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James Wilson's Judge as Agent-Plus

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James Wilson's theory of constitutional interpretation is based on a multi-dimensional view of sovereignty, both principled and derived. While the American people serve as the principle sovereign, they delegate authority to the Court (their agents) to uphold the Constitution and educate the American people about the Constitution, its principles, and the duties of the sovereign people. In rendering their decisions, Wilson argues that judges should apply principles of common sense natural law and natural right that informed the sovereign people's original understanding of the Constitution. By applying Wilson's multidimensional concept of sovereignty, the role of the judge can be used as a guide to understanding Wilson's overall theory of constitutional interpretation.

According to Wilson (2007, 304), a constitution is

that supreme law, made or ratified by those in whom sovereign power of the state resides, which prescribes the manner, according to which the state wills that government should be instituted and administered. From this constitution the power of government must be directed and controlled: of this constitution no alteration can be made by government; because such an alteration would destroy the foundation of its own authority.

Wilson's definition of a constitution relies upon the idea of sovereignty as a multi-dimensional concept, based on a principle-agent relationship. The Constitution is the supreme law. The people, as principle sovereign, both make the Constitution, and will their power to the agents of the government which they have created. These agents are designed to pursue the will of the people, and limited by the division of powers, and the boundaries set in the Constitution, in order to prevent tyranny. According to this logic, a judge serves as an agent of the people. A judge is to represent the wants and interests of the people. However, the nature of a judge cannot be treated the same as the nature of a representative in Congress. Representatives in Congress are supposed to be the most accurate voice of the people, with little or no alteration. Judges, on the other hand, are entrusted with the job of upholding the Constitution, while simultaneously educating the people on the law. Therefore, they can be considered as agents-plus. Judges serve as both an agent and educator of the principle sovereign, aiding the people in understanding their position as principle sovereign. Judges help educate the people to make them

better citizens through their decision making and interpretation of the Constitution (Zink 2009).

Here, I address Wilson's conception of judges as an agents-plus in three different roles. The first role is as agents. Judges are not to serve as political agents, in order to preserve the proper balance between the three branches of government. Wilson stresses the importance of an independent judiciary in completing the duties necessary of judges. Wilson also believes that as agents, judges should rely on scientific reasoning when making their decisions. The second role is as representatives. Wilson designates three jobs for judges as a representative: (1) Not to make law, but to interpret it in light of the Constitution, (2) To promote a true science of law and to follow precedent grounded on scientific principles instead of Aristotelian prudence, and (3) Judicial review must be textually based. The third role is as educators. According to Wilson, judges have the social responsibility of educating the people (the principle sovereign) through their judicial decisions. This education not only clarifies the Constitution and the law, but also serves to educate the people about the nature of their responsibilities as principle sovereign. Included in this is Wilson's concept of the moral sentiment, and its relationship with reason (the science of law). Wilson clarifies this relationship with his idea of judgment and its relationship with reflection, memory, and reason.

Judges as Agents

Since judges are representatives of the people, it is important that they are independent from the other branches of government. Wilson (2007, 704) argues that the Courts "ought to be completely independent... They should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by anything, except their own behavior and consequences." Important to Wilson is that judges are not political agents. Where the executive and legislative branches have popularly elected members, either directly or indirectly, they become political agents that are restrained by the will of the people. This forces political agents to change their platform according to trends in the general populace. Since Supreme Court judges are appointed for life, they do not have concern with reelection, and therefore can make their decisions according to the Constitution. This does not mean that judges are not agents of the people, it simply means that they are held above the fray of politics, and serve only to protect the Constitution, which is the original expression of the people's will. Wilson asks:

Can dignity and independence be expected from judges, who are liable to be tossed about by every veering gale of politics, and who can be secured from destruction, only by dexterously swimming along with

every successive tide of party? Is there not reason to fear, that in such a situation, the decisions of courts would cease to be the voice of law and justice, and would become the echo of faction and violence? (Wilson 2007, 704-05)

The independence of the courts is crucial to maintaining a boundary between not only the three branches, but between the courts and politics. Since the Court is not supposed to be a political body, its authority and power is very constricted. Hamilton describes this issue stating "The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (Federalist #78, 402). The Court's authority relies upon the Constitution, rather than the current politics of society. This jurisdiction allows for judges to take on the responsibility of maintaining the Constitution, and most importantly, maintaining the boundaries between the three branches.

