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Book Review. The Constitutionalism of "the Common-Law Mind"

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The Constitutionalism of "the Common-law Mind"[1]

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JOHN PHILLIP REID, *Constitutional History of the American Revolution*: Vol. 1, *The Authority of Rights*. Madison: University of Wisconsin Press, 1986. Pp. x+374. $27.50.

JACK P. GREENE, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607–1788*. Richard B. Russell Lectures, No. 2. Athens: University of Georgia Press, 1986. Pp. xiv+274. $30.00.

I

To interpret the American Revolution as a *constitutional movement* might today seem, at best, to indulge in legal niceties or, at worst, to regress into whig delusions. In fact, the case for the importance of a constitutionalist perspective on the American Revolution has never been an easy case to make. After all, in a sense, the American revolutionaries themselves failed to make it; and several decades ago even a Pulitzer Prize-winning historian, together with some redoubtable reinforcements to boot, encountered very effective resistance when they resumed the effort.[2]

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1. The quoted phrase in this title is a historiographical term of art drawn from a modern classic, first published in 1957, that has recently been reissued in a volume including a substantial supplementary essay by the author: 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* (Cambridge: Cambridge University Press, 1987) ("Pocock, *Ancient Constitution and Feudal Law*").

2. The prize-winning historian was Charles Howard McIlwain; and the prize-winning book is *The American Revolution: A Constitutional Interpretation* (New York: Macmillan Company, 1923). As Dean Black has pointed out, reinforcement came from the likes of no less than Andrew C. McLaughlin and Randolph G. Adams. The resistance came from forces

Undaunted by the evidently chronic difficulty of the task, two leading historians of colonial America, John Phillip Reid and Jack P. Greene, are now trying once again. In the books under review, they have refined, consolidated, and amplified earlier work so as to raise new hope for the fortunes of some of the perennial "whig" pieties.[3] Especially when heeded as a pair, these two historians, each with a distinctive approach that happens to complement that of the other, might well prove more persuasive than any of their historic whig forebears or later whiggish historians. Reid and Greene might persuade many remaining skeptics at last that the American Revolution was truly a controversy over constitutional *law*,[4] and even an

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then equally redoubtable, e.g., Robert Livingston Schuyler and Julius Goebel. See Barbara A. Black, The Constitution of Empire: The Case for the Colonists, 124 *U. Pa. L. Rev.* 1157, 1158ff. (1976). But see Reid, *Constitutional History of the American Revolution*: Vol. 2, *The Authority to Tax* 7 (Madison: University of Wisconsin Press, 1987) ("Reid, *Tax*"): "Although Charles Howard McIlwain has written an invaluable preliminary study, the truth is that we have only begun to investigate [the "constitutional and legal ideology" of the American Revolution]. . . . [T]he book by Robert Livingston Schuyler was based on a constitutional theory that would have been nonsuited in any court of law."

For a recent comprehensive—and judicious—reconsideration of McIlwain's enduring contribution to understanding the origins and development of American constitutionalism, see Stanley N. Katz, The American Constitution: A Revolutionary Interpretation, *in* Richard Beeman et al., eds., *Beyond Confederation: Origins of the Constitution and American National Identity* 23–37 (Chapel Hill: University of North Carolina Press, 1987) ("Katz, The American Constitution"). Unfortunately, the two books under review here were not published in time for Professor Katz to take account of them in his discussion.

3. The term *"whig" pieties* may—indeed, should—raise questions about the meaning intended. The word *whig* alone (not to mention the variants *neo-whig, Whig, whiggish*, etc.) admits of a variety of meanings that even the most searching explication does not pretend to exhaust, viz., that by Professor Pocock: The Varieties of Whiggism from Exclusion to Reform: A History of Ideology and Discourse, *in* J. G. A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* 215–310 (Cambridge: Cambridge University Press, 1985).

