

# JAMES WILSON.

1742-1798.

BY

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“**I**NDEED the character of this excellent man has been too little known—similar has been the fate of many other valuable characters in America. They are too little known to those around them, their modest merits have been too familiar, perhaps too uniform, to attract particular and distinguished attention; by those at a distance the mild and peaceful voice of their virtues has not been heard. But to their memories justice should be done, as far as it can be done, by a just and grateful country.” So said James Wilson, speaking to the assembled wit and wisdom of those states which he had so powerfully aided to become a country. The words were spoken in that first lecture upon law which he delivered in the year 1790,<sup>1</sup> to the newly created law class of the college which was later to become the University of Pennsylvania; the school that was in after years to honor him as its founder; as its first professor; as one of the wisest of its teachers. Yet how

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<sup>1</sup> Wilson's Works, vol. I, ~ Phila. 1804.

well his own phrases—spoken of Lord Baltimore—apply in these later days to the man who spoke them more than a hundred years ago! Indeed his character has been too little known; his modest merit has not attracted attention; the mild and peaceful voice of his virtue has not been heard amid the noisier claims, the more showy attributes of many who have deserved far less from their country.

James Wilson was not a descendant of the early settlers: the stress and strain of colonial life had not helped to shape the character of his forebears, or to fashion the strength and sweetness of his own. He was a Scotchman, born in St. Andrews, September 14th, 1742, and educated, as to his earlier years, in the place of his birth, afterwards going to Glasgow and to Edinburgh, where he received that knowledge of the civil law which enabled a recent biographer and editor to call him "the greatest English speaking civilian of the age in which he lived." He had just passed his majority when he arrived in New York, but his impressionable period had by no means gone by; he was still a youth in whom enthusiasm, eagerness for improvement, avidity for knowledge, were at their keenest. This formative period of his life, was also that formative period of the country of his adoption, in which the vague beginnings of the national idea were gradually taking shape, to be finally formed into the Constitution of 1787.

From 1763 to 1775, while he was passing from the youth of twenty-one to the man of thirty-three, he

was in the very center of all that turmoil of the heart and brain, that unrest of the people, that was making, month by month, the later history of that people possible. Not born of them physically he soon showed himself to be of their kindred through those higher bonds of mind and heart by which men are bound one to another. He sometimes felt the reproach of that alien birth; he repelled the insinuation that such birth should be considered a reproach, when the question came up during the debates upon the Constitution,<sup>2</sup> but he repelled it without bitterness, even without a touch of that sarcasm of which he was a master—that swift lightning stroke that sometimes fell upon an adversary so suddenly out of the soft-seeming clouds of his customary benignity. In his Fifehire home; in his student days in Edinburgh, he was among influences inimical to the England which was slowly absorbing his country.<sup>3</sup> In the discussions of that time, to which a young man of so keen an intellect; so self-poised a mentality, must have listened with deepest interest, he heard England not praised, not admired, not referred to with the love and reverence with which he might have heard her mentioned had he lived farther south, but in terms of distrust, dislike, and disapproval. It may well have been that in those early days his love for liberty took root; that his faith in the ability of the people to govern themselves, was born; and that

<sup>2</sup> Elliott's Debates, vol. V, 399, 412.

<sup>3</sup> Kellogg, Lippincott, vol. LXIII, 245.

he acquired that never-failing confidence, that serene sureness of faith in the principles which were afterwards to be the foundation stones of the great republic he was to be instrumental in forming.

It is probable that James Wilson, with his mind already busy with its investigations into the rights of man; already disturbed in its allegiance to the government under which he lived, felt that the life that lay before him in his native country was too narrow for the powers that he was conscious of possessing, and that the opportunities opening before him were not tempting. His father is said to have injured his business affairs by unfortunate speculations; therefore he could give his son little more than that good education which has rightly been considered, both in Scotland and America, better than any other species of wealth. Wider opportunities, greater freedom, and that fascination which a young, new country has for the mind that loves to explore, to overcome, to create, were all to be found in America. When James Wilson arrived in New York he was "An American in principle, if not by birth," for certainly no more sincere, loyal, devoted American was ever born among us than this young, highly educated Scotchman proved himself to be. It has been said that he brought to his new home little of that which we are accustomed to call wealth, but he possessed a mind rich in such training as could be given by two famous men; Dr. Blair, who was his tutor in rhetoric, and Dr. Watts, under whom he was in-

structed in both logic and rhetoric—that learning which in later life was to give him the power to move minds with his eloquence and to sway them with “an almost irresistible logic.”

After spending some time in New York, Mr. Wilson went to Philadelphia, well provided with letters to persons in that city. One of these letters was to Dr. Richard Peters, rector of Christ and St. Peter's churches, who proved himself a most devoted friend to the young stranger. Doctor Peters, himself a man of learning, a lover of wisdom, and desirous of furthering the cause of education, was a trustee of the Philadelphia College and Academy, and recognizing the exceptional qualifications of Mr. Wilson, introduced him to the trustees of that institution. He triumphantly acquitted himself, upon examination, being considered by the examiners the best classical scholar who had ever offered himself to them as a tutor in the Latin department of the college. His mind turned naturally to the study of the law, however, and through the influence of the friends whom he had drawn to him during his short residence in the city, especially through the friendship of Doctor Peters and of Bishop White, he secured the privilege of studying law in the office of Mr. John Dickinson. This step involved the loss of his salary as tutor in the College of Philadelphia, and funds were provided by mortgaging a farm in Scotland. Two years of arduous application fitted Mr. Wilson for the practice of his profession, and at the end of

this period of study he was admitted to the bar. He did not at once settle in Philadelphia, but first went to Reading, where he remained for a short time. He then removed to Carlisle, where he lived until 1777. He then went to Maryland for one year, finally settling in Philadelphia in 1778.

When about thirty years of age, and soon after taking up his residence in Carlisle, Mr. Wilson was married to Miss Rachel Bird, the youngest daughter of William Bird, of Bucks County, Pennsylvania. Mr. Bird, the father, was the proprietor of extensive iron works on the banks of the Schuylkill river, and he resided near them upon an estate called, from the family name, "Birdsborough." Six children were born of this union, two daughters and four sons. Mr. Wilson's family life, like his public life, was of a character to secure the "reverence and affection of all about him." In this relation he showed the simplicity, the serene kindliness, which are characteristic of the philosopher and philanthropist of all times.

An anecdote is told of the early days of Mr. Wilson's practice, which shows the impression he made upon his contemporaries at the bar. He was employed as counsel for a Mr. Wallace, a dealer in lands, in a suit in which the opposing parties were the proprietaries of Pennsylvania. Mr. Chew, then attorney-general, was of counsel for the proprietaries. It was noticed, soon after Mr. Wilson began to speak, that Mr. Chew fixed his eyes upon him with an intense interest, and remained in that atti-

tude to the end of the argument. Counsel on the same side with Mr. Wilson consulted as to whether it would be best to add anything to the argument of Mr. Wilson, who had spoken first. They decided it would be best not to do so. Before the court had closed its session Mr. Wilson had been retained in another proprietary cause; "and his standing at the bar was henceforth lofty, firm and unalterable."<sup>4</sup>

Not long after Mr. Wilson had become thus firmly established in his profession, the first movements of the struggle between the colonists and the mother country took place. He had already begun his literary labors by writing, conjointly with Bishop White, a number of essays, under the title of "The Visitant." But it was while living in Carlisle that he began the publication of those political pamphlets which had so much influence upon the minds of his contemporaries. In 1774 he published the pamphlet entitled, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament,"<sup>5</sup> which was greatly admired at the time, and which shows how his mind was already working along the lines in which he was to do so much for the remainder of his life. In this essay, he denied, in every instance, the authority of the British Parliament over the colonies. His argument was based upon broader grounds than any that had theretofore been advanced, but these grounds were

<sup>4</sup> Sanderson, *Lives of the Signers*, James Wilson, p. 2.

<sup>5</sup> *Wilson's Works*, vol. III, 203. Phila. 1804.

afterwards generally adopted by others. He showed, here as always, the originality which was so marked a feature of his mind: he was an originator, a leader, a pioneer; and those who used his ideas and followed in the path he had marked out, too often reaped what he had sown, with no thought of recognition of the sower. It is in this essay that he wrote:

All men are by nature equal and free; no one has a right to any authority over another without his consent; all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.

If this paragraph had been written after the Declaration of Independence had been published to the world there can be little doubt that Mr. Wilson would have been thought to have absorbed both the words and the sentiments of that document to a degree that amounted to plagiarism. As it was written in 1774, it must be equally apparent that Mr. Wilson had formulated the ideas and created some of the phrases of the Declaration two years before it took its final shape.

The provincial congress of Pennsylvania met in the early summer of 1774, before the delegates had been appointed to the first general congress. It was soon understood that the delegates would be appointed at the first meeting of the Assembly, and dur-



ing the Convention Mr. Wilson exhibited so many of the talents which were afterwards to render him a leading figure in the events of the time, that it was recommended that he should be among the delegates. This recommendation was rejected, at the same time that Mr. Dickinson, Mr. Wilson's former teacher, was refused an appointment. Mr. Galloway, the speaker of the Assembly, differed with them in political opinions, and had, it is said, a personal enmity toward Mr. Dickinson. The pupil had thus been raised to an equality with his former preceptor only to be rejected with him as a candidate for this honorable position. The adverse decision was soon reconsidered, however, and on May 6, 1775, the Assembly of Pennsylvania added Thomas Willing, Benjamin Franklin, and James Wilson to the delegation. Mr. Wilson took his seat May 10, 1775; he was re-appointed November 3, 1775; July 20, 1776, and March 10, 1777. Before the latter dates, however, much had happened. Events in the political world were bringing the colonists more and more rapidly to the point at which they were able to consider separation from England as a possibility. In January, 1773, in a speech before the Convention of Pennsylvania, Mr. Wilson defended the colonists against the reports, circulated in England, that they were "licentious and ungovernable." He follows the course of the English government in regard to the colonies; depicts in language that has still the power to stir men as it had when it was first uttered,

the attempts of the colonists to preserve their liberties and at the same time their faith in, and allegiance to, the mother country. He protests the right of the colonists to protect themselves, and asks:

Were the colonists so blind as not to discern the consequences of these measures? Were they so supinely inactive as to take no steps for guarding against them? They were not. They ought not to have been so. We saw a breach made in those barriers, which our ancestors, British and American, with so much care, with so much danger, with so much treasure, and with so much blood, had erected, cemented and established for the security of their liberties and — with filial piety let us mention it — of ours; we saw the attack actually begun on one part: ought we to have folded our hands in indolence, to have lulled our eyes in slumbers, till the attack was carried on, so as to become irresistible, in every part? Sir, I presume to think not. We were roused; we were alarmed, as we had reason to be. But still our measures have been such as the spirit of liberty and of loyalty directed; not such as a spirit of sedition or of disaffection would pursue. Our counsels have been conducted without rashness and faction: our resolutions have been taken without phrenzy or fury.

