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JAMES WILSON'S "ASSIMILATION OF THE COMMON-LAW MIND"

Stephen A. Conrad*

I. INTRODUCTION: WILSON IN THE LIGHT OF THE CURRENT NEO-WHIG REVIVAL

In this essay I turn to James Wilson—again. In fact, periodic return to this neglected Founder has long been one of the minor revisionist motifs in the constitutional historiography of the early republic. Yet thus far even the accumulated greater and lesser attempts at rehabilitating him have not amounted to quite enough to do the job.¹ Nor do I pretend

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¹ Among the major twentieth-century efforts are those by Randolph G. Adams, Charles Page Smith, and Robert Green McCloskey. Adams' contributions include: J. WILSON, *SELECTED POLITICAL ESSAYS OF JAMES WILSON* (R. Adams ed. 1930); Adams, *The Legal Theories of James Wilson*, 68 U. PA. L. REV. & AM. L. REG. 337 (1920) reprinted in R. ADAMS, *POLITICAL IDEAS OF THE AMERICAN REVOLUTION* 134 (1922) [hereinafter Adams, *Legal Theories*]. Smith's is the only full-length biography of Wilson. See C.P. SMITH, *JAMES WILSON: FOUNDING FATHER, 1742-1798* (1956). Before his untimely death, McCloskey gave us two invaluable essays on Wilson. See J. WILSON, *THE WORKS OF JAMES WILSON* (R. McCloskey ed. 1967) [hereinafter WORKS]; McCloskey, *James Wilson*, in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 79-96 (1969); see also G. SEED, *JAMES WILSON* (1978).

Of lesser scope than the above cited works are Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 L. & SOC. INQUIRY 1 (1988) [hereinafter Conrad, *Metaphor and Imagination*]; Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 SUP. CT. REV. 359 (1985) [hereinafter Conrad, *Polite Foundation*]; Dennison, *The "Revolution Principle": Ideology and Constitutionalism in the Thought of James Wilson*, 39 REV. POLITICS 157 (1977); Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 POL. SCI. Q. 394 (1942); Rossum, *James Wilson and the Pyramid of Government*, 6 POL. SCI. REVIEWER 113 (Fall 1976); Wills, *James Wilson's New Meaning for Sovereignty*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 99-106 (1988).

Among the significant unpublished work on Wilson, several dissertations have proved especially

to get the job done here. But the present juncture does seem to me auspicious for an attempt at a better understanding of at least one feature of Wilson's constitutional thought that has been a factor in his consignment to the margins of our usable national past.²

The feature in question is Wilson's high regard—to judge from his own professions, his *highest* regard—for “the common law.” Wilson held the common law not only over and above statutory law, but also perhaps—and Wilson's apparent ambiguity is at the heart of the matter—over and above what we now call *constitutional* law.

There is some irony in this historical circumstance as thus (so anachronistically) formulated: that Wilson, one of the principal founders of our distinctly American constitutional jurisprudence,³ would (even as he sat on the first Supreme Court) reserve his warmest regard *not* for the “supreme Law of the Land,” but for the proverbially antique, Anglo-Saxon “common law.”⁴ Granted, the irony, when couched in this way, is rather superficial—as historians have generally recognized. Still, the paradoxical character of Wilson (not to mention many another patriotic Founder) as an ardent common-law ideologue has never been altogether easy to explain. It may be somewhat easier now, I believe, because several leading historians of eighteenth-century Anglo-American constitutionalism have recently published important works that refine and supplement earlier scholarship so as to afford a newly enriched historiographical context for reconsidering the strain of “common-law” constitutionalism in the American Founding and its immediate aftermath. Among the recent works in this neo-whig revival, those of J.G.A. Pocock, Stanley N. Katz, Jack P. Greene, and John Phillip Reid loom largest for my purposes—in no small part because these historians, as they all acknowledge, amplify and consolidate both their own earlier contributions and those of others.

valuable for the purposes of my own research. See J. Nedelsky, *Property and the Framers of the United States Constitution: A Study of the Political Thought of James Madison, Gouverneur Morris, and James Wilson* (1977) (Ph.D. dissertation, Univ. of Chicago); R. Rossum, *The Popular Pyramid and the Federal Republic: The Political Thought of James Wilson* (1973) (Ph.D. dissertation, Univ. of Chicago); C.P. Smith, *James Wilson, 1787-1798* (1950) (Ph.D. dissertation, Harvard University). Also deserving mention is an appreciative and documentary MS work that extends to six volumes: B. Konkle, *The Life and Times of James Wilson* (Friends Historical Library of Swarthmore College).

Furthermore, it has been announced that Professor Garry Wills is at work on a book devoted to Wilson.

² See Conrad, *Polite Foundation*, *supra* note 1, at 386 & n.73. As I trust I make clear in the present essay, I could not have written it in 1984, my pretensions in that earlier footnote notwithstanding.

³ For a recent and representative example of scholarship that tends to reinforce this hardly unorthodox claim, see Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POLITICS 51, 59-71 (Feb. 1986).

⁴ See E. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 24 (1928).

Nevertheless, as the quoted phrase in the title of this essay is intended to indicate, in my reconsideration here of what Wilson said about the common law, the work of Professor Pocock serves as the uniquely central point of reference. It was over thirty years ago that Pocock first introduced a term of historiographical art that has proved to be an invaluable, albeit controversial, rubric: "the common-law mind." In his 1957 book *The Ancient Constitution and the Feudal Law*, he coined that term and began to give it meaning as an analytical category that admits of both historical variations and the integrity of a long-term tradition. In 1957 Pocock's focus was largely on the legal, historical, and political thought of seventeenth-century England. But in a substantial 1986 "retrospective" essay on the book, and in other recent essays, Pocock has given increased attention to some of the latter-day, eighteenth-century moments in what he has continued to see as an identifiable common-law mentality.⁵ In his view, although the "common-law mind" originated in seventeenth-century England, it spanned at least two hundred years thereafter—and at times became as important in some of England's "cultural provinces"⁶ as it was at home.⁷

Whether or not the early 1790s was one of those times is a broad question I do not mean to address. But to the extent that James Wilson was a representative or otherwise significant public figure in America during those years, then this question might be worth pursuing further than it has been pursued thus far. In any event, in light of Pocock's work and that of a number of other historians, most notably those I have named above, it would now be hard to argue that even the most basic general account of James Wilson's constitutional thought could do justice to the subject without coming to terms with Wilson's approach to "assimilating the common-law mind" into the constitutionalism of the New Republic.⁸

II. THE IDEALIZATION OF THE COMMON LAW AND THE AUTHORITY OF CUSTOM: FROM IDEAL TYPE TO THE ECONOMICS OF ASSIMILATION

While serving as a Justice of the first United States Supreme Court

⁵ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY—A REISSUE WITH A RETROSPECT* 381 (1987) [hereinafter J.G.A. POCOCK, *THE ANCIENT CONSTITUTION*]; see also J.G.A. POCOCK, *VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY* 230-310 (1985) [hereinafter J.G.A. POCOCK, *VIRTUE, COMMERCE, AND HISTORY*].

⁶ I take both the term—and the notion of the important category it has been used to denote—from John Clive and Bernard Bailyn. See Clive & Bailyn, *England's Cultural Provinces: Scotland and America*, 11 *WM. & MARY Q.* 200 (1954).

⁷ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION*, *supra* note 5, at 355.

⁸ The best treatment of Wilson's legal theory in this respect, as in so many other respects, is by McCloskey. See McCloskey, *Introduction*, in 1 *WORKS*, *supra* note 1, at 39-40.

in the early 1790s, Wilson also served as the first Professor of Law at what is now the University of Pennsylvania. In that academic capacity he composed, though never completed or fully revised, an extensive series of *Lectures on Law*. By the standards of today, however, these lectures hardly answer to that general title; they are devoted much more to patristic constitutional commentary and abstract legal theory than to applied doctrine.

Like the first edition of the *Lectures* by Wilson's own son, the modern edition by Robert McCloskey contains a lecture entitled (either by the elder Wilson or by his son) "Of the Common Law." While it is primarily this lecture on which I want to draw here, I hasten to add that the entire series of lectures includes so much revealing discussion of "the Common Law"—almost always referred to more in the way of an integral, reified entity than as an aggregate of doctrines—that this single lecture, ostensible set piece though it is, fails to convey some of the most important things Wilson had to say about the topic to which the title of the lecture lays claim.

Most important perhaps, this lecture, when taken alone, falls short of capturing the articulate affect that suffused Wilson's attitude towards "the Common Law," writ large. As Wilson himself remarked in a preceding lecture (and as McCloskey underscores), when he contemplated "the Common Law" as "a system of law," Wilson was inclined to speak nothing short of "poetically." With language that anticipated Keats himself, he praised the Common Law as not only "just" but "beautiful"; indeed, "to every age," he said, "it has disclosed new beauties and new truths."⁹

Most historians of eighteenth-century America are unlikely to find it especially remarkable to encounter a testimonial to the common law from an erudite American lawyer writing in the 1790s. As the historian Stanley N. Katz reminds us in a recent essay, it has often been noted that, even during the climacteric of the Revolutionary break from England, Americans, in creating their Republic, remained very much—although far from exclusively—under the influence of their longstanding "eighteenth-century romance with the common law."¹⁰ Moreover, after independence had been won, the "Cokeian" tradition of English constitutionalism,¹¹ predicated on a defense of "rights" inhering in or derived from the common law, became a sufficiently important "original" ele-

⁹ 1 *Works*, *supra* note 1, at 182-83; see also *id.* at 40 n.122 (McCloskey's *Introduction*). Cf. Stein, *Common Law*, in 2 *DICTIONARY OF THE HISTORY OF IDEAS* 691, 694 (P. Wiener ed. 1973) (on "the emotive force" that the common law came to acquire in England); *id.* at 696 ("As a body of law the common law has inspired an intensely emotional loyalty in its adherents.").

¹⁰ Katz, *The American Constitution: A Revolutionary Interpretation*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 23, 35 (1987).

¹¹ For a convenient account of this tradition in its formative period, see H. NENNER, *BY COLOUR OF LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND, 1660-1689*, at ix-xx, *passim* (1977).

ment of "the American constitutional tradition" that "without it we can hardly begin to understand the basic theme in the development of American political institutions over the past two hundred years."¹²

Yet even if one accepts (as I do) Katz's synthesizing approach, which acknowledges a place for the common-law tradition in the origins of American constitutionalism but does not by any means try to reduce those origins to that source,¹³ one is, I believe, still left without a satisfactory explanation for the headiness of Wilson's distinctive rapture over "the Common Law."

To Wilson, even after the American war against parliamentary sovereignty had been won—thus, in the eyes of many Americans, vindicating their devotion to "the true principles" of *authentic*, that is, seventeenth-century, English constitutionalism¹⁴—it remained equally important to appreciate the surpassing excellence of the common law as it had come to expound the principles of the popular republicanism that was the most novel contribution of the Revolutionary generations to modern constitutional theory.¹⁵ In Wilson's words, even though the national Constitution and the several state constitutions "compose the supreme law of the land . . . [, in that] they contain and they suggest many of the fundamental principles of jurisprudence, and must have a governing and an extensive influence over almost every other part of our legal system,"¹⁶ nevertheless, in the new American nation and its several states the common law remained not merely the "*gravior lex*," in respect to statutes,¹⁷ but also the only "species" of law that took its very identity from the "*most significant*" and "*most effectual . . . mode for the promulgation of human laws*"—namely "*custom*."¹⁸ It was, then, the character of the common law as customary law that moved Wilson to the language

¹² Katz, *supra* note 10, at 31, 35.

¹³ Katz points out that not even Charles Howard McIlwain—the doyen of the modern neo-whig "constitutionalist" school—subscribed to such reductionism. *Id.* at 30-31; see C. MCLWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* (1923); see also B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22-54 (1967); F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 144 (1985). *But see* J. REID, 1 *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 188 (1986) [hereinafter J. REID, *AUTHORITY OF RIGHTS*]; J. REID, 2 *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* 265, 268 (1987) [hereinafter J. REID, *AUTHORITY TO TAX*].

