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"Judgments of Nature": James Wilson's Natural-Law Jurisprudence

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Abstract: Can and should judges refer to the natural law? I address these questions from the point of view of James Wilson, paying specific attention to a question the scholarship does not address: Why does Wilson believe judges can (and must), in certain instances, refer to natural law? I develop a new taxonomy of Wilson's conception of judgment that answers this question. Wilson's definition of judgment as including the moral sense and reason, and his division of reasoning into demonstrative, moral, and legal reasoning, indicate why he countenances judicial recourse to natural law in certain cases yet remains committed to popular sovereignty and judicial restraint. Wilson describes "judgments of nature" as intuitive judgments based on self-evident truths and articulates how judges might be called upon to make certain judgments based on a manifest repugnancy to the natural law. His judicial decisions confirm this commitment to natural law and judicial restraint.

Introduction

Do judges have the authority and capacity to engage in natural-law reasoning? If so, should they? These questions have recurred throughout the history of American jurisprudence. I approach them from James Wilson's point of view. As a prominent jurist during the American founding, a signer of the Declaration of Independence and the Constitution, a delegate to Pennsylvania's ratifying convention, and the jurist chosen to deliver the nation's inaugural series of law lectures at the College of Philadelphia, Wilson's views on the judge's role as it pertains to natural-law reasoning are informative.[1] The vast majority of the scholarship recognizes, and

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[1]See Robert Green McCloskey, introduction to *The Works of James Wilson*, ed. Robert Green McCloskey (Cambridge, MA: Harvard University Press, 1967), 1:2.

sometimes analyzes, Wilson's natural-law philosophy. However, these authors do so generically, through the lens of his moral-sense philosophy, his epistemology, and his legal philosophy more broadly.[2] Some scholars who focus on Wilson's legal and constitutional philosophy discuss judicial application of the natural law, but they do so briefly and tangentially.[3] Hadley Arkes, Arthur E. Wilmarth, and Gary J. Jacobsohn are exceptions.[4] None of these authors address why Wilson believes judges can and should apply the natural law. Nor do they turn to his conception of judgment as providing the answer to this question. A thorough investigation of the philosophical underpinnings of Wilson's practical engagement with the natural law as a jurisprudential tool is wanting.

Through an exhaustive textual analysis, I explore the philosophical reasoning behind Wilson's argument that judges have the authority, capacity, and obligation to apply the natural law in certain, rare cases, a question that Wilson scholars have not addressed. I also explore Wilson's conception of judgment and sketch out a new taxonomy that comes to light in his works. The distinction between moral and legal reasoning within this taxonomy is unaddressed in the scholarship but provides a key insight into why he believes that judicial application of the natural law in certain circumstances is not equivalent to judicial usurpation.

By analyzing Wilson's *Lectures on Law*, speeches, and judicial opinions, one uncovers the foundations for his belief that not only do judges have the authority and capacity to engage in natural-law reasoning, but they must. Yet he remains adamant that judges are not lawmakers. He is committed to both judicial restraint and natural-law reasoning simultaneously, offering a

[2]See, e.g., Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798* (Columbia: University of Missouri Press, 1997), 35–89; Justin Buckley Dyer, "James Wilson, Necessary Truths, and the Foundations of Law," *Duquesne Law Review* 56, no. 2 (Summer 2018): 54–69; Dyer, "Reason, Revelation, and the Law of Nature in James Wilson's Lectures on Law," *American Political Thought* 9, no. 2 (Spring 2020): 264–84; McCloskey, introduction to *Works of James Wilson*, 1:15–16, 40; William F. Obering, "James Wilson's Fundamental Principles of Law," *Thought* 5, no. 1 (June 1930): 66–85; Obering, *The Philosophy of Law of James Wilson* (Washington, DC: The American Catholic Philosophical Association, 1938), 110–13.

[3]See, e.g., Aaron T. Knapp, "Law's Revolutionary: James Wilson and the Birth of American Jurisprudence," *Journal of Law and Politics* 29, no. 2 (Winter 2014): 264–70, 278 with n. 470; Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, CT: Yale University Press, 1990), 72–77.

[4]See Hadley Arkes, *Beyond the Constitution* (Princeton: Princeton University Press, 1990); Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (Lanham, MD: Rowman & Littlefield, 1986), 75–80; Arthur E. Wilmarth Jr., "Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic," *George Washington Law Review* 72, no. 1/2 (December 2003): 164–89. I address relevant aspects of their arguments below.

third way between those who favor frequent judicial recourse to the natural law[5] and those who view such recourse as illegitimate.[6] The linchpin for this conclusion is Wilson's conception of judgment, which involves the faculties of the moral sense and reason. In rare instances where a human law manifestly violates self-evident truths or demonstrable inferences from those truths, the judge must declare the law inoperative. Such "judgments of nature" (intuitive judgments based on self-evident truths)[7] do not include freestanding authority for the judge to impose his private opinions or policy preferences. Wilson is a committed democrat, believing, perhaps more than any other Founder, in popular sovereignty, particularly through direct election, universal male suffrage, and equal apportionment.[8] For Wilson, "judgments of nature," even when rendered by judges, do not usurp popular sovereignty.

Section 1 develops Wilson's democratic epistemology of law. This section presents a novel articulation of his conception of judgment that highlights

[5]See, e.g., Arkes, *Beyond the Constitution*; David F. Forte, "Natural Law and the Limits to Judicial Review," *Catholic Social Science Review,* no. 1 (1996): 42–47; Josh Hammer, "Common Good Originalism: Our Tradition and Our Path Forward," *Harvard Journal of Law & Public Policy* 44, no. 3 (Spring 2021): 917–59.

[6]See, e.g., Robert P. George, *In Defense of Natural Law* (Oxford: Oxford University Press, 1999), 12–13, 110–11, 325–30. Casey and Vermeule take a related, though somewhat more moderate, position, arguing that judicial application of natural-law principles in the context of "deeply unjust laws" is, "at an institutional level, a matter for prudential determination." See Conor Casey and Adrian Vermeule, "Myths of Common Good Constitutionalism," *Harvard Journal of Law & Public Policy* 45, no. 1 (Winter 2022): 123–27 with n. 65, 132–36 with n. 104 (also describing natural-law principles as assisting in the interpretation of positive law; being a source of authority in "hard cases" where judges must, of necessity, resort to "background principles"; and not inevitably leading to judicial supremacy); see also Adrian Vermeule, *Common Good Constitutionalism* (Cambridge: Polity, 2022), 10–20, 43–48, 57–60, 68–77, 111–16 (describing this institutional determination and the exceptional cases and advocating for deference by courts as part of the classical tradition of understanding positive law as a concretization of the natural law).

[7]James Wilson, *The Works of the Honourable James Wilson, L.L.D.*, ed. Bird Wilson (Philadelphia: Lorenzo, 1804), 1:250. I use this version throughout because it is the original and was edited by his son. It is widely available on HathiTrust. In a few places, I use another edition when citing speeches that this original version does not include or when citing a particular editor's introduction.