All the troubled feelings of the time: the thoughts and hopes and fears, the respect for authority and desire for liberty, the love for the old order of things and the hatred of the new oppression, find here their appropriate expression. In principle and in manner it parallels the Declaration of Independence, citing the same grievances, declaring the same fundamental truths. But the time was not yet quite ripe for a complete rupture with the home government, and Mr. Wilson disclaimed any disloyalty to the crown

or to the British constitution. He declared that the colonists were loyal, but that ministers had been made the instruments of an oppression too intolerable to be borne. Yet he sees the inevitable approaching:<sup>6</sup>

We behold — Sir, with the deepest anguish we behold — that our opposition has not been as effectual as it has been constitutional. The hearts of our oppressors have not relented: our complaints have not been heard: our grievances have not been redressed: our rights are still invaded: and have we no cause to dread, that the invasions of them will be enforced in a manner, against which all reason and argument, and all opposition of every peaceful kind, will be vain? Our opposition has hitherto increased with our oppression: shall it, in the most desperate of all contingencies, observe the same proportion?

Let us pause, Sir, before we give an answer to this question: the fate of us: the fate of millions now alive: the fate of millions yet unborn depends upon the answer. Let it be the result of calmness and intrepidity: let it be dictated by the principles of loyalty, and the principles of liberty. Let it be such, as never, in the worst events, to give us reason to reproach ourselves, or others reason to reproach us for having done too much or too little.

In such words as these James Wilson, delegated by the people to speak for them, voiced all they dumbly felt. No voice more eloquent could have been found for them.

The re-appointment of Mr. Wilson to the Continental Congress, in November, 1775, proved to be a most important event, not only in his own history,

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<sup>6</sup> Wilson's Works, vol. III, 258. Phila. 1804.

but in its effect upon those measures which were to be of such vital import to his country. The men of that congress were to shape and give to the world the Declaration of Independence. The delegates from Pennsylvania were divided in their opinions. John Dickinson, Robert Morris, Charles Humphreys, and Thomas Willing were opposed to the Declaration. Benjamin Franklin, James Wilson, and John Morton favored it. The attitude of Mr. Wilson during the sessions of Congress preceding the second of July, and in the final debate itself, is in perfect accord with the principles upon which he uniformly acted.

On the fifteenth of May, 1776, Congress adopted a resolution recommending all the colonies to form for themselves independent governments. John Adams had written a preamble which caused a hot debate. To adopt it was in effect to declare independence. James Duane, of New York, said that he believed that the people would sustain such a declaration, but that he would not yet believe they were not destined to receive a favorable answer to their demands; he objected to so much haste and urging. Fiske, in his account of this meeting says: <sup>7</sup>

James Wilson, of Pennsylvania, one of the ablest of all the delegates in that revolutionary body, urged that Congress had not yet received sufficient authority from the people to justify it in taking so bold a step.

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<sup>7</sup> Fiske, *American Revolution*, vol. I, 182.

It seems that Mr. Wilson had first stated the progress of the dispute between Great Britain and the colonies; declared it to be his opinion that the colonies would stand justified before God and the world in declaring an absolute separation from Great Britain forever; and that he believed that the people of Pennsylvania were in favor of independence, but that the sense of the assembly as delivered to him by their instructions was against the proposition. He therefore wished the question to be postponed, because he had reason to believe that the people of Pennsylvania would soon have an opportunity of expressing their sentiments, and he thought the people should have an opportunity given them to signify their opinion in a regular way upon a question of such importance. Delegates from other colonies were bound by instructions to disagree to the proposition and he thought it right that the constituents of these delegates should have an opportunity of debating upon it. It is evident that Mr. Wilson comprehended fully the need that the delegates should be supported by those who had clothed them with their powers. He looked, in all these proceedings, to the end in view; saw the subject on all sides; knew where too rapid a movement would defeat that end and how to so marshal his forces as to bring them together at the critical moment. He was then bending all his energies to secure for the Declaration the support of the people, which to his mind could be its only sanction. To

so ardent and confirmed a supporter of the rights of the people no movement could be well timed if made before the people were ready. It must be by their consent and command that such a thing should be done. So he waited until they should have expressed their will. This expression came to him two days after he had made this speech, when the instructions of the Assembly were altered and new instructions given to the delegates from Pennsylvania. He was now free to act, and said that being now unrestrained, if the question were put he should vote for it. But the people had as yet only spoken through the voice of a body not elected with that subject in mind. The deputies of the people of Pennsylvania were soon to meet to give their opinion upon the matter; other members were still under negative instructions; the people of several colonies had not yet recalled their objections. Until the people had spoken there was fear that unanimity could not be obtained.<sup>8</sup> All this is eminently judicious and characteristic. To him there was one ideal government, government by the people; all other governments were in their several degrees tyrannical, a benevolent tyranny as tyrannical as any. The best action taken by a delegate or official of the people against their expressed will or in violation of their wishes he believed to be an act of

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<sup>8</sup> A certificate, signed by John Hancock, Samuel Adams, Thomas Jefferson, Robert Morris, and nineteen other members of the Congress certifies to the action of Mr. Wilson as stated above. This certificate is in manuscript in the Library of Congress.

tyranny. This being so, he could not act until the people had acted. The advocates of delay were successful, and on the seventh of June, after a long debate, the motion of Edward Rutledge, of South Carolina, to postpone the question for three weeks, was carried. The people were active during those three weeks and when the first day of July came there could be little doubt as to what they wished. Twelve of the colonies had finally committed themselves to the cause of independence. New York alone sent delegates without instructions, and her delegates were excused from voting. In Pennsylvania there had been a hot discussion; the Quakers desired, at any price, to avoid an armed conflict; the proprietary, very naturally, exerted itself against independence. On the eighteenth of June a convention was held to decide on the question of independence, and there were six days of earnest discussion, which terminated in a vote for separation. The people had spoken; the wisdom of delay was made manifest. That practical unanimity which Mr. Wilson had so much desired had been secured. When Congress, on the first of July, resolved itself into a committee of the whole, to "take into consideration the resolution respecting independency," the delegates of but two states were opposed to the Declaration. John Dickinson, of Pennsylvania, made a powerful speech in opposition; and four of the votes of that state were in the negative; Mr. Wilson, with Franklin and John Morton, voted in the affirmative.

The next morning, the second of July, Delaware changed her vote to the affirmative; Dickinson and Morris stayed away. Franklin, Morton, and Wilson voted in the affirmative; the great state of Pennsylvania was won for the cause of independence; and the states had voted unanimously for it. It is largely due to Mr. Wilson that the votes which won this victory were not those of uninstructed delegates but those of men acting in accordance with the expressed will of the people. The firm, bold signature of James Wilson stands out clearly from among the names of those who, by the placing of their names on so significant a document, proved to the world their willingness to devote their lives and all that made them valuable to the upholding of a government in which the only sovereign should be the people.

While a member of Congress Mr. Wilson had been one of the most active and able of its members. In the summer of 1775 he was a member of the committee which prepared an eloquent and moving appeal to the Assembly of Jamaica, and in July of the same year he was elected a commissioner of the middle department to superintend Indian affairs—the Indians having been divided into three departments, the northern, southern and middle. He was a member of many other committees, one of the most important being that to confer with Washington and concert a plan of military operations. He thus proved himself in every way an active and ardent



worker, giving to this work, as to all work that he undertook, a most conscientious attention.<sup>9</sup>

It may be because of all this activity that he made many enemies: to act is often to act against the interests of some one; to act vigorously and constantly in matters upon which public opinion is hotly divided, is to act against the self interests of many. James Wilson had acted vigorously, constantly, and in co-operation with those who were willing to sac-

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<sup>9</sup> Sanderson, in his *Lives of the Signers*, gives the following paragraph to Wilson's committee work:

"He was also a member of the several committees, to take into consideration the state of the colonies, and report what number of forces would be necessary for their defense; to prepare a letter to the inhabitants of Canada; to prepare an address to the United Colonies;—to take into consideration the state of the Indians in the middle department;—to consider on the most speedy and effectual means for supporting the American cause in Canada;—to confer with General Washington, and concert a plan of military operations;—to devise ways and means for supplying the treasury;—to form an effectual plan for suppressing the internal enemies of America;—to devise and execute measures for effectually reinforcing General Washington, and obstructing the progress of General Howe's army;—to take into consideration the state of the army;—to explain to the several states the reasons which induced Congress to enlarge the powers of General Washington;—to consider what steps were necessary to be taken, should the enemy attempt to penetrate through New Jersey, or to attack Philadelphia;—to devise a plan for encouraging the Hessians, and other foreigners, employed by the king of Great Britain, and sent to America for the purpose of subjugating the states, to quit that iniquitous service, etc., etc., etc. He was a member of the standing committee on Indian affairs, and of the standing committee to hear and determine upon appeals brought against sentences passed on libels in the courts of admiralty in their respective states. He was also attached to the first board of war. In fact, no member was more frequently called upon to exert his talents, and no member exhibited more industry, capacity, and perseverance, in obeying the calls of duty, than James Wilson."

rifice the selfish interests of themselves and others for the common cause; therefore he made enemies. His foreign birth was used as an argument against him. "I will never trust a Scotchman again," wrote one of his enemies. "They cannot be honest when liberty is in question." <sup>10</sup>

The details of the debates which preceded the Declaration were not then known to the people, or James Wilson would have been known to them as he was to his colleagues, as one of the most ardent and earnest of all the advocates for independence.

During the period of Mr. Wilson's absence from Congress, M. Gerard, minister plenipotentiary of France, finding it necessary to secure for his country some person to settle the constant disputes which arose between the citizens of France and the citizens of this country, regarding many matters of importance, entered into negotiations with Mr. Wilson for the purpose of appointing him advocate-general of the French nation in the United States. June 5, 1779, M. Gerard made the appointment; Congress was notified, September 15, 1779; and February 18, 1781, the King of France issued letters patent confirming the appointment under his hand, stating it to have been made, "in consideration of the zeal and attachment which he had, on various occasions, shown toward the subjects of his majesty." The original commission still exists, signed by the hand of

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<sup>10</sup> See Sanderson's *Lives of the Signers* for a long and detailed account of the political activities against Mr. Wilson, and the letters and expressions of sentiment of the time.

the king and is preserved in the library of the Law Department of the University of Pennsylvania, which honors Wilson as its founder. The reasons for choosing Mr. Wilson are given in these words of the commission:

The daily discussions which arose in the different parts of United America, relative to commerce and navigation, and the establishment of fiscal regulations on those subjects, formed an object of great labor and importance, which can only be confided to a person versed in the laws and international administration of America, as well as in the rights of man, and the general usages of commerce; and the experience and talents of which Mr. James Wilson has afforded us many brilliant proofs making him worthy of this nomination, we hereby appoint and constitute him, subject to the good pleasure of the king, and until his decision be known, advocate general of the French nation, in the thirteen United States.