¹⁴ Cf. J. MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-1776*, at 19 (1987) (quoting Wilson: "They know little of the English Constitution who are ignorant [of] the Lawfulness of Resistance on the Part of those who govern."). *But see* H. NENNER, *supra* note 11, at xiv.

¹⁵ For an appreciation of the distinctiveness of the constitutionalist legacy of the American Revolution—by one of the leading European students of early American history, see Stourzh, *The American Revolution, Modern Constitutionalism, and the Protection of Human Rights*, in *TRUTH AND TRAGEDY: A TRIBUTE TO HANS J. MORGENTHAU* 162 (1984).

¹⁶ 1 *WORKS*, *supra* note 1, at 61.

¹⁷ *Id.* at 356; see also *id.* at 60-61.

¹⁸ *Id.* at 102 (emphasis added).

of superlatives. It would seem to follow that it is this defining characteristic—this “mode of promulgation”—of the common law that should be the point of departure in trying to understand Wilson’s enthusiasm. But, once again, to say this much does not go very far towards explaining what, if anything, was distinctive about Wilson’s common-law ideology.

On the contrary, the notion that the common law owes its incomparable virtues to its basis in “custom” was surely the most important common denominator (if there was one) in the approaches to legal and constitutional theory that predominated in eighteenth-century England and began to proliferate in the New Republic. And if this sweeping generalization as applied to America was ever open to challenge, it seems much less so now, on account of the wealth of evidence assembled in recent work by Jack P. Greene and John Phillip Reid. This work is most fully represented in Greene’s *Peripheries and Center*,¹⁹ a synoptic study of seventeenth- and eighteenth-century American constitutional thought, and in Reid’s *Constitutional History of the American Revolution*,²⁰ a trilogy in progress that has concentrated thus far on the 1760s and 1770s. When considered together and of a piece, both Greene’s and Reid’s analyses can, however, be traced back to Professor Pocock’s work, at least insofar as all three of these neo-McIlwainians²¹ treat what might be called, in the most general terms, the Anglo-American “constitutionalism of the common-law mind.”²²

More than anything else, it is Pocock’s hypostasis of a historically specific but variable and enduring “common-law mind” that has elicited charges tantamount to “closet McIlwainianism” against him, because of the primacy he has at times appeared to ascribe to “law” in his own treatments of politics and political culture.²³ And what is most interesting for my purposes, and for those of Greene and Reid as well, is that Pocock’s method of hypostasis proceeds from his positing an “ideal type”²⁴ of the “common-law mind” with reference to which the “idealization of custom”²⁵ can then be considered as the integrating theme of the common-law tradition over time. This approach, whatever its full

¹⁹ J.P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788* (1986) [hereinafter J.P. GREENE, *PERIPHERIES AND CENTER*].

²⁰ J. REID, *AUTHORITY OF RIGHTS*, *supra* note 13; J. REID, *AUTHORITY TO TAX*, *supra* note 13. A third volume, *The Authority to Legislate*, is forthcoming. See Greene, “*The Ostensible Cause Was . . . the True Cause*”: *The Saliency of Rights in the Origins of the American Revolution*, 16 *REV. AM. HIST.* 198 (1988) (Greene’s review of Reid’s *AUTHORITY OF RIGHTS*).

²¹ On Charles W. McIlwain and his legacy, see Katz, *supra* note 10.

²² See Conrad, *The Constitutionalism of “the Common-law Mind”*, 13 *L. & SOC. INQUIRY* 619 (1988) (review essay on Reid and Greene); cf. Conrad, *Book Review*, 45 *WM. & MARY Q.* 775 (1988) (review of Reid’s first two volumes on the constitutional history of the American Revolution).

²³ See J.G.A. POCOCK, *THE ANCIENT CONSTITUTION*, *supra* note 5, at 265, 276.

²⁴ *Id.* at 263.

²⁵ *Id.* at 15, *passim*.

array of strengths and weaknesses, has done more than any other to highlight the intrinsic ambiguities in the constitutional thought of all the revered seventeenth-century paragons of the common-law tradition.

As his "ideal type" of the "common-law mind," however, Pocock has selected not the illustrious Coke, or even Hale or Prynne, but Sir John Davies,²⁶ a figure somewhat earlier and less familiar than those Whig notables, but as a common-law theorist even more fitting than they as an epitome of the problematic ambiguities at issue. For, as Pocock presents him, Davies personifies both the inherent cultural relativism of the common-law mind *and* its logically contradictory pretension to absolute, universal superiority. Furthermore, as Pocock has emphasized in his own most recent reconsideration of key passages from Davies' pen (and Coke's, too), this ambiguity of the common-law mind, as between relativistic and universalistic claims of authority, extended not only to the dimension of geographical space—that is, the self-deluding "insularity" of the seventeenth-century common-law mind in its claims about the source(s) of English law.²⁷ This ambiguity in the common-law mind also extended to the dimension of historical time itself, above all, in a paradoxical insistence that the basis of the common law in *consuetudines* has always rendered it at once constantly adapting yet essentially unchanging, indeed, timeless.²⁸

The belief in the paradoxical timelessness of the common law as a nonetheless adaptive institution was compassed most ingeniously in the classical seventeenth-century axiom that the common law was "immemorial." While the paradox was open to at least partial resolution by "saying that it was less . . . the content of the law than the juridical process itself . . . that was immemorial,"²⁹ still, in eighteenth-century

²⁶ Davies was an early seventeenth-century attorney general of Ireland (and also a poet of some note). His principal legacy to the common-law tradition has proved to be his *Irish Reports*. On Davies generally, see *Davies, Sir John (1569-1626)*, 14 *DICTIONARY OF NATIONAL BIOGRAPHY* 140 (L. Stephen ed. 1888). See also J.P. GREENE, *PERIPHERIES AND CENTER*, *supra* note 19, at 38-39; J. REID, *AUTHORITY OF RIGHTS*, *supra* note 13, at 34.

²⁷ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION*, *supra* note 5, at 41; *But see id.* at 59, 263-64 (where Pocock qualifies his point about Davies' insularity even as he reiterates it). On this theme in Blackstone, see Cairns, *Blackstone, the Ancient Constitution and the Feudal Law* 28 *HIST. J.* 711, 717 (1985). But for a complementary perspective, see Cairns, *Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State*, 4 *OXFORD J. LEGAL STUD.* 318, 359-60 (1984) (citing Professor A.W.B. Simpson in accord with this view of Blackstone as a European "institutional writer").

²⁸ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION*, *supra* note 5, at 32-34, 36, 41, 263-264; *see also id.* at 274 (on the tradition similarly but more broadly); *id.* at 170, 178, 339 (on the intrinsic ambiguities in Coke's thought). Pocock carefully avoids making any claims as to Davies' typicality or direct influence. On some of the difficulties of making such claims—and for a rather different view of Davies' significance as a general theorist of English law—see M. JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645*, at 134-35 (reprint ed. 1988).

²⁹ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION*, *supra* note 5, at 275; *cf. id.* at 340-41.

England there did eventually emerge within the common-law tradition itself a manifest disinclination to continue to take "literally" the earlier synchronistic assertion that both the common law and the "constitution" it had generated had existed from "time out of mind."³⁰

In remarking on this eighteenth-century reorientation of the common-law tradition away from the "myth" of immemoriality, Professor Pocock has, however, recently added that "in the latter part of the eighteenth century [in England], we encounter what is unmistakably a recrudescence of the prescriptive and immemorial character of the law and the constitution."³¹ Although he has thus far elaborated his general point chiefly as it applies to Burke,³² Pocock has also mentioned Blackstone and Bentham in this connection, because of the undeniable (although as yet too little explored) "ideological significance" of *The Commentaries* and the reaction they provoked from their first and greatest utilitarian critic.³³

What Professor Pocock merely hints about Blackstone and Bentham is nevertheless a very suggestive complement to what he argues in detail about Burke. Looking back on Blackstone's achievement and Bentham's challenge to it in light of Pocock's argument that "Burke knew and assimilated 'the common-law mind' in a way which sets him apart from [other "intelligent conservatives" of the era like] Hume and [Josiah] Tucker" might prompt many fruitful analogies. For example, it might prove enlightening to explore precisely how *Blackstone* knew and assimilated "the common-law mind" in a way that distinguishes his achievement as an "intelligent conservative" not only from *Burke's* but also

³⁰ *Id.* at 233. On Blackstone, see a recent article to which I am greatly indebted: Lieberman, *Blackstone's Science of Legislation*, 27 J. BRIT. STUD. 117 (1988); cf. 1 WORKS, *supra* note 1, at 184-185, 342.

³¹ J.G.A. POCOCK, THE ANCIENT CONSTITUTION, *supra* note 5, at 379.

³² *Id.*; see also *id.* at 380-84. Also of interest are three earlier essays by Pocock: Pocock, *The Political Economy of Burke's Analysis of the French Revolution*, 25 HIST. J. 331 (1982) reprinted in J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY, *supra* note 5, at 193; Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, 3 HIST. J. 125 (1960) reprinted in J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 202 (1971); Pocock, *Josiah Tucker on Burke, Locke, and Price: A Study in the Varieties of Eighteenth Century Conservatism*, reprinted in J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY, *supra* note 5, at 157. See also J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY, *supra* note 5, at 279-310; Conrad, Book Review, 5 L. & HIST. REV. 286 (1987) (my own review of VIRTUE, COMMERCE, AND HISTORY).

³³ J.G.A. POCOCK, THE ANCIENT CONSTITUTION, *supra* note 5, at 379. But on the ideological aspects of Bentham's critique of Blackstone, see Lieberman, *supra* note 30; see also D. LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN (1989). I am indebted to Lieberman's article not least in those respects in which it acknowledges Lieberman's own debt to the earlier work of A.W.B. Simpson and Gerald J. Postema. See G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986); Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 77 (A.W.B. Simpson ed. 1973) [hereinafter cited as reprinted in A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359 (1987)].

from that of another noted eighteenth-century exponent of *customary* constitutionalism, Thomas Rutherford, who was the leading eighteenth-century English exponent of "natural law" theory, and whose ideas proved accessible and appealing to American and English whigs alike.³⁴ Indeed, the strategic use that Professors Greene and Reid have lately made of both Burke and Rutherford in reinterpreting the story of the early development of American constitutionalism³⁵ adds fresh historical interest to the prospect of exploring, via analogy to Pocock's suggestive insight, this and any number of individual distinctions within the motley eighteenth-century canon of whig constitutionalists.

My own immediate focus on Wilson, in light of the recent neo-whig revival, therefore raises the question, in Pocock's terms, how Wilson—as a distinctly American whig—might be understood to have "known and assimilated" the English "'common-law' mind" into *republican* constitutional theory in a way that "sets him apart" from, say, Madison and Hamilton, or, for that matter, many another leading apologist for the "Federalist persuasion." Indeed, this question, although to my knowledge not addressed at any length in the studies we have of Wilson,³⁶ would seem unavoidable. It is well-settled that Wilson was widely regarded by his illustrious American contemporaries as the outstanding legal scholar in the new nation.³⁷ More to the point, however, and more a matter of fact than reputation, Wilson, with his *Law Lectures*, became the only leading framer³⁸ to leave behind an extensive patristic contribution to early American legal theory.³⁹ Wilson's unique place as both a leading framer and one of the foremost American jurists of his generation should lead us to ask whether and, if so, how Wilson went about appropriating the common-law tradition to American legal theory.

³⁴ See, e.g., A.W.B. SIMPSON, *supra* note 33, at 260, 298-99 (referring to the accessibility and appeal of Rutherford in eighteenth-century America in two different essays, *The Horwitz Thesis and the History of Contracts* and *The Rise and Fall of the Legal Treatise*). But, for a differing view about the Independence movement, if not also about the subsequent Founding period, see F. McDONALD, *supra* note 13, at 60.