[8]See Stephen A. Conrad, "James Wilson's 'Assimilation of the Common-Law Mind,'" *Northwestern University Law Review* 84, no. 1 (1989): 210; Knapp, "Law's Revolutionary," 206 with n. 75; McCloskey, introduction to *Works of James Wilson*, 1:1–5 with n. 1; Wilmarth, "Elusive Foundation," 154. For general conceptions of "democracy" and "republicanism" in the late eighteenth century, including Wilson's view of these terms as meaning the same thing, see generally Robert W. Shoemaker, "'Democracy' and 'Republic' as Understood in Late Eighteenth-Century America," *American Speech* 41, no. 2 (May 1966): 83–95.

its connection with Wilson's democratic thought and his epistemology regarding human obligations. Section 2 analyzes Wilson's democratic jurisprudence, according to which the common law is an experiment in applying the law of nature to particular circumstances. Wilson's democratic conception of the judiciary is the subject of section 3. Judges in a free society governed by the common law derive their authority from the people and are bound by the judgments of the people and precedent when making their judgments. They are also bound, however, by a law that supersedes the judgments of the people, the natural law. These two conclusions are not in conflict for Wilson. Section 4 addresses Wilson's judicial decisions, which demonstrate a consistent application of the views espoused in his *Lectures* and speeches. Wilson views the entire enterprise of "law" in a free society as an experiment in applying the natural law. Judges do not have a supreme role in this experiment. But they have a role.

1. Wilson's Democratic Epistemology of Law: The Moral Sense, Reason, and the Natural Law

To ascertain Wilson's conception of the judge's role in relation to the natural law, one must begin with his account of law itself. His epistemology of law is democratic because it relies on common sense and intuitive judgments stemming from human nature that are theoretically available to all. Wilson's epistemology of law begins with faculties that all men have: reason and conscience. These faculties both reveal the natural law to all men and are the faculties involved in judgment. All men, through reason and conscience, are capable of discerning principles that illuminate their obligations, including legal obligations. Wilson's starting point for assessing legal obligation is a common human nature and its concomitant universal attributes of reason and conscience.

Wilson repeatedly refers to law (or jurisprudence, or government) as a particular kind of science based on principles.[9] That science and those principles, for Wilson, refer first and chiefly to human nature. "Law can never attain either the extent or the elevation of science, unless it be raised upon the science of man."[10] The study of human nature is thus essential for the judge (or lawyer).[11] Accordingly, Wilson devotes an entire law lecture to the study of human nature.[12] He declines to offer an entire "system of human nature," which would be an undertaking "too vast for any one man," but he does propose to study man in two aspects falling directly

[9]See, e.g., Wilson, *Works*, 1:5, 2:31–32, 413–15. See also Hall, *Political and Legal Philosophy*, 28, 30.

[10]Wilson, *Works*, 1:230; see also 1:91.

[11]See ibid., 1:229–30.

[12]See ibid., 1:229.

within his subject: man "as an author, and as a subject of law." Man is the subject of both divine and human law but is the author only of the latter. Divine laws, "which God has given to us, are strictly aggregable to our nature; they are adjusted with infallible correctness to our perfection and happiness"; human laws ought to reflect "the same characters, as deeply and as permanently as possible."[13] Wilson's inquiry into law is thus grounded on an inquiry into human nature, and both divine and human laws are (or should be) suitable to that nature.

Wilson's investigation into human nature and its importance to law rests on an inquiry into obligation. "To be without law is not agreeable to our nature," so Wilson proceeds to uncover the source of moral obligation.[14] All obligation stems from the will of God, which we discover "by our conscience, by our reason, and by the Holy Scriptures."[15] Reason and conscience are "the divine monitors within us."[16] The scriptures are "the divine monitors without us."[17] Though Wilson describes obligation as stemming from God's will, he is far from a voluntarist. As Justin Dyer has observed, for Wilson, the natural law is the expression of the indissoluble combination of God's goodness, wisdom, and power perfectly oriented toward our happiness; "the rule of his government" is reducible "to this one paternal command—Let man pursue his own perfection and happiness."[18] Reflecting this understanding, Wilson defines the natural law as "that law, which God has made for man in his present state; that law, which is communicated to us by reason and conscience, the divine monitors within us, and by the sacred oracles, the divine monitors without us. . . . As promulgated by reason and the moral sense, it has been called natural; as promulgated by the holy scriptures, it has been called revealed law."[19] The natural law is a divine moral law governing man's actions in his present state. It guides us in the "proper exertion and direction of our numerous powers" to achieve "such great and such good ends," including the great amount that is "to be known," "to be done," and "to be enjoyed" by human beings.[20] It is immutable "because it has its foundation in the nature, constitution, and mutual relations of men and things," and God, the author of our nature, "cannot but command or forbid such things as are necessarily agreeable or disagreeable to this very constitution." It is also universal for the same reason; all men are equally subject to God, and the law of nature "has an essential fitness for all

[13]Ibid., 1:232.
[14]Ibid., 1:114.
[15]Ibid., 1:118–20; Hall, *Political and Legal Philosophy*, 72.
[16]Wilson, *Works*, 1:64, 104.
[17]Ibid., 1:104.
[18]See ibid., 1:111–12; Dyer, "Necessary Truths," 51–61; Dyer, "Reason, Revelation, and the Law of Nature," 269–72.
[19]Wilson, *Works*, 1:104.
[20]Ibid., 1:107–8.

mankind."[21] At the end of this discussion, Wilson quotes Cicero, who defines true law as right reason in accordance with nature, binding on all mankind in all places and at all times.[22] And despite its principles being immutable, the law of nature is "progressive in its operations and effects," meaning that it is "fitted" to contemporary circumstances but that its immutable principles will "direct" the improvement of man's morals.[23]

According to Wilson, natural law and revelation are distinct but related and mutually reinforcing. The natural law is that part of the divine law suited to man in his present state that "is communicated to us by reason and conscience"; but "as promulgated by the holy scriptures, it has been called revealed law."[24] Both natural and revealed law have a divine pedigree, flowing, "though in different channels, from the same adorable source. It is, indeed, preposterous to separate them from each other." "Both are necessary" for the singular object of discovering the will of God.[25] Thus the divine law calibrated to human nature has two components that are distinguishable but inseparable: that part which we know through reason and conscience, and that part which we know through revelation.

Wilson does not directly engage the question whether it is theoretically possible to conceive of natural law without God or whether a judge must believe in God or in revelation in order to have recourse to the natural law. But he does state that conscience is the foundation for moral reasoning and that it reveals the "intuitive truth" that the efficient cause of moral obligation is the will of God. Without it, "it would not be in the power of arguments, to give [one] any conception of the distinction between right and wrong. These terms would be to him equally unintelligible, as the term *colour* to one who was born and has continued blind."[26] These statements, coupled with his description of attempts to separate reason and conscience from revelation as "preposterous," are all but explicit declarations that such a conception would deprive the natural law of its obligatory character and its true object, to discover the will of God as the source of obligation. However, Wilson is also clear that revelation is distinct from reason and conscience, so the natural law's promulgation and knowability do not depend upon any specific divine revelation.[27]

[21]Ibid., 1:140–41.

[22]See ibid., 1:141.

[23]See ibid., 1:143. Obering, *Philosophy of Law*, 66, offers an explanation of what Wilson means by "progressive":"The principles themselves do not change; but the secondary rules of moral conduct, by which general applications are made of these principles to the specific circumstances," change with circumstances in order to preserve "the principles themselves."

[24]Wilson, *Works*, 1:104.

[25]Ibid., 1:120.

[26]Ibid., 1:118–19.