Mr. Wilson found himself in a position of considerable delicacy and importance. He was a pioneer, a maker of paths in the wilderness. He felt the position fully, saying:

I fancy myself in the position of a planter, who undertakes to settle, and cultivate a farm in the woods, where there has not been one tree cut down, nor a single improvement made.

He was well aware, both of his attainments and of his deficiencies, and in his own words, written in a letter to a friend, he vividly depicts the situation:

A close study of the laws of England and of this country, for upwards of thirteen years, and an extensive practice during the

greater part of that period, entitle me to say, that I am not altogether unacquainted with them. I have given attention to the laws of nations. Since I have been honored with the nomination to be advocate general, I have directed my studies to the laws and ordinances of France; but I am very deficient in the knowledge of them. Nothing but intense application, for a considerable time, can make me so much master of them, as to do justice to the office, or to derive reputation from it to myself. As the trade of France with the United States shall increase, the number of processes in which the kingdom will be interested, and of cases in which law opinions must be given, will increase in proportion. To give a safe opinion upon any particular point, however simple, or detached it may appear, requires a general knowledge of the laws from which it ought to be deduced.

The "intense application" which Mr. Wilson declared to be necessary to the proper fulfillment of his duty, was not wanting in him. He gave up a large part of a valuable practice to devote his time to a conscientious study of those laws which he was called upon to apply. Through arduous labor he was able, early in 1780, to submit to the minister plenipotentiary a draft of a general plan, concerning the jurisdictions and proceedings of courts in commercial causes, in which the subjects of France were parties, and also in regard to the functions of consuls. No reflections are known ever to have been made upon the manner in which Mr. Wilson discharged this arduous duty, or upon his conduct of the office he had sacrificed so much to accept; but in spite of this fact, and of the additional fact that he had stipulated, upon accepting the post, that an annual salary should

be annexed to it, no payments were made by France, and in 1782 the Duke de Luzerne actually announced that the king had no intention of attaching an annual salary to the post. Mr. Wilson immediately replied that he should not have accepted the appointment upon such terms and that he could no longer divert so much of his time and attention from the practice and study of the law as he had done, adding,

But, Sir, I am a citizen of the United States, and feel what I owe to France. While the king is making such generous and expensive efforts in behalf of my country, any service of which my situation and circumstances will admit, is due to him. With the greatest cheerfulness, therefore, I will, during the war, give my best advice and assistance, in the line of my profession and practice, concerning such matters as the ministers and consuls of France will do me the honor of laying before me.

In November, 1783, he received from the king ten thousand livres, as a recognition of the services which he rendered to France. Mr. Wilson's conduct in this matter showed both independence and a high sense of honor. He seems to have felt that, having given up the emoluments of his large practice to so great a degree, he might become dependent upon the whims of ministers and consuls. To be dependent financially is to become dependent morally. Therefore their desires and their wishes would have a greater weight in such circumstances than they otherwise might. For this reason he declared he would be "dependent only upon the king," whose one object in the appointment must be supposed to be that jus-

tice should be done between the citizens of France and America.

In September, 1777, the same faction which had before defeated Mr. Wilson's nomination for Congress, reasserted itself, and his friends foresaw that it was again probable that it would defeat his reelection. Robert Morris wrote him that he feared that even the "honesty, merit and ability, which you possess in so eminent a degree" would not be sufficient pleas against the determination of a strong party which he believed existed. This fear was justified, for on September 14, 1777, the new delegation elected consisted of Joseph Reed, William Clemency, and Dr. Samuel Duffield, who were chosen to succeed Jonathan B. Smith, who had resigned, and "James Wilson and George Clymer, Esquires, who are hereby superseded."

The strong party feeling indicated by this action soon showed itself in other ways. By the year 1779, two parties had become well defined; the constitutionalists and republicans opposed each other with a bitterness which naturally bore fruit in acts of disorder and even violence. The constitutionalists opposed Mr. Wilson, who was then a leading member of the republican party, and who was one of a number of persons in that party who had agreed not to accept any office or appointment under the Constitution, in order that they might not be bound to support it. Times were "hard," paper money almost valueless. The merchants were believed by the people

to be in a conspiracy to monopolize the goods in which they dealt, and those who defended them in court were supposed to be implicated in their evil designs. Wilson had so defended them. He had all the qualities which make a great man hated by smaller men, and none of the smooth hypocrisies which catch popular favor; he was therefore chosen to be the victim of one of those popular uprisings by which the rougher element of the opposite party chose to express its sentiments. When one looks upon the serene, benevolent, gently benignant, face of James Wilson, as his portrait shows it to us, it may be well to remember that his character had other aspects, and that he was called upon to defend, not only attacks upon his character, but that he had also to repel a violent attack upon his life; and that his house, from the fame of the assault upon it, became known as "the fort." In September, 1779, the town meeting of Philadelphia had appointed a committee which had regulated the prices at which rum, salt, sugar, coffee, flour, and other staple articles, should be sold. The importers—Robert Morris, Blair M'Clanachan, and others—refused to dispose of their goods at the stated prices. This caused great dissatisfaction, and during the rest of September small mobs collected at various times and marched through the city, threatening to break open the stores, and to distribute the goods among the people. Placards were posted, menacing Morris and others. Wilson was to be punished by banishment to the

enemy who then held New York. The men who were menaced determined to defend themselves, and met together in the house owned and occupied by Mr. Wilson, which is described as a large, old fashioned brick building with a large garden, situated on the corner of Third and Walnut streets, in Philadelphia. The exact number of those who assembled in the house is not known, but among them were Wilson himself, Morris, Burd, the Clymers—George and David—McLean, Delany, Lawrence, Robinson, Potts, Samuel C. Morris, Beck, Captain Campbell, and Generals Mifflin, Nichols and Thomson. These, with others whose names are not known, are supposed to have made up a company of about thirty, or by some accounts—forty, in number. They had taken the precaution to be provided with arms, but they had no stock of ammunition. While the mob was on the way, General Nichols and Daniel Clymer hastily proceeded to Carpenter's Hall, which was then used as an arsenal, and filling their pockets with cartridges, hastened back to their companions.

The mob and the militia assembled in the open spaces outside the city, while the leading citizens gathered at a coffee house, from which a deputation was sent to the mob, urging them to disperse, but without effect. The first troop of city cavalry appointed a place of rendezvous and agreed to be ready to mount at a moment's warning. The dinner hour came; all was quiet; the cavalry went to dinner; the mob, numbering about two hundred, seized the op-



portunity, marched to Mr. Wilson's house, and being provided with two pieces of cannon began the bombardment. Their fire was returned by the besieged, and the mob, whose cannon were apparently rather ineffectual, finding that their efforts were frustrated, proceeded to use weapons to which they were probably more accustomed, and by the effective use of a sledge hammer and crow bar, procured from a blacksmith's shop, succeeded in forcing the door. At this moment, when the lives of all within the house stood in imminent peril, the city troop—to the number of seven—charged the mob, and the cry of "the horse! the horse!" being raised, a sudden panic seized the rioters, who did not stop to learn the number of those who had come to the rescue, but fled at once; and the danger was over for the moment. Within the house Captain Campbell had been killed, and Mr. Mifflin and Mr. Morris had been wounded, while of the attacking party a man and a boy had been killed, and a number had been wounded. It was several days before order was completely restored in the city, and violence was attempted and numerous threats made against all those who had defended themselves in Mr. Wilson's house. They were advised to leave the city, but at a meeting held by those threatened, it was decided that most of them should remain. It was deemed advisable, however, that Mr. Wilson, whose house had formed the "fort" where the stand was made, should be for a time absent from the scene of the trouble.

At the time of this occurrence Mr. Wilson bore the title of colonel, having been chosen colonel of a regiment at the time when military movements were first made. He was at that time a resident of Carlisle, in Cumberland county, in which county the regiment was raised. He acted in this capacity when necessary, and the public stores and magazines in Carlisle were committed to his care, but he was never in active service in the field, his civic duties during most of the period of the war occupying him to the exclusion of other affairs. Mr. Wilson was afterwards made brigadier-general of the Pennsylvania militia; the appointment bearing date, May 23, 1782.

In 1781, Congress appointed Mr. Wilson one of the directors of the Bank of North America. It was while serving as a director of this bank that he wrote the pamphlet entitled "Considerations on the Power to Incorporate the Bank of North America." A bill had been introduced into the legislature of Pennsylvania intended to repeal the act of 1782, which had granted a charter to the Bank of North America. An attack had been made on the credit of the bank, and it had been denounced as injurious and dangerous. In his defense of the bank Mr. Wilson made an examination into the powers of the legislature under the constitution, which, while made before the Constitutional Convention of 1787, and therefore before any discussion had been made in public of the constitutional questions which were to arise both during the debates upon the Constitution, and in the

cases which were to come before the courts, covers in the clearest, most concise and logical manner, all the important points since brought up and decided by the great constitutional law cases, involving the implied powers of the United States, which have come before our Supreme Court.<sup>11</sup>

In June, 1782, Mr. Wilson was appointed by the President and Supreme Executive Council, a counsellor and agent for Pennsylvania in the controversy which had arisen between that state and Connecticut in regard to what is now known as "The Connecticut Claim." Mr. Wilson delivered a "luminous and able argument" in this case, and the unanimous decision in favor of the contention of Pennsylvania was due largely to his efforts.

April 7, 1785, Mr. Wilson was re-elected to Congress, and again on March 7, 1786. In the work of the Congress during these years he was earnest, active, and energetic in his labors for the public good. But conditions under the Federation were rapidly approaching a crisis; public affairs could no longer be administered under the system which had obtained since the separation of the states from England. The state of affairs at that time is nowhere more completely pictured than in the words of Wilson himself:

When we had baffled all the menaces of foreign power, we neglected to establish among ourselves a government, that would ensure domestic vigor and stability. What was the consequence?

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<sup>11</sup> Wilson's Works, vol. III, 395. Phila. 1804.

The commencement of peace was the commencement of every disgrace and distress, that could befall a people in a peaceful state. Devoid of national power, we could not prohibit the extravagance of our importations, nor could we derive a revenue from their excess. Devoid of national importance, we could not procure for our exports a tolerable sale at foreign markets. Devoid of national credit, we saw our public securities melt in the hands of the holders, like snow before the sun. Devoid of national dignity, we could not, in some instances, perform our treaties on our parts; and, in other instances, we could neither obtain nor compel the performance of them on the part of others. Devoid of national energy, we could not carry into execution our own resolutions, decisions or laws.

Shall I become more particular still? The tedious detail would disgust me; nor is it necessary. The years of languor are past. We have felt the dishonour, with which we have been covered: we have seen the destruction with which we have been threatened. We have penetrated to the causes of both, and when we have once discovered them, we have begun to search for the means of removing them.