Maintaining these boundaries is one of the Supreme Court's most important jobs. Wilson (2007, 705) states "Liberty and security in government depend not on the limits, which the rulers may please to assign to the exercise of their own powers, but on the boundaries, within which their powers are circumscribed by the constitution." The enforcement of boundaries ensures that government will not become tyrannical. The most important boundary to enforce is between the judicial and the legislative departments. Wilson (2007, 743) argues "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 effectual and permanent provision is made, that every transgression of those bounds shall be adjudged and rendered vain and fruitless." Using the power of judicial review, the Court can strike down a law if it conflicts with the Constitution. This allows the judiciary to maintain this boundary between the two branches. Wilson (2007, 743) explains when he states "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." According to Wilson, an act should be declared unconstitutional by the Supreme Court if it violates the spheres of power (on an institutional level), or if it usurps power for the legislature. James Madison shares the same sentiment on the maintenance of

boundaries in order to prevent the usurpation of power by another branch. Madison discusses tyranny as “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective” (Federalist #47, 249). In addition to the threat of tyranny, Madison discusses the concept of factions in a majoritarian society. Madison states “the society itself will be broken into many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority” (Federalist #51, 270). One of Madison’s biggest fears was the creation of a majority faction. The division of power, and the maintenance and enforcement of those divisions prevents against majority faction, and protects the interests of the minority. The enforcement of boundaries serves to maintain the Constitution is and always will be the supreme law, in which no branch of government can infringe upon.

In the case where the Constitution does not provide clear guidance, or consists of conflicting protections, judges should be entrusted to make equitable decisions. Wilson relies upon Aristotle’s definition of equity, which is “the correction of that, in which the law is defective, by being too general” (Wilson 2007, 924). According to Wilson’s understanding, the science of law is used to educate a judge on justice and equity. Wilson responds to arguments calling for separate courts of law and equity by arguing that equity is an inherent aspect and concern of the law and that the two cannot be separated. Wilson (2007,925) critiques the British system, stating “When we find a court of law and a court of equity placed in contradistinction to each other, how natural is it to conclude, that the former decide without equity, and that the latter decides without law. Such a conclusion, however, is greatly erroneous.” He describes the combination of a court of equity and a court of law when interpreting constitutional issues stating:

It has, indeed, been said, concerning a court of equity, that it determines by the spirit, and not by the letter of a rule. But ought not this to be said concerning a court of law likewise? Is not each equally bound – does not each profess itself to be equally bound – to explain the law according to the intention of those, who made it? In the interpretation of laws, whether strictly or liberally, there is not a single maxim, which is not adopted, in the same manner, and with the same force, by both courts. Hitherto, then, we find no difference between a court of law and a court of equity. (Wilson 2007, 925)

Although others have tried to make the argument that courts of equity and law should remain separate entities, Wilson does

not agree. Wilson (2007, 933-34) states “law and equity are in a state of continual progression; one occupying incessantly the ground, which the other, in its advancement, has left. The posts now possessed by strict law were formerly possessed by equity; and the posts now possessed by equity will hereafter be possessed by strict law.” Here, Wilson appears to separate law and equity on the one hand, and science on the other. Science is grounded and proven, and informed by reason. This supports the theory of Hobbes, who believes scientific reasoning should be applied to the law. Hobbes (1994, 26) says “reason is the pace; increase of science, the way; and the benefit of mankind, the end.” This suggests that both Hobbes and Wilson believe the use of scientific reasoning is the driving force which should solidify the law, justice and equity. For Wilson, applying scientific reasoning with equity helps to aid judges in translating the Constitution while simultaneously improving society. This idea of equity is also consistent with Hobbes. Hobbes defines equity in the role of a judge as “a precept of the law of natural that he deal equally between them. For without that, the controversies of men cannot be determined but by war” (Hobbes 1994, 97). In a similar sentiment, Wilson (2007, 934) states “equity may be well deemed the conductor of law towards a state of refinement and perfection.” The idea of equity serving as a tool to refining and perfecting society, also suggests that equity can serve as an end of government and society. While Wilson attributes the creation of government as the agent for the will of the people, equity can serve as one of the ends government is designated to achieve.