[27]See ibid., 1:139.

Wilson offers thorough descriptions of how reason and conscience promulgate the natural law to man. He calls the conscience the "moral sense."[28] It is a faculty of the mind that enables us to perceive right and wrong, without which we would not be moral beings. It reveals first principles in morals to us. It needs the assistance and correction of reason though is superior to it.[29] The "offices of reason and of the moral sense" are distinguished in the following manner: Reason "conveys the knowledge of truth and falsehood" or "judges either of relations or of matters of fact"; it cannot determine virtue and vice or "the *ultimate* ends of human actions. . . . It is necessary that reason should be fortified by the moral sense: without the moral sense, a man may be prudent, but he cannot be virtuous."[30] There are certain principles, such as the reliability of the information conveyed by our senses and our consciousness, "which we are required and determined, by the very constitution of our nature and faculties, to believe" both concerning external realities and moral truths. In moral matters, the moral sense (or conscience) reveals these first principles that align with our nature to us, and reason lends its assistance in interpreting, extending, and deliberating about them.[31]

Reason and the moral sense together reveal the natural law to us. And these are the same two faculties involved in judgment. Here we begin to uncover the elements in Wilson's taxonomy of judgment. He equates judgment with common sense because "common sense means common judgment"; "sense always implies judgment: a man of sense is a man of judgment: common sense is that degree of judgment, which is to be expected in men of common education and common understanding."[32] Judgment is the faculty that discerns truth or falsehood and decides upon truths that are self-evident. Self-evident truths are those that "derive not their evidence from any antecedent principles" but are "intuitively discerned" without reasoning, thus making reasoning possible in the first place; they are "first principles," which means that they are "the immediate dictates of our natural faculties" and have no "other evidence of their truth."[33] Judgment is a common faculty of man involving both reason and the moral sense, the same two faculties that reveal the natural law to all mankind. The faculty of judgment and the natural law thus go hand in hand, both requiring reason and the moral sense and both resting on self-evident truths.

Judgment consists of two types: intuitive and discursive. Wilson describes discursive reasoning as stepwise proofs and inferences, contrasting it with

[28]See ibid., 1:104.
[29]See ibid., 1:124–37, 255–58, 274–81; 2:81–83.
[30]Ibid., 1:134–36.
[31]See ibid., 1:238–44; Hall, *Political and Legal Philosophy*, 78.
[32]See Wilson, *Works*, 1:250; 2:107–9.
[33]Ibid., 1:118–19, 125, 256–57, 278; see also 2:81–83; Dyer, "Necessary Truths," 61–62; Dyer, "Reason, Revelation, and the Law of Nature," 274.

intuitive judgments.[34] This discursive reasoning includes demonstrative reasoning and moral reasoning. Wilson describes these categories as follows:

> To every determination of the mind concerning what is true or what is false, the name of judgment may be assigned. . . . Judgments are intuitive, as well as discursive, founded on truths that are selfevident, as well as on those that are deduced from demonstration, or from reasoning of a less certain kind. The former, or intuitive judgments, may, in the strictest sense, be called the *judgments of nature*. . . .
>
> In demonstrative reasoning there are no degrees; the inference, in every step of the series, is necessary; and it is impossible but that, from the premises, the conclusion must flow. Hence demonstrative reasoning can be applied only to such truths as are necessary; not to such as are contingent.
>
> With regard to reasoning, which is only probable, the connexion between the premises and the conclusion is not a necessary connexion. Probability is susceptible of numerous and widely differing degrees of strength and weakness.[35]

Intuitive and discursive judgments form the first and most significant division within Wilson's taxonomy of judgment. The "judgments of nature" that Wilson describes are intuitive because they involve the moral sense, and that moral sense relies on nature. The first principles of morality are perceived, not reasoned to. Instead, nature reveals them, and we reason from them.[36] Wilson accordingly calls judgments based upon these self-evident principles "judgments of nature."

For Wilson, any act of judgment requires the moral sense and reason, which are able to discern moral truths and are available to all. In Wilson's democratic epistemology of law, all moral obligation is understood through these

[34]See Wilson, *Works*, 1:250–52.

[35]Ibid., 1:250–52 (emphasis added); see also 2:106–13 (equating judgment with "common sense" and self-evident truths, stating that it is "common to all men," and distinguishing between (1) judgment, which is "that power of the mind, which decides upon selfevident truths"; (2) reasoning from demonstrative evidence, which "has for its subject abstract and necessary truths, or the unchangeable relations of ideas"; and (3) reasoning from moral evidence, which "has for its subject the real but contingent truths and connexions, which take place among things actually existing"). In the quotation in the text, Wilson characterizes discursive reasoning as either "demonstrative" or "probable" depending upon whether the inference is "necessary" (certain) or "contingent" (subject to varying degrees of strength). See Wilson, *Works*, 1:252. I assume that "necessary" here does not include the separate category of self-evident or intuitive judgments, which are necessary in their own right as well. See Dyer, "Necessary Truths," 57, 61–69. I further assume that Wilson believes that some demonstrative conclusions can be arrived at by necessary inference from self-evident truths.

[36]See Wilson, *Works*, 2:82.

faculties, which all men possess and which are suited to discern the will of God, whose law for us in turn is suited to our common nature. Wilson's definition of judgment as relying upon these same two faculties by which all men determine their obligations is unexplored in the Wilson scholarship, but it proves to be the key explanatory factor in Wilson's views regarding judicial recourse to the natural law.

2. Wilson's Democratic Jurisprudence: Common Law as the Application of Natural Law

Though all individuals possess the faculties of moral sense and reason that enable them to make judgments, judges (particularly common-law judges) exercise these faculties in a unique context. According to Wilson, the common law is, like all human law, an attempt to apply the law of nature to concrete circumstances. Speaking of human law, Wilson states: "What we do, indeed, must be founded on what [God] has done; and the deficiencies of our laws must be supplied by the perfections of his. Human law must rest its authority, ultimately, upon the authority of that law, which is divine."[37] The common law is unique in the success of its attempt to conform to the natural law. It has endured from antiquity because "it contains the common dictates of nature, refined by wisdom and experience."[38] It reflects both accumulated, perfected reason and consent. The common law, based on custom, is "nothing else but common reason—that refined reason, which is generally received by the consent of all."[39] Wilson's jurisprudence is thus democratic, based on dictates of a common human nature (namely, reason) and on consent.

The common law reflects the natural law in its adherence to reason. For Wilson, who is citing English jurist Sir Edward Coke, "human reason, in general, is not so much the knowledge, or experience, or information of any one man, as the knowledge, and experience, and information of many, arising from lights mutually and successively communicated and improved." Because of this accumulation, law, and in particular the common law, is the perfection of reason.[40] Like all good sciences, the common law "keep[s] close to particulars," reducing observation and experience "gradually into general rules" and following "the natural progress of the human mind . . . from particular facts to general principles."[41] The common law, "like natural philosophy, when properly studied, is a science founded on

[37]Ibid., 1:104–5; see also 2:456, 3:15; Obering, *Philosophy of Law*, 107–8.

[38]Wilson, *Works*, 2:43; see also Hall, *Political and Legal Philosophy*, 122, 125; Wilmarth, "Elusive Foundation," 161.

[39]See Wilson, *Works*, 2:4, 46; Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (Oxford: Oxford University Press, 2021), 58.