³⁵ See, e.g., J.P. GREENE, *PERIPHERIES AND CENTER*, *supra* note 19, at 64-66, *passim* (on Burke); *id.* at 38-39, *passim* (on Rutherford); J. REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 83, *passim* (1988) (on Burke); *id.* at 30, 42 (on Rutherford).

³⁶ *But see* 1 WORKS, *supra* note 1, at 39-40; Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629 (1933) *reprinted in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW (D. Flaherty ed. 1969).

³⁷ See, e.g., R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 6 (1948); *see also* Adams, *Legal Theories*, *supra* note 1, at 338.

³⁸ On Hamilton's negligible role as a framer, see C. ROSSITER, 1787: THE GRAND CONVENTION 165, 252-53 (1966). Thus, strictly speaking, I need not face the important question of the significance of Hamilton's contributions to legal theory.

³⁹ See, e.g., B. WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 281 (1931) (Wilson's law lectures "give us the best statement we have of the considered legal theories of one of the founders of American constitutional law"); *see also* 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 564 (1953).

As I have tried to make clear already, the initial question is answered in Wilson's law lectures in no uncertain terms. Like eighteenth-century America at large, Wilson embraced the common-law tradition; his claim to distinction seems to lie only in that he forcefully expressed, and at a formative moment, what many other Americans felt and some had said. But an examination of Wilson's elaborately articulate common-law ideology discloses more. In expounding it, he evidently aspired to nothing less than a fundamental reconception of "the Common Law," in which he would try to "reconcile" the latent "contradictions,"⁴⁰ not to mention the manifest ambiguities,⁴¹ of "the rule of law" in a new republic whose still predominating legal tradition was *not* predominantly republican.

This ambitious project of "reconciling" the ostensibly English common-law tradition with the principles of Revolutionary American republicanism was just what Wilson had in mind in offering what he candidly termed a "political doctrine"⁴² of the common law. And it is not the least measure of Wilson's perceived success in this endeavor that modern commentators as different as an insider like jurist and American Bar Association President Simeon E. Baldwin⁴³ and an outsider like maverick legal philosopher Morris Cohen⁴⁴ have each recognized Wilson's contributions. Baldwin referred to Wilson as "the real founder of what is distinctive in our American jurisprudence";⁴⁵ Cohen wrote that Wilson was

⁴⁰ See 1 WORKS, *supra* note 1, at 185; see also Conrad, *Metaphor and Imagination*, *supra* note 1, at 39, *passim*; Conrad, *Polite Foundation*, *supra* note 1, at 368, *passim*; Farr, *Conceptual Change and Constitutional Innovation*, in CONCEPTUAL CHANGE AND THE CONSTITUTION, *supra* note 1, at 13.

Americans could change their language just as they could change their government and its instrument. Thus "contradictions" both charged the rhetorical atmosphere of debate and informed the quieter chambers of reflection. And they motivated changes in belief and in practice and in the concepts that made these beliefs and practices possible.

Id. at 29; cf. Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 350 (1982) (quoting with approval Herbert Storing on the Anti-Federalists' unrealistic attempts "to reconcile contradictions").

⁴¹ On what Gordon Wood calls "The Ambiguity of American Law," see G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 291 (1969).

It began to seem to some that Americans could not have specific legislative enactment and equity at the same time, or, contrary to the Beccarian belief, that codification and simplification of the law demanded an increase, not a lessening, of judicial interpretation and discretion. . . .

At the heart of the problem lay Americans' ambivalent attitude toward law in confrontation with the new circumstances of the 1780's. . . . Morality was the basis of a republic.

. . . .

. . . . What was needed in fact was a revolutionary clarification in the Americans' understanding of law and politics.

Id. at 303, 305.

⁴² 1 WORKS, *supra* note 1, at 184; cf. *id.* at 183 ("customary law . . . part of the political family").

⁴³ See Horwitz, *Introduction* to C. GOETSCH, *ESSAYS ON SIMEON E. BALDWIN*, at xxiii, xxiv (1980).

⁴⁴ See Rosenfield, *Introduction* to M. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY*, at xiii-xxxv (1982).

⁴⁵ See Alexander, *James Wilson, Patriot, and the Wilson Doctrine*, 183 N. AM. REV. 971, 980 (1906) (quoting Simeon E. Baldwin).

the first in time of the five American legal theorists (the others being Marshall, Kent, Story, and John Bannister Gibson) "who may be said to have laid the foundations of the American common law."⁴⁶

But, at least to the historian, more interesting than Wilson's putative "success" in devising a faithfully republican appropriation, or assimilation, of "the common-law mind" is the way he went about it. For, not entirely unlike Burke, at least as Pocock has recently interpreted him,⁴⁷ Wilson tried in the 1790s to redeem the common-law tradition by "remov[ing]" it almost entirely from "the key of jurisprudence" and transposing it to that of "culture"⁴⁸—in Wilson's case the *civic* culture of the newly imagined ideals of popular republicanism.

At the Founding the ingrained habits of "the common-law mind" and the cherished institutionalization of the common-law tradition in America continued, of course, to pose the task of "Americanizing the common law," as Professor Nelson has explained in his meticulous study of this process in Massachusetts from 1760 to 1830.⁴⁹ But the Americanization of the common law, at least at the level of common-law constitutionalism and general legal theory that preoccupied Wilson, also required a fundamental reconception of "the Common Law" that would greatly change the meaning of that term while seeming to do so as little as possible. Given that the ideal—or delusion—of reconciling, indeed, identifying, change within continuity was at the heart of the common-law tradition itself, Wilson's aim to assimilate the common-law mind into the "republican manners" of the new American nation may have engaged a problem that entailed *its own* solution—and was therefore a problem already in the process of solving itself. Yet even if so, this was not the way Wilson saw the situation. Rather, to serve republican ends in America, the authority of common law, he believed, would have to be carefully and expressly reconceived. And this would have to be done in a way that would economize on the historic dignity of the common law, but also seek a *justification* for its authority by reaching beyond historical arguments, even to the point of reaching outside the common-law tradition,

⁴⁶ See M. COHEN, *supra* note 44, at 333.

⁴⁷ See Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, *supra* note 32.

⁴⁸ J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION*, *supra* note 5, at 381-82; cf. J.G.A. POCKOCK, *VIRTUE, COMMERCE, AND HISTORY*, *supra* note 5, at 209-210, 301, *passim* (discussing Burke). More than one review has focused on the centrality of this theme in Pocock's work. See, e.g., Conrad, *Book Review*, 5 L. & HIST. REV. 286 (1987); Goldie, *The Rise of Politeness* (Book Review), *Times Literary Supplement*, June 27, 1986, at 715.

⁴⁹ W. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975). For an especially important and provocative sample of Professor Nelson's views on the place of what I have called common-law constitutionalism in early American constitutional theory, see Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978).

at least as it had theretofore been understood.⁵⁰

III. THE COMMON LAW AS COMMON SENSE: THE PHENOMENOLOGY OF CONSENT

The analogy between Burke and Wilson that Pocock's hint can be taken to suggest is especially useful for my immediate purposes⁵¹ because it opens the way to seeing why Wilson displayed such an obsessive antipathy to the proclaimed common-law constitutionalism of Blackstone. Among the Founders, antipathy towards Blackstone was not unique to Wilson. Jefferson, for one, came to share it, and indeed to feel it so strongly that it was not until another Virginia lawyer, St. George Tucker, produced a "republicanized" version of the *Commentaries* in the early nineteenth century that Jefferson thought they made safe reading for Americans.⁵² Nevertheless, in point of time and degree of vehemence, Wilson took the lead in warning against the danger of Americans' widespread acceptance of what he thought to be Blackstone's superficially appealing yet ultimately corrupt restatement of common-law constitutionalism.⁵³

The danger, as Wilson saw it, lay in the subtly "antirepublican,"⁵⁴ indeed, "despotic,"⁵⁵ implications of what Blackstone said—and even more in what Blackstone did not say. In other words, the danger to susceptible Americans, devoted as they were to the authentic common-law tradition, was that Blackstone himself was at best a diffident, and at worst a duplicitous, exponent of that tradition.⁵⁶

In fairness to Blackstone, however, it should be repeated that the danger Wilson perceived in Blackstone's version of common-law constitutionalism was to some extent inherent in the intrinsic indeterminacy of the common-law tradition itself. As Pocock emphasizes, the tradition was chronically "liable to assimilation" into the hoary ideal of the balanced constitution, especially as the tradition was embodied in the myth of an "ancient constitution" predicated on customary authority that had existed "time out of mind."⁵⁷ This ideal (whether in Aristotle's original

⁵⁰ For an analogous point about Wilson's reconception of "natural law theory," see Cohen, *The American Revolution and Natural Law Theory*, 39 J. HIST. IDEAS 491, 497-98 (1978).

⁵¹ Cf. Conrad, *Metaphor and Imagination*, *supra* note 1, at 53 & n.225.

⁵² Waterman, *supra* note 36, at 460-61, 480-81. For Waterman's discussion of Wilson's views on Blackstone, see *id.* at 475-80.

⁵³ See F. McDONALD, *supra* note 13, at 37 n.35 ("Americans could derive their English constitutional history from a variety of sources, but the most common were two: Hume's *History of England* and Blackstone's *Commentaries* . . . Blackstone's version was the more generally accepted in America."); see also Waterman, *supra* note 36, at 452-53.

⁵⁴ 1 WORKS, *supra* note 1, at 79.

⁵⁵ *Id.* at 104, *passim*.

⁵⁶ On the important point that it was Blackstone's intention to address the lay audience at large, see Milson, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 1 (1981).

⁵⁷ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION*, *supra* note 5, at 365.

formulation, or in a reformulation by Polybius, James Harrington, John DeLolme, or Edmund Burke) *by definition* made a place in the constitutional order for monarchical, aristocratic, and democratic elements alike. Moreover, because of the susceptibility of the tradition itself to this ideal of balanced constitutionalism, the danger that the American attachment to the common-law tradition might lead to a subversion of popular republicanism was not precluded by the otherwise reassuring circumstance that an American consensus had formed against the establishment of distinct orders either in government or in society. At the Philadelphia Convention the framers generally agreed that the "manners" of the American people were thoroughly and immovably "republican."⁵⁸ Nevertheless, as the Anti-Federalists so often warned during the ratification debates, this did not mean that the threat of the development of aristocratic tendencies in American government was thereby obviated.⁵⁹ Indeed, to quote Professor Pocock yet again, "a republic is *ex hypothesis* a relationship between an aristocracy and a democracy. . . . [In a true republic t]he practical necessity is therefore the reconstitution of aristocracy in some other form, to play its part"⁶⁰

This, I submit, is what Wilson aimed at: to reconceive what the common law, as an institution, meant, in order to incorporate into American constitutionalism something of the proverbial political virtues of aristocracy—namely, wisdom and knowledge⁶¹—but in a way that would both *seem* and *prove* compatible with the fortunes of thoroughly popular republicanism. Furthermore, by the time he composed his law lectures, Wilson had arrived at an approach for accomplishing this reconception.

In sum, Wilson argued that the common-law tradition must be reconciled in America with what stood indisputably as the one and only legitimate principle of political obligation, the truth of which had often

⁵⁸ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66, 153 (M. Farrand rev. ed. 1966) [hereinafter FARRAND].

⁵⁹ See 1 THE COMPLETE ANTI-FEDERALIST 17, 43-44 (H. Storing ed. 1981). On the culture of monarchialism in America, see R. BUSHMAN, KING AND PEOPLE IN PROVINCIAL MASSACHUSETTS (1985).

⁶⁰ J.G.A. POCOCK, THE ANCIENT CONSTITUTION, *supra* note 5, at 328-29. For Pocock's perspective on the "monarchical" American presidency, at the Founding and today, see his essay *States, Republics, and Empires: The American Founding in Early Modern Perspective*, in CONCEPTUAL CHANGE AND THE CONSTITUTION, *supra* note 1, at 55, 73-76. For a fascinating study of the Continental Congress as a functional republican analog of the English monarchy, see generally J. MARSTON, *supra* note 14.