Nevertheless, the meaning of the term *"whig" pieties* that is intended here is captured well, because so evocatively, by Richard S. Dunn in his Foreword to Gary B. Nash, *Race, Class, and Politics: Essays on American Colonial and Revolutionary Society* ix (Urbana: University of Illinois Press, 1986):

> The history of colonial and revolutionary America is peculiarly susceptible to mythic, chauvinistic, and patriotic interpretation: for the past two hundred years we have become habituated to a ritualistic scenario populated by Pilgrims escaping from Old World persecution, by pioneers forging into the trackless wilderness, and by revolutionary heroes creating a new republic. Most historians of early America, including the present writer, accept a good part of this pious vision of the past, however hard we may struggle to escape it. We remain Whigs at heart, and all things considered, we believe that our colonial and revolutionary ancestors should be chiefly remembered for their religious idealism, economic enterprise, social mobility, and participatory politics.

4. The reference here to constitutional *law* may—and, Professor Reid tells us, should—strike thoroughly modern American lawyers as somewhat puzzling, if only because this so-called law did not cohere, as our constitutional law does today, in a jurisprudence generated through the determining mechanism of judicial review and based on a determinate written document.

Elusive though this earlier concept of constitutional law may now be, it was nonetheless a concept ostensibly so coherent and compelling to 18-century American whig lawyers that they had trouble containing their frustrated irritation when it was called into question. Consider, for example, a remark that James Wilson, one of the most lawyer-like of revolu-

episode of constitutional *development*,[5] authorized by an identifiable if complex constitutional tradition. And, incidentally, these two historians might also help some of us to reconsider how this same tradition still obtains today, not as such, but rather as a vestigial mode of thought—for good, or ill, or both—in our modern American constitutionalism.[6]

II

Professor Reid's project, when it is completed and can be assessed as a whole, is likely to stand unmatched in the sheer weight of the erudition it brings to bear in the old cause. The volume that Reid has entitled *The Authority of Rights* is only the first in the trilogy that his *Constitutional His-*

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tionary American whigs, initially thought to include in his attempt at a legalistic apology for Independence, his February 1776 Address to the Inhabitants of the Colonies: "They know little of the English Constitution who are ignorant [of] the Lawfulness of Resistance on the part of the governed against illegal Exertions of Power on the Part of those who govern." Quoted, from a MS draft, by Jerrilyn Greene Marston, *in King and Congress: The Transfer of Political Legitimacy, 1774–1776*, at 19 & 329–30 n.24 (Princeton, N.J.: Princeton University Press, 1987); cf. Randolph G. Adams, ed., *Selected Political Essays of James Wilson* 103–21 & 345–46 (New York: Alfred A. Knopf, 1930).

5. For a notable earlier example of Greene's perception of a trajectory of development in this respect, see his article Paine, America, and the "Modernization" of Political Consciousness, 93 *Pol. Sci. Q.* 73–92 (1978). Cf. Greene, Peripheries and Center at 163.

6. Cf. Gerald Stourzh, The American Revolution, Modern Constitutionalism, and the Protection of Human Rights, *in* Kenneth Thompson & Robert J. Meyers, eds., *Truth and Tragedy: A Tribute to Hans J. Morganthau* 162–76 (New Brunswick, N.J.: Transaction Books, 1984).

It is my reading of the work of Stourzh and others (e.g., J. G. A. Pocock, Stanley N. Katz, and Nicholas Canny and Anthony Pagden, as cited elsewhere in this review) that is largely responsible for my inclination to take a second look at the conclusion offered in an important review of one of Professor Reid's many earlier books that prefigure his volume under review here, viz., the conclusion in Hendrik Hartog's 1978 review, 54 *Ind. L.J.* 65, of Reid's *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (1977). See, e.g., Hartog at 80–81: "Whatever our political values and commitments, we can no longer be eighteenth century whigs, much as we might wish to the contrary. . . . We have little more in common with the men and women who made 'our' revolution than we have with resistant traditional groups in the new states of the Third World."

Hartog's review is reprinted in a volume he edited, *Law in the American Revolution and the Revolution in the Law: A Collection of Review Essays on American Legal History* (New York: New York University Press, 1981). Cf. in the same volume at 229 his essay Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History; and at 46 Reid's essay The Irrelevance of the Declaration.