[40]See Wilson, *Works*, 2:46; Banner, *Decline of Natural Law*, 66–67.

[41]Wilson, *Works*, 2:43–44.

experiment."[42] The common law is an experiment in applying the natural law because it is the attempt to discern "regular and undeviating principles" through continual study of human affairs and formulate rules by which it "works itself pure."[43]

The common law also adheres to the natural law by relying upon and demonstrating consent.[44] In tracing the obligation of law, Wilson references the divine law (including the natural law), rejects the notion of human superiority as a basis for the obligation of human law, and concludes that if God had intended some men to govern others without their consent, we would see "indisputable marks distinguishing these superiours" analogous to "those which distinguish men from the brutes."[45] Consent is thus a requirement of natural law: "I hope I have evinced," Wilson states, "from authority and from reason, from precedent and from principle, that *consent* is the sole obligatory principle of human government and human laws."[46] The common law is unique and praiseworthy in its manifestation of consent, through which it adheres to the natural law.[47] "In the countenance of that law, every lovely feature beams consent. . . . This law is founded on long and general custom. A custom, that has been long and generally observed, necessarily carries with it intrinsick evidence of consent. Caution and prudence are universally recommended in the introduction of new laws."[48]

The law "introduc[ed]" is not the decision of the judge; it is the custom of the people and its concomitant reflection of their judgment (though articulated by the judge and systemized under the logic of the common law). Wilson hews closely to the traditional common-law doctrine that judicial decisions are mere evidence of the law rather than the law itself. The common law has its "evidence" in "written monuments" (decisions), but its "authority" rests not on those decisions but "on reception, approbation, custom, long and established."[49] The people, not the judge, make the common law. "It is the characteristick of a system of common law, that it be accommodated to the circumstances, the exigencies, and the conveniencies of the people, by whom it is appointed."[50] The common law is derived from the people, though it is articulated by the judge. It is consonant with the natural law because it attempts, through reason, to apply universal principles,

[42]Ibid., 2:44; see also 2:411.

[43]See ibid., 2:44–47.

[44]For a thorough explanation of how consent works as a social phenomenon to authorize the common law in Wilson's account, see Conrad, "Common-Law Mind," 197–215.

[45]See Wilson, *Works*, 1:66, 74.

[46]See ibid., 1:219–21 (emphasis in original).

[47]See McCloskey, introduction to *Works of James Wilson*, 39.

[48]Wilson, *Works*, 1:204–5.

[49]Ibid., 2:37–38 (emphases omitted), 302–3; see Banner, *Decline of Natural Law*, 52.

[50]Wilson, *Works*, 2:38; see Banner, *Decline of Natural Law*, 58.

discovered in nature and refined over time, to particular circumstances in a way that adheres to the natural-law requirement of consent.

Wilson presents the common law as a unique form of legal reasoning. Administering it requires not only good moral character and impartiality but "skill in the science of jurisprudence," which includes knowledge of the statutes, customs, and constitutions that judges must apply.[51] In particular, the science of common-law jurisprudence requires regard for precedent. Judicial decisions are the most authentic evidence of the customs that constitute the common law, and the judges who make such decisions "were selected for that employment" on the basis of their experience in the common law itself. "Every prudent and cautious judge will appreciate" precedents, remembering "that his duty and his business is, not to make the law, but to interpret and apply it."[52] The common law is a law of experience, and though it is governed by general principles, these principles are formed in an inductive philosophical manner "from the coincidence, or the analogy, or the opposition of numberless experiments, the accurate history of which is contained in records and reports of judicial determinations." Consulting these reports and methodizing them "under the proper heads" requires great time and a "habitually exercised" and "naturally strong" judgment.[53]

Common-law reasoning depends upon precedent, analogy, and artificial rules. Wilson does recognize a connection between philosophy and law and cites Bacon for the proposition that the laws ought to be in harmony with philosophy and nature.[54] He also states that lawyers ought to be familiar with human nature, human society, and "what appertains to justice—to comprehensive morality" because "from the fountains of justice . . . the civil laws should spring."[55] Common-law reasoning and probabilistic, discursive moral reasoning both depend upon self-evident principles. Neither form of reasoning is possible without such principles. But at the point of application, legal judgment (particularly the common law) relies on a peculiar form of reasoning, legal reasoning—the application of statutes, constitutions, and customs to particular facts through the medium of previous judicial experiments and the artificial common-law distinctions that categorize them. Comprehensive morality and abstract justice are always relevant in any judgment. The point of departure is in the application to particulars. Judges apply justice and morality to particular situations through the artificial mechanisms of the common law. Individuals apply justice and morality to specific situations through discursive moral reasoning.

Wilson's common-law jurisprudence is democratic in adhering to common reason and consent. As we will see in the next two sections, Wilson maintains

[51]See Wilson, *Works*, 1:405.
[52]Ibid., 2:302–3.
[53]Ibid., 2:407–8.
[54]See ibid., 2:407–14.
[55]See ibid., 2:414.

his commitment to popular sovereignty and consent as validating features of law when discussing the judiciary in general and when applying the Constitution and laws of the United States. Yet the common law is also independent of probabilistic moral reasoning and contributes its own independent and artificial principles to legal reasoning. Wilson's emphasis on the uniqueness of common-law reasoning and the science of common-law jurisprudence has been hitherto unexplored. But this form of reasoning is a unique and critical feature of his taxonomy of judgment. It creates space for judicial recourse to natural law while maintaining a unique, limited, and nonlegislative role for judges.

3. Wilson's Democratic Judiciary and the Natural Law

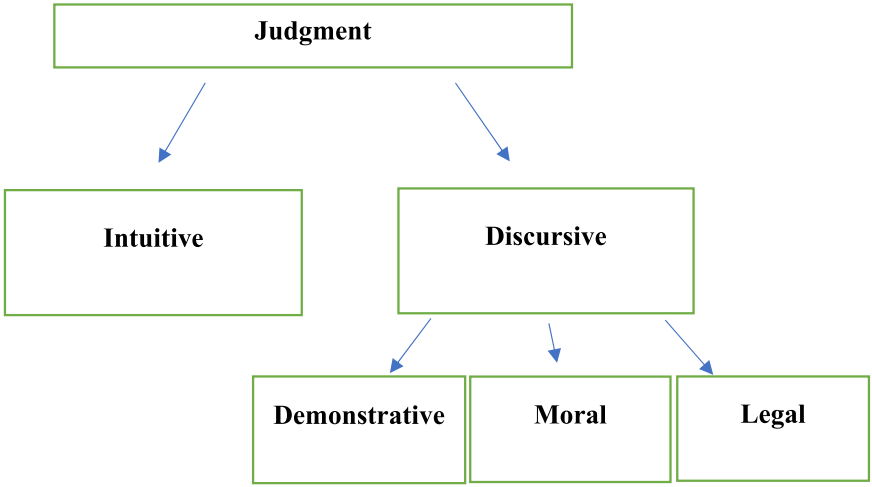
In addition to his democratic epistemology of law and democratic conception of the common law, Wilson views the judiciary as a whole as democratic, and this conception of the judiciary in general illuminates his more specific view of the judiciary's role regarding the natural law. "The judicial authority," he states, "consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them."[56] Borrowing again from Coke, Wilson defines a court as simply "a place where justice is judicially administered."[57] Wilson conceives of judges as using faculties that all men have (determining the principles of right and justice through the moral sense and reason) but in a unique context (applying constitutions and laws and administering justice "judicially").

