Wilson's story—surely the most tragic of all the Founders' stories—in his book on "tragedies at the Founding" is both a great shame and a clear sign of how truly ignored Wilson remains.

in the past decade have also looked past Wilson.³⁶⁶ Wilson's absence from the historical discourse has not gone unnoticed. When forty-five authorities on the Founding were recently asked to rank the most neglected key Founders, they placed James Wilson in first by a wide margin.³⁶⁷ The issue, in other words, is not that no one is aware of the Wilson void. The issue is that no one has made a sustained effort to fill it.

Much like the modern literature on the Founding, modern museums' treatment of Wilson is mixed. Like its enormous mural of the convention, which accords Wilson no particularly special status, the National Archives paints an emphatically negative portrait of Wilson in its description of him—as not only a conservative, corrupt aristocrat.³⁶⁸ Despite Wilson's important role at the Constitutional Convention, no mention is made of his virtues—including, among many others, his opposition to slavery, respect for women, or commitment to democracy.³⁶⁹ Fortunately for Wilson, his harsh treatment at the Archives is somewhat balanced by his treatment at Independence Hall, which pays him ample, and generally favorable, attention.³⁷⁰

In the related area of pop culture, Wilson, unlike the other major Founders, has remained absent from public memory, with two minuscule exceptions. First, a moderately successful Minneapolis alternative rock band has named itself "Fort Wilson Riot"—a name chosen, according to the band leader, because of the name's "populist" undertones, which comported well with the band's politics.³⁷¹ (The irony behind the fact that this populist band's name celebrates the attempted murder of America's most democratic Framer is no doubt lost on the band's well-intentioned members.) On Facebook, the social networking site, the Judge James Wilson Appreciation Society—a reference to Wilson's pitiful character in the musical *1776*—boasts a membership of

366. See, e.g., CHARLES CERAMI, *YOUNG PATRIOTS: THE REMARKABLE STORY OF TWO MEN, THEIR IMPOSSIBLE PLAN, AND THE REVOLUTION THAT CREATED THE CONSTITUTION* 88 (2005) (book placing Hamilton and Madison at the center of the Constitution's creation describes Wilson as a side-kick to the latter—one of Madison's "major supporters throughout the convention"); ALF J. MAPP, JR., *THE FAITHS OF THE FOUNDERS: WHAT THE FOUNDERS REALLY BELIEVED* (2003) (no mention of Wilson).

367. See *AMERICA'S FORGOTTEN FOUNDERS* (Gary L. Gregg II & Mark David Hall eds., 2008). One of the book's co-editors, Mark David Hall, is the sole person to publish a book on Wilson in the past thirty years.

368. See *America's Founding Fathers: Delegates to the Constitutional Convention*, http://www.archives.gov/exhibits/charters/constitution_founding_fathers_pennsylvania.html#Wilson (last visited Jan. 25, 2010) ("Wilson's strenuous opposition to the republican Pennsylvania constitution of 1776 [indicated] a switch to conservatism on his part. . . . Wilson affirmed his newly assumed political stance by closely identifying with the aristocratic and conservative republican groups. . . . [As Supreme Court Justice, Wilson] tried to influence the enactment of legislation in Pennsylvania favorable to land speculators.").

369. *Id.*

370. See, e.g., *Speech of James Wilson, Pennsylvania, October 6, 1787*, <http://www.constitution.org/afp/jwilson0.htm> (last visited Jan. 25, 2010).

371. As its guitarist Jacob Mullis has explained, "I picked out the name while reading *A People's History Of The United States* by Howard Zinn." E-mail from Jacob Mullis to author, Apr. 11, 2009 (on file with the author). The name, he explained, had the "benefit of fitting with our populist political views, which tend to inspire a lot of our writing. . . . Mainly we chose the name because it just sounded right for our band, and it is a reference that not many people will get so it gave us license to create a world of songs around the name. . . . It doesn't actually have anything to do with the actual James Wilson for us." *Id.*

one.