Judges as Representatives

The second job of judges is to serve as representatives of the will of the people. On this front, Wilson identifies three important jobs designated for judges. The first is that they should not make the law (Wilson 2007, 738). Making the law is the job of the legislature. Judges have only the function of interpreting the law in light of the Constitution. Wilson (2007, 738) argues “In the United States, the judges stand upon the sure basis of the constitution: the judicial department is independent of the legislature.” A judge can determine the constitutionality of the law, and strike it down with the power of judicial review, if and only if it is found to be unconstitutional. A judge has no other power to strike down a law other than this power, limiting their ability to create the law. However, Wilson(2007, 738) argues “In many cases, the jurisdiction of the judges of the United States is ascertained and secured by the constitution; as to these, the power of the judicial is coordinate with that of the legislative department.” The coordination between the legislative branch and the judiciary was of particular importance to Wilson. Since the judiciary serves as the final check on a new law, judges must coordinate with lawmakers in order to best serve the needs of society, in accordance with the Constitution.¹

The second role of judges as representatives is that judges “should implement ‘principles and rules of genuine policy and natural justice’ for the purpose of promoting a true science of law” (Wilson 2007, xxiii). According to Wilson, the term “science” is viewed as progress in reflection of enlightenment principles. For Wilson, the use of precedent is seen as necessary, but not in every situation. Each new case and new decision improves upon or uses precedent, almost like a science experiment. In science, a result is only deemed legitimate if it can be replicated. This is the same for the law. If precedent cannot be applied to more than one case that is similar in nature, then the decision should be improved upon and changed. Wilson uses his knowledge of the natural sciences and applies them to the law using the writings of Lord Francis Bacon. Wilson describes the science of law while mentioning the importance of Lord Bacon in the following:

I think I may venture the position – that in no science can richer materials be found, and that, in no science, have rich materials been more neglected or abused, than in the science of law – particularly of the common law. Listen to the sentiments of my Lord Bacon, in his book on the advancement of learning. It is well known, that the vast object of this exalted and most comprehensive genius was, to erect a new and lasting fabric of philosophy, founded, not on hypothesis or conjecture, but on experience and truth. To the accomplishment of this design, it was necessary that he should previously review, in all its provinces and divisions, the state of learning as it then stood. To do this effectually required knowledge and discernment, exquisite and universal; such were happily employed in the arduous task. (Wilson 2007, 1026-1027)

The use of science for Wilson is very important in the interpretation, as well as the teaching of the law. Wilson looks towards the law, as well as the interpretation of it, as an advancement of learning. Applying the science of law is important to the overall job of judges, because they are entrusted with clarifying the law of the Constitution for the people. The science of law serves as a way of improving the existing law, as well as an aid in interpreting what the law intends through replication. The use of science and the emphasis on replication suggests that through the use of scientific principles and reason, a judge can better clarify the law, leading to uniformity in the interpretation of it. If interpretation of the law, and more importantly the Constitution, is more uniform, it will be easier to educate the people on its meaning. This also supports Wilson’s idea that the law and its application is universal in nature, which should facilitate, on one hand, the perfection of society and the cultivation of American citizens, on the other. For example, if

similar laws are interpreted differently in two different states, then two different lessons are learned by the people. This works against Wilson’s national impulse. Therefore, for Wilson, a scientific grounding for precedent is surer than the grounding of precedent currently and historically found in the common law.

The science of law also helps to maintain the idea of the judiciary as a pyramid. The courts, according to Wilson (2007, 945) should resemble a pyramid where there is “a regular, progressive gradation of jurisdiction.” The gradation of jurisdiction provides options, as well as limits them. The higher up the pyramid, the more limited the power of the Court becomes. This is helpful in maintaining the boundaries of the Supreme Court. Giving the Supreme Court the final authority is potentially dangerous, therefore the pyramid provides limitations on the Court’s power.² The potential danger is seen in the fact that the Court is not popularly elected, and is not accountable for its decisions. The fear is that an empowered court could degenerate into an aristocracy. In addition to this, he states “a supreme court prohibits the abuse, and protects the exercise, of every inferior judiciary power” (Wilson 2007, 945). The creation of the United States judicial system allows for the science of law to function properly. Each district has its own federal court, and appellate court to which the law is interpreted and applied. However, the Supreme Court has the ultimate authority, and makes the ultimate decision of whether or not a decision, or law is constitutional.