⁶¹ Cf. 1 WORKS, *supra* note 1:

In the natural body, diseases will happen; but a due temperament and a sound constitution will, by degrees, work out those adventitious and accidental diseases, and will restore the body to its just state and situation. So is it in the body politick, whose constitution is animated and invigorated by the common law. When, through errors, or distempers, or iniquities of men or times, the peace of the nation, or the right order of government have received interruption; the common law has wrought out those errors, distempers, and iniquities; and has reinstated the nation in its natural and peaceful state and temperament.

Id. at 355.

been glimpsed down through the ages, but that the American Revolution had decisively vindicated for the first time in recorded history.⁶² This was the principle comprehended in the "maxim" that Wilson took to be "of prime importance in the science of government and human laws—a free people are governed by laws, of which they approve."⁶³

Throughout his law lectures, Wilson endlessly repeated this maxim, in one variation or another, apparently for the sake of the evocativeness in which he, as a common lawyer, believed maxims abound: "[C]onsent is the sole obligatory principle of human government and human laws."⁶⁴ Wilson fully appreciated that much of what this maxim evoked was a sense of historic authority that nevertheless went beyond the particular authority of any specific person or event that had borne historic witness to it. In fact, he pointed out, this maxim about the consensual basis of all legitimate political and legal obligation had been as familiar to the republican lawyers of ancient Rome as to the barons on Runnymede, and as self-evidently true to that tasteful libertine the Earl of Shaftesbury as to the artfully pious Elizabethan Richard Hooker.⁶⁵

In his express reverence, then, for what Francis Bacon had taught common lawyers about the capability of maxims generally in "legal science"—that maxims, by their pointed but elliptical nature, require but also direct further inquiry⁶⁶—and in what Wilson had learned were the rather indiscriminate, even if heartening, historic testimonials to the truth of the consent maxim, he saw important implications: he saw that a maxim alone was not a theory, at least not a theory sufficient to insure American republicanism against Blackstone's appeal.

For on occasion Blackstone did pay eloquent lip service to the principle of consensual obligation, foremostly in rehearsing the common-law tenet that "custom" evinces "consent." "It is," Blackstone intoned, "one of the characteristick marks of English liberty . . . that our common law depends upon custom, which carries this internal evidence of freedom along with it, that it was probably introduced by the voluntary consent of the people."⁶⁷

⁶² See *id.* at 79 ("the revolution principle"); cf. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 362 (M. Jensen ed. 1976) [hereinafter DOCUMENTARY HISTORY] (the American Revolution as one of the "progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind").

⁶³ 1 WORKS, *supra* note 1, at 179.

⁶⁴ *Id.* at 192 (emphasis in original).

⁶⁵ *Id.* at 123.

⁶⁶ For example, in *De Augmentis Scientiarum*, Bacon says that a legal maxim "points at the law but does not settle it." F. BACON, *DE AUGMENTIS SCIENTIARUM* 8:85; see also Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 J. HIST. IDEAS 3, 3-12 (1957); Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727, 736-37 (1969).

⁶⁷ 1 WORKS, *supra* note 1, at 185 (Sir William Blackstone as quoted by Wilson); cf. W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND—A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 74 (1979).

Yet Wilson was far from satisfied that such passages in the *Commentaries* sufficed, either in themselves or in context, to render Blackstone the trustworthy modern spokesman he was widely taken to be for a "political doctrine" of the common law appropriate to a republic.⁶⁸ In Wilson's judgment, what might *seem* to be Blackstone's restatement of the authentic common-law tradition turned out to be, in effect, a covert but thoroughgoing repudiation of that tradition. In the true, historic "publick" and "private" law of England, said Wilson,

[W]e shall find the stream of authority running, from the most early periods, uniform and strong in the direction of the principle of consent—consent, given originally—consent, given in the form of ratification—and, what is most satisfactory of all, consent given after long, approved, and uninterrupted experience. This last, I think, is the principle of the common law. It is the most salutary principle of obedience to human laws, that ever was diffused among men. With such a Byzantium before him, is it not astonishing, indeed, that the attention—must I say the attachment?—of Sir William Blackstone should be attracted towards a Chalcedon?⁶⁹

Chalcedon here stands *both* for Blackstone's positivist, hence to Wilson "despotick," definition of "law in general" as a rule or command dispensed from superior to inferior,⁷⁰ and for Blackstone's salient endorsement of the eighteenth-century English constitutional doctrine of the supremacy, both political and legal, of the legislature, that is, Parliament.⁷¹ It was in the name of "the Common Law" that Wilson emphatically rejected this definition and this doctrine for America (and for any

⁶⁸ But see Stourzh, *William Blackstone: Teacher of Revolution*, 15 JAHRBUCH FÜR AMERIKASTUDIEN 184 (1970):

Blackstone's conservatism and his championship of parliamentary sovereignty should not obscure the fact that not only radical Whigs like Trenchard and Gordon or James Burgh stood on "revolution principles," but Blackstone as well. He had a Whig message to convey, and it was taken up by a number of prominent colonists in their fight against the mother country.

Id. at 184 (English abstract).

⁶⁹ 1 WORKS, *supra* note 1, at 180. Wilson's classical allusion is apparently to pages from Tacitus and Gibbon. For example, from Tacitus:

For the city of Byzantium is situated at the extreme edge of Europe, at the narrowest part of the straits which separates it from Asia. When its Greek founders enquired of the Pythian Apollo where they should build their city, the oracle told them to look for a site opposite *Blind-man's Land*: a riddle which pointed to the people of Chalcedon, who having arrived there first, and having the better situation before their eyes, chose the worse.

2 *The Annals of Tacitus* 110 (G. Ramsay trans. 1909).

⁷⁰ 1 WORKS, *supra* note 1, at 103-09, *passim*.

⁷¹ *Id.* at 180, *passim*. For background on the "rise" of the doctrine of parliamentary supremacy as a matter of constitutional and legal sovereignty, various contributions from many of the historians cited in this essay are helpful. See, e.g., Pocock, *1776: The Revolution Against Parliament*, in THREE BRITISH REVOLUTIONS: 1641, 1688, 1776, at 265 (J.G.A. Pocock ed. 1980). For further background, see Dickinson, *The Eighteenth-Century Debate on the Sovereignty of Parliament*, 26 ROYAL HIST. SOC'Y, TRANSACTIONS 189 (1976). But perhaps the most sophisticated and elucidating work on the topic "from the perspective of law" is Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976); cf. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 S. ATLANTIC Q. 57, 64 (1986).

“free” regime).⁷² He also added that both the definition and the doctrine were “not calculated [even] for the meridian of Great Britain” herself.⁷³ For Blackstone to embrace the common-law tradition on one page only to subscribe wholesale on the next to the very antithesis of that tradition—namely, in what Wilson viewed as Blackstone’s positivist constitutionalism predicated on the principle of “parliamentary sovereignty”—was for Blackstone to contradict himself irredeemably and to betray the cause of constitutional liberty all but outright.⁷⁴

Thus provoked by what he saw as Blackstone’s subversion of the principle of consensual obligation and by Blackstone’s degradation of the common law from its rightful primacy, Wilson reasserted an indisputable pre-eminence for the common law, both as private law and as the model for “publick law.” Furthermore, he insisted that its pre-eminence had remained continuously intact, at law even if not in politics, both in America and England, notwithstanding Blackstone to the contrary.⁷⁵ This “uninterrupted” pre-eminence *at law* was, for Wilson, a historical fact; but much more important, it was a datum exemplifying an essential principle that transcended any of the accidental eventualities of politics or jurisprudence. This was the essential common-law principle itself, a principle that Wilson, as I have tried to begin to convey, thought it necessary to couch not in formal but in functionalist terms. It was the principle that:

Of all yet suggested, the mode for the promulgation of human laws by custom seems the most significant, and the most effectual. It involves in it internal evidence, of the strongest kind, that the law has been introduced by common *consent*; and that this consent rests upon the most solid basis—experience as well as opinion. This mode of promulgation points to the strongest characteristick of liberty, as well as of law. For a consent thus practically given, must have been given in the freest and most unbiased manner.⁷⁶

As much as Wilson’s words might at first appear to resemble Blackstone’s, the differences are (or, at least, were to Wilson) more important

⁷² 1 WORKS, *supra* note 1, at 118, *passim*.

⁷³ *Id.* at 185; *see also* 2 WORKS, *supra* note 1, at 735 (Wilson’s 1774 pamphlet “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament”); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 887-89 (1978).

⁷⁴ David Lieberman has collected a number of citations to modern scholarly commentary on this putative contradiction. Lieberman, *supra* note 30, at 126 n.40; *see also* Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365, 385, 405 (1928); Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFFALO L. REV. 205 (1979); Simpson, *supra* note 33, at 362. Rather in contrast to Wilson’s anxious castigation of Blackstone is the view expressed in Lobban, *Blackstone and the Science of Law*, 30 HIST. J. 311, 326 (1987) (“Blackstone seems to have adopted this notion of parliamentary sovereignty without fully realizing its difficulties for his natural-law arguments and his belief in the primacy of the common law.”).

⁷⁵ 1 WORKS, *supra* note 1, at 182, 352.

⁷⁶ *Id.* at 102 (emphasis in original).

than the similarities. When considered in the context of Wilson's full exposition of his enthusiasm for the common law—which was much more than Blackstone's, the enthusiasm of a true believer in the incomparable excellence and authority of the common law among all the "species" of "human law"—this passage suggests a view different from Blackstone's about exactly how it is that the common law as customary law imports consensual obligation.

As Wilson indicated here and explained more fully over the course of his *Law Lectures*, for him the crux of the matter lay in the actual process of the development of the common law, which reconciles "law" and "liberty" by drawing on both "experience" and "opinion." Despite Blackstone's acknowledgment that "custom" bears "internal evidence" of "voluntary consent," Wilson surmised that Blackstone was not at all concerned with inquiring into the meaning of "custom" beyond its significance as *precedent*;⁷⁷ thus, Blackstone had no regard to or for custom as an institution of *social* authority. Blackstone therefore failed to take seriously the importance of this essential phenomenon of the common law—custom—in that he never addressed the question of exactly how consent is realized in custom. Instead, Blackstone simply reduced the common law to a "historical science,"⁷⁸ to be studied and applied without reference to what Wilson deemed the most fundamental of sciences, the "science of human nature."

Wilson himself said more than once in his lectures that "the most proper way to teach and to study the common law, is to teach and study it as an historical science."⁷⁹ Francis Bacon, among others, had said the same.⁸⁰ And Wilson apparently meant it as much as Bacon had, because Wilson devoted a great portion of his lecture "Of the Common Law" to a historical "deduction"⁸¹ of the common-law tradition, tracing its origins from the Greeks and Romans, to the Druids, and through the Saxon, Norman, and later epochs of the British constitution, down to "the common law, as now received in America."⁸²

⁷⁷ Cf. Lieberman, *supra* note 30, at 129-130 (emphasizing Blackstone's concern with judicial reception as authority for the legal force of customary law); Lobban, *supra* note 74, at 328 ("It is significant that Blackstone should argue that precedents must be followed because their reason was hidden."). For a discussion of "artificial reason" in Coke's legal theory, and for an interpretation written "[a]gainst . . . the populist version of Coke's basic approach," see Gray, *Reason, Authority and Imagination: The Jurisprudence of Sir Edward Coke*, in *CULTURE AND POLITICS FROM PURITANISM TO ENLIGHTENMENT* 25, 39, *passim* (P. Zagorin ed. 1980).

⁷⁸ For examples of recent scholarly attention to Blackstone's appeal to the authority of history, see Willman, *Blackstone and the "Theoretical Perfection" of English Law in the Reign of Charles II*, 26 *HIST. J.* 39 (1983), and Cairns, *Blackstone, the Ancient Constitution and the Feudal Law*, 28 *HIST. J.* 711 (1985) (response to Willman).

⁷⁹ See, e.g., 1 *WORKS*, *supra* note 1, at 350.