While Wilson sees legal judgment as necessarily requiring the moral sense (after all, judges must be able to perceive those "principles of right and justice" that are to direct them in applying laws and constitutions), he does not see it as requiring discursive and probabilistic moral reasoning. In Wilson's scheme, judges engage in legal judgment, which includes the moral sense and uniquely legal reasoning. Ordinary individuals engage in judgment *simpliciter*. This basic form of judgment also includes the moral sense, but, rather than legal reasoning, it relies (in nonintuitive cases) on discursive moral reasoning, which, as noted above, Wilson describes as probabilistic, contingent, and fact specific. The type of reasoning applicable in a judgment will vary depending on who is doing the judging (a judge or a private individual) and whether the context is the judicial administration of justice (which requires legal reasoning) or a nonlegal setting (which requires ordinary, probabilistic, and discursive moral reasoning).

Bringing together these insights, we may now complete and illustrate our taxonomy. For Wilson, judgments are either intuitive or discursive. Both

[56]Ibid., 1:405.
[57]Ibid., 2:201.

require self-evident truths (without which, as noted above, all reasoning is impossible). Intuitive judgments are based on the moral sense perceiving self-evident truths directly. Discursive judgments are based on either demonstrative (certain) reasoning, moral (probable) reasoning, or legal (precedential/analogical) reasoning. This taxonomy can be visualized as follows:



This division of the types of reasoning involved in judgment and the presence of legal reasoning in this taxonomy explain how Wilson is able to countenance judges engaging with the natural law while maintaining that they are not legislators. By characterizing legal reasoning under the common law as the judge's proper work but leaving room for self-evident and demonstrative truths, he suggests that judges will not need to rely on their own moral sense in the vast majority of cases where legal reasoning (which itself seeks conformity with the natural law) supplies an answer. The judge's work rarely carries him out of the bottom right-hand box above.

I differ from Hadley Arkes on this particular point. He describes Wilson as treating legal principles as a subset of "the laws of reason and the principles of moral judgment"[58] and, along with "other jurists of [his] age,"[59] as treating moral laws as a "subset" or "part" of the laws of reason and of logic.[60] Arkes asserts that these jurists, in applying principles of logic, did not sense that they had crossed "an invisible threshold that separated propositional logic from something we would call 'moral reasoning.' For [these jurists], the two were indistinguishable."[61] Arkes is correct that Wilson does not view legal principles as independent from the laws of reason and morality.

[58]Arkes, *Beyond the Constitution*, 24 (emphasis omitted).
[59]Ibid., 33.
[60]Ibid., 32.
[61]Ibid., 33.

As stated above, all reasoning in Wilson's account derives from indemonstrable principles that contain moral content. But, contrary to Arkes's overstatement, Wilson definitively separates intuitive moral judgments from discursive and probabilistic moral reasoning. The principles upon which common-law reasoning proceeds may derive from and overlap with the laws of reason and the principles of moral judgment (as all reasoning must). But these legal principles are not, in their entirety, simply a subset of the principles of logic and morality. The science of common-law jurisprudence that Wilson describes contributes its own principles for legal reasoning beyond simple morals and logic. Arkes also goes too far in his assessment that, according to Wilson and thinkers like him, judicial recourse to principles of moral reasoning or moral judgment is, and ought to be, common.[62] Arkes refers to such appeals as "the routine and dominant work of the judges."[63] But for Wilson, common-law reasoning is the "routine and dominant" judicial task. That task is not separate from logical and moral principles, but neither is it simply a subset of them.

Moral reasoning seems to be, in Wilson's estimation, the prerogative of branches other than the judiciary. Citing Justice Hale, he states that judges either act as "only the instrument" of the law when it "gives an express decision" or as those who frame and deduce decisions "by way of deduction and illation upon those laws."[64] In either case, the judge neither makes law nor imposes his own preferences. Neither scenario involves the judge's own will. Wilson's description of the judiciary leaves room for some natural-law reasoning (intuitive judgments based on self-evident truths and demonstrable reasoning from them); it leaves no room for judicial will.

Wilson consistently insists that judges are not legislators. He does conceive of the judiciary as a coequal branch and argues in several speeches at the Constitutional Convention and at the Pennsylvania ratifying convention that the judiciary should have significant powers to guard against legislative tyranny (proposing that the Supreme Court be part of a "council of revision" to review legislation and that it have an absolute veto jointly with the president).[65] He is an early proponent of judicial review[66] and countenances (with

[62]See ibid., 21–23.

[63]Ibid., 23.

[64]Wilson, *Works*, 2:104.

[65]See Wilson, *Collected Works of James Wilson*, ed. Kermit L. Hall and Mark David Hall (Indianapolis, IN: Liberty Fund, 2007), 1:88, 91, 121–22, 148–50, 203–4, 226; Hall, *Political and Legal Philosophy*, 133–34, 270; Wilmarth, "Elusive Foundation," 116, 167–69.

[66]See Wilson, *Works*, 1:411, 455–63; Wilson, *Collected Works*, 1:246; Hall, *Political and Legal Philosophy*, 134–36, 173. Hall argues that Wilson views the Supreme Court as having the final say in interpreting the Constitution. Wilson's admonishment that all other branches, and individuals, refuse to obey or enforce an unconstitutional law (see n. 81 below) indicates otherwise.

caution) judicial interpretations that take into account the "spirit"[67] of the law. However, he is adamant that judges are not lawmakers. He warns of the tyranny arising from judicial usurpation of legislative or executive powers, calling judicial decisions based on "considerations of policy" the "terrible instruments of arbitrary power" that "cut with the keenest edge, and inflict the deepest and most deadly wounds." He praises judicial restraint and the binding precedent of the common law, and he describes the judiciary as being governed by fixed principles in a manner consistent with the famous Hamiltonian distinction between "will" and "judgment."[68] For Wilson, a robust judiciary that takes the natural law into account is not in conflict with any principle prohibiting judges from exercising force or will. They exercise judgment according to "fixed or known principles of law," which include the accumulated wisdom of legal reasoning as well as the natural law. None of these aspects involves "private opinions."[69]

Understanding accurately how Wilson sees the judiciary as democratic is the key to understanding how he can advocate for a robust judiciary while simultaneously arguing against judicial supremacy. Wilson genuinely believes that the judiciary is simply another representative branch of government, drawing its power from the people as their "servants" and "friends" as much as the legislature and making the United States, in principle, "purely democratical."[70] Although the representation of the people is less direct in the judiciary than it is in the other branches, Wilson does not see a countermajoritarian dilemma in the judiciary.[71]

Wilson's judiciary is democratic not simply because it is indirectly accountable to the people and responsible for applying their constitution as the supreme law.[72] Wilson has a broad conception of civic participation in law, through juries of course,[73] but also through education.[74] He believes it absolutely vital, in a free society in which "every citizen forms a part of the sovereign power," including taking "a personal share" in the judiciary, that "the knowledge of those rational principles on which the law is founded . . . be

[67]See Wilson, *Works*, 2:95–96, 260–62; Wilmarth, "Elusive Foundation," 163.