The third responsibility of a judge as representative is that judicial review should always be textually based (Wilson 2007, xxiii). This should be seen as a limitation. Although the power of judicial review is an implicit power with the function of ascertaining the validity of a statute, Wilson limits this implicit power by requiring judge’s decisions involving judicial review to be strictly text based. Since the Constitution is the supreme law of the land, and is the will of the sovereign people, Wilson believes it provides the proper criteria for making this determination. Wilson (2007, 897) describes judicial review as:

If the validity of a statute or treaty of the United States, or of an authority exercised under them, be drawn in question, in any suit in the highest court of law or equity of a state, in which a decision of the suit could be had; and a decision is against their validity – if the validity of a statute of any state, or of an authority exercised under that state, is, in any suit in such court, drawn in question, as repugnant to the constitution, treaties or laws of the United States; and a decision is in favor of their validity – if the construction of any clause of the constitution, of a treaty, of a statute of the United States, or of a commission held under them, is,

in any suit in such court, drawn in question; and a decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause – a final judgment or decree, in all these cases, may, upon a writ of error, be reexamined and affirmed or reverse in the supreme court of the United States.

The power of judicial review is used when the Constitution is not clear about a certain issue, or if there are conflicting principles. Grounding judicial review in text also limits the power of the Supreme Court from overstepping their jurisdictional boundaries. It also allows for a legitimate check on the acts of the legislature. In recognition of this, Hamilton refers to the judicial branch as an “intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority” (Federalist #78, 404). Maintaining the proper balance between the three branches of government constitutes a significant part of a judge’s responsibilities. A judge wants to promote a true science of law, and reach natural justice according to Wilson, therefore the power of judicial review works towards that goal, by refining the wants and needs of the people, by limiting them with the Constitution. Hamilton, picking up on this point, goes further and says “the interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body” (Federalist #78, 404). Judicial review stands as the strongest check against legislative encroachment, and aides in the enforcement of boundaries between these two branches.

Judges as Educators

The third function of a judge is to serve as an educator of the sovereign people. Judges are entrusted with this education, because they are seen as knowledgeable individuals, enlightened by studying the law and what Wilson refers to as the science of law. In the example that the people ask Congress to do something that is outside the government’s derived power, or is inconsistent with the ends of government, the Court has the job of recognizing that this is unconstitutional, and has the job of educating the people on why what they are asking is inconsistent with the ends of government as designated by the Constitution. Wilson (2007, 447-48) describes a judge as “He who is qualified to teach, is well qualified to judge; and he, who is well qualified to judge, is well qualified to teach.” According to Wilson, a judge has the social responsibility of bettering society. A judge does this by educating the people on the law through their decisions.

When interpreting the Constitution, judges use what Wil-

son (2007, 819) refers to as “common sense.” This “common sense” is informed by Wilson’s concept of the moral sentiment, which is used to resolve the tension between natural right principles and common law principles. Wilson (2007, 458) states that when making decisions, a judge must “pry into the secret recesses of the human heart, and become well acquainted with the whole mortal world, that they may discover the abstract reason of all laws.” This implies two important concepts for Wilson. When he refers to “the secret recesses of the human heart,” he is referring to the moral sentiment. Wilson (2007, 512) states that the moral sentiment “from its very nature, is intended to regulate and control all our other powers. It governs our passions as well as our actions.” For Wilson (2007, 512), the concept of the moral sentiment is “In short; if we had not the faculty of perceiving certain things in conduct to be right, and others to be wrong; and of perceiving our obligation to do what is right, and not to do what is wrong; we should not be moral and accountable beings.” Therefore, according to Wilson, the moral sentiment serves as our internal check on right and wrong, placed in the hearts of individuals by God.