For intimations of Hartog's own current inclination to reexamine his earlier views on the necessity and the benefits of our "distancing" ourselves quite so far from the 18th century, see Hendrik Hartog, Imposing Constitutional Traditions, 29 *Wm. & Mary L. Rev.* 75 (1987), esp. at 75 ("I am . . . reluctantly coming to believe that it may make sense to think historically in terms of long-term political traditions"); but see also 82 ("I am [convinced] that the emotional energy that lies behind the original republican impulse is largely unknown to us"). Cf. Hartog, The Constitution of Aspiration and "the Rights that Belong to Us All," 74 *J. Am. Hist.* 1013 (1987).

tory of the American Revolution will comprise.[7] The second volume, *The Authority to Tax*, was published in 1987.[8] And while the special, extended attention it gives to but *one* among many disputed constitutional rights—"the right to be taxed only by consent"[9]—is important to the "tale" Reid wants to "tell,"[10] this second volume remains faithful to the master argument of the first. Moreover, given that both these volumes are generally quite consonant with Reid's earlier relevant articles and individual books, we might expect that his forthcoming third volume, *The Authority to Legislate*,[11] will remain similarly faithful to that argument. In any event, Reid's first volume both invites and merits consideration on its own terms.

To say that this first volume evinces (and that Reid's entire trilogy may evince) a *master* argument is not to say, however, that the argument is reducible to a comprehensive summary, at least not one that it is within the present reviewer's "competence" to hazard.[12] More to the point, Reid himself eschews comprehensive summarization. The overall format and organizing terminology that he has adopted for *The Authority of Rights* would seem to preclude formulating his argument as anything less than a gestalt appreciably more than the sum of its parts.

Indeed, the aggregated, complex substance and the emphatically cross-referential presentation of Reid's argument strike me as virtually defying systematization, much less encapsulation. The text of the volume, although only some 230 pages, is nevertheless divided into 27 chapters following the short Introduction. These chapters are, in turn, subdivided into sections (usually of about one to three pages), with each section, as well as each chapter, bearing its own very brief title. And yet this staccato of titles and subtitles tends to repeat, compound, and recompound a relatively few key terms. For example, the chapter "Rights as Property" contains sections entitled "The Vocabulary of Property" and "The Tenure of Rights," while the very next chapter, "Property in Rights," contains sections under this repetitive train of rubrics: "The Property Imperative," "The American Language," "The American Inheritance," and similarly

7. Reid, *Tax*, dustjacket (cited in note 2).

8. *Id.* at iv.

9. Reid, *Rights* at 110; cf. Reid, *Tax* at e.g., 273–74 & 280–84.

10. Cf. Reid, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* 167 (Chapel Hill: University of North Carolina Press, 1981).

11. For kindly confirming to me that this is the contemplated title, I thank Mr. Gordon Lester-Massman, of the University of Wisconsin Press, the contracted publisher. Cf. e.g., Reid, *Tax* at 350 n.12 & 379 n.42. Also see generally a related but independent recent book by Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988).

12. For notice that Professor Reid may not suffer lightly the "foolishness" of one he considers an "incompetent" reviewer, see Reid, *Tax* at 343 n.3 & 344 n.7. Cf. Paul Fussell, Being Reviewed: The A.B.M. and Its Theory, *in* Fussell's collection *The Boy Scout Handbook and Other Observations* 101 (New York: Oxford University Press, 1982).

but not quite the same as before, "The Importance of Property." Thus Reid's long table of contents itself testifies that the *linear* elaboration of an argument is not chiefly what he is about.

Although something like a general argument does emerge in *The Authority of Rights*, what remains conspicuously absent is any pretense to *synthesis*. Indeed, Reid's dense analysis, resolutely pursued without regard for *our* conventions of synthesis, is of the essence of his achievement. By renouncing the aspiration to synthesis, and even the constraint of strict consistency that is so dear to many modern constitutional theorists,[13] he has accomplished more than any other scholar in giving us an authentic representation of the articulate legalistic-constitutionalist attitude of those backward-looking 18th-century American whigs (and their British sympathizers) who claimed to see the American Revolution as a historic act of constitutional conservation. Notwithstanding that the substantive constitutionalism they invoked included much more than what they called (or we would call) the common law, their avowed mentality and their methods of disputation were drawn wholesale from a distinctive common-law tradition. In other words, although by no means all the rights that the American revolutionaries claimed to be defending were rights specifically recognized at common law, the *authority* for their *general conception* of rights was, at least as a constitutional matter, largely one with this tradition, namely, the tradition of the *17th-century* English common law. It is the emphasis Reid maintains on this theme—the American revolutionaries' paradoxical appeal to the conservative authority of the "ancient" constitutionalism of English common-law ideologues like those paragons of the tradition Sir Edward Coke and Sir John Davies[14]—that is, I take it,