[68]See Kermit L. Hall, introduction to *Collected Works*, 1:xxiii; Wilmarth, "Elusive Foundation," 163. Compare Wilson, *Works*, 1:408, 452, 2:260, and 303 with Alexander Hamilton, *Federalist*, No. 78, in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001), 402–7.

[69]See Wilson, *Works*, 1:408.

[70]See, e.g., Wilson, *Works*, 1:397–99; Wilson, *Collected Works*, 1:193; Hall, *Political and Legal Philosophy*, 117; McCloskey, introduction to *Works of James Wilson*, 14 with n. 47; Wilmarth, "Elusive Foundation," 117, 147, 154–56.

[71]See Wilson, *Collected Works*, 1:192–93, 3:334. Contra Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New Haven, CT: Yale University Press, 1986), 16–23.

[72]See generally Knapp, "Law's Revolutionary," 206n75.

[73]See Wilson, *Works*, 2:383–84.

[74]See ibid., 2:386; 3:392–93; Hall, *Political and Legal Philosophy*, 180–81.

diffused over the whole community"; the citizens' rights and duties demand all the time and means that one can spare "to learn that part, which it is incumbent on him to act."[75]

Not only the judiciary, but judicial review is democratic according to Wilson. He portrays it as an aspect of popular sovereignty rather than a usurpation of it.[76] The Constitution is the act of the people, who are the "supreme power," and thus it overrides any act of a "subordinate" power. Foreshadowing John Marshall, Wilson contends that if the legislature enacts a statute "manifestly repugnant" to the Constitution, and the question comes before the court on a matter within its jurisdiction, the court must decide what the law, according to which it is to administer justice, is. It must, therefore, declare the Constitution, given by the "supreme power," to be the supreme law, and the statute, given by a "subordinate power," void.[77]

Wilson prefaces this general justification of judicial review by discussing judicial recourse to the natural law. The same superiority of one law over another that justifies judicial review he describes, just a few pages earlier, as justifying the judge in relying on the natural law, including to declare legislation void.[78] Wilson addresses judicial review under the Constitution only after analyzing judicial recourse to the natural law. His argument is simple. Law is emphatically not the command of a superior, except in one instance. The divine law, including the natural law, is the only exception to the requirement of consent for a law to be binding, the one instance in which the parties are not equal and man is obliged to obey simply based on the status of the lawgiver rather than based on consent.[79] Just as an act that contradicts the superior authority of the Constitution is void, so too, and under the same principle, is one that violates the natural law. The judiciary's declaration of that fact is not an act of usurpation or even a claim to supremacy.

Taking issue with Blackstone's famous declaration of parliamentary sovereignty, Wilson asks: "Is it really true, that if 'the parliament will positively enact an unreasonable thing—a thing manifestly contradictory to common reason—there is no power that can control it?' Is it really true that such a power, vested in the judicial department, would set it above the legislature, and would be subversive of all government?"[80] Recall that Wilson does not view judges as moral philosophers or as engaged in probabilistic, discursive moral reasoning. The judge would thus presumably discern a manifest repugnance to the natural law through intuitive "judgments of nature" based on

[75]Wilson, *Works*, 1:10–11, 3:334.

[76]See Obering, *Philosophy of Law*, 263–65.

[77]Wilson, *Works*, 1:461–62; cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–80 (1803).

[78]See generally Snowiss, *Judicial Review*, 72–77 (describing Wilson's view of judicial review and linking it to natural law but not to judicial supremacy).

[79]See Wilson, *Works*, 1:66, 101, 140–41, 212.

[80]Ibid., 1:458.

self-evident truths. In such cases, the judge is morally bound by a superior law, as are all other officials and all other human beings.[81] Judges cannot be excluded from this obligation simply because they are judges. Even Blackstone, who thought that no power could "control" Parliament, stated that no laws should be suffered to violate the natural law or revelation (and that we should violate such laws), and Wilson takes aim at this apparent contradiction: "What! are we bound to transgress it?—And are the courts of justice forbidden to reject it? Surely these positions are inconsistent and irreconcilable."[82] If a human law manifestly repugnant to the law of nature cannot command an individual in conscience to obey, neither can it command the judiciary to enforce it.[83]

Wilson continues by trying to suggest that Blackstone hinted at just such a conclusion.

> His meaning is obviously, that he knew no *human* power sufficient for this purpose. But the parliament may, unquestionably, be controlled by natural or revealed law, proceeding from *divine* authority. Is not this authority superior to any thing that can be enacted by parliament? . . . 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 repeal the act of parliament: they pronounce it void, because contrary to an overruling law. From that overruling 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.[84]

Wilson's attempt to reconcile the contradiction in Blackstone may fail since Blackstone, despite maintaining the natural law's binding force, denies that judges can nullify acts of Parliament and offers no carve-out to that rule for

[81]See ibid., 1:211 (describing all branches and individuals as having a right to judge a statute unconstitutional and refuse to obey it). Though Wilson is speaking of unconstitutionality, as demonstrated above, he applies the same logic to laws contradictory to the natural law.

[82]Ibid., 1:459.

[83]Wilson discusses the duty to disobey, and even resist, unjust laws. See Wilson, *Works*, 1:110. Demonstrating the restrained nature of this doctrine of repugnancy, Wilson includes an example of a statute that might not pass muster and that English judges had found repugnant to the natural law (their phrase was "common right and reason"): a law that makes a person judge in his own cause. See Wilson, *Works*, 1:456. An ex post facto law seems to be another example. See Wilson, *Collected Works*, 1:153–54; 470–71; see also Arkes, *Beyond the Constitution*, 27; Snowiss, *Judicial Review*, 42–43, 46. Wilson does not describe many statutes as manifestly contradicting the natural law.

[84]Wilson, *Works*, 1:460.

violations of the natural law.[85] Still, Wilson's own view is clear. The judiciary can and must enforce the natural law.[86] As with the Constitution, courts cannot countenance repugnancy with it.[87] To reiterate, the repugnancy must be manifest. Because probabilistic and discursive moral reasoning is not the province of the judiciary, the proposition is limited to self-evident truths and demonstrable inferences from them.

Wilson does not, as Wilmarth asserts, envision an "activist" judiciary that has "a 'divine' mandate to exercise a Cokean form of judicial review based on the tenets of natural law" or contend that judges should promote legal principles derived from natural law "to assist in the perfection of law and republican society."[88] This assertion is an inaccurate overstatement. Wilson's judiciary has a role to play in the perfection of law only in the sense that the common law aims at the perfection of accumulated legal reasoning. And if "promoting" means "adhering to," then Wilson does believe that judges have a role to play in promoting natural-law principles. Anything more is again an overstatement. Moreover, Wilson consistently emphasizes the bonds that judges find themselves under: precedent, considerations of prudence and restraint, their institutional function of interpreting rather than making laws, and the superior force of the natural law. Finally, any divine mandate that Wilson sees as applicable to the judiciary applies to every other branch and to all citizens. The judiciary has no unique divine mandate to apply the natural law. The natural law is discoverable by, applicable to, and binding on all human beings and institutions.