Another way of conceptualizing the moral sense is as conscience. This is an important quality of a judge, because judges require the proper understanding of right and wrong while making decisions. According to Wilson (2007, 514), “His conscience or moral sense determines the end, which he ought to pursue; and he has intuitive evidence that his end is good: but the means of attaining this end must be determined by reason.” Reason is the second part of Wilson’s understanding of the “common sense,” as well as judicial decision making. Once a judge has consulted with the moral sense to determine what is right or just, they must use reason in order to execute what the moral sense is telling them to do. Wilson (2007, 514) states “Thus, though good and ill, right and wrong are ultimately perceived by the moral sense, yet reason assists its operations, and, in many instances, strengthens and extends its influence.” Reason and the moral sense work together to find the best possible outcome for a situation. The moral sense cannot act without reason, because reason provides what the moral sense cannot. Wilson (2007, 514-515) states “reason serves to illustrate, to prove, to extend, to apply what our moral sense has already suggested to us, concerning just and unjust, proper and improper, right and wrong,” while in addition, “reason contributes to ascertain the exactness, and to discover and correct the mistakes, of the moral sense... It considers the relations of actions, and traces them to the remotest consequences.” However, this is not to suggest that reason is superior to the moral sense. According to Wilson (2007, 519), “the ultimate ends of human actions, can never, in any case, be accounted for by reason.” However, the fault of reason is that it “presents false appearances to our moral sense” (Wilson 2007, 518). Although it may seem that

reasoning can be used to solve an issue in the natural sciences, in the science of law, the moral sentiment is required. According to Wilson (2007, 517), “the dictates of reason are neither more general, nor more uniform, nor more certain, nor more commanding, than the dictates of the moral sense.” Therefore, it is important, given the strengths and weaknesses of both the moral sense and reason separately, that the two work together.

According to Wilson’s conception of the moral sense, it would seem that using a pure science of law is inadequate when making decisions. Wilson believes good judges need the combination of the science of law and the moral sense in order to arrive at the right decision. Wilson (2007, 469) asserts “Truth may, indeed, by reasoning, be rendered evident to the understanding; but it cannot reach the heart, unless by means of the imagination.” This suggests that science is silent on the question of right and wrong. However, the moral sense also cannot be the only influence on judicial decision making either. Wilson (2007, 470) states “Laws may be promulgated by reason and conscience, the divine monitors within us.” Both coordinate with one another in order to arrive at a just and equitable decision. The moral sense, without the use of reason appears to have no restrictions. This tension between the moral sense and the science of law is solved by Wilson’s conception of judgment.

The first important part of Wilson’s conception of judgment is reflection. Wilson believes that experience, as well as reflection on the experience of others is a very important influence on judicial decision making. Wilson (2007, 586) describes the action of reflection: This way: “By this power, the mind makes its own operations the subject of its attention, and views and examines them on every side.” While reasoning and the moral sense both used when making decisions, reflection serves as the best restriction against the passions of the moral sense. Wilson (2007, 586) states “how utterly impossible is it to make any clear and distinct observations on our faculties of thought, unless the passions, as well as the imagination, be silent and still.” Once reflection has restricted the overbearing passions the moral sense can sometimes present, one can apply the science of law and come to a decision that is consistent with the dictates of natural justice. Reflection allows for the discovery of truth, and therefore the right and best answer for a given situation.

A second component of Wilson’s conception of judgment is the relationship between judgment and memory. According to Wilson (2007, 599), “Judgments are intuitive, as well as discursive, founded on truths that are self-evident, as well as 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.” When Wilson refers to demonstration, he is referring to experience, or memory. According to Wilson, judgment and memory are mutual assistants. Wilson (2007, 597) states “Memory furnishes the materials which judgment selects, adjusts, and arranges. Those materials selected, adjusted and arranged are more at the call of memory than before: for it is a well known fact, that those things, which are disposed most methodically and connected most naturally, are the most distinct, as well as the most lasting objects of remembrance: hence, in discourse, the utility as well as beauty of order.” Without memory, judges would not have the ability to collect and organize information in a particular case. Memory also allows for reflection, not only on personal experience, but also on evidence and precedent. Judgment uses memory in order to make affirmative or denial distinctions. This ability is keen when relying upon the moral sense for a scale of right and wrong. Wilson (2007, 599) describes judgment as “an important operation of the mind; and it is employed upon the material of perception and knowledge. It is generally described to be, that act of the mind, by which one thing is affirmed or denied of another.” However, he believes this definition is too limited, while at the same time too extensive. Wilson sees judgment as limited, because it can only be expressed by either affirmation or denial. There is no true gray area. He believes it is too extensive because it includes testimony as a conjuncture to judgment, when they are two completely different concepts with different implications. Judgment, in addition to memory, requires reasoning in order to function.