The history of the search for the means of removing them is well known to the student of that era. When the time came for Pennsylvania to select her delegates to the convention to be held in Philadelphia for the purpose of framing a constitution for the United States, Mr. Wilson was, most naturally, selected as a member. He had now become the acknowledged head of the Philadelphia bar; his exceptional learning in the civil law was known; in his public speeches he had shown oratory of the highest order; the convincing quality of his logic, so often shown in the debates in Congress, marked him as a

man peculiarly well equipped for the task before the convention; the task to which he was to give his best energies, his highest qualities of mind and heart; in which he was to enshrine so much of himself.

It is difficult adequately to express the value of his services in this convention. When Sanderson was writing his "Lives of the Signers," a member of the convention, whose name he does not give, observed that, "In his opinion, the most able and useful members of the convention were James Wilson and James Madison; that he is in doubt which of these deserves the preference, but is inclined to give it to the former." McMaster says,<sup>12</sup>

Of the fifty-five delegates he [Wilson] was undoubtedly the best prepared by deep and systematic study of the history and science of government for the work that lay before him . . . none, with the exception of Governor Morris, was so often on his feet during the debates, or spoke more to the purpose.

Fiske calls him one of the most learned jurists this country has ever seen. He was "one of the four men who bore the burden and the heat of the day" in the long and heated debates of the convention. He was consistently an advocate of the rights of the people, believing that they should be as directly represented as possible. "He was for raising the Federal pyramid to a considerable altitude, and for that reason

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<sup>12</sup> McMaster, *History of the United States*, vol. 421. See also McMaster & Stone, *Pennsylvania and the Federal Constitution*, p. 699, where they say: "Gouverneur Morris and James Wilson led the debate in the convention. The former spoke one hundred and seventy-three times, the latter one hundred and sixty-eight times."

wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people."

He anticipated the feeling against the choice of the Senate through the medium of the state legislatures, and desired that both branches of the national legislature should be elected by the direct vote of the people.<sup>13</sup> He never deviated from this position throughout the course of the Convention. He declared that in forming a constitution he was not governed by a British model, stating that he believed that the extent of the country was so great and the manners so republican that nothing but a great confederated republic would do for it. He "wished for vigor in the government, but he wished that vigorous authority to flow *immediately* from the legitimate source of all authority. The government ought to possess not only, first, the *force*, but, second, the *mind* or *sense* of the people at large. The legislature ought to be the most exact transcript of the whole society."<sup>14</sup>

He especially insisted upon an equitable ratio of representation; it was the only plan, he said, upon which Pennsylvania would confederate. With a great attachment to the state governments he united a firm belief in the necessity of a strong national government; feeling that it was probable that the states would acquire power at the expense of the nation,

<sup>13</sup> Elliott's Debates, vol. V, 136, 137, 168, 239.

<sup>14</sup> Elliott's Debates, vol. V, 160.

rather than that the nation would grow strong through weakening the powers of the states. It seems clear that this latter opinion grew out of the temporary condition of confusion in which the states found themselves at the close of the Revolution, and the few years immediately succeeding,<sup>15</sup> combined with the impression made by the local jealousies which had caused so much friction during the years of struggle, and which were a source of so much dread during the critical time when the Constitution was in process of making. Past history and present conditions all confirmed the idea that local self-interest would prevail over national self-interest. The conditions prevailing around them were present in the minds of all; possibly more strongly present in the mind of Mr. Wilson,<sup>16</sup> who had been so active in the Congress and in the military movements; who had been in touch with every phase of the Revolution, and knew all the difficulties of the situation through having faced each in its turn. Prophet though he was, he necessarily was blind to the immense economic changes which were to mark the course of the coming century, binding so closely the lives of all the citizens into one interest, that the danger would come to lie, not in the selfishness of the separate states, but in the gradual absorption of power by the central government.

Throughout the debates Mr. Wilson maintained a

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<sup>15</sup> Elliott's Debates, vol. V, 172.

<sup>16</sup> Elliott's Debates, vol. V, 219, 221.

clear, logical, and firm mind upon all the questions debated. He supported his own views with vigor, but endeavored to harmonize rather than antagonize the ideas which were not in accord with his own. His desire that the Convention should be carried to a successful issue was intense, and he was ready to give up anything but his fixed principles to secure that end. But he believed that only by strict adherence to the best principles could harmony be attained, and that no permanent success could be secured "if the foundation should not be laid in justice and right."<sup>17</sup>

July 23, 1787, it was resolved, "That the proceedings of the Convention for the establishment of a national government, except what respects the supreme executive, be referred to a committee for the purpose of reporting a constitution conformably to the proceedings aforesaid." The committee was appointed the next day. The members chosen were: Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Ellsworth, and Mr. Wilson. On August 6, 1787, they reported the draft of a constitution. Mr. Wilson's influence upon this report was very great. Shirley says that "Judge Wilson" (he was not then judge, however), "was even more to the committee on detail than Morris to that on style."<sup>18</sup> Shirley also says, "He was not only a master of the civil law, but of the French and Scotch law, which had the

<sup>17</sup> Elliott's Debates, vol. V, 285.

<sup>18</sup> Shirley, Dartmouth College Causes, p. 214.



civil law for its basis, and of the common law as well." <sup>19</sup> This knowledge of the civil law and of the continental law which had grown from it, gave Mr. Wilson an authority which was not exceeded by any member of the Convention. He is the reputed author of the "obligation clause," <sup>20</sup> which is supposed to have had its origin in the Roman law. He had always asserted that a legislative grant was a contract, and had held that in some cases the charter of a corporation might be a contract. We have no record of the debates of the committee, and it is now impossible to discern the exact part which each of the five members took in framing the draft which they finally presented, and which is still in existence in the handwriting of Mr. Wilson; but it is safe to assert that Mr. Wilson, in point of learning, originality of thought, and lucidity of style, was at least the equal of any member of the committee.

The Constitution was finally agreed to and signed on September 17, 1787, and then came the struggle for ratification by the states. Mr. Wilson was chosen a delegate to the convention which was called for Pennsylvania, and the era of speech-making began. Of this period Mr. Fiske says, in his "Critical Period of American History":

And now ensued such a war of pamphlets, broadsides, caricatures, squibs, and stump speeches, as had never yet been seen in America. . . . And now came James Wilson, making speeches

<sup>19</sup> Shirley, Dartmouth College Causes, p. 220.

<sup>20</sup> Shirley, Dartmouth College Causes, p. 216.

in behalf of this precious constitution, and trying to pull the wool over people's eyes and persuade them to adopt it. Who was James Wilson any way? A Scotchman, a countryman of Lord Bute, a born aristocrat, a snob, a patrician, Jimmy, James de Caledonia. Beware of any form of government defended by such a man. . . . Then there was Hamilton and Madison, mere boys; and Franklin, an old dotard, a man in his second childhood. And as to Washington, he was doubtless a good soldier, but what did he know about politics. . . . But the logic and eloquence of James Wilson bore down all opposition.

Doubtless one of the speeches referred to was that delivered by Mr. Wilson, on the sixth of October, at a great mass meeting in Philadelphia. This speech is considered a remarkable example of his powers, and it had a very marked influence upon the public mind. He confesses that he expects opposition to the adoption of the Constitution, but he shows that he believes opposition to be rather for selfish ends than because of any principle in the opposers. In that speech he said: <sup>21</sup>

It is neither extraordinary nor unexpected, that the constitution offered to your consideration, should meet with opposition. It is the nature of man to pursue his own interest, in preference to the public good; and I do not mean to make any personal reflection, when I add that it is to the interest of a very numerous, powerful and respectable body, to counteract and destroy the excellent work produced by the late convention.—Every person, therefore, who enjoys or expects to enjoy, a place of profit under the present establishment, will object to the proposed

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<sup>21</sup> McMaster & Stone, *Pennsylvania and the Federal Constitution*, pp. 148, 149.

innovation;—not, in truth, because it is injurious to the liberties of his country, but because it affects his schemes of wealth and consequence. 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. But when I reflect how widely men differ in their opinions, and that every man,—and the observation applies likewise to every state,—has an equal pretension to assert his own, I am satisfied that anything nearer to perfection, could not have been accomplished. If there are errors, it should be remembered, that the seeds of reformation are sown in the work itself, and the concurrence of two-thirds of the Congress, may, at any time, introduce alterations and amendments. Regarding it, then, in every point of view, with a candid and disinterested mind, I am bold to assert, that it is the best form of government which has ever been offered to the world.

With this feeling he went into the Convention which met the third Tuesday in November, 1787, prepared to expound, uphold, and commend, that instrument. He was the only member of the state convention who had also been a member of the Federal convention, and he felt bound to make known to the delegates all that he could of the reasons for the framing of the Constitution in the form in which it was presented to them. The eloquence, the wisdom, and the wit, with which his task was performed can only be understood by first tracing his course in the debates of the Convention itself, and following this by a close reading of the speech which he delivered before the ratifying convention on the 26th of November. Curtis calls this speech "One of the most comprehensive and luminous commentaries on

the Constitution that have come down to us from that period.”<sup>22</sup> McMaster says that if it had not been for this speech the Constitution would not have been adopted.<sup>23</sup> His devotion to the cause of the people; his belief that in them all power should be vested, and that the Constitution, recognizing that right, had so vested it; were eloquently expressed toward the end of the strong speech. He had been explaining the source of power, and especially the power of the British Parliament; he then goes on to say:<sup>24</sup>

Perhaps some politician, who has not considered, with sufficient accuracy, our political systems, would answer, that in our governments, the supreme power was vested in the constitutions. This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures; so the people are superior to the constitutions. Indeed the superiority, in the last instance, is much the greater; for the people possess, over our constitutions, control in act, as well as in right.

The consequence is, that the people may change the constitutions, whenever and however they please. This is a right, of which no positive institution can ever deprive them.

These important truths, sir, are far from being merely speculative: we, at this moment speak and deliberate under their immediate and benign influence. To the operation of these truths, we are to ascribe the scene, hitherto unparalleled, which America now exhibits to the world — a gentle, a peaceful, a voluntary, and

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<sup>22</sup> Curtis, *History of the Constitution*, vol. II, 464.

<sup>23</sup> McMaster & Stone, *Pennsylvania and the Federal Constitution*, p. 758.

<sup>24</sup> Wilson's *Works*, vol. III, 292-295. Phila. 1804.

a deliberate transition from one constitution of government to another. In other parts of the world, the idea of revolutions in government is, by a mournful and indissoluble association, connected with the idea of wars, and all the calamities attendant on wars. But happy experience teaches us to view such revolutions in a very different light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and of mankind.