13. E.g., see Reid, *Rights* at 66 ("It was a matter of rhetoric as well as legal theory"); at 72 ("the alternatives . . . were all constitutional"). Contrast 111 (the "immutability" of rights) with 185 ("the duty was not just to transmit, but if possible to improve . . . the heritage [of rights]").

14. The definitive study of the origins of this "ancient" constitutionalism remains Pocock, *Ancient Constitution and Feudal Law* (cited in note 1). Cf. Howard Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660–1689* (Chicago: University of Chicago Press, 1977). Although Pocock discusses the more familiar Coke extensively, he takes the less familiar Davies as his "ideal type of 'the common-law mind.' " *Id.* at 263. Davies was a 17th-century attorney general of Ireland; his principal legacy to the common-law tradition was his *Irish Reports* (1614; London ed., 1674). Cf. Greene, *Peripheries and Center* at 38 & *passim*; Reid, *Rights* at 30 & *passim*.

In fairness to both Reid and Pocock, it is important to add here that the allusion in the text to "the doctrine of the ancient constitution," casually identifying that term with the conceptions of "the common law" held by Coke and Davies and their progeny in the "tradition," disregards important explicit and implicit distinctions in both Reid's and Pocock's painstaking historical analysis. See, e.g., Pocock, *Ancient Constitution and Feudal Law* at 302; cf. at 297. Moreover, Reid's analysis in *The Authority of Rights* at no point depends on "the doctrine of the ancient constitution" as distinguished from revolutionary Americans' "inherited" conceptions of "the common law." Nevertheless, as important as such distinctions can be in specific historical context, for the purposes of the present review it is convenient, if oversimple, not to pursue them.

more important to Reid than is any narrower argument he might happen to make about it in the course of any of his volumes.

III

Even before Reid began to give us his *Constitutional History of the American Revolution*, he had already accomplished a great deal in helping to recall Professor Greene's attention to the common-law foundations of the revolutionary ideology of the American whigs. For example, before either of the first two volumes in Reid's *History* was published, in a 1986 review essay Greene wrote that Reid stands as "by far the most prolific contributor to [the] growing body of work" that has lately been focusing on "the origins of the American Revolution" from a distinctly *legal* perspective.[15] Greene also singled out for credit in this regard Barbara A. Black, William E. Nelson, and Thomas C. Grey, among others. Unsurprisingly, then, the work of this neo-whig school of legal historians, and above all Reid's, takes on a central—although never a *controlling*—importance in Greene's *Peripheries and Center*. In fact, it is precisely because Greene incorporates into his own synoptic study the work of these legal historians, while still maintaining reservations about particular aspects or elements of it,[16] that I find myself continually juxtaposing Greene's overall approach with Reid's.

Whereas Reid, even in his consummating trilogy, is loath to venture (to impose?) an interpretive synthesis, Greene offers synthesis on a grand scale—and with a frankly *in*authentic interpretive approach that is hardly less interesting or valid because it is borrowed from the general theory of a self-described "macrosociologist" who is neither historian nor lawyer. As Greene suggests in the carefully denotative title of his book, he argues that

15. Greene, From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution, 85 *S. Atl. Q.* 56, 56 (1986). Cf. Greene's review of *The Authority of Rights*: "The Ostensible Cause Was . . . the True One": The Salience of Rights in the Origins of the American Revolution, 16 *Revs. Am. Hist.* 198 (June 1988). I regret that this review by Greene appeared too late for me to take it fully into account before the present review reached the final stages of editing. Although I see in this most recent statement by Greene a position on Reid's work quite consistent with Greene's earlier statements, nevertheless, for the reasons I try to convey in my text, I take every comment by Greene on Reid's work to be of special interest.