The third component of judgment for Wilson is the connection between judgment and reason. Wilson (2007, 600) states that “with the power of judging, the power of reasoning is very neatly connected.” Wilson sees judgment and reasoning as corresponding with one another in order to reach the right decision. This coincides with Aristotle’s practical judgment (See *Ethics*, 1142a-1142b). According to Wilson (2007, 600), “reasoning is strictly the process, by which we pass from one judgment to another, which is the consequence of it. In all reasoning, there must be one proposition, which is inferred, and another, at least, from which the inference is made.” Reasoning is the bridge between memory and judgment. Reasoning allows for judgment to make the necessary connections, and helps to organize and analyze the information contained within memories. This organization allows for a judge to think about memories in a restrained form. This restrained form is less likely to be overly passionate, and can aid a judge in his/her decision making in a clear and logical sense. However, Wilson (2007, 600) points out that “reason, as well as judgment, has truth and falsehood for its objects: both proceed from evidence; both are accompanied with belief.” Therefore, accord-

ing to Wilson, reasoning and judgment cannot stand alone. Both have the ability to reach the wrong conclusion. Wilson's solution to this is the moral sense. Wilson (2007, 803) states "Our knowledge of moral philosophy, of natural jurisprudence, of the law of nations, must ultimately depend, for its first principles, on the evidence and information of the moral sense." The combination of the moral sense with judgment and reason is very important in understanding and interpreting the Constitution. According to Wilson (2007, 615), the Constitution contains common sense moral principles. The Constitution does not explicitly state these principles, but it is required of a judge to identify them using reason. One of the strongest common sense moral principles contained within the Constitution is the protection of the innocent. Wilson (2007, 627-28) states "the moral sense restrains us from harming the innocent: it teaches us, that the innocent have a right to be secure from harm. These are two great principles, which prepare us for society; and with regard to them, the moral sense discovers peculiar inflexibility: it dictates, that we should submit to any distress or danger, rather than procure our safety and relief of violence upon an innocent person." The Constitution deals with common sense moral principles in a limited approach. It places restraints upon individuals in society through the use of a common sense. Each individual has a common, moral sentiment that tells them what is right and wrong placed in them by God. The Constitution, as well as the governmental institutions it creates, is intended to inform the people on this moral sentiment, and aid them in discovering it. The Constitution cannot simply be looked at as the will of the people, but as the will of the people that embodies and presumes and argument on certain moral principles.

Discussion

Having distilled Wilson's theory of how judges make decisions, it can now be placed alongside the other schools of thought. Although each has similar qualities to Wilson's thought, each has significant differences as well. The first school is the natural law. According to the natural law, law and morality cannot be divorced from one another. The natural law also provides principles for how one ought to live, based on substantive moral reasoning that defines right and wrong. The natural law is universal, but not in the same sense as Wilson understands universality. Arkes (1990) and George (1999) attempt to incorporate Thomistic natural law principles into a theory of jurisprudence, where Wilson grounds a theory of jurisprudence on scientific principles. Since the natural law argument focuses on the Thomistic idea of right and wrong, Wilson does not fit within its confines. Wilson believes that God has placed within each individual the dictates of right and wrong, he uses common sense, the moral sentiment, and reasoning rather than a strict reliance on the divine. Wilson focuses on the common

sense, reaching inside ourselves for the dictates of morality. The traditional natural law argument, in contrast, argues that the source of natural law is external to man, in the form of a divine God. For Wilson, the natural law does not provide a thorough basis for decision making, but instead creates a very limited understanding of right and wrong based on divine reasoning.