⁸⁰ *Id.* at 91.

⁸¹ *Id.* at 349; see also *id.* at 472.

⁸² *Id.* at 348. It is worthy of mention, but hardly surprising, that Wilson relies for much of his historical deduction on that "bold and industrious antiquarian," *id.* at 346, the Celtic historian John

It becomes clear, however, that to Wilson, although historical study of the common law is "valuable and instructive," such study nevertheless "illustrates," but ultimately cannot "justify," the authority of the common law—much as Cicero taught that the "philosophical" tales of *belles lettres* could at times afford convenient "illustrations" of law.⁸³ Indeed, when read closely, Wilson's extensive "historical deduction" reveals how little of the history of the common law was truly *known* at all. The lessons of history are, for the lawyer, of little more than incidental significance. As Wilson casually remarked at the outset of his confessedly arcane excursion into the ancient pedigree of the common law: "If this investigation is difficult, there is one consolation, that it is not of essential importance."⁸⁴

For Wilson, then, the "justifying"—that is, the *empirical* authorization—of the common law is to be found not in history, but in "science" proper, not in the vagaries of the particularized experience of distant and largely unknowable societies but in the truths of general, or "common," experience. These truths are sometimes corroborated by the historical record, but they can be authenticated sufficiently and necessarily only in the experience of each individual, as individual experience testifies to common experience.⁸⁵

No theme waxes more prominent over the course of Wilson's lectures than the one he finds in the Ciceronian precept "*Natura juris a natura hominis repetenda est.*"⁸⁶ In the more emphatic version of Wilson's avowedly Baconian⁸⁷ polemic against Blackstone—especially as Wilson took his Baconianism via the scientism of eighteenth-century Scottish Common Sense philosophy⁸⁸—this Ciceronian precept becomes: "[L]aw can never attain either the extent or elevation of science, unless it be raised upon the science of man."⁸⁹ And while Wilson shunned reductive systematization wherever he recognized it and instead relished "the variety of human nature" (which is not "easily comprehended or

Whitaker. See 2 WORKS, *supra* note 1, at 856 (citing the edition of Whitaker's *History of Manchester* on which Wilson drew so heavily).

⁸³ 1 WORKS, *supra* note 1, at 236, 336.

⁸⁴ *Id.* at 335-36. In the *Commentaries* Blackstone presented a similar but ultimately distinguishable view. See 1 BLACKSTONE, *supra* note 68, § 3, at 67 ("nothing being more difficult than to ascertain the precise beginning and first spring of an antient and long established custom").

⁸⁵ Some truths are too plain to be proved. That a law, which has been established by long and general custom, must have received its origin and introduction from free and voluntary consent, is a position that must be evident to every one, who understands the force and meaning of the terms, in which it is expressed.

1 WORKS, *supra* note 1, at 184; *cf. id.* at 337, 356 (the common law contains "the dictates of nature").

⁸⁶ *Id.* at 196; *cf.* N. WOOD, *CICERO'S SOCIAL AND POLITICAL THOUGHT* 78-79 (1988).

⁸⁷ 1 WORKS, *supra* note 1, at 91.

⁸⁸ See generally Conrad, *Polite Foundation*, *supra* note 1; see also, Conrad, *Metaphor and Imagination*, *supra* note 1, at 23 & n.81.

⁸⁹ 1 WORKS, *supra* note 1, at 197; *cf. id.* at 222, 384, 398.

reached" by any simple scheme of the new science that David Hartley had been the first to call "psychology"⁹⁰), Wilson's appeal to the authority of this science of human nature is, throughout his lectures, what unifies his legal theory and "justifies" it as "legal science."

Thus, as varied, complex, and indefinite as Wilson took human nature to be, he contemplated no other sound basis for legitimate human authority but this most important of all sciences, the science of the mind. It, more than any other source or method, afforded men the means to fulfill their duty to "know themselves," both as men and as citizens, and to "know" their institutions, as well.⁹¹ For Wilson, knowing, not merely thinking or learning, was the object of any true "science"; and knowledge was the only scientific ground for politics or law. One of Wilson's greatest anxieties about the immediate circumstances of the American republic was that its system of law, depending as it must on the idea of consensual obligation for its "animating principle,"⁹² would remain in danger of being corrupted by subtly "despotick" influences like Blackstone's unless this animating principle were secured on the "solid foundation" of *knowledge*.⁹³ While Wilson was quick to attest that the American Revolution itself had been a rich source of new knowledge in this respect,⁹⁴ there was still much yet to be understood and taught.

What the historian James Kettner says about the "ramifications" of the consent theory of obligation in politics was equally true of its ramifications in legal theory. To Americans of the Revolutionary and Founding decades, the problem *as they saw it* was that they were among the first generations of mankind ever to "explore deeply" the actual "character" of consensual "allegiance" to a free political regime and its law, by exploring the nature of the "relationships between the individual and the community of which he [is] a part."⁹⁵ This crucial problem was, to Wilson, one to which law could and must contribute to the answer. For, in the Montesquieuan conception of law held by Wilson,⁹⁶ "law in general" is not, as Blackstone would have it, "a rule" so much as it is a "relation."⁹⁷ According to such a conception of law, the independent significance of law itself is minimized when law is conceived of as inhering in a

⁹⁰ *Id.* at 200. For Hartley's use of the term "psychology," see 12 OXFORD ENGLISH DICTIONARY 766 (2d ed. 1989); see also F. KENNER, *THE CHAIN OF BECOMING* 15 (1983).

⁹¹ 1 WORKS, *supra* note 1, at 157, 197.

⁹² *Id.* at 363.

⁹³ *Id.* at 222-23.

⁹⁴ Address by James Wilson in the Pennsylvania Ratifying Convention (Nov. 24, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 62, at 362; cf. *id.* at 348.

⁹⁵ J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 189 (1978).

⁹⁶ See P. SPURLIN, *MONTESQUIEU IN AMERICA, 1760-1801*, at 91 (1940) (a contemporary observer said that Montesquieu's works occupied "a position of first importance" in Wilson's library; he made "a daily study of them").

⁹⁷ See MONTESQUIEU, 1 *THE SPIRIT OF THE LAWS* 1 (T. Nugent trans. 1949) ("Laws, in their most general signification, are the necessary relations arising from the nature of things.") For Wil-

relationship or "intimate connection" (as the etymology of the word "*lex*" discloses). All legal relationships thus take their meaning, and derive their (human) authority, not from any laws themselves, but from their social basis. And this social basis is manifested in the idea, life, and history of "a people," whose "existence" as a "unity" is ultimately "quite independent of all laws."⁹⁸

Hewing to the notion that any and all legal relationships in the American republic must be consensual in order to be "binding,"⁹⁹ Wilson therefore approached the problem of devising a general theory of the common law in terms of an inquiry into the nature of community, or "society,"¹⁰⁰ as he called it, and into individual human nature.¹⁰¹ He gives no indication of wanting to relax in any way the Lockean constraint that consent, in order to obligate an individual, must be individual, active consent.¹⁰² Yet he plainly resisted confining his theory of consent by reducing it into a definition, or by deriving it from the contractarian scenarios of *histoire raisonnée*. Instead, he was resolved to attend scrupulously to whatever "phenomena" might "import" this consent.¹⁰³

son's rejection of what he takes to be Blackstone's conception of law as "rule," see 1 WORKS, *supra* note 1, at 100-02.

Hooker, I think, conveys a fuller and stronger conception of law, when he tells us, that "it assigns unto each thing the kind, that it moderates the force and power, that it appoints the form and measure of working." Not the direction merely, but the kind also, the energy, and the proportion of actions is suggested in this description.

Id. at 101. But Wilson's position is hardly unambiguous, in that elsewhere he wrote, "Law in particular, which (being intended for universal reception) ought to be a plain rule of action." *Id.* at 63 (1791 letter proposing to digest the laws of Pennsylvania). Still, I believe the context and circumstances of this occasional remark were such that it does little or nothing to diminish the force of Wilson's antipathy to Blackstone's positivism, an antipathy that pervades the *Lectures on Law*.

⁹⁸ H. ARENDT, *ON REVOLUTION 187-89* (rev. ed. 1963). In my view Arendt gives the best account we have of this Montesquieuan conception of law in its significance for early American republican theory. On Wilson's own appreciation of the "Roman" origins of this conception, see 1 WORKS, *supra* note 1, at 123; *cf. id.* at 102.

Others have expressed similar notions:

The idea . . . is that expressed by Cicero, that law is the common possession of a people in its corporate capacity. This idea appears in the theory that customary law has the consent of the people, since custom exists only in common practice. It appears also in the classification of the sources from which law is derived. Thus law might arise by the enactment of a popular assembly (*leges*), or by the vote of some authorized part of the people such as a plebian assembly (*plebscita*), or by a decree of the Senate (*senatus consulta*), or by a decree of the Emperor (*constitutiones*), or by the edict of an ordinance-issuing official. In all cases, however, the source must be authorized and in the last resort all forms of law go back to the legal activity inherent in a politically organized people. In a sense every established organ of government does "represent" the people in some degree and some capacity, but there is obviously no implication that representation has anything to do with voting and still less that voting is a right inherent in every person. The "people" is an entity quite different from the persons who happen at any given time to be included in it.

G. SABINE, *A HISTORY OF POLITICAL THEORY 172* (1937).

⁹⁹ 1 WORKS, *supra* note 1, at 189.

¹⁰⁰ *Id.* at 227-46, *passim*.

¹⁰¹ *Id.* at 197-226.

¹⁰² *E.g., id.* at 243-46.

¹⁰³ *E.g., 1 WORKS, supra* note 1, at 123; *see also id.* at 180.

Accordingly, although his approach to a general theory of consensual obligation is at many points diffuse, it is perhaps in his reconception of the common law that he comes closest to making his theory clear. He accomplishes this by conceiving of the common law itself as the exemplary republican social "science"—in the strict, cognate sense: what a society knows about itself and how it puts that knowledge to use.

From Wilson's perspective, the endeavor to secure and increase the knowledge a society has of itself called for a phenomenological method of inquiry, in legal science no less than in the science of man. This is just the point Wilson makes in undertaking his general discussion of the nature of "society." And he makes this point chiefly by recalling that his entire approach to legal theory in the law lectures had been predicated on his general aversion to definitions and fixed distinctions of all kinds. Indeed, he had announced his position at the outset, in rejecting not only Blackstone's general definition of law, but also the very idea of *any* general definition of law, especially any analytic, and hence reductive, definition.¹⁰⁴

On that earlier occasion he had cited Thomas Reid, the doyen of the Scottish Common Sense school, as one of the "philosophers," together with Bacon, Bolingbroke, and Kames, whom he takes as guides on his questions of method. By the time he arrived at his lecture "Of Man, as an Individual," he had praised Reid above all other philosophers of the age,¹⁰⁵ and had relied heavily on Reidian Common Sense throughout his discussion of the nature "of man as an individual."

Yet it is only in Wilson's pivotal discussion of human nature considered *in the context of "society"* that the full importance of Reid's Common Sense, "scientific" renovation of orthodox eighteenth-century "moral sense" doctrines becomes clear. For it is here that Wilson rehearses the central polemical argument of Reid and his school: that those metaphysicians, such as Hobbes, Locke, and Hume, who had resolved, or unwittingly tended, to "divide" and "reduce" the human mind into its individual faculties had thereby obscured a whole category of "social operations" of the mind that are in fact "deeply laid" in human nature. It is these "social operations" that, in turn, are the locus of the indefinite and innumerable, but authentic and authorizing, "connexions" between the individual and his society.¹⁰⁶

Here Wilson is distinguishing the "science" that was later to become

¹⁰⁴ *Id.* at 229; see also *id.* at 98-101. On Blackstone's attempt to reconcile his "analytical method" with the "common law content" of the *Commentaries*, see Lobban, *supra* note 74, at 323-35.