16. See Greene, From the Perspective of Law, e.g., at 60 n.1 (Reid's reference to local law in Massachusetts as "whig law" overemphasizes its partisan character); at 66 n.2 (Reid is anachronistic is referring to the colonial charters collectively as an "American constitution"); at 69 (Reid exaggerates in saying that "by the 1760s the 'case had been won against the royal prerogative' in America"); at 74 (Grey's misperception that "during the colonial period Americans had not been much given to debate over issues of constitutional theory"); at 74 (Reid is "misleading" when he says that "the colonists were merely 'the heirs, not the progenitors of their constitutional world' "); 75 (Reid is wrong to characterize as " 'peculiar' " the American view " 'of how authority was distributed throughout the empire,' " given that the same view "was shared by the dominant populations of Ireland and the West Indian and other island colonies").

there are indeed *broad* analytic categories that can sometimes be applied across large spans of time and space to elucidate, on balance, more than they misrepresent, because they can help us understand, for certain purposes, what can never really be thoroughly familiar, no matter how faithfully it might be represented. Greene's own announced general purpose is to reexamine the 17th- and 18th-century British Atlantic empire as a whole, together with some of its individual constituent units (particularly British colonial America), and ultimately to reexamine both the newly independent United States and (though in much less detail) the later British empire—all as examples of the prototypically modern endeavor to organize and justify an "extended polity" on an expressly *constitutional* basis.

Adopting the conceptual apparatus of a classic essay in macrosociology by Edward Shils, "Centre and Periphery," Greene predicates his historical analysis throughout on the presumption of an inherently unstable relationship between any *modern* governing metropolitan center and its governed peripheries. For, according to Shils, in these governed peripheries there is by definition the potential for the emergence of claims to "local," or self-, government that the most basic principles of metropolitan authority will make especially difficult for the metropolis to dismiss.[17] When reviewed in this light, the 17th- and 18th-century Anglo-American sequence of historical problems of empire, confederation, and federalism appears to be a set of variations on the same theme. But in Greene's book, unlike Shils's essay, the theme and variations are rendered at once historically specific and of a piece, because the point of departure from which Greene traces a pattern of constitutional development and an identifiable tradition of constitutionalism is precisely the same English "common-law" mentality[18] that Reid insists was the principal source of the American revolutionaries' ideology of Independence.

Thus Greene follows, or rather, joins Reid in arguing that the work that continues to hold pride of place as the most complete account of "the ideological origins of the American Revolution," namely, Professor Bailyn's celebrated book of that title,[19] significantly underestimates the importance of law to the articulate American revolutionaries. Although Bailyn does concede that the 17th-century "common law was manifestly

17. Cf. Shils, Centre and Periphery, *in The Logic of Personal Knowledge: Essays in Honour of Michael Polanyi* 117 (Glencoe, Ill.: Free Press, 1961), esp. at 120 ("dynamic potentialities" of "order" . . . . "every central value system contains within itself an ideological potentiality"). The essay is reprinted as the title essay *in* Shils, *Center and Periphery: Essays in Macrosociology* (Chicago: University of Chicago Press, 1975) ("Shils, Centre and Periphery"). To anyone inclined to doubt that Shils himself is a neo-whig, I would commend Shils's essay Ideology and Civility: On the Politics of the Intellectual, 66 *Sewanee Rev.* 450-80 (1958).

18. Cf. Pocock, *Ancient Constitution and Feudal Law* at 255-80 (cited in note 1) ("The 'Common-law Mind,' Considered as *Mentalité*").

19. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, Belknap Press, 1967).

influential in shaping the awareness of the Revolutionary generation," he then proceeds to argue that the common law "did not in itself determine the kinds of conclusions men would draw in the crisis of the time. . . . [It] was no science of what to do next."[20]

Neither Reid nor Greene directly challenges Bailyn's position as *thus* (almost irrefutably) stated.[21] But the force of their moderate revisionism is to try to persuade us that Bailyn is wrong in relegating "law in itself" to a decidedly secondary place in the "ideological" congeries of the Revolution. That a strong case for this revisionism can be made on the basis of much the same documentary record of whig political discourse on which Bailyn himself relies is just the discovery, or rediscovery, that elicits from Greene his repeated expressions of gratitude to Reid and company.