Oft have I viewed with silent pleasure and admiration the force and prevalence, through the United States, of this principle—that the supreme power resides in the people; and that they can never part with it. It may be called the *panacea* in politics. There can be no disorder in the community but may here receive a radical cure. If the error be in the legislature, it may be corrected by the constitution; if it be in the constitution it may be corrected by the people. There is a remedy therefore, for every distemper in government, if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy; from their power, as we have seen, there is no appeal; to their error, there is no superior principle of correction. . . .

What is the nature and kind of that government, which has been proposed for the United States, by the late convention? In its principle it is purely democratical: but that principle is applied in different forms, in order to obtain the advantages, and exclude the inconveniences of the simple modes of government.

If we take an extended and accurate view of it, we shall find the streams of power running in different directions, in different dimensions, and at different heights, watering, adorning, and fertilizing the fields and meadows through which their courses are led; but if we trace them, we shall discover, that they all originally flow from one abundant fountain. In this constitution, all authority, is derived from THE PEOPLE.

The Constitution was triumphantly ratified in the face of a determined and strong opposition. But

that opposition decided to express in some way their sense of the wrong they believed had been done them, and they expressed it against those whom they felt had done the most to win this triumph for their opponents, by gathering in the public square of Carlisle, and there burning in effigy, Mr. Wilson and Mr. McKean, who had also been a powerful advocate of the Constitution. It was an act intended to mark both these gentlemen with the brand of the people's disapproval; it serves now to show that of the defenders of the people of Pennsylvania, and of their rights under the Government, these two men were the strongest and most marked for their zeal and ability.

In Philadelphia the adoption of the Constitution was celebrated by a great procession on the Fourth of July, 1788. On that occasion (and it was considered at the time to be one of very great grandeur and dignity), Mr. Wilson was chosen to deliver the oration, which he did with great acceptance. His powers of oratory not only convinced the soberer minds, but by their brilliancy and ease, were suited to the popular character of the celebration. He dwelt at large on all the happy aspects of the occasion; he did not omit to turn the thoughts of the people to higher things than their own material welfare, but he took occasion to impress upon these citizens of the new republic that they could only be fortunate, could only be happy, if they discharged the duties now imposed upon them conscientiously and seriously. He seemed, indeed, to have in mind

the later conditions which were to prevail in the city in which he was speaking when he reminded the electors of their duty: <sup>25</sup>

To speak without a metaphor, if the people, at their elections, take care to choose none but representatives that are wise and good, their representatives will take care, in their turn, to choose or appoint none but such as are wise and good also. The remark applies to every succeeding election and appointment. Thus the characters proper for public officers will be diffused from the immediate elections of the people over the remotest parts of administration. Of what immense consequence is it then, that this primary duty should be faithfully and skilfully discharged! On the faithful and skilful discharge of it, the public happiness or infelicity, under this and every other constitution, must, in a very great measure, depend. For, believe me, no government, even the best, can be happily administered by ignorant or vicious men. You will forgive me, I am sure, for endeavoring to impress on your minds, in the strongest manner, the importance of this great duty. It is the first concoction in politics; and if an error is committed here, it can never be corrected in any subsequent process; the certain consequence must be disease. Let no one say, that he is a single citizen; and that his ticket will be but one in the box. That one ticket may turn the election. In battle every soldier should consider the publick safety as depending on his single arm; at an election, every citizen should consider the publick happiness as depending on his single vote.

It was now found necessary to alter the Constitution of the state of Pennsylvania, in order that it might conform to that of the United States. Mr. Wilson again and again, as a matter of course, was a delegate to the convention called for the purpose of

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<sup>25</sup> Wilson's Works, vol. III, 308, 309. Phila. 1804.

reforming it. Other members were McKean, Lewis, Ross, Addison, Sitgreaves, Pickering, and Gallatin. In this convention Mr. Wilson found himself opposed to his federalist friends, for he desired that the people should elect their senators directly, while his colleagues desired that this should be done through the medium of electors. Here, as always, Mr. Wilson, though accused by his enemies of aristocratical and monarchical ideas, was the advocate of the people; his theory was that all power resided in them, and it was his principle that this power should be expressed as directly as possible. In the people lay the power and they should be aided to wield that power, even though they might sometimes wield it to their own undoing. In describing the dignity of the elector he said:

I cannot sufficiently express my own ideas of the dignity and value of this right; in real majesty an independent and unbiassed elector stands superior to princes, addressed by the proudest titles, attended by the most magnificent retinues, and decorated with the most splendid regalia. His sovereignty is original; theirs is only derivative.

His labors in the previous conventions and the reputation he had now won, made him the most prominent member of this convention. He was one of the committee to prepare the form of the Constitution, and the duty of drawing up that document was placed in his hands.

The Judiciary Act was signed by Washington in September, 1789, and immediately thereafter he sent



to the Senate the names of his appointees for the offices of chief justice and associate justices. Among the latter was that of James Wilson, who is said to have been mentioned for the chief justiceship. He accepted the appointment, and was the fourth of the associate justices to receive his commission. Mr. Wilson had participated in the debates upon the Constitution; had helped to form that instrument; had been its advocate in debate and in the public meetings of the time. If he did not understand the Constitution and the thoughts which were in the minds of the framers, "it is safe to assume that no one outside of the convention did." <sup>26</sup>

The evidence that he did thoroughly understand the Constitution is complete, voluminous and convincing. That his interpretation was as wide, as far-seeing, as enlightened, as any that has ever been made, has not of late years been remembered as it should be. In his "Considerations on the Power to Incorporate the Bank of North America"; in his arguments before the conventions of which he was a member; in his lectures upon law; and in his speeches and other writings, Mr. Wilson used phrases and made arguments which are to be found repeated in the line of constitutional cases to which belong, *Marbury vs. Madison*, *Fletcher vs. Peck*, *McCulloch vs. Maryland*, *Cohens vs. Virginia*, and the *Dartmouth College Case*. The decisions in these cases have been said to reach the "high water

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<sup>26</sup> Shirley, *Dartmouth College Causes*, p. 223.

mark of great statesmanship and profound political philosophy.”<sup>27</sup> They have been called canons of American jurisprudence; landmarks in constitutional law. It has been said that Marshall’s only light was “the inward light of reason.”<sup>28</sup> To him alone has been rendered the credit, the adulation, the sincere, yet too fulsome, praise of generations of men. Yet these men had but to turn to the records, plainly printed, undisputed, open to all, to find that the arguments had been anticipated, the phrases formulated, even before the opinions of the framers of the Constitution had taken final form in that instrument.

In *Marbury vs. Madison*,<sup>29</sup> we have the first of these great opinions on the Constitution.<sup>30</sup> Mr. Thayer says:

The decision was that the court had no jurisdiction, and that a statute purporting to confer on it power to issue a writ of mandamus in the exercise of original jurisdiction was unconstitutional. . . . The opinion began by passing upon all the points which the denial of its own jurisdiction took from it the right to treat.

Twenty out of twenty-seven of the pages of the decision are thus pure dicta and need not be considered. It is claimed by Professor Thayer that the reasoning on the constitutional points is mainly that of Hamilton, as printed in the *Federalist*, and he considers

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<sup>27</sup> Dillon, *Life of Marshall*, vol. II, 464. Address of William McNutt.

<sup>28</sup> Dillon, *Life of Marshall*, vol. I, 305. Address of LeBaron Colt.

<sup>29</sup> 1 Cranch’s Reports, 49.

<sup>30</sup> Dillon, *Life of Marshall*, vol. I, 232. Address of Professor Thayer.

that the reasoning does not answer the chief difficulties. Speaking of the opinion he says:

It assumes as a chief feature of a written Constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of a federal court in disregarding the acts of a co-ordinate department, and in dealing thus with the legislation of the local states; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of cases, while denying it in the other.

Mr. Wilson had studied with great care the written constitutions of Europe as they then existed, and the unwritten constitution of England. In one of his lectures, delivered in 1790, now forming chapter eleven of his collected works, he took up this subject and there, in a comparison of the British constitution with that of America, he not only anticipated all that Marshall was to say in *Marbury vs. Madison*, but his argument avoids the objection that Professor Thayer has made to that of Marshall (or Hamilton). After showing the supreme power of the British Parliament, and quoting Lord Holt,—<sup>31</sup> “An act of Parliament can do no wrong though it may do several things that look pretty odd,” he cites Blackstone’s remark: <sup>32</sup> “I know of no power which can control the Parliament.” He argues that Blackstone must have meant human power, for the Parliament may, unquestionably, be controlled by natural or re-

<sup>31</sup> Wilson’s Works, vol. I, 460. Phila. 1804.

<sup>32</sup> Wilson’s Works, vol. I, 462. Phila. 1804.

vealed law, proceeding from divine authority. He continues: <sup>33</sup>

Is not this authority superior to anything that can be erected by parliament: is not this superior authority binding upon the courts of justice? When repugnant commands are delivered by two different authorities, one inferior and the other superior; which must be obeyed? When the courts of justice obey the superior authority, it cannot be said with propriety that they control the inferior one; they only declare, as it is their duty to declare, that this inferior one is controlled by the other, which is superior. They do not repel the act of parliament: they pronounce it void, because contrary to an over-ruling law. From that over-ruling law, they receive the authority to pronounce such a sentence. In this derivative view, their sentence is of obligation paramount to the act of the inferior legislative power.

In the United States, the legislative authority is subjected to another control, beside that arising from the natural and revealed law; it is subjected to the control arising from the constitution. From the constitution, the legislative department, as well as every other part of government, derives its power; by the constitution,

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<sup>33</sup> Mr. Wilson then quotes from a speech by Mr. Elias Boudinot, the remarks made by him "in a late debate": "It has been objected, . . . that, by adopting the bill before us, we expose the measure to be considered and defeated by the judiciary of the United States, who may adjudge it to be contrary to the constitution, and therefore void, and not lend their aid to carry it into execution. This gives me no uneasiness, I am so far from controverting this right in the judiciary, that it is my boast and my confidence. It leads me to greater decision on all subjects of a constitutional nature, when I reflect, that, if from inattention, want of precision, or any other defect, I should do wrong, there is a power in the government, which can constitutionally prevent the operation of a wrong measure from affecting my constituents. I am legislating for a nation, and for thousands yet unborn; and it is the glory of the constitution, that there is a remedy for the failures even of the legislature itself." *Wilson's Works*, vol. I, 462, 463. Phila. 1804.

the legislative, as well as every other department, must be directed; of the constitution, no alteration by the legislature can be made or authorized. In our system of jurisprudence, these positions appear to be incontrovertible. The constitution is the supreme law of the land; to that supreme law every other power must be inferior and subordinate.