Perhaps the best source for demonstrating just how forgotten Wilson remains is through high school educational materials, where most Americans study the Constitution and civic affairs for the first and last time in their lives. Like the textbooks of the past, the textbooks of today omit Wilson from their stories of our nation's birth. Many fail to mention this lead architect of our polity even once in their many hundreds of pages.³⁷² In those that do mention him, Wilson is lucky if he receives more than a single sentence. Some books simply quote him as an observer of events identified by name alone—a name that of course means nothing to its readers.³⁷³ Other textbooks do comparably little to signal his importance; one widely used textbook describes Wilson, with almost comical understatement, as “a Pennsylvania lawyer.”³⁷⁴ Still others describe him in ways that, though facially neutral, clearly come off as negative. In its sole reference to Wilson, for instance, *Call To Freedom* (2000) identifies him only as a co-crafter of the Three-Fifths Compromise:

To resolve this problem [of Northern states not wanting but southern states wanting slaves to count for representation purposes], Edmund Randolph and James Wilson proposed that three fifths of the slaves in each state be counted as part of that state's population when allotting representatives to the lower house.³⁷⁵

By omitting Wilson's opposition to slavery, and indeed everything about him but his role in brokering the Three-Fifths Compromise, the book ensures that its young readers' sole association with the name James Wilson, if they have one at all, will be with one of the most famously repugnant clauses of the original Constitution. Perhaps no modern textbook, however, better epitomizes America's treatment of Wilson than *American Anthem: Modern American History* (2007).³⁷⁶ “Because of the role he played in planning and writing the final document,” the authors explain, “Madison is often called the Father of the Constitution.”³⁷⁷ Then, in an abnormal turn for American high school textbooks, the text identifies Wilson, along with four others in addition to Madison, as a “key” Framer: “Other key delegates to the Constitutional

372. The list is long. See, e.g., ANDREW CAYTON ET AL., *AMERICA: PATHWAYS TO THE PRESENT* (2007); PAUL BOYER, *BOYER'S THE AMERICAN NATION* (1998); MCDUGAL LITTELL, *CREATING AMERICA: A HISTORY OF THE UNITED STATES* (2001); JAMES WEST DAVIDSON, *THE AMERICAN NATION: BEGINNINGS THROUGH 1877* (2005); GERALD A. DANZER ET AL., *THE AMERICANS* (2007); MARK C. CARNES, *THE AMERICAN NATION: A HISTORY OF THE UNITED STATES* (2008).

373. See, e.g., JOYCE APPLEBY ET AL., *THE AMERICAN JOURNEY: BEGINNINGS TO 1787*, at 199 (2002) (“Pennsylvania sent the highly regarded Benjamin Franklin, as well as Gouverneur Morris, Robert Morris, and James Wilson”); BOORSTIN KELLEY, *A HISTORY OF THE UNITED STATES* 115 (2005). These books devote much attention in their sections on the Constitutional Convention to such figures as Hamilton, Sherman, Ellsworth, and William Samuel Johnson—all constitutional lilliputians next to Wilson. Wilson, however, is nowhere to be found. See *id.* 116-21.

374. *Id.*

375. STERLING STUCKEY, *CALL TO FREEDOM* 241 (2000).

376. EDWARD L. AYERS ET AL., *AMERICAN ANTHEM: MODERN AMERICAN HISTORY* (2007).

377. *Id.* at 45.

Convention—now known as the framers—included Roger Sherman, Alexander Hamilton, and James Wilson. Leading the group were George Washington and Benjamin Franklin.”³⁷⁸ This placement with the heavy-hitters appears to be a victory for Wilson—until the reader takes a look at the graphic below the text.³⁷⁹ Howard Chandler Christy’s painting is reproduced, and imposed on it is a tab listing “Key Delegates at the Constitutional Convention.” Of the six “key” delegates mentioned in the text, however, only five are listed on the graphic—Madison, Sherman, Hamilton, Washington, and Franklin. The missing Framers, of course, is Wilson. Wilson’s subordinate status is conveyed none too subtly in the reprint of Christy’s painting. In the original, Wilson can be found on the rightmost side of the painting, where he sits, prominently and contemplatively, to Washington’s left.³⁸⁰ In the textbook’s graphic, this sliver of the painting has simply been lopped off. Figuratively and literally, Wilson has been cropped out of the page of American history.

And that is where Wilson remains, even to this day. For all the efforts to resuscitate him in the past, and for the decisive role his thoughts have played in so many critical junctions in our history, Wilson remains cropped off our collective page. The crafter of America’s Constitution who, more than any other Founder, championed the political ideals Americans have grown to cherish, is lucky if he receives a single mention in a modern history textbook. After all this time, and despite cries for his revival from the most revered academics, in the story of the Founding that all of us who are not professors learn, Wilson’s character, and his many important lines, have been—and remain—redacted.