¹⁰⁵ See 1 WORKS, *supra* note 1, at 213-26 (Wilson's historical sketch of the opinions of philosophers, beginning with Plato); see also *id.* at 193-94. Wilson also cited Reid prominently in his opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453-54 (1793). Cf. generally Howe, *The Political Psychology of The Federalist*, 44 WM. & MARY Q. 485 (1987).

¹⁰⁶ 1 WORKS, *supra* note 1, at 230-32.

known as "social psychology." He considered it a science that had only quite recently been rediscovered and elucidated, principally by none other than Reid. But, Wilson added of late, "both on this and on the other side of the Atlantick . . . the spirit of patriotism has been vigorously exerted"¹⁰⁷ to promote this pioneering inquiry into the "social operations" of the mind and their significance in politics and law.

This is not the place to follow Wilson's expatiations on his Common Sense conception of these distinctive and irreducible "social operations" of the mind. For the purpose at hand—that is, to recognize the importance of the "naive realism" propounded by Reidian Common Sense to Wilson's conception of the common law—it may suffice to quote one of Wilson's general, descriptive, and comparative statements of what he means when he refers to these "social operations":

Some operations of the mind may take place in a solitary state: others, from their very nature, are social; and necessarily suppose a communication with some other intelligent being. In a state of absolute solitude, one may apprehend, and judge, and reason. But when he bears or hears testimony; when he gives or receives a command; when he enters into an engagement by a promise or a contract; these acts imply necessarily something more than apprehension, judgment, and reasoning; they imply necessarily a society with other beings, social as well as intelligent.¹⁰⁸

For Wilson, then, it is these "connexions" with society, which are "deeply laid" in every individual of ordinary "constitution," that make it possible for citizens to obligate themselves consensually, under government and law. Moreover, it is in these "connexions" that consent implicates not only an individual's will but also his knowledge.

It is, however, not to a historic or a mythic "social contract" that Wilson recurs in explaining the necessity of both will *and* knowledge for consensual obligation. Rather, it is to the most pervasive of the generic "forms" at common law that he turns: the legal contract. Through "private contract" a man can consensually obligate himself;¹⁰⁹ but, when it comes to the fundamental matter of obligation through consent, Wilson is ultimately concerned not with "forms," but with "principles."¹¹⁰ And the essential principle of authentic obligation was thoroughly familiar to the classical law of contracts in just the formulation that Wilson gives: For obligation to be consensual, it must be both "voluntary" and "knowing."¹¹¹

Wilson's focus on will and knowledge as the constituent elements of consent was thus squarely within the common-law tradition; yet he sustained this focus from the novel perspective of the "new science" of social

¹⁰⁷ *Id.* at 229.

¹⁰⁸ *Id.* at 230.

¹⁰⁹ *Id.* at 191.

¹¹⁰ *Id.* at 180; see also *supra* notes 14-16 and accompanying text.

¹¹¹ 1 WORKS, *supra* note 1, at 190.

psychology. From this perspective, the mental phenomena of the "sociable self," together with the processes of individual socialization, seemed to become the most important objects of inquiry into the nature of a republican institution.

Merely to adopt this perspective, however, even on the good authority of the Common Sense "science of man," did not satisfy the need Wilson saw for a "comprehensive" and operational theory of consensual obligation. Rather, it approached the challenge of devising a theory by translating the problem presented into different terms. As Professor Pocock has remarked in commenting on this enterprise of translation in early American republican theory, "[t]here was a point at which the proposition that the self was sociable raised [rather than settled] fundamental questions about the relation of self to society."¹¹²

For Wilson, what this proposition does occasion, however, is a commitment not just to the Lockean doctrine of the primacy of "society" above any institution of law or government, but also to the resolutely sociological orientation of Montesquieu's masterpiece of scientific constitutionalism, *The Spirit of the Laws*.¹¹³ Additionally, it entailed what by 1790 had become for Burke the dogma from which his own case for a modern revision of "the common-law mind" proceeded: that "[m]anners are of more importance than laws[, because manners] aid morals, they supply them, or they totally destroy them."¹¹⁴ Indeed, Wilson thought the matter so well settled that he need do no more to make Montesquieu's and Burke's point than pose the rhetorical question, "What are laws without manners?"¹¹⁵

But if manners, in the sense of mores, were to Wilson more fundamental than law, and if social science was then the source of authorization for "legal science," this did not mean to Wilson, as it had meant to Montesquieu, that republican theory is hostage to historical pessimism.¹¹⁶ Even less did it mean to Wilson, as it meant to Burke, that prescriptive authority and institutionalized aristocracy are necessary constituents of a constitutionalism of the common-law mind for the modern

¹¹² Pocock, *Between Gog and Magog: The Republican Thesis and the Ideologia Americana*, 48 J. HIST. IDEAS 325, 340 (1987); see also Pocock, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, in J.G.A. POCKOCK, VIRTUE, COMMERCE, AND HISTORY, *supra* note 5, at 37 [hereinafter Pocock, *Virtues, Rights, and Manners*].

¹¹³ Montesquieu stated that throughout his study he had by design not separated the political from the civil institutions, as I do not pretend to treat of the laws, but their "spirit," and as the spirit consists in the various relations which the laws may bear to different objects, it is not so much my business to follow the natural order of the laws as that of their relations and objects.

C. MONTESQUIEU, *supra* note 97, at 7.

¹¹⁴ E. BURKE, LETTERS ON A REGICIDE PEACE (quoted in Pocock, *Virtues, Rights, and Manners*, *supra* note 112, at 49); cf. J.G.A. POCKOCK, THE ANCIENT CONSTITUTION, *supra* note 5, at 382.

¹¹⁵ 1 WORKS, *supra* note 1, at 85.

¹¹⁶ Cf. J. SHKLAR, MONTESQUIEU 49-66 (1987); P. SPURLIN, MONTESQUIEU IN AMERICA, 1760-1801, at 225-26 (1940).

era. Wilson considered that republicanism in America had by 1790 already transcended the historicism that darkened Montesquieu's vision, just as surely as Americans had decisively rejected the aristocratic ethos of Burke's.¹¹⁷

IV. THE "ORIGINAL POWERS" OF "CIVIL SOCIETY" AS AUTHORITY FOR THE COMMON LAW

The concern over the distinction between "power" and "authority" that is so familiar to modern liberal theory was no less a concern in Wilson's liberal republicanism. His law lectures alone are compelling evidence that the American Founding was not what Hannah Arendt once characterized it as having been: an event which, in the minds of the Founders, "authorized itself."¹¹⁸ The importance of knowledge (at least to some Federalists) in the requisite task of conceiving of authorization beyond the "act of foundation," and even beyond the "power" of "the People,"¹¹⁹ is clear enough in John Adams' otherwise strikingly ambiguous remark in 1785 that, "[t]he social science will never be much improved, until the people unanimously know and consider themselves as the fountain of power"¹²⁰

In this remark, for all its emphasis on what "the people" must come to "know," there is, however, an apparent final emphasis on power itself. Wilson sometimes expressed himself similarly; on at least one occasion at the Federal Convention he referred to "the original powers of Society"¹²¹ in a context suggesting that, while he deemed these powers to be insufficient to fulfill his constitutionalist vision for America, he acknowledged that the fundamental and decisive authority of a society, in law and government, was justified by its powers.¹²² Evidently it was not troubling to Wilson that, in this matter, authority derived from power.

If there is a paradox here in the apparent inversion of "power" and "authority" in a considered statement by so liberal a republican as Wilson, the paradox is easily explained by recalling that the "power" of which Wilson spoke was the power of "knowledge" itself. To Wilson no other power but the "scientific" power of knowledge could legitimately

¹¹⁷ See 2 WORKS, *supra* note 1, at 574.

¹¹⁸ H. ARENDT, *supra* note 98, at 202-04.

¹¹⁹ See *id.* at 182.

¹²⁰ 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 540 (C. Adams ed. 1854).

¹²¹ 2 FARRAND, *supra* note 58, at 469 (Madison's notes of Aug. 30, 1787). Compare this formulation with the more conventional formulation of the "authority" of society in terms of the people—for example, the "authority . . . of the people at large." 1 FARRAND, *supra* note 58, at 132-33 (Madison's notes of June 6, 1787).

¹²² Wilson quoted Hooker for a comparable proposition: "The lawful power of making laws to command whole politick societies of men, belongeth so properly unto the same entire societies." 1 WORKS, *supra* note 1, at 123. By contrast, Wilson held a very different earlier position, at least as it has been interpreted by Dennison. See Dennison, *supra* note 1, at 172.

be invoked to create authority. At the early point in the development of American constitutionalism at which Wilson found himself, the orthodox liberal sequence of derivation (deriving power from authority) was, in a sense, impossible—at least for the authorization of the new popular republican government—since the new national government and the several state regimes were at the time patently still so much in the making.¹²³

As Professor Dennison puts the matter in discussing Wilson's attempt to incorporate "the revolution principle" of consensual obligation into a theory of a stabilizing constitutionalism, Wilson's conception of consensual obligation required him to "postulate[] an American society before one existed."¹²⁴ For, in fact, "one would have to be created from whole cloth, a process requiring time to complete."¹²⁵

While postulating American society as an established institution—in order to "invent a People," as Professor Judith Shklar has phrased the matter¹²⁶—Wilson, one of the consummate Federalist apologists, also put great faith in the social consequences of establishing extensive political representation as a civic (and civil) institution. Indeed, among all the leading Federalists, he was one of the strongest and most unrelenting advocates of extended political representation to (what then seemed) the utmost—by means of a broad suffrage, the minimization of formal qualifications for elected office, and a uniform practice of direct popular elections.¹²⁷ This "extension" of political representation was so important to Wilson that he dared say that by 1790 the American republic, although it still fell short of his ideal in this respect, nevertheless afforded the very first instance in history of government according to a plan of "comprehensive" political representation.¹²⁸ Even the contemporary British constitution, though in many respects not to be despised, nonetheless fell so short of providing sufficiently extensive representation that it too presented yet another lamentable example of a "government" not really based on the foundation of what could be called a true "People" at all.¹²⁹ Wilson thought that in America, however, the unprecedented extension of political representation had created (or was in the process of creating)

¹²³ See E. ELLIOTT, *REVOLUTIONARY WRITERS: LITERATURE AND AUTHORITY IN THE NEW REPUBLIC, 1725-1810*, at 19-53 (1982).

¹²⁴ Dennison, *supra* note 1, at 190.

¹²⁵ *Id.*; see also Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 333 (1987); Zuckerman, *Identity in British America: Unease in Eden*, in *COLONIAL IDENTITY IN THE ATLANTIC WORLD, 1500-1800*, at 115 (1987).

¹²⁶ J. SHKLAR, *ORDINARY VICES* 71-72 (1984); see also E. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

¹²⁷ The most convenient collection of documentary evidence for this point is in G. SEED, *supra* note 1, at 42-69, 122-40.

¹²⁸ 2 DOCUMENTARY HISTORY, *supra* note 60, at 354.

¹²⁹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 462 (1793).

“a People” in the fullest sense, in large part by inculcating civic practices and routines of civility, inspired by and attendant upon the right of suffrage, that would harness resources of both popular will and popular knowledge in the service of the Republic.¹³⁰

To recall these features of Wilson's constitutional theory is to be reminded of the frequent reference that Americans in Wilson's day made to “the publick mind.” And Wilson himself made clear that for him this “publick mind” was not merely a synonym for “public opinion”—a term then only beginning its rise to importance in politics and political science.¹³¹ Rather, in Wilson's Common Sense view, “the publick mind” encompassed “knowledge” as much as “opinion,” and “understanding” as much as “will.” Indeed, as I have emphasized elsewhere,¹³² Wilson believed that perhaps the most important lesson he had learned from Thomas Reid about human nature was that,

It is probable, that there is no operation of the understanding, in which . . . the will has not some share. On the other hand, there can be no energy of the will, which is not accompanied with some act of the understanding. In the operations of the mind, both faculties generally, if not always concur¹³³

It is thus important to recognize that, while yielding to no one in his firmly held view that extensive political representation was essential for republican institutionalization of the public mind, Wilson also thought the common law in America to be an important institutional analog of this *complex* “publick mind,” comprehending as it did both knowledge justified by experience and opinion evincing the energy of will. In this respect, the common law was therefore an indispensable complement of electoral representation as a democratic political institution. Indeed, given the novel and still problematic circumstances of extensive political representation that Wilson himself had observed in America,¹³⁴ he considered the common law to be not just a necessary *complement of*, but also a necessary *supplement to* political representation,¹³⁵ since electoral politics and the common law each equally embodied, in principle, the means and ends of republican government.