Greene's debt to Shils, however, would seem to be even greater than a casual reader might notice, given that, beyond the first page of his Preface, Greene seldom refers expressly to Shils again. But at the outset Greene does indicate that it has been his experience of years of reflection on Shils's insights that has led him to his appreciation of the general paradox to which his book bears such convincing historical witness. This is the paradox that when constitutionalism is considered from a functionalist perspective—as a *solution* to the problem of political organization and legitimation—then constitutionalism itself at times comes to look as much like part of the problem as part of the solution. When constitutionalism is viewed as a central value in an extended polity whose history is traced over enough time to reveal the processes of conceptual change, it becomes clear that constitutionalism can *and probably will* tend to serve and even to enhance not only forces of association, organization, and order but also forces of dissociation, separation, and revolution (or its analogs). Greene's vast, schematic narrative of political and intellectual history, stretching from 1607 to 1788 and beyond, concentrates on developing this single, paradoxical theme—which is a theme of Reid's, as well.

As Greene observes, the paradoxical functions of constitutionalism as a central value and as an ideology have been much discussed by students of other, later periods of American history, especially the period of "constitutional crisis" that ended with the Civil War and its constitutional aftermath.[22] But Greene is justified, I believe, in implying that, the diligence of many an earlier McIlwainian notwithstanding, he is the first to sketch for us the full pattern of development of the common-law ideology of the

20. *Id.* at 31. Cf. Katz, The American Constitution at 27–30 (cited in note 2).

21. Occasionally Reid does come close to such a challenge, although only in passing, e.g., in *Rights* at 188: "Certainly not everyone in Great Britain, but many people, including some in high office, understood that it was 'law' the Americans acted on."

22. Greene cites as an example the classic article by Kenneth M. Stampp, The Concept of a Perpetual Union, 65 *J. Am. Hist.* 5 (1978). Cf. Arthur Bestor, The American Civil War as a Constitutional Crisis, 69 *Am. Hist. Rev.* 327 (1964).

American revolutionaries, from its incubation *throughout* the colonial period, to its climacteric during the Revolution, to its survival—by means of transformation—at the Founding and beyond. In terms of Shils's general theory (as the titles of the three sections of Greene's book indicate), for Greene these three phases of constitutional development correspond to the respective periods when the American problem of "peripheries and center" was first "experienced," then "defined," and then—but not finally—"resolved." According to Greene's scheme, in America virtually the entire colonial period from 1607 to 1763 was one of more or less unreflecting "experience" of the problematic relationship between peripheries and center. Then the years from 1764 to 1776, with the Stamp Act crisis and its sequels, brought intensive discussion and dispute that yielded, at last, a "definition" of the problem. In the period after Independence, up to and including the Founding of the late 1780s, there emerged at last a complex "resolution" of the problem—yet in a way that proved to be a resolution by means of redefinition rather than anything like an ultimate solution.

Indeed, with the title of his final chapter, "In Quest of a Republican Empire: Creating a New Center, 1783-1788," Greene highlights the aspect of ironic circularity in the generally progressive constitutional development that he has chronicled. Furthermore, by casting our thoughts ahead briefly to the Civil War, he induces us to hear some of the tragic overtones[23] in his story: For the Federalists' success in "resolving" the problem of peripheries and center by creating the first modern "republican empire" (on the authority of a radically new American concept of "popular sovereignty") was a success purchased at a price—to social peace, and perhaps to "democracy" itself[24]—that eventually proved much greater than any Federalist seems to have envisioned.

IV

If I am justified in taking Reid and Greene as a complementary pair—if Greene is indeed developing the same theme that Reid has done so much to reintroduce to the study of our early constitutional history; and if Greene, the realist, is proceeding to trace the continuities and discontinuities in a long-term tradition, while Reid, the nominalist, is determined to remain focused on that moment in the history of the same tradition in America when it authenticated itself as a revolutionary ideology—then what is the meaning of this whig, or neo-whig, this "common-law" tradi-

23. Cf. Reid, *Rights* at 227–37, esp. 229 (the American Revolution represented a "constitutional dilemma").

24. Cf. Joshua Miller, The Ghostly Body Politic: *The Federalist* Papers and Popular Sovereignty, 16 *Pol. Theory* 99 (1988).

tion in our constitutional history in general? And what significance, if any, does the legacy of the American revolutionaries' anxious devotion to a 17th-century English constitutionalist "myth"[25] have for our modern constitutionalism?