Now, let us suppose, that the legislature should pass an act, manifestly repugnant to some part of the constitution; and that the operation and validity of both should come regularly in question before a court, forming a portion of the judicial department. In that department, the "judicial power of the United States is vested" by the "people" who "ordained and established" the constitution. The business and design of the judicial power is, to administer justice according to the law of the land. According to two contradictory rules, justice, in the nature of things, cannot possibly be administered. One of them must, of necessity, give place to the other. Both, according to our supposition, come regularly before the court, for its decision on its operation and validity. It is the right and it is the duty of the court to decide upon them: its decision must be made, for justice must be administered according to the law of the land. When the question occurs — What is the law of the land? It must also decide this question. In what manner is this question to be decided? The answer seems to be a very easy one. The supreme power of the United States has given one rule; a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence the latter is void, and has no operation. In this manner it is the right and it is the duty of a court of justice, under the constitution of the United States to decide.

This is the necessary result of the distribution of power, made by the constitution, between the legislative and the judicial departments. The same constitution is the supreme law to both. If that constitution be infringed by one, it is no reason that the infringement should be abetted, though it is a strong reason

that it should be discountenanced and declared void by the other.

The effects of this salutary regulation, necessarily resulting from the constitution, are great and illustrious. In consequence of it, the bounds of the legislative power — a power the most apt to overleap its bounds — are not only distinctly marked in the system itself; but effective and permanent provision is made, that every transgression of those bounds shall be adjudged and rendered vain and fruitless. What a noble guard against legislative despotism!

This regulation is far from throwing any disparagement upon the legislative authority of the United States. It does not confer upon the judicial department a power superior, in its general nature, to that of the legislature; but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superior power of the constitution — the supreme law of the land.

Nothing seems to be needed to make this exposition of the supreme power of the Constitution, full and complete. In the last paragraph it would seem that Mr. Thayer's objection to Marshall's decision is answered. The judiciary does not control the legislative; it merely acts in accordance with the Constitution from which both derive their powers, before which both are equal, and to which both must bow.<sup>34</sup> The remarks by Mr. Boudinot, quoted in the note, show that no one man can claim any exclusive right to the idea that the judiciary had a revisionary power over the acts of the legislature. During the convention, in the clash of mind with mind, in the necessity

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<sup>34</sup> See Elliott's Debates, vol. II, 445, 446, 489, where he declares that it is the duty of the judges to declare unconstitutional acts void; for the power of the Constitution dominates.

which drove them to feel after feasible modes of effecting that which they knew they must effect or perish, they took up and left behind, adopted or rejected, debated and argued upon, nearly every point, nearly every scheme, that has since been mooted in the after life of the nation. These arguments, these discussions, were still afloat in the mental atmosphere in Marshall's time, and his quick and fertile mind, took, shaped, and used them, to his own honor and the lasting good of his country. It seems that he, if his character has been properly understood, would be the first to lay a silencing finger upon the lips of those whose adulation has moved them foolishly to assert that he alone, without light or leading, had originated all those ideas which he well knew were the common property of his time.

The decision in *Cohens vs. Virginia*,<sup>35</sup> is foreshadowed in the lecture on the Nature of Courts,<sup>36</sup> as an examination of the reasoning in that lecture, and the decision itself, will show. In his decision Marshall said: <sup>37</sup>

They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the union; that the constitution, law and treaties, may receive as many constructions as there are states; and that this is not a mischief, or if a mischief, is irremediable. . . . The judicial power

<sup>35</sup> 6 Wheaton's Reports, p. 264.

<sup>36</sup> Wilson's Works, vol. II, 149, 150. Andrew's edition.

<sup>37</sup> 6 Cranch's Reports, 377, 384.

of every well constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

Mr. Wilson, in his lecture, had said in 1791: <sup>38</sup>

According to the rules of judicial architecture, a system of courts should resemble a pyramid. Its base should be broad and spacious: it should lessen as it rises: its summit should be a single point. To express myself without a metaphor—in every judicial department, well arranged and well organized, there should be a regular progressive gradation of jurisdiction; and one supreme tribunal should preside and govern all the others.

If no superintending tribunal of this nature were established, different courts might adopt different and even contradictory rules of decision; and the distractions springing from these different and contradictory rules, would be without remedy and without end. Opposite determinations of the same question, in different courts, would be equally final and irreversible. But when, from those opposite determinations, an appeal to a jurisdiction superior to both is provided, one of them will receive a sentence of confirmation, the other of reversal. Upon future occasions, the determination confirmed will be considered as an authority; the determination reversed will be viewed as a beacon. . . .

*“Ampliare jurisdictionem”* has been a principle avowed by some judges: it is natural and will operate when not avowed. It will operate powerfully and irresistibly among a number of co-ordinate and independent jurisdictions; and without a tribunal possessing a control over all, the pernicious and interfering claims could neither be checked nor adjusted. But a supreme court prohibits the abuse and protects the exercise, of every inferior judiciary power.

In France, before the present revolution, the establishment of a number of parliaments or independent tribunals produced,

<sup>38</sup> Wilson's Works, vol. II, 290. Phila. 1804.



in the different provinces, a number of incongruous and jarring decisions. This has been assigned, and with much apparent reason, as the great source of that diversity of customs and laws, which prevailed, to an uncommon degree, in the different parts of the kingdom of France, in other respects so well compacted. . . . In the United States and Pennsylvania—for here we must take the two constitutions in a collected view—a fine and regular gradation appears, from the justices of the peace in the commonwealth, to the supreme court of the national government.

But it is in the “Considerations on the Power to Incorporate the Bank of North America”<sup>39</sup> that we find the greatest of all the arguments upon constitutional law—arguments clearer, more forcible, more logical, than those found in the whole course of our decisions, or those of our writers upon the law of the Constitution. The question which Mr. Wilson had before him arose before the adoption of our present constitution. He had, in the phraseology of the Articles of Confederation, more to contend against, than he would have had if the similar, but slightly amended language of the Constitution of 1787 had been before him.<sup>40</sup>

In reading Marshall’s opinion in *McCulloch vs. Maryland*, the impression given is that Marshall’s mind is laboring with a difficulty that it is not sure it is overcoming. We feel, in reading Wilson’s argument that he finds no logical impediment to the

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<sup>39</sup> Wilson’s Works, vol. III, 397–427.

<sup>40</sup> The word “expressly” had been eliminated from the later document, and Marshall himself seems to experience some relief at this fact. See 4 Wheaton’s Reports, 406, 407.

conclusion he is reaching. The "Considerations" do not form a lengthy document; they should be read in their entirety to be rightly judged, but a few phrases from the decision in *McCulloch vs. Maryland*, and from Wilson's argument, may serve to show how the two great minds treated the same subject. These extracts merely indicate, they cannot reveal, the "irresistible logic" of the finished performance. The attitude taken by Mr. Wilson is very broad, and needs no extension to admit of the exercise by the national government, of all the powers since claimed by it, or declared by the courts to adhere to it, up to the period of the Spanish War. At the same time it does not look to any infringement of the rights of the states, for Mr. Wilson always retained a strong attachment for the separate state governments, believing that only by the federal system could such a nation as that he saw rising around him, be enabled to govern itself and maintain its existence.

The question before the two men was similar, as they themselves stated it. Marshall answered the question, "Has Congress power to incorporate a bank?" Wilson answered the question, "Had the United States in Congress assembled a legal and constitutional power to institute and organize the Bank of North America?" In answering these questions they found it necessary to examine the Constitution in regard to what are now known as the "implied powers." Marshall in his decision in *McCulloch vs. Maryland*, an opinion which is considered by

most of his biographers the best opinion on constitutional law ever delivered, says: <sup>41</sup>

Though one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act must necessarily control its component parts. . . . In America the powers of sovereignty are divided between the government of the union, and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional. . . . We cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government.

In his "Considerations" Mr. Wilson answers the question which he had to answer in this manner: <sup>42</sup>

The objection under this head will be that by the second article of the confederation, "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right,

<sup>41</sup> 5 Wheaton's Reports, 410, 411, 421.

<sup>42</sup> Wilson's Works, v. III, 397-427. Phila. 1804.

which is not, by the confederation, *expressly* delegated to the United States in Congress assembled."

If, then, any of the states possessed, previous to the confederation, a power, jurisdiction, or right, to institute or organize, by a charter of incorporation a bank for North America; in other words, commensurate to the United States; such power, jurisdiction, and right, unless expressly delegated to Congress cannot be legally or constitutionally exercised by that body.

But, we presume, it will not be contended, that any or each of the states could exercise any power or act of sovereignty extending over all the other states, or any of them; or, in other words, incorporate a bank, commensurate to the United States.

The consequence is, that this is not an act of sovereignty, or a power, jurisdiction, or right, which, by the second article of the confederation, must be expressly delegated to Congress, in order to be possessed by that body. . . .

Though the United States in Congress assembled derive *from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in Congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.

The United States have general rights, general powers, and general obligations, not derived from any particular state, nor from all the particular states, taken separately; but resulting from the union of the whole. . . .

To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.

Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature. The purchase, the sale, the defense, and the government of lands and countries, not within any state, are all included under this description. An institution

for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.

The act of independence was made before the articles of confederation. This act declares that "these United States (not enumerating them separately) are free and independent states; and that, as free and independent states, *they* have full power to do *all* acts and things which independent states, may, of right, do."

The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of these powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation, it continues vested in them still. The confederation clothed the United States, with many, though perhaps not with sufficient powers; but of none did it disrobe them.

It is no new position, that rights may be vested in a political body, which did not previously reside in any or all the members of that body. They may be derived solely from the union of those members. "The case," says the celebrated Burlamaqui, "is here very near the same as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each."

Much has been claimed for this argument,<sup>43</sup> but it does not seem that it has been too much. It covers all the ground that has since been taken, and is more definite in its attitude than any that has been put forth

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<sup>43</sup> "In these two sentences is found the gist of all the arguments in favor of the incidental or implied powers so called of the government. . . . The national banking system, the legal tender acts and the acquisition of national territory by peaceful means are all clearly within the argument of our author. No less power than that claimed in this argument will sustain such powers. The statement of the proposition by Wilson is clearer in one particular than the

later. Some of the phrases have a familiar sound, and it may be that Marshall's mind had retained them, since he was familiar with the debates upon the incorporation of the bank, which had been widely diffused, and which had greatly influenced the public mind.

It was in this same pamphlet that the argument in *Fletcher vs. Peck* was also anticipated. Mr. Wilson was arguing against the repeal of a charter which the legislature had granted to the Bank of North America. He did not believe that it would be wise or politic to revoke the charter. He argued that the act in question formed a charter of compact between the legislature of the state, and the president, directors, and company of the Bank of North America.

In pursuing his argument he said:

It may be asked — Has not the state power over her own laws? — May she not alter, amend, extend, restrain, and repeal them at her pleasure?