This avowedly “fundamental” significance of the common law to Wilson is a matter somewhat neglected by historians of political

¹³⁰ See 1 WORKS, *supra* note 1, at 404-05; 2 WORKS, *supra* note 1, at 787-88; see also Conrad, *Polite Foundation*, *supra* note 1, at 381-85; Michelman, *The Supreme Court, 1985 Term—Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 54 (1986).

¹³¹ For an elegant discussion that relates this “rise” in America to the Baconian tradition, among others, see Beer, *Two Models of Public Opinion: Bacon's “New Logic” and Diotima's “Tale of Love”*, 2 POL. THEORY 163 (1974).

¹³² Conrad, *Polite Foundation*, *supra* note 1, at 382.

¹³³ 1 WORKS, *supra* note 1, at 199.

¹³⁴ See, e.g., *id.* at 158; 2 WORKS, *supra* note 1, at 786.

¹³⁵ Cf. Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POLITICS 51, 63-67 (1986).

thought—even in the invaluable treatments by Professors Wood and Dennison, for example¹³⁶—if only because it falls largely outside the chosen scope of their work. But, as I have meant to suggest, to neglect Wilson's legal theory is to neglect an intrinsic part of his political theory, not to mention his constitutional theory.

It is especially interesting, then, to remember that Wilson's conception of the common law as complement of, if not supplement to, his theories of republican politics and constitutional jurisprudence did catch the eye of Charles Beard. In *An Economic Interpretation of the Constitution of the United States*, Beard noted how important law in general was to Wilson's idea of American politics. But, in keeping with the argument of that brilliant and tendentious book, Beard asserted that Wilson looked to law not as an implementation or augmentation of popular politics, but as a crucial restraint on it, in that Wilson looked to the judiciary to "control" and "check" the power of the people as it is realized in "popular legislation."¹³⁷

Where Beard errs—in reminding us that for Wilson politics and law, although distinguishable, were of a piece¹³⁸—is in Beard's failure to appreciate the considerable importance of law to Wilson not just as an arm of strictly voluntarist, instrumental politics, but as a "social science"¹³⁹ in its own right. And yet, even Professor Dennison, in doing so much to set right the Beardian view of Wilson in this respect, still does not go far enough. For in showing how Wilson's general understanding of the Revolution and the Founding was derived from his vision of American society, Dennison presents such a generalized account of Wilson's conception of "society" that he slights the distinction that gave Wilson's vision much of its distinctiveness and coherence, and its significance for politics and law. This is the distinction Wilson made between "natural society" and "civil society."

For example, in developing this distinction in a way quite different from Locke's way,¹⁴⁰ Wilson introduced into his legal theory what was not primarily a formal distinction at all—although, as I have said, Wilson often took "forms" to be illustrative of the principles he meant to establish.¹⁴¹ Rather, it was ultimately a *moral* distinction that for him marked the "real" and important differences between natural society and civil society, as he cumulatively *described* without presuming to define the latter. This was a distinction that posited a fund of civic morality in

¹³⁶ See G. WOOD, *supra* note 41, at 259-305; Dennison, *supra* note 1; cf. F. McDONALD, *supra* note 13, at 9-55.

¹³⁷ See C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 216 (reprint ed. 1986).

¹³⁸ *E.g.*, 1 WORKS, *supra* note 1, at 356-57.

¹³⁹ Cf. Pocock, *Virtues, Rights, and Manners*, *supra* note 112, at 49 ("Jurisprudence, whatever it was like as the formal study of law, was the social science of the eighteenth century.")

¹⁴⁰ 1 WORKS, *supra* note 1, at 238, *passim*.

¹⁴¹ Cf. *id.* at 239, 361 (civil society formed by an original compact).

a "civil society," or "People," or "state"—all terms Wilson used as synonyms for one another¹⁴²—that accrues from the self-conscious knowledge Wilson followed eighteenth-century British convention in calling "moral science."

In his attempt to develop a "comprehensive view" of the Federalist project of "inventing a People," Wilson thus anticipated a central problem Shklar ascribes to modern "liberal democracy" in general: that "[w]ithout ancestor worship or divine providence to rely on" for authorization, "modern liberal democracy has little but its moral promise to sustain it."¹⁴³ It is this consideration, she says, that has helped to make such an important, indeed necessary, place in American politics for "hypocrisy" (or delusion).

In a way, Wilson anticipated this last insight, too—at least insofar as he drew so assiduously, uncritically, and anxiously on Scottish Common Sense as a philosophy offering at once culturally fashionable and "scientifically" fortified reassurances that men's belief in their moral capabilities is "justified." The wholesale moral reaffirmation that Common Sense proclaimed, and the aspirations to social reform as moral reform that it inculcated, were thus what recommended it so warmly to George III, Dr. Johnson, and James Wilson alike.¹⁴⁴ In the milieu of Atlantic high culture that the Revolution never seriously disrupted, Scottish Common Sense effectively sustained the Augustan belief that, as Wilson put it, "progress in virtue" and "progress in knowledge" bear a "just proportion" to one another.¹⁴⁵ In other words, Common Sense empirically vindicated what Wilson, in his lectures and elsewhere, called "politeness."¹⁴⁶

The "polite" principles that Wilson found in Common Sense, and the "polite" character (or capability) that he claimed he saw in American society, convinced him that American society had already acquired and was cultivating the resources of "civility" that he took to be a condition of the feasibility of liberal representative democracy. The politeness of the American citizenry was not for him an end in itself: "politeness" and "civility," he knew full well, could co-exist with, and even serve the purposes of, despotic regimes.¹⁴⁷ Yet Wilson averred that in a constitutional republic like America, where the republican manners of the People universally testified to a zealous "love of liberty," "politeness," or "civility,"

¹⁴² See, e.g., *id.* at 239, 270, 401; *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 418, 455 (1793); see also Conrad, *Metaphor and Imagination*, *supra* note 1, at 26-31.

¹⁴³ J. SHKLAR, *supra* note 126, at 70.

¹⁴⁴ On George III and Dr. Johnson in this respect, see S. CONRAD, *CITIZENSHIP AND COMMON SENSE: THE PROBLEM OF AUTHORITY IN THE SOCIAL BACKGROUND AND SOCIAL PHILOSOPHY OF THE WISE CLUB OF ABERDEEN* 186, *passim* (1987).

¹⁴⁵ 1 WORKS, *supra* note 1, at 147.

¹⁴⁶ See Conrad, *Polite Foundation*, *supra* note 1, at 374-88; Conrad, *Metaphor and Imagination*, *supra* note 1, at 17-19.

¹⁴⁷ 1 WORKS, *supra* note 1, at 343.

afforded values and processes of republican socialization without which representative democracy could not long endure.¹⁴⁸

It bears repeated emphasis that the politeness that for Wilson characterized a "civil society" was a matter of "knowledge" as well as "will," in precisely the same sense of those terms that Wilson meant when he characterized the consensual authority of the common law as derived from both knowledge and will. Perhaps this is why the best restatement we have of Wilson's general theory of a common law for America is not that of any modern student of the history of political, legal, or constitutional thought, strictly speaking, but that by the historians of philosophy Elizabeth Flower and Murray G. Murphey. They tell us that to Wilson the common law was the exemplary "species" of human law because it was "designed and created in accordance with custom" in such a way that "it express[ed] *funded social wisdom*."¹⁴⁹

Even this formulation, however, does not indicate quite clearly enough how faithfully Wilson's approach to reconceptualizing the common law exemplifies what Gladys Bryson once called "the comparable interests of the old moral philosophy and the modern social sciences."¹⁵⁰ In the case of the liberal Scottish sociology on which Wilson drew so heavily, these comparable interests centered on a vision of integrating knowledge and morals, facts and values, truth and belief, and other such arch-dualisms—through formulas of reconceptualization that would, in practice, as Wilson virtually confessed, avoid the immediate problem of confronting contradictions.¹⁵¹ And the occasion of this telling remark by

¹⁴⁸ Recalling attention to this point was one of my principal aims in *Polite Foundation*. Yet, in repeating it here, I cannot help but remark self-critically that nothing in that essay, or in this, explains the apparently paradoxical relationship between Wilson's "polite" orientation and the political vicissitudes he experienced that would seem to have made such an orientation difficult for him to sustain. After all, it was none other than Wilson who became the eponymous victim of one of the most noted episodes of mob violence in early American politics. See Alexander, *The Fort Wilson Incident of 1779: A Case Study of the Revolutionary Crowd*, 31 WM. & MARY Q. 589 (1974); Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. 35 (1970); Rosswurm, "As a Lyen out of His Den": *Philadelphia's Popular Movement, 1776-80*, in THE ORIGINS OF ANGLO-AMERICAN RADICALISM 300, 313-15 (1984).

¹⁴⁹ 1 E. FLOWER & M. MURPHEY, A HISTORY OF PHILOSOPHY IN AMERICA 332 (1977) (emphasis added); see also Goldstein, *supra* note 135, at 68. Wilson, in *Of the Common Law*, wrote: "Indeed, what we call 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." 1 WORKS, *supra* note 1, at 358.

¹⁵⁰ Bryson, *The Comparable Interests of the Old Moral Philosophy and the Modern Social Sciences*, 11 SOC. FORCES 19 (1932).

¹⁵¹ 1 WORKS, *supra* note 1, at 185; cf. C. GEERTZ, *Common Sense as a Cultural System*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 73, 93 (1983) (quoting an early 18th-century definition of "common sense": "the ordinary ability to keep ourselves from being imposed upon by gross contradictions, palpable inconsistencies, and unmask'd impostures").

Wilson was none other than one on which he undertook to cope with Blackstone.

For if Wilson revealed nothing so much as his repressed anxiety about the American Founding when he castigated Blackstone as an apologist for "despotism," nevertheless, he was quite correct in discerning that the ambivalent common-law mind that Blackstone embodied did not call for the thoroughgoing synthesis of "law and liberty," "experience and opinion," and, above all, "knowledge and will" that Wilson insisted was necessary for a truly republican common law. To Blackstone, the "consensual" authority of "customary" common law had little or nothing to do with knowledge. That is what Wilson, protesting both on behalf of American republicanism and the authentic common-law tradition, could not abide. As I have tried to point out, this is where the Common Sense rehabilitation of "politeness" and "civility" served him, in reconceiving what the common law meant.

V. CONCLUSION

While the express references to "the common law" in *The Federalist* are remarkably few and brief, they are no less significant for that.¹⁵² Moreover, I have in mind for my immediate purposes only those instances in which the reference is not merely to an individual doctrine, rule, or other element of the common law, but to the common law as a tradition, to "the common-law mind."

Even Madison's passing reference in *The Federalist* No. 37 to "the common law"—as but one more example supporting the general argument that pervades this one of the *The Federalist* papers—is important, because of the underlying importance to Madison of his general argument, and because of what it suggests about why he, in contrast to Wilson, evidently never felt a need to offer a general, "republicanized" theory of "the Common Law." The reference in question occurs in what must now seem to have been the obviously true assertion that

the precise extent of the common law, the statute law, the maritime law, the ecclesiastical law, the law of corporations and other local laws and customs, remain[s] still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world.¹⁵³

Although there is nothing in this statement that Wilson would have disputed, how different in emphasis and tone Madison's statement is from the remarks Wilson was shortly to offer in his law lectures about the uninterrupted pre-eminence of "the Common Law" in English legal culture. Wilson was certain of this, or professed to be, notwithstanding

¹⁵² See T. ENGEMAN, E. ERLER & T. HOFELLER, *THE FEDERALIST CONCORDANCE* 85, 293 (1988).