In his analysis of these passages in Wilson, Gary Jacobsohn has helpfully pointed out the connection between natural law and constitutional interpretation for Wilson. According to Jacobsohn, Wilson views judges not as policymakers but as enforcing the Constitution (by protecting natural rights),

[85]See William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979), 1:91. Blackstone leaves room for courts to declare "collateral consequences" of certain statutes void as manifestly contrary to reason. But if the statute's main object and express terms are unreasonable, Blackstone leaves no room for a declaration of invalidity or even an equitable construction. He thus differs from Wilson in this regard, though the two are in general agreement about the divine provenance of natural law and its binding character. They simply disagree regarding the judiciary's role in applying it.

[86]See Hall, *Political and Legal Philosophy*, 37, 135–36, 143–46, 197–98; Hall, introduction to *Collected Works*, xv, xxiii; Mark David Hall, "James Wilson: Presbyterian, Anglican, Thomist, or Deist? Does It Matter?," in *The Founders on God and Government*, ed. Daniel L. Dreisbach, Mark David Hall, and Jeffry H. Morrison (Lanham, MD: Rowman & Littlefield, 2004), 196. But see Knapp, 278–83 with nn. 470, 475.

[87]See Wilson, *Works*, 1:459–60; Hall, "Does It Matter," 196.

[88]See Wilmarth, "Elusive Foundation," 167. I also disagree with Wilmarth's implicit characterization of Coke, but that is a subject for another article.

conformity with which ensures basic justice.[89] In Jacobsohn's estimation, Wilson is likely advocating for judicial recourse not to an unwritten constitution but only to principles of natural law embodied in the Constitution. He reaches this conclusion because Wilson's criticism of Blackstone is "anachronistic" in the context of the US Constitution and its embodiment of basic justice, which "obviate[]" extraconstitutional reference to natural law.[90] While Jacobsohn is correct that the proximity of Wilson's discussions of judicial review and judicial recourse to natural law suggests that the two are related, Jacobsohn underemphasizes the independent binding force of the natural law in Wilson's account. Wilson specifically takes Blackstone to task for the contradiction inherent in claiming that the natural law is binding and of higher authority than human legislation but that judges can do nothing in the face of a manifestly repugnant statute. There is no indication that Wilson views the natural law's force as entirely dependent upon the Constitution. On the contrary, Wilson states that the legislature "is subjected to another control, beside that arising from natural and revealed law; it is subjected to the control arising from the constitution."[91] Wilson thus classifies the natural law as a check on legislatures prior to and independent of constitutions. Whereas Arkes goes too far in claiming that Wilson argues for judicial recourse to the natural law as the routine work of judges, Jacobsohn does not go far enough when he suggests that Wilson views the natural law as only applicable through the Constitution. The truth lies in the middle. Wilson recognizes that judges will of necessity have to resort to the natural law, a superior law of independent and preexisting authority, but only in rare cases where the repugnancy of a human law to the natural law is manifest. In most other cases, Jacobsohn is correct that for Wilson the Constitution (and the common law too, I might add) incorporates and aims at conformity with the natural law sufficiently to obviate direct recourse to the natural law.

Judicial recourse to the natural law, for Wilson, is consistent with his democratic conception of the judiciary. Even in making these "judgments of nature" concerning manifest repugnance to the natural law, the judiciary is simply another representative branch. The divine law (particularly the natural law) is the unique exception to the requirement of consent for a law to be binding, not an invitation to judicial usurpation. Any judicial recourse to the natural law involves intuitive, self-evident truths (as does all reasoning) rather than discursive and probabilistic moral reasoning. And all branches of government, just as all individuals, have a duty to uphold and apply the natural law. Judges are not excluded from this duty simply because they are judges. However, their particular task (the judicial administration of justice) and their unique form of legal reasoning (applying fixed and known principles and precedents through the artificial mechanisms of the

[89]See Jacobsohn, *Decline of Constitutional Aspiration*, 75–80.
[90]See ibid., 79–80.
[91]Wilson, *Works*, 1:460.

common law) restrain judges. Wilson's democratic conception of the judiciary includes judicial recourse to the natural law while requiring judicial restraint. These are the same features that come to light in Wilson's judicial practice.

4. Wilson's Judicial Practice and the Natural Law

Wilson puts the foregoing jurisprudence into practice. He refers to natural law in his judicial decisions but does so with restraint. In *Henfield's Case*, in his instructions to both the grand and petit juries, Wilson employs natural-law reasoning as prefatory to and confirmatory of his explication of the law. The natural law provides the background assumptions from which the judicial administration of justice (including legal reasoning) can proceed and provides a baseline against which to confirm one's interpretation and application of the law. The case involved a US citizen who had engaged in acts of war on behalf of France against Great Britain in violation of US neutrality and several treaties. In both charges, Wilson comments on the law of nations (a subset of the law of nature), describing its fundamental principles and obligatory force.[92] He also refers to the treaties at issue and the Constitution in both charges. In particular, when instructing the petit jury before its decision on guilt or innocence, he states that "there are, also, positive laws, existing previous to the offence committed, and expressly declared to be part of the supreme law of the land"; he then proceeds to describe the treaties involved and the Supremacy Clause of the Constitution.[93] He also tells the jurors that they must decide both the law and the facts, which does not authorize them to decide "as they please[]" because "they [a]re as much bound to decide by law as the judges."[94] Wilson views the principles of the natural law as discernible, relevant, and applicable for judges and juries and not as a license to decide cases according to personal preference or opinion.[95] Natural law provides the preconditions and guidance requisite for applying the positive law as opposed to usurping it. At least in his

[92]See Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360); Wilson, *Works*, 1:145. The subject is beyond the scope of this article, but Wilson views the law of nations as another way that judges might be called upon to engage in natural-law reasoning when deciding cases within their jurisdiction. See Wilson, *Works*, 1:374–81; Obering, *Philosophy of Law*, 164.

[93]See *Henfield's Case*, 11 F. Cas. at 1120.

[94]*Id.* at 1121. Wilson's views on whether jurors may decide as to both law and fact are complex. See Wilson, *Works*, 2:366–75; Knapp, "Law's Revolutionary," 274–75, 295–96. This subject is also beyond the scope of this article, but Wilson's statements corroborate his view that applying the law (including the natural law) does not provide license to decide cases based on private opinion.

[95]For a debate regarding Wilson's opinion in this case as relying on a federal common law of crimes, see Hall, introduction to *Collected Works*, xxiv; Knapp, "Law's Revolutionary," 289–97; Wilmarth, "Elusive Foundation," 184–89.

instructions to the petit jury (which ultimately acquitted Henfield), Wilson feels the need to refer to, and indeed spends the most time referring to, the positive law.[96]

In *Ware v. Hylton*, the Supreme Court addressed whether Virginia had the power to confiscate debt payments to British loyalists during the Revolutionary War. Wilson determines that the United States had been "bound to receive the law of nations" at its independence and that such confiscations as Virginia had enacted "ha[d] long been considered disreputable" "by every nation."[97] But, in addition, Congress had not even authorized such a confiscation, and the treaty with Britain "annuls the confiscation."[98] As mentioned previously, for Wilson, the law of nations is a subset of the natural law. He feels comfortable referring to natural law; nevertheless, when an argument based on the Constitution (or a treaty) is readily at hand, he ultimately rests his determination on that positive law. Rather than ultimately grounding his decision in the law of nations, which he refers to as one of the "two points involved,"[99] Wilson roots it in the Constitution (which does not grant Congress the authority to enable such a confiscation) and the treaty at issue. His views regarding judges applying the natural law do not, so it seems at least based on his practice, lead him to override positive law on the bare claim of principle or to consider himself authorized to make judicial determinations based on subjective considerations. But neither is the natural law off limits to him.