I am far from opposing the legislative authority of the state; but it must be observed, that according to the practice of the legislature, public acts of very different kinds are drawn and promulgated under the same form. A law to vest or confirm an estate in an individual — a law to incorporate a congregation or other society — a law respecting the rights and properties of all the

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statement by any other person whose language the editor has been able to discover. Where the power is not within the power of the state, and is within the general object for which the general government was created he finds no trouble of sustaining the use of any legitimate means to exercise the power which might be exercised by any sovereign nation." Andrews, *Wilson's Works*, vol. I, 558, 559. Andrew's Edition.

citizens of the state—are all passed in the same manner; are all clothed in the same dress of legislative formality; and are all equally acts of the representatives of the freemen of the commonwealth. But surely it will not be pretended, that, after laws of those different kinds are passed, the legislature possesses over each the same discretionary power of repeal. In a law respecting the rights and properties of all the citizens of the state, this power may be safely exercised by the legislature. Why? Because, in this case, the interest of those who make the law (the members of the assembly and their constituents) is the same. It is a common cause, and may, therefore, be safely trusted to the representatives of the community. None can hurt another without, at the same time, hurting himself. Very different is the case with regard to a law, by which the state grants privileges to a congregation or other society. Here two parties are instituted, and two distinct interests subsist. Rules of justice, of faith, of honor, must, therefore, be established between them; for, if interest alone is to be viewed, the congregation or society must always lie at the mercy of the community. Still more different is the case with regard to a law, by which an estate is vested or confirmed in an individual: if, in this case, the legislature, may, at discretion, and without any reason assigned, divest or destroy his estate, then a person seized of an estate in fee simple, under legislative sanction, is, in truth, nothing more than a solemn tenant at will.

For these reasons whenever the objects and makers of an instrument passed under the form of a law are not the same, it is to be considered as a compact, and to be interpreted according to the rules and maxims by which compacts are governed. A foreigner is naturalized by law: is he a citizen only during pleasure? He is no more, if, without any cause of forfeiture assigned and established, the law, by which he is naturalized, may at pleasure be repealed. To receive the legislative stamp of stability and permanency acts of incorporation are applied for from the legislature. If these acts may be repealed without notice, without accusation, without hearing, without proof, without forfeiture;

where is the stamp of their stability? Their motto should be "levity." If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, a precedent will be established for repealing, in the same manner, every other legislative charter of Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politics, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction.

From the first moment of our original confederation to the last moment of our constitutional history, there has been one problem of unfailing interest, of vital moment—a problem which was nearly fatal to the Constitution in the Convention, which nearly prevented the ratification of it by the states, and which ultimately led to a contest of state with state that convulsed the whole country for years, seeming for a time to sever the bonds which for seventy years had held those states together as one nation. In this union of states, where was the supreme power to reside? What was to become of state sovereignty? How were the rights of state and nation to be equably adjusted?

In the Federal convention Wilson had spoken upon this point and had shown that he desired a strong central government, but that he also desired that the state governments should continue. He believed that the Constitution guaranteed the continued existence of the states, and he went into the ratifying



convention prepared to uphold that idea. In that convention, however, he was called upon to go much farther in defining the relation of the states to the Federal union. The enemies of the Constitution declared that the states were about to be robbed of their power; that a "consolidated government" was about to be established which would deprive the states of nearly all their prerogatives, and, possibly, of their very existence. It was in reply to these strictures that Mr. Wilson, in the debate of December first, said:

Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people. They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare. This constitution stands upon this broad principle. . . . When the principle is once settled that *the people* are the source of authority, the consequence is that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that they will be productive of more good. They can distribute one portion of power to the more contracted circle called state governments; they can also furnish another proportion to the government of the United States. Who will undertake to say as a state officer that the people may not give to the general government what powers and for what purposes they please? How comes it, Sir, that these state governments dictate to their superiors?—to the majesty of the people? When I say the majesty of the people, I mean the thing, and not a mere compliment to them. . . . The truth is, and it is a leading principle in this system, that not the states only but the people

also shall be represented. . . . I have no idea that a safe system of power in the government, sufficient to manage the general interest of the United States, could be drawn from any other source or vested in any other authority than that of the people at large, and I consider this authority as the rock on which this structure will stand.

December fourth, while continuing his task of answering objections to the Constitution, he again encountered the objection that the supporters of the Constitution were endeavoring to introduce a consolidating and absorbing government. His reply was still more definite and assured in tone. He repeated in a few words the argument which he made on the former occasion, and added:

It has not been, nor I presume, will it be denied, that somewhere there is, and of necessity must be, a supreme, absolute and uncontrollable authority. . . . I had the honor of observing, that if the question was asked, where the supreme power resided, different answers would be given by different writers. I mentioned that Blackstone will tell you, that in Britain it is lodged in the British parliament; and I believe there is no writer on this subject on the other side of the Atlantic, but supposes it to be vested in that body. I stated further, that if the question was asked, some politician, who had not considered the subject with sufficient accuracy, where the supreme power rested in our governments, would answer, that it was vested in the state constitutions. This opinion approaches near the truth, but it does not reach it; for the truth is, that the supreme, absolute and uncontrollable authority *remains* with the people. I mentioned also, that the practical recognition of this truth was reserved for the honor of this country . . . His position [Findley's] is that the supreme power resides in the states, as governments; and

mine is, that it *resides* in the PEOPLE, as the fountain of government; that the people have not — that the people mean not — and that the people ought not, to part with it to any government whatever. . . . I agree with the members in opposition that there cannot be two sovereign powers on the same subject.

I consider the people of the United States as forming one great community, and I consider the people of the different states as forming communities again on a lesser scale. . . . Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the states as made *for* the people as well as *by* them, and not the people as made for the states. . . . My position is, Sir, that in this country the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments, but that the fee simple continues, resides and remains with the body of the people.

The “principle” on which this system was constructed was, as interpreted by Wilson, not that of either party to the controversy. One side contended then, as it has ever since contended, that sovereignty resides in the states; the other contended, as it has contended ever since, that the Union alone is sovereign. Mr. Wilson was right in saying that in this way the system could never be comprehended. He did not attempt to untie the metaphysical knot. He cut it. With the same sureness of mental touch with which he brushed aside the vexing technicalities in regard to the implied powers, he found the cord, which once severed, left an untangled skein. Had he been able to carry out the plans of his later life, and digest the laws of the nation in connection with

a digest of laws of the state of Pennsylvania, marking out, as he hoped to do, the lines which demarcate the boundaries between the powers of the states and of the nation, it may not be too much to say that he would have brought his theory so plainly before the people that they might have been saved from holding opposing views until those views could no longer be reconciled by an appeal to reason.

As the legislatures have had to protect themselves against the consequences of the decision in the Dartmouth College Case,<sup>44</sup> so have they been obliged to

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<sup>44</sup> Wilson was much quoted and relied upon by Shirley in his book on the Dartmouth College Causes (p. 216). Mr. Hunter in his argument in the case of *Sturges vs. Crowninshield* (4 Wheaton's Reports, 151), said of the words "obligation of contracts:" "They were not taken from the English common law, or used as a classical or technical term of our jurisprudence in any book of authority. No one will pretend that those words are drawn from any English statute, or from the states' statutes before the adoption of the constitution. Were they then furnished from that great treasury and reservoir of rational jurisprudence, the Roman law? We are inclined to believe this. The tradition is that Mr. Justice Wilson, who was a member of the convention, and a Scottish lawyer, and learned in the civil law, was the author of this phrase."

In the Dartmouth College Causes of Shirley, the authority of Mr. Wilson is used, not to support, but to controvert, the opinions of Judge Marshall. Mr. Shirley wrote his book to prove that Marshall's attitude in his decision in the Dartmouth College Case was wrong. He believed that Mr. Wilson's views, as he understood them, were correct, and he had a very strong admiration for Mr. Wilson. He says, in the short sketch of Wilson's life that he inserts in his work on the College Cases, "he" (Wilson) was in favor of a strong central government, as were his colleagues, Gouverneur Morris, and Hamilton; but they differed very much in their views. Hamilton regarded the British government as the proper model, but Judge Wilson did not; he proposed to build anew from the foundation, while preserving the autonomy of the states.

find a way out of the difficulties they themselves made in overriding the decision of Mr. Wilson in *Chisholm vs. Georgia*,<sup>45</sup> for as a recent writer has pointed out:<sup>46</sup>

While we cannot directly sue a sovereign state, the lawyers forced by the exigencies of a decent equity, have provided for suing officers of government whose costs and penalties the states, and even the United States, now freely pay out of the taxes.

It was for a "decent equity" that Mr. Wilson continued, saying:

"A state, like a merchant, makes a contract; a dishonest state, like a dishonest merchant, wilfully refuses to discharge it; the

In his lectures to the law school upon the "general principles of law and obligation," etc., prepared within a year after the Federal constitution went into operation, he criticises Blackstone's definition of municipal law and its "obligation," with a severity scarcely equalled by Austin and his admirers, at a later day, upon other points. With Wilson all forms of government and all laws were "contracts." He says, "We find that an act which, considered indistinctly and dignified by the name of law, requires the whole supreme power of a nation to give it birth is, when viewed more closely and analysed into the component parts of its authority properly arranged under the class of contracts. It is a contract to which there are three parties; those who constitute one of the three parties, not acting even in public characters." . . . In his lectures he says of the common law: "It prescribes the manner and the obligation of contracts, wills, deeds, and even acts of parliament are interpreted." (Wilson's Works, 205. Philadelphia 1804.)

It seems to us from the debates in the Convention, the views of Judge Wilson, and those of other eminent authorities to which we have referred, that the framers of the constitution had this meaning in mind when they adopted the provision. An interpretation which would restrict the provision to executory contracts would be much more natural and reasonable than the other." Shirley, *Dartmouth College Causes*, pp. 220, 221, 227.

<sup>45</sup> 2 Dallas Reports, 419.

<sup>46</sup> Kellogg, Lippincott, vol. LXIII, 245.

latter is amenable to a court of justice. Upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring, 'I am a sovereign state?' Surely not."

In this case, the verdict of time has been with Wilson, while in the earlier cases Wilson's argument was broad enough in principle to cover phases of national development which were later to come up for adjustment.<sup>47</sup> Mr. Wilson believed that the Constitution must be founded on principles that would "expand with the expansion, and grow with the growth of the United States."<sup>48</sup>

He was the deepest and clearest expounder of such principles.

In the debates of the constitutional convention, in his public speeches, in his legal work, Mr. Wilson had shown himself learned, not only in the common law, but, what was a rarer qualification at that time in this country, learned in the civil law. When the College of Philadelphia decided to found a professorship of law, it was to this citizen of Philadelphia, the acknowledged leader of the bar of their city, that the trustees looked for their professor. Mr. Wilson accepted the offer, and as the college was soon afterwards united with the University of Pennsylvania,<sup>49</sup>

<sup>47</sup> The Legal Tender Cases, for example. See Wilson's Works, vol. I, 556, 559. Andrew's Edition. Note 2, by the editor.

<sup>48</sup> Elliott's Debates, vol. V, 262.