The second school is natural right. According to natural rights theorists, if a law is against natural rights, judges should reject it as government has the job of protecting the inalienable rights of individuals. Natural rights theorists also believe that legitimacy in government is gained by the proper protection of rights, not the consent of the governed. Barnett (2004, 30) states "a duty to obey the law cannot be grounded on the consent of the governed when there has been anything less than unanimous consent and that, obviously, no government legal system can claim this degree of consent." According to the natural rights argument, the job of government is to secure individual rights, unless everyone, unanimously, can all agree that government does not have the means to execute a given action. Barnett goes on to claim that the phrase "We the People," is a fiction, as well as the idea of popular sovereignty itself. This idea is in direct tension with Wilson's idea of popular sovereignty. Wilson's political thought focuses heavily on the importance of consent, as well as the people as principle sovereign. Wilson agrees that the government, as an agent of the people, and as part of their social responsibility should protect individual's natural rights and improve society. This implies a trust between the sovereign people that the government will actively protect their natural rights. For Wilson, the government is simultaneously empowered and limited by this trust. For Barnett and other natural rights theorists, the government is limited. Natural rights theorists also believe that popular attachment is based on what an individual's conscience dictates. If an individual believes a law, or the government is not protecting them properly, they have the right to deny/disobey that law. Wilson would disagree with this concept of political attachment, given the multiple provisions provided in the Constitution to ensure that the laws created and passed by the legislature will be good laws. However, Wilson would agree that conscience is a necessary factor in determining right and wrong. Wilson's moral sentiment, based on common sense principles, provides guidance on right and wrong, in the same way individual conscience does.

The third school is of the common law in America. According to Stoner (1992), the common law requires judges to make decisions using prudence and precedent. A heavy reliance on precedent allows for judges to make decisions based on the prior decisions of other judges, while accounting for new evidence presented within a case. Wilson agrees with the use of precedent, but does not place a heavy reliance upon it. The com-

mon law is adaptable, changing with each generation to fit the needs of the people. The common law is unwritten, therefore allowing for flexibility. For Wilson, the common law does not provide a solid basis for judicial decision making. Instead, Wilson favors grounding the Constitution and its interpretation on scientific principles. Science is proven. The common law is dynamic and unstable. Although the common law has been perfected over time, science allows for replication. The common law does not rely on scientific reasoning, and is therefore nonreplicable. This creates tension within the law, and therefore a problem with popular attachment to the law. This tension is commonly seen within interstate law. If a given action is legal in one state, but illegal in another, the people can become confused, therefore undermining the ability of the sovereign people to perform their responsibilities. If the law is universal, and grounded on scientific principles, it will be more solidified, and therefore the people will be more likely to consent to it.

Wilson's position on judicial decision making blends natural law and natural rights principles, based on a scientific grounding of the law. Wilson's science of law is ultimately a scientifically-informed understanding of precedent and judicial reasoning. Where the three competing interpretations of how judges should decide go wrong is in viewing the act of decision making as having to fall exclusively into a single intellectual camp. This requirement is inconsistent with what is generally regarded as the fundamental starting point to the study of American political thought. A single body of philosophy cannot accurately explain or describe the American political thinking as Americans draw on multiple, often contradicting, intellectual traditions (Gibson 2007, 130-164; Gibson 2006, 7-63). Wilson's multi-dimensional concept of popular sovereignty, as well as his understanding of what judges should have recourse to when making decisions serves as the perfect example of how multiple influences affect the political thought of our Founding Fathers.

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Endnotes

1 Wilson was also a strong advocate for a Council of Revision, which would create a larger check on the legislative power when creating laws by determining whether or not a particular piece of legislature was consistent with the Constitution. Having this check would ensure that no law passed by the legislature would be unconstitutional. However, the Council of Revision was eventually rejected by the delegates at the Constitutional Convention.

2 This limitation on the Supreme Court's power is best seen in the case of *Marbury v. Madison* 1803. In *Marbury*, the Supreme Court denied cert because Marbury had filed for original jurisdiction. The Supreme Court only has the power of appellate jurisdiction, therefore making Marbury's claim outside the sphere of the Supreme Court's jurisdiction.