Wilson's judicial philosophy is most clearly on display in *Chisholm v. Georgia*, his most famous opinion. In finding Georgia subject to suit in federal court, Wilson states that such an important question should be analyzed from "every possible point of sight," and he offers his criteria of analysis in order: first, "the principles of general jurisprudence"; second, "the laws and practice of particular States and Kingdoms"; and third, "the Constitution of the United States, and the legitimate result of that valuable instrument."[100]

True to his word, Wilson analyzes "principles of general jurisprudence" first. He engages in a long, philosophical discussion of the concept of sovereignty and reiterates a view articulated in his *Lectures*: that governments are created for man and not vice versa.[101] He applies the natural law to

[96]See *Henfield's Case*, 11 F. Cas. at 1120–22. His instructions to the grand jury contain significantly more discourse on the law of nations.

[97]Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796).

[98]*Id.*

[99]See *id.*

[100]Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

[101]See *id.* at 453–59; see, e.g., Wilson, *Works*, 2:453–54. This same point appears in *The Federalist Papers* in the context of an argument against state supremacy. See James Madison, *Federalist*, No. 45, in *The Federalist*, 238.

both men and governments, noting that "upon general principles of right," it cannot be less proper to secure justice "by compulsion" against a "great number" who fail to do justice than to do so when an individual fails to do justice. In other words, under the natural law, both governments and individuals can and should be held accountable for their wrongs. It therefore follows that states, like men, can bind themselves by the laws and become amenable to the courts "formed and authorised by those laws."[102] To allow a state to assume a "proteus-like" character when called to answer for its refusal to honor a contract is to allow it to "insult [its creditor] and justice" and to allow a claim "contrary, in its first appearance, to the general principles of right and equality.[103]

Even in the midst of discussing general principles, Wilson does not see himself as unconstrained or as imposing his own views. He reasons abstractly but does not venture beyond applying the Constitution in light of the natural law. As a judge, he does not know whether the citizens of Georgia surrendered all of their original sovereignty to their state government, but

> as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is, one constructed on this principle, that the Supreme Power resides in the body of the people. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the 'People of the United States,' did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.[104]

According to Wilson, it does not take training in the common law to engage in judgment regarding the first principles of republican government (he makes this part of the judgment "as a citizen"), in particular the sovereignty of the people (rooted in the natural-law requirement of consent). Even so, Wilson does not feel free to roam at large interpreting Georgia's state constitution;[105] "as a judge," he knows only that the citizens of Georgia "acted upon the large scale of the Union" and signed on to pursue the ends of republican government. He interprets the Constitution of the United States in light of the natural law, which includes the sovereignty of the people.[106]

[102]See *Chisholm*, 2 U.S. (2 Dall.) at 456.

[103]*Id.*

[104]*Id.* at 457.

[105]See Knapp, "Law's Revolutionary," 288–89 (noting that Wilson did not intend to assert judicial supremacy but the supremacy of the people, particularly the consenting individual's sovereignty).

[106]Wilson leaves room for a monarchic government, but its power must ultimately derive from the people. See Wilson, *Works*, 1:437–40. For a helpful description of how Wilson's reliance on the principles and methods of "science" enables judges to play a

Wilson continues to blend judicial restraint with natural-law reasoning when analyzing the Constitution. After describing several historical and foreign examples to support the proposition that kings were amenable to legal process, Wilson turns "thirdly, and chiefly," to "the Constitution . . ., and the legitimate result of that valuable instrument."[107] He may analyze the Constitution last after laying a foundation in general principles, but it is the most important consideration. He reiterates the point that governments tend to ignore the "natural order" and presume that their "subjects" exist for them rather than the other way around. He then applies this general principle to the United States, which is not immune from this tendency.[108]

In light of these principles, Wilson asks, could the people bind their states under all three branches of the federal government? And if so, has the Constitution vested the federal courts with jurisdiction over those states? Wilson answers in the affirmative.[109] Blending natural law and constitutional interpretation, he refers to the Preamble and the clause prohibiting the impairment of the obligation of contracts as indicative of jurisdiction. He reiterates his reliance on a "combined and comprehensive view" of "the general texture of the Constitution" to discern that the claim of "an entire exemption" from federal jurisdiction would be "repugnant to our very existence as a nation."[110] However, he explicitly does not "rest" his decision on such generalities but on the clauses extending the judiciary power to controversies between two states and between a state and a citizen of another state, which put the matter "beyond all doubt."[111] He concludes his opinion by rearticulating the three lenses from which he attempted to answer the question ("principles of general jurisprudence," the laws and practices of other states and kingdoms, and the United States Constitution). "From all [of these], the combined inference is" that states are subject to suit in federal court.[112] Again, the natural law provides the background premises guiding Wilson's interpretation of the Constitution, supplying content to principles like sovereignty and republican government. Yet Wilson's judgment relies chiefly on the text of the Constitution that incorporates these principles. As his *Lectures* make clear, Wilson treats natural law as an independent basis

meaningful role in achieving the constitutional goal of republican government without imposing their subjective or personal views, see Jacobsohn, *Decline of Constitutional Aspiration*, 34–36.

[107]*Chisholm*, 2 U.S. (2 Dall.) at 461.

[108]See *id.* at 455, 461–63.

[109]See *id.* at 463–65.

[110]*Id.* at 465.

[111]See *id.* at 466.

[112]*Id.* For summaries and analyses of Wilson's opinion in *Chisholm*, see Hall, *Political and Legal Philosophy*, 169–73; Knapp, "Law's Revolutionary," 287–89; Wilmarth, "Elusive Foundation," 176–84.

of authority. In his judicial decisions, however, he prefers not to use it independently.

Wilson's opinions demonstrate his natural-law jurisprudence in action. He does not believe that judges possess a roving commission to decide cases according to their policy preferences. The natural law exists as an independent source of authority for judges to strike down legislation, but that independent authority is not unique to judges (it is the same authority that gives officials in other branches and all citizens the right and duty to disregard a statute that violates the natural law). In practice, Wilson prefers to invoke natural law in a largely prefatory manner. He never finds it necessary to rely on natural law independently to strike down legislation but instead relies upon it as providing the background assumptions and preconditions for reasoning about the positive law (both statute and common law). Though he countenances, in theory, a judicial obligation to invalidate a positive law manifestly repugnant to the natural law, he appears to believe that applying the positive law with reference to and in light of the natural law is more often than not the proper path for the prudent and restrained judge.

Conclusion

Wilson is committed to the natural law epistemologically, jurisprudentially, and in practice. Judges are not only capable of engaging in, but authorized and bound to engage in, "judgments of nature." These judgments are intuitive, based on self-evident truths, do not require discursive and probabilistic moral reasoning, and must be based on manifest contradictions of the natural law. In the vast majority of ordinary cases, judges need not engage in such judgments but can operate within the legal reasoning of the common law (which itself aims at conformity with the natural law). Wilson does not view this capability or authorization as a license for judges to impose their preferences. Instead, the natural law binds all branches of government and all individuals. For Wilson, natural law's direct role in judicial decisions is limited but meaningful. By engaging in judgments of nature, judges play a nonexclusive and limited role, but an important one, in making human law conform to the law of nature.