PART IV: WHY DOES OUR WILSON AMNESIA MATTER?

This Note has traced three facets of Wilson’s story—who he was, why he was forgotten, and how he has been sporadically remembered through American history. A major question remains to be asked, however: Why does our Wilson amnesia matter? This final Part aims to provide a brief answer this question.

The first reason we must revive Wilson is simply to develop a better understanding of the Founding. For Americans, the story of the Founding is as important as stories come. “As long as the Republic endures,” Wood has written, “Americans are destined to look back to its founding,”³⁸¹ not just for a sense of how our country was born, but also for our sense of collective American identity. Given how important the story we tell ourselves about the Founding is, our current omission of one of the most fundamental players in

378. *Id.*

379. *See id.* at 44–45.

380. For more thorough discussion of this painting, see *supra* note 287 and accompanying text.

381. GORDON WOOD, *supra* note 362, at 4.

this story renders our current narrative deeply inadequate. The many cursory tellings of the Summer in Philadelphia that appear in textbooks, for instance, many of which omit Wilson entirely, are *Hamlet* without the Prince.³⁸² Indeed, when we look at the Constitution of today—a document that has evolved so neatly in line with Wilson’s principles—there is good reason to believe the man most worthy of the title Father of the Constitution is not the one who has held it for centuries, James Madison, but rather his obscure Philadelphian ally from the convention, James Wilson.³⁸³ For over two centuries now, in recounting stories about the Founding, Americans have been reading off a script with a well-defined cast of *dramatis personae*, unaware that a lethal combination of annihilative factors—including a disgraceful death, lingering deep-rooted misunderstandings, and centuries of scholarly complacency—has redacted from this script one of its noblest and most important characters, who resolutely wielded his professional prestige and formidable intellect to make the Constitution a far more democratic and immigrant-friendly charter than his colleagues would have constructed in his absence. To understand the full story of our nation’s birth and position ourselves to learn lessons from it, we must first uncensor the manuscript from which we have been reading to include this vitally important character. We can then see how his inclusion affects our overall interpretation of the Founding.

Only good can come from casting aside the veil that now obscures Wilson. His inclusion into our Founding narrative would shed further light on our nation’s birth by, among many other things, demonstrating that the Founders, despite politically conservative recent attempts to appropriate them, and anachronistically minded liberal attempts to disavow them, belong not just to conservatives, but to all Americans. For the past thirty years, Antonin Scalia and Howard Zinn have joined hands to leave many Americans with the misimpression that to be enthusiastic about the Founders is to engage in a filiopietistic rejection of all things new. To know Wilson, however—and to know how important he was in designing the nation—is to know how deeply flawed an idea this is. Wilson and the other Founders were anything but the conservatives of their time. Rather, they were the reformers of their day, radically innovative thinkers and doers, willing to rethink and remake age-old political paradigms anew. And they fully expected future Americans would continue to do this as well. No one better than Wilson demonstrates that to contemplate how we might restructure our governmental institutions is to operate *within* the tradition of the Founders, not outside it. “It is the glorious destiny of mankind,” Wilson wrote, “always to be progressive.”³⁸⁴ To know

382. As discussed above, there is good reason to believe Wilson was the most influential player in crafting the Constitution.

383. See note 60, *supra*.

384. SEED, *supra* note 12, at 21.

Wilson is to know that originalism and liberalism are not at odds, but can—and do—go hand in hand.

Another major reason to disinter this Founder for good is that, of all the men who created the country, Wilson best embodied the egalitarian political ideals that, in the eyes of many Americans anyway, form the bedrock of our democracy today. Indeed, it is hardly an exaggeration to say that American history is the story of America catching up to James Wilson.³⁸⁵ To say that Wilson got things right, however, is to say one of two things, and it is important to draw a distinction between them. The first has to do with Wilson's simple vindication by subsequent generations of Americans—with the fact that it was *Wilson's vision* of what America ought to be, more than that of any other American Founder, that best reflected what it in fact became.³⁸⁶ "His contributions to the framing of the Constitution," Bryce wrote, "were of inestimable value—and among the proposals he made which were not accepted there are some which a weighty body of opinion in later days has approved."³⁸⁷ In itself, however, Wilson's seemingly prescient *accuracy* is not so much what makes him special. What is accurate is not always what is right. Indeed, some of Wilson's constitutional predilections realized over the course of the past 220 years have turned out to be of questionable value. His wish to see more power amassed in the Executive branch, for instance—a view he fought hard for against the many King-wary delegates in the summer of 1787—was largely realized over the course of the twentieth century, most disastrously in the human rights abuses of the George W. Bush Administration.³⁸⁸ And some other fulfilled Wilsonian dreams, including his positions in a variety of arcane legal disputes, would strike us today as fairly neutral in moral value.³⁸⁹