These are questions that neither Reid nor Greene engages. But both supply so much in the way of relevant historical evidence and analysis that any student of modern constitutional law will find much in this pair of books that should prove stimulating. And if Greene's carefully and conveniently schematic analysis at first seems the more accessible, because the more broadly synthesized and interpreted, it may happen that Reid's work, because of the intensity of the authentic voices it represents and its own abiding concern with the fundamental issue of the "authority" for constitutionalism, proves the more evocative, at least to contemporary American lawyers and their ilk.

In any case, my own recent experience of reading *both* Reid's *The Authority of Rights* and Greene's *Peripheries and Center* has led me to wonder about the extent of the "distance" between, on the one hand, the rights-obsessed, common-law constitutionalism of the American revolutionary whigs and, on the other hand, our rights-based, textualist constitutionalism today. Too much of what I encounter in Reid's and Greene's work sounds too familiar for me to believe that we today *can* or *do* hold our earliest American constitutionalism completely at arm's length. (Whether we *should* do so, or try to do so, is, of course, another matter altogether.)

Perhaps a few examples will suffice to suggest how Reid's and Greene's accounts of the constitutionalism of the common-law mind in 18th-century America might prompt fruitful reconsideration of its vestigial significance today. Granted, the contexts then and now differ greatly. According to both Reid and Greene, it was, above all, the circumstance of the colonists' perception of a historic attack on their "rights as Englishmen" that gave meaning[26] or "definition"[27] to the peculiar variant of constitutionalism in question. But this is merely to concede what seems evident: that the early American version of what we might call the "rights daemon" was born out of a specific historical crisis. It was born out of the need to mount a defense against 18th-century "metropolitan" assertions of a "constitutional" principle of "parliamentary supremacy."[28] Avowedly possessed of this rights daemon, the Americans could and did argue, on

25. Pocock, *Ancient Constitution and Feudal Law* at 17 & *passim* (cited in note 1).

26. Reid, *Rights* at 179: To the American revolutionaries "perceptions were more important than actualities." Cf. at 181: "It was as much the image as the reality that caused alarm."

27. Greene, *Peripheries and Center*, e.g., at 95–96 & *passim*. But see also, e.g., 39: "From very early on, however, colonists defended their rights to assemblies on the basis not just of English but of their own custom."

28. Reid, *Rights*, e.g., at 223; Greene, *Peripheries and Center* at 144–50. Cf. a recent example of legal historians' continuing interest in this topic, Martin Stephen Flaherty, Note,

the authority of the 17th-century whig tradition, that the assertion of parliamentary sovereignty was "unconstitutional."[29] But Greene shows us, and Reid hardly denies, the long-term presence and significance of the tradition, both before and after the period of revolutionary crisis in America. The original American rights daemon had, then, an authorizing ancestry; and, given the traumatic circumstances of its birth and maturation, not to mention its early triumphs in the Revolution and at the Founding and afterwards, this same rights daemon is not likely to have been easily stilled or sublimated. Its voices were too many and too strong for that—especially the voices in which it spoke the language of the common law.

For example, as I have mentioned above (in attempting to give a sense of Reid's pointillist manner of argument as reflected in his use of so many titles and subtitles), Reid makes much of a motif that he calls "the 'propertyness' of rights." And his coinage is well taken, because to early American whigs the idea that rights had the essential quality of property was of the utmost importance to both the "security" and the "authority" of rights in general. To conceive of rights *as property* was to give them the fullest possible security—even to the point of *immutable* stability—that the common law could afford. The common-law mode of conceptualizing a constitutional category—"civil rights"—thus strictly *identified* this category with the concept of property in all its preeminence as "an absolutely sacred part of the whole absolutely sacred legal order."[30] Moreover, this constitutionalist recurrence to the common-law language of property rights was not necessarily, or even chiefly, an appeal to rights of property "in a corporeal sense."[31] Precisely because the common law had already done so much to abstract a host of intangible property rights from tangible property itself, it could seem not only meaningful but "lawful" to defend abstract civil rights in terms of property rights. And Reid gives examples of how arguments for the American whig cause drew on the rich traditional "vocabulary" of abstracted property rights—for example, freehold, estate, birthright, inheritance, indefeasible title, seisin—in order to clothe the col-

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The Empire Strikes Back: *Annesley v. Sherlock* and the Triumph of Imperial Parliamentary Supremacy, 87 *Colum. L. Rev.* 593 (1987).