¹⁵³ *THE FEDERALIST* No. 37, at 236 (J. Madison) (J. Cooke ed. 1961).

the gaps and vagueness he acknowledged in the extant historical record; for though Wilson made use of that record, he believed he had—and had to have—other ways of knowing he was right. But Madison, the prudent skeptic, saw an open question where Wilson held firmly to a historic—more, a *necessary*—truth. Madison's general argument ultimately becomes an argument about the limits of men's capacity to arrive at certainty, knowledge, or even consensus on almost any matter of practical moment, great or small. In fact, in the context of *The Federalist* papers in general, *Federalist* No. 37 can be read as something of a "skeptical digression"¹⁵⁴ amounting to "a short essay concerning the human understanding."¹⁵⁵

Madison's paper No. 37 is therefore hardly an irrelevant or insignificant digression, if it is a digression at all. It is perhaps his most elegant and revealing statement of the theory of knowledge that informed his constitutional theory. We might even wish that Madison had told us more, that he had revealed at greater length, if not more self-consciously, his epistemology and his own view of the relationship between it and his constitutional thought.

Because Madison never tells us much more in this regard than we find in *Federalist* No. 37, it has been left to scholars like Morton White¹⁵⁶ to venture analysis, arguments, deductions, and inferences about the relationship between Madison's theory of knowledge and Madison's constitutional theory that are, of necessity, somewhat speculative.¹⁵⁷ In any case, it is important to appreciate that such speculation, however problematic, is in principle eminently worth the candle if only in that, as Professor Appleby has recently observed, "recognizing how our culture of constitutionalism implicates theories of knowledge should . . . help us appreciate the limits of historical evidence."¹⁵⁸

For even if what I take to be the prudent skepticism of Madison's epistemology was and remains a theory of knowledge "implicated in our constitutional culture," there can be little doubt that the "naive realism" of Wilson's Common Sense theory of knowledge has not retained the appeal and authority it had for him and a number of his contemporaries.¹⁵⁹ And without its "scientific" authorization in Common Sense, Wil-

¹⁵⁴ D. EPSTEIN, *THE POLITICAL THEORY OF The Federalist* 117 (1984).

¹⁵⁵ *Id.* at 114.

¹⁵⁶ M. WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* (1987).

¹⁵⁷ See G. White, Book Review, 74 J. AM. HIST. 499 (1987); see also McCoy, Book Review, 8 J. EARLY REPUBLIC 80 (1988).

¹⁵⁸ Letter from Joyce Appleby, in *PERSPECTIVES: AM. HIST. A. NEWSL.*, Mar. 1987, at 15; see also Appleby, *One Good Turn Deserves Another: Moving Beyond the Linguistic Turn; A Response to David Harlan* 94 AM. HIST. REV. 1326 (1989).

¹⁵⁹ For a general introduction to the heyday of Common Sense in America, the most accessible published works are H. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976); D. MEYER, *THE DEMOCRATIC ENLIGHTENMENT* (1976); D. MEYER, *THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC* (1972). But see also R. Petersen, *Scottish Common Sense in*

son's general "republican" theory of the common law and common-law constitutionalism is left without the foundation that he himself said it required.

To say this much is simply to make a point as familiar in the work of Professor Pocock¹⁶⁰ as it is in that of many other historians,¹⁶¹ and not least some Critical legal historians.¹⁶² When we take into account the historical context and historical contingency of any statement of an idea that has pretensions to theoretical (that is, explanatory, or "justifying") force, then we are likely to find that the statement takes so much of its meaning from the way it functions in its original ideological context that we must question whether, once the context changes, we should or even can recover that meaning for the purpose of making use of it today.¹⁶³

For example, to turn to one of Hamilton's contributions to *The Federalist* papers, we find in *Federalist* No. 84 Hamilton's famous argument against amending the proposed Constitution by adding a bill of rights. Hamilton argues that, notwithstanding the legendary constitutional significance of such historic "declarations of right" in England, foremostly those of 1215, 1612, and 1688-89:

[It] is evident . . . that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate servants and representatives. Here, [in the American case], in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations. . . . [In the opening sentence of the preamble of the proposed Constitution] is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights¹⁶⁴

This was an argument with which Wilson too had prominently identified himself.¹⁶⁵ And it was, in effect, an argument that made use of the com-

America, 1768-1850: An Evaluation of Its Influence (1963) (unpublished doctoral dissertation, American University). On the authority of Common Sense today, at least among philosophers, the best short introduction known to me is Lehrer, *Reid's Influence on Contemporary American and British Philosophy*, in THOMAS REID: CRITICAL INTERPRETATIONS 1 (1976); see also Conrad, *Metaphor and Imagination*, *supra* note 1, at 22 n.76, *passim*. Nevertheless, for philosophers, historians, and others, one of the most stimulating discussions of the meaning and authority of Common Sense today is surely C. GEERTZ, *supra* note 151. For calling my attention to this essay I thank my ever-resourceful friend John Patterson.

¹⁶⁰ See J.G.A. POCKOCK, VIRTUE, COMMERCE, AND HISTORY, *supra* note 5, at 1-34.

¹⁶¹ E.g., J. REID, AUTHORITY OF RIGHTS, *supra* note 13, at 75.

¹⁶² E.g., Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1051-54 & n.143 (1981) (citing work by Tushnet, Kennedy, and Klare).

¹⁶³ For an argument quite to the contrary, see Presser, *Saving God's Republic: The Jurisprudence of Samuel Chase*, 1984 U. ILL. L. REV. 771.

¹⁶⁴ THE FEDERALIST No. 84, at 578-80 (A. Hamilton) (J. Cooke ed. 1961). Hamilton's discussion in *The Federalist* No. 83 of the common-law right to trial by jury, including discussion of certain proposals mooted in Pennsylvania and Massachusetts, is interesting in this context. THE FEDERALIST No. 83, at 565-74 (A. Hamilton) (J. Cooke ed. 1961).

¹⁶⁵ See Wilson's *State House Speech*, in 2 DOCUMENTARY HISTORY, *supra* note 62, at 167-72.

mon-law tradition against itself. It characterized the signal historical moments of the tradition—the Magna Charta, the Petition of Right, and the English Bill of Rights—as redundant “declarations” that did nothing to secure, much less to enhance, common-law rights and, instead, posed the danger of diminishing them: *Expressio unius est exclusio alterius*.

That two such strong nationalists as Hamilton and Wilson could and did make this argument plausibly if not persuasively suggests, again, not only how deep the ambiguities of the common-law tradition ran but also how useful those ambiguities could be as the ideological context changed over time.¹⁶⁶ From the outset, the “common-law mind” had displayed an ambivalence about the territorial scope of “custom” as a source of law. To Sir John Davies, as Professor Pocock quotes him, “custom” in this sense plainly was not local, or even national (e.g., Irish), but was rather “the common custom of the realm.”¹⁶⁷ And yet, as Professor Greene reminds us, a “fierce, full-hearted localism” did have a very important place in the common-law tradition, both in England and America, and showed little sign of diminution in the eighteenth century, even in the new American republic when the fortunes of the Federalists’ nationalism were at their highest.¹⁶⁸ As “customary” law, the common law was, then, by necessity neither predominantly “local” nor predominantly national (or, for that matter, imperial) as to its territorial ambit.

But nationalists like Hamilton and Wilson had their preferences as between the predominance of the one orientation and the predominance of the other. In Wilson’s bounded universalization of the very idea of what an American “Common Law” was and had to be—a historic inheritance justified by a social science that “escapes from history,”¹⁶⁹ but that depends on the existence of a “civil society” which in its manners is “thoroughly republican”—one cannot but infer that Wilson was pursuing his nationalist aims, albeit by indirection.

As many common lawyers would be likely to acknowledge, I suspect, argument by indirection is one of the principal methods of common-law jurisprudence. The adaptation, or manipulation, of the

¹⁶⁶ For the use to which Hamilton puts the historic ambiguities of the common-law tradition concerning the scope of appellate jurisdiction, see THE FEDERALIST No. 81 (A. Hamilton) (J. Cooke ed. 1961). Cf. THE FEDERALIST No. 83, *supra* note 164, at 570-71 (on “common law jurisdiction”). See generally Stoner, *Constitutionalism and Judging in The Federalist*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING 203-18, 310-13 (C. Kesler ed. 1987). “Publius seems more explicitly bent on quieting republican jealousy and rallying the partisans of good government than on cultivating a general judiciousness, and . . . his ambiguity on the judicial power suggests the limits either of his attention or his theory.” *Id.* at 217.

¹⁶⁷ J.G.A. POCOCK, THE ANCIENT CONSTITUTION, *supra* note 5, at 266.

¹⁶⁸ J.P. GREENE, *supra* note 19, at 11.

¹⁶⁹ J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY, *supra* note 5, at 95; see also J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 545-46 (1975); S. Conrad, James Wilson’s Vision of the “Escape from History” (manuscript in the possession of the author).

authority of "custom" virtually requires indirection—or else the illusion of continuity is lost, and with it the "tradition." But some of our leading neo-whig historians have lately invited us to consider a proposition that most modern common lawyers might not be so quick to concede (and that at least one of these historians, Professor Reid, emphatically refuses to concede¹⁷⁰): that the common-law tradition, "the common-law mind," has always been so ambivalent in itself that, as in Wilson's "polite" Common Sense polemic against Blackstone, in any "comprehensive" theory of the common law, the fixed point of authorization may well necessarily lie outside legal institutions and strictly legal culture altogether.¹⁷¹

The common law is, as Wilson said in following Coke, a "social system" of law, in that it happily borrows from other systems of law as needed.¹⁷² But, when it comes to the underlying matter of authorization, "the common-law mind" and its tradition are intrinsically more *susceptible* to than *capable of* assimilation. This is what makes it so important, in any specific ideological context, to ask *how* and *into what* the mentality and the tradition are assimilated.¹⁷³ The answers to these questions are likely to reveal *every* theory of the common law to be a "political" theory and tell us as much as anything can about the "success" it is likely to enjoy or not.

¹⁷⁰ See, e.g., J. REID, AUTHORITY OF RIGHTS, *supra* note 13, at 188; J. REID, AUTHORITY TO TAX, *supra* note 13, at 265, 268.

¹⁷¹ Cf. J. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1986). I take it that there is no such concession, express or implied, in the conclusion reached in M. EISENBERG, THE NATURE OF THE COMMON LAW (1988)

[U]nder the institutional principles that govern the way in which the common law is established in our society, there is a necessary connection between the content of the common law and those moral norms, policies, and experiential propositions that play a role in the standards of social congruence and systematic consistency, because those standards figure in determining both what the common law should be and what it is. Because of the dual role those standards play, what the common law is cannot be determined without consideration of what the common law should be.

Id. at 161. For me to hazard the notion set forth in the text is not to deny in the least that the common law and its tradition have proved to have instrumental capabilities of great historic, and even enduring, significance. Thus, I would no more deny Professor Bailyn's point that the American revolutionaries were powerfully influenced by and made effective use of the tradition in their libertarian cause, see B. BAILYN, *supra* note 14, at 30-31, 76-79, than I would deny John Stuart Mill's observation, on economic relations in mid-nineteenth-century England, that "[c]ustom is the most powerful protector of the weak against the strong." J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY 243 (W. Ashely ed. 1926) (7th ed. 1871). Nor do I question Professor Tribe's repeated insistence on "the importance" in contemporary American constitutional jurisprudence "of property and contract in protecting the dispossessed no less than the established." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1374 (2d ed. 1988); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 949 (1st ed. 1978).

¹⁷² 1 WORKS, *supra* note 1, at 357.

¹⁷³ For a related point, see Shapiro, *supra* note 66, at 762 ("Perhaps the safest moral for a historian to draw is that legal history should now be more fully pledged to the fraternity of intellectual history.").