Wilson also got things right, however, in a more meaningful sense. Most of Wilson's stances on political and ethical issues that have been borne out through American history—popular sovereignty, expansion of suffrage, eradication of slavery, respect for women, one person one vote—reflect what many of us across America and the globe today would consider significant moral progress.³⁹⁰ Wilson's vision of America was right not only in the sense

385. "Many of the great principles of government advocated by [Wilson]," John B. McMaster wrote in 1907, "we, as a nation, are only beginning to apply." See Alexander, *supra* note 117, at 145. One hundred years after he made it, McMaster's observation remains still holds today.

386. See 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 2 (Robert McCloskey ed., 1967) ("It is not too much to say that the ideas of James Wilson more nearly foreshadowed the national future than those of any of his well-remembered contemporaries.").

387. See Adams & Bryce, *supra* note 146, at 360.

388 See, e.g., Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

389. Most Americans, for instance, wouldn't feel too strongly one way or the other about the fusion of law and equity, or certain developments in evidence law doctrine.

390. Before we venture too far into judgment-laden territory, it will be useful to clarify some points at the outset. Some modern historians go so far as to fault the Founders for not going far enough—for failing to liberate blacks and women in the American Revolution. Gordon Wood is rightfully quick to attack such

that it accurately reflected what America would become; most today would say it was right in a weightier sense as well—right in a right-or-wrong sense. The principles Wilson espoused at the close of the eighteenth century embodied, more than those of any other Founder, what would become some of the country's and globe's most treasured ideals in the ensuing centuries. If we are in search of the Founder who best embodied the nation we have become, we need look no further. When we look past his aristocratic veneer to his deeds and the content of his character, we find that Wilson is us, and we are him.

This point is especially important because, once we have embraced Wilson as students of the past, we can further embrace him as citizens of the present. Wilson, once recognized as one of our nation's key architects, can perhaps serve as a guiding light for where America ought to go next, just as he has done in the past—whether in the abolitionist era, the Progressive Era, or the Civil Rights Movement. Though America has steadily been catching up to him, Wilson's gauntlet very much remains down. Our Electoral College, a mechanism Wilson designed but opposed,³⁹¹ which essentially confines national presidential elections to a small subset of swing states, and has repeatedly placed losers of the national popular vote inside the Oval Office;³⁹² our flagrantly undemocratic Senate, where one citizen of Wyoming enjoys the senatorial representation of seventy people in California; our punitive system—uniquely savage among western democracies, and comparably harsh to those of many oppressive states—which sends people to brutal prisons for nonviolent crimes such as selling narcotics;³⁹³ our broken and discriminatory immigration laws—on all these legal fronts and others, we still have not caught up to Wilson, who was for a national majority vote of the president, against equal representation in the Senate, in favor of humane treatment of criminals, and, half-Scotsman that he was, of course in favor of an open and enlightened immigration policy.³⁹⁴ Were today's reformers on all these fronts

scholars for “the grossest kind of anachronism.” See Wood, *supra* note 361. Of course, faulting the Founders for failing to espouse ideas that did not exist in their times makes little sense. Surely, however, looking favorably upon free thinkers who arrived at the right answers before others is a different matter. If to admire, say, the Founders of America's first antislavery society in 1775, or the attendees of the Seneca Falls Convention, were simply to be guilty of anachronism, history would be a dull subject indeed. If we can admire those figures, we can admire Wilson.

391. As explained above, Wilson only designed the Electoral College because it was the most democratic means of electing a President he could get other delegates to agree to.