29. For an account of how, in the aftermath of the Stamp Act crisis of 1764–66, Americans began to make frequent use of the then still rather unusual term "unconstitutional," see Gerald Stourzh, *Vom Widerstandsrecht zur Verfassungsgerichtsbarkeit: Zum Problem der Verfassungswidrigkeit im 18. Jahrhundert* (Graz: Universitäts-Buchdruckerei Styria, 1974).

30. Reid, *Rights* at 40, quoting Fritz Kern, *Kingship and Law in the Middle Ages* 186, trans. S. B. Chrimes (New York: Harper Torchbooks, 1970). It is interesting to observe that Shils, in explaining what he means by his general concept of "the centre," refers to its "intimate connection with what the society holds to be sacred." See Shils, Centre and Periphery at 118 (cited in note 17).

31. Reid, *Rights* at 97; cf. at 103.

onists' "civil rights" claims in the august authority of the common law.[32]

Reid stresses that the 17th-century English and the 18th-century American practice of referring to "civil rights as private property" was more than merely a matter of indulging in "a figure of speech" or drawing an analogy. No, the whigs of that era took so seriously "the propertyness" of civil rights that for them "a personal civil right" assumed (in ways that our different, perhaps diminished "intuition for legalism" does not permit us fully to share)[33] the identity of "a higher kind of property as it was a species of civil liberty and personal rights."[34] Yet, for example, isn't Charles Reich, in his seminal 1964 article "The New Property," very much (I do not say *perfectly*) a whig of the old stripe? As Professor Radin has reminded us,[35] Reich's conceptual approach in that path-breaking article "has the effect of doing away with any intrinsic difference between property and non-property rights." Reich's approach is "simply to identify all claims or interests that the government ought to protect, and then call them 'property.' " And Radin quite appropriately characterizes Reich's approach as "functionalist," because "it calls for 'new property' rights in government largess to the extent necessary to maintain people's independence from government." The *function* in question—securing personal independence from government by limiting the power and authority of government—could hardly be more essentially "whig," despite the fundamental differences in historical context between the ethos of government responsibility that defines the modern welfare state and the ideal of limited government that prevailed throughout the 17th and 18th centuries.[36]

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32. Reid, *Rights* at 98–113. Cf. Greene, *Peripheries and Center* at, e.g., 84; Pocock, *Ancient Constitution and Feudal Law* at, e.g., 302 & 320–21.

33. Reid, *Rights* at 75.

34. *Id.* at 103. When Professor Carol M. Rose encountered this phrase, as quoted from Reid's book, it prompted from her a well-taken response to this effect: that while by the 18th century there was, no doubt, an Anglo-American/European tradition of political and constitutional theory that derived from property rights *against government*, there was also a tradition, at least as important, that derived from property rights *of governance*. This paraphrase cannot pretend to do justice to her point; cf. her own elaboration in Rose, "Private Property, Old and New," 79 *Nw. U.L. Rev.* 216 (1984) (reviewing Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Life, 1730–1870* (Chapel Hill: University of North Carolina Press, 1983)). Much the same point serves, of course, as a unifying theme of Pocock's *Ancient Constitution and Feudal Law* (cited in note 1): e.g., at viii, n.3 ("I endeavour in the retrospective essay to make it clear that 'the ancient constitution' and 'the Norman yoke' are antithetically related"), & at 353 ("In so far as the Exclusion crisis raised, especially after 1681, serious dangers of rebellion and civil war, it made sense for the party of order to revive, in patriarchal and possibly in feudal terms, the argument that property entailed obedience and carried no rights that could justify resistance").

35. Margaret Jane Radin, Property and Personhood, 34 *Stan. L. Rev.* 957, 989 n.111 (1982).

36. Cf. Hartog, The Constitution of Aspiration, 74 *J. Am. Hist.* at 1022 (cited in note 6): "[T]he metaphor of