<sup>49</sup> The rights and properties of the college had been confiscated by the legislature in 1779, and bestowed upon a new organization called

he thus became the first professor in law of that University. Upon accepting the appointment he resigned the office of Trustee which he had held since 1779.

The first lecture was delivered in the winter of 1790. We have had the occasion painted for us in picturesque language by a number of writers. The setting for the picture was the large hall of the old Academy of Philadelphia, where Mr. Wilson had once been an instructor. General Washington and the "republican court" were there in the dignified dress of the time, and Mr. Wilson speaks of his embarrassment in finding his plain law lecture an occasion of so much interest to both sexes. "The lecture was replete with classic references and graceful thoughts, and at the University Commencement which followed, the degree of Doctor of Laws was conferred upon its learned author." That lecture was followed by others during the remainder of the winter, and a second course was begun the following year, but soon ceased. The reason for the cessation is not known, but it is probable that the time was not ripe for a sustained effort of this kind; the training received in a law office being then held sufficient to prepare for the work of the bar, and also thought to be of a more practical nature. Mr. Wilson had ventured to criticise Blackstone, and it may have been

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"The Trustees of the University of the State of Pennsylvania." Ten years later these rights were restored, and in 1791 an Act was passed amalgamating the old college with the new University. University Bulletins. Sixth Series, No. 2, Part 2.

thought that a man whose opinions were so well received in England as Judge Blackstone's must, of necessity, be wiser than any American lecturer. The influence of England in the world of thought was still too strong for mere merit to make head against it. An editor of Blackstone, Mr. Hammond, expresses surprise that Blackstone's definitions should be so generally received, and this exposition of Judge Wilson's remain in oblivion.<sup>50</sup>

The surprise expressed by Mr. Hammond grows as one reads these lectures. Luminous, logical, sustained by a depth of learning not common at any period, they carry the reader along with their clear simplicity of diction, so that one leaves off with regret at passing out of an intellectual atmosphere so exhilarating and elevating. Could the lecture on Law and Obligation be read each year as an opening lecture before the incoming class of every law school in the United States; could its principles be impressed upon the mind of each student in every such school, the benefit to the student himself and to the world into which he will afterwards enter, would be incalculable. The false premises and insincere logic of Blackstone would be supplanted by the well-taken premises and irresistible logic of Wilson. The criticism of Blackstone's definition of law has become famous. Such English writers as Austin and Dicey have approved the view taken by Wilson, but still the American student is set to study and absorb the

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<sup>50</sup> Hammond's Blackstone, vol. I, 113.



doctrines of absolutism and even of despotism, which Wilson showed to be defended by the Vinerian professor.

Of the remaining lectures, those on the Common Law, the Nature and Philosophy of Evidence, the Comparison of Constitutions, the Judicial Department, and that on Corporations, may perhaps be the more noteworthy. In the lecture on Corporations, Mr. Wilson's prevision of future events is shown to a remarkable degree. He describes a corporation as:<sup>51</sup>

A person in a political capacity is created by the law, to endure in perpetual succession. Of these artificial persons a great variety is known to the law. They have been formed to promote and to perpetuate the interests of commerce, of learning and of religion. It must be admitted, however, that, in too many instances, these bodies politic have, in their progress, counteracted the design of their original formation. Monopoly, superstition and ignorance have been the unnatural offspring of literary, religious, and commercial corporations. This is not mentioned with a view to insinuate, that such establishments ought to be prevented or destroyed: I mean only to intimate that they should be erected with caution, and inspected with care.

He could hardly have uttered a stronger warning had he foreseen the over-development of the corporate power which was to take place in the coming century.

These lectures were published in three modest volumes, where they stand as given to the world by Mr.

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<sup>51</sup> Wilson's Works, vol. II, 265, 266.

Wilson's son, Mr. Bird Wilson, in 1804. They had not the benefit of a revision by the author, who died six years before their publication. Mr. Wilson had contemplated publishing them, but in the spring of 1791, the Pennsylvania house of representatives unanimously resolved to appoint him to revise and digest the laws of the commonwealth; to ascertain 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 form of the new state constitution might require. His letter to the speaker of the House of Representatives, written August 24, 1791, shows how fully he felt the importance of the duty laid upon him, and the vast amount of care and labor it would involve. It also sheds much light upon the extreme carefulness with which he entered upon any work which he was to do; the minute attention he gave to each detail, to each minor point, entailing much that would be considered drudgery today, and which could be given only at a vast expense of time and strength. The letter also shows that with all this attention to detail and minutiae, Mr. Wilson could take the widest view of the same subject that had just been submitted to this keen scrutiny. No work he undertook seems to have been a matter of mere business to him, and he even idealized the drudgery of digest making; he loved the law, and he meant to make it beloved by others. He shows that his choice of a literary style on such work was well considered.

If youth should be educated in the knowledge and love of the laws, it follows, that the laws should be proper objects of their attachment, and proper objects of their study. Can this be said concerning a statute book drawn up in the usual style and form? Would any one select such a composition to form the taste of his son, or to inspire him with a relish for literary accomplishments? It has been remarked, with truth as well as wit, that one of the most irksome penalties, which could be inflicted by an act of parliament, would be, to compel the culprit to read the statutes at large from the beginning to the end.

But the knowledge of the laws, useful to youth, is incumbent on those of riper years.

From the manner in which other law books, as well as statute laws, are usually written, it may be supposed that law is, in its nature, unsusceptible of the same simplicity and clearness as other sciences. It is high time that law should be rescued from this injurious imputation. Like the other sciences, it should now enjoy the advantages of light, which have resulted from the resurrection of letters; for, like the other sciences, it has suffered extremely from the thick veil of mystery spread over it in the dark and scholastic ages.

It was this task of rescuing his beloved science from the injurious reputation which had rested upon it, that prevented him from seeing his lectures in print; but it is in those lectures that he did give to it those "advantages of light" which have resulted from the resurrection of letters, even though they lost the benefit of that final revision which every author must desire for the work of his brain.

The work of arranging the laws which Mr. Wilson had undertaken with such devotion was never to be accomplished. The two branches of the legisla-

ture failed to agree; provision for pecuniary compensation for the work was never made; the necessary books were to be obtained only with great difficulty; and the enterprise as a public undertaking had to be given up. Mr. Wilson, however, still continued to devote much time and labor to the work which he felt to be so essential. He had hoped to publish it under his own name, and there is evidence that he had planned to extend the scope of the work, making it not only a state but a national digest, but he did not live to see this hope fulfilled.

In April, 1776, Mr. Wilson had met with a great grief in the loss of his wife. The six children of the marriage survived Mrs. Wilson, and one, Bird Wilson, was, as has been mentioned, the editor of the first edition of the works of his father. Some years after the death of his first wife, Mr. Wilson contracted a second marriage. Miss Hannah Gray, who was the daughter of Mr. Ellis Gray, a merchant of Boston, became his second wife, and survived him for some years. The only son of this marriage died in infancy.

As was customary at that time, Mr. Wilson received students in his law office. Among those whom he received were Bushrod Washington and Samuel Sitgreaves. President Washington himself was instrumental in sending his nephew to study under Mr. Wilson, as he had a very high opinion of Mr. Wilson's abilities and character.

It has been said that Mr. Wilson was more a man

of books than of the world. Perhaps for this reason his financial affairs were not always in a sound state. He entered into the great land speculation of the time, known as that of the "Yazoo Land Companies," and is said to have owned shares to a very large amount. The failure of this speculation involved him deeply in debt, and the distress of mind necessarily caused to so sensitive a spirit by such a situation, may have hastened his death, which occurred while he was still in middle life. From the amount of work which he had done; from the grave and dignified style of his writings; from the learning he displayed; from the evidences of a wisdom no learning can bestow, and which usually only comes from a long experience, we are accustomed to think of him as an old man, who died in the fullness of years. In fact he was only fifty-six years of age when he died; a man, who, it seemed, had a large part of his life before him, whose work, great as it was, had not been finished. He was in the active exercise of his judicial duties, being on circuit in North Carolina, when attacked by his fatal illness. He died on the 28th of August, 1798, at the home of his old friend Iredell, in Edenton, North Carolina. There he was laid to rest, far from the scenes of his active life, farther still from the land of his birth. But no place in America could be an alien spot to James Wilson; he had given his best gifts to the making of a united country, and any place in that country where he might find his final rest would

honor him as one of the greatest of those who had participated in this work.

To set down simply the facts of the life of James Wilson, as has here been done, is to write a eulogy. It is impossible that it should be otherwise. The petty politicians who spoke of him as "Caledonian James," who thought of him as an aristocrat, may have been sincere; time has shown that they were mistaken. The people who besieged him in his house, who burned him in effigy, were doubtless sincere; but the words, the acts, for which they blamed him are those for which a whole people must now reverence him. Of his life as a private citizen we have but a short and simple record. Dignified, upright, honorable, he lived among the people of his chosen country, a model citizen. A certain simplicity, which is said to have been a prominent element of his character, and which at times was the cause of pleasantries at his expense among his friends, is apparent in his writings, and to it those writings owe a peculiar charm; that charm which, in literature, as in life, is most inexplicable yet most potent. This simplicity seems to have been the keynote of his character. It enhanced the beauty of a dignified domestic life, increased the weight of his influence as a sincere and upright citizen, and illuminated his whole course as a statesman. To such a mind there could be no concealment for personal ends, no duplicity of action, no insincerity in its intellectual expositions. To this simplicity, born of sincerity, was

added an enthusiasm for that which he, after profound study, conceived to be right—an enthusiasm which seems never to have faltered, never to have diminished, but to have gone on burning with a steadier glow through all his life. That life, devoted to high ends, directed by deep moral purpose, intensely human, yet interfused with those high qualities which blend the human with the divine, was lived in a time in which its energies had a scope for good which even he, with all his prophetic insight, his belief in the great things to be, could not foresee. He lives in those great writings under whose influence we live today, and his mind still dominates our minds, as he dominated the better spirits of his own time, and it is well that they were so dominated then, and that we are now so dominated.<sup>52</sup>

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<sup>52</sup> Since this article was written, through the efforts of a Committee representing the various legal organizations in Pennsylvania and the University of Pennsylvania, the remains of James Wilson have been transferred from Edenton, North Carolina, to Christ Church Yard in the city of Philadelphia. The remains arrived in Philadelphia on board the U. S. S. *Dubuque* on Wednesday, November 21st, and were taken to Independence Hall, the scene of Wilson's greatest triumphs, where they lay in state. On Thursday, November 22nd, the Chief Justice of the United States and Associate Justices of the Supreme Court, representatives of the Federal Government and of the Governments of Pennsylvania and the City of Philadelphia, as well as representatives from the American Bar Association and a large number of other legal and patriotic associations, accompanied the remains to Christ Church where appropriate services were held, Hampton L. Carson, the Attorney General of Pennsylvania, delivering the oration.—Ed.