392. Three presidential elections—those of 1876, 1888 and 2000—handed victory to a man who did not receive the plurality of the nationwide popular vote, and there have been close calls (the 1960 election, for instance) that came electoral inches from doing the same. For a thorough exploration of the mechanism and its many problems, see GEORGE C. EDWARDS, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* (2004).

393. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2005).

394. As Wilson admitted while trying to convince Pennsylvanians to ratify in the Constitution, “I will confess indeed, that I am not a blind admirer of this plan of government, and that there are some parts of it, which if my wish had prevailed, would certainly have been altered.” JAMES WILSON, *State House Yard Speech*, in WORKS, *supra* note 66, at 176.

to know that the Father of America's Constitution espoused views in his time that align neatly with theirs today, they—like some of the most revered reformers in American History—could invoke this Founder to move the country forward on all these new fronts.

In light of Wilson's crucial importance—both to the Founding itself and to the lessons we draw from it as Americans today—the scholarly community's ongoing failure to resuscitate this man is as astonishing as it is indefensible. The neglect, of course, is neither a product of malice nor laziness. Rather, it more likely stems from generations of conventional wisdom—or, in this case, conventional folly. The academy, like many things in this world, can be a victim of inertia. When a scholar has grown up reading plenty about the Founding, but hearing next to nothing about a given player in it, it becomes easy to assume there *must* be a reason why, even in the face of considerable evidence to the contrary. So it has apparently been with the historians who have written our high school texts and the professors teaching our college courses in their approach to Wilson. The inertial forces at work here have been powerful, overcoming repeated efforts by our most prominent academics to direct our attention to Wilson. And thus generations of neglect have accreted into an enormous blindspot, which to this day is rendering invisible a man who deserves to sit in the first rank of our public memory, just after Washington and along with the other key founders who are household names. Wilson may never have been president, as many of the now major Founders were. Nor, with his uncharismatic brand of genius and disastrous finances, could he have been. But many of the household names from the Era were never president—Franklin, Hamilton, Paine, and Marshall. This class of Founding Fathers is widely known and discussed today, occasionally in best sellers. If American memory has made space for these other men, surely, somewhere beyond the pages of obscure political science articles, there is room for Wilson.

Rousing Wilson from the dead will take sustained effort. A very powerful group of people tried to do it a century ago and decisively failed. Disillusioned Wilson enthusiasts of the twentieth century have judged such efforts at revival doomed to failure. Wilson's second biographer, Geoffrey Seed, for instance, finished his brief book on Wilson on a melancholy note, expressing little hope that America will ever allow Wilson to claim his spot inside the temple where America's key Founders reside. His final paragraph read:

The story of Wilson, at the personal level, is a sad one. Admired but unloved in his day, his compelling ambition, powered by his enormous energy, failed, though only just, to obtain for him the position in the new nation he so desperately coveted. His life ending in disgrace, the memory of his vital contributions to the welfare of his country almost died with him, and even now resuscitation

is impeded by prejudices and misconceptions which still persist. Perhaps it is now too late for Wilson to achieve with posterity the fame he so much desired, and others less deserving may continue to outshine him in the estimation of the people in whom he had put such great faith.³⁹⁵

Seed's resignation, coming as it did from an aged Scottish professor looking across an ocean at a country he would never call home, was understandable. Indeed, in the thirty years since his words were written, little on the Wilson front has changed, and Seed's pessimism has largely been vindicated. But as Americans of today rather than Scots of the past, there is no need, nor even any reason, to adopt Seed's fatalism. The pages of history, as Jefferson might have said, belong in usufruct to the living. They are ours to write and revise. As the scholars of today, it is fully within our power—and, indeed, our duty—to unredact the manuscript of the Founding era to uncover this fundamental Founder. Now is as good a time for his renaissance as any. Not only has the country only become more Wilsonian since the first earnest attempt to bring him back one hundred years ago, but even on our contemporary constitutional debates, his voice continues to pull us forward toward further reform, as though somehow beyond the limitations of its time. As America continues to recast itself in the frame he aimed to construct for it, Americans owe it—both to Wilson and to themselves—to take permanent notice of America's lost Founder, who of course yearned for fame as much as his colleagues did, and deserves it no less. It is time to finish the job started by the abolitionists, Teddy Roosevelt, the Warren Court, and the greatest constitutional historians of the past and present. Another resuscitation—this one enduring—is in order.

395. SEED, *supra* note 12, at 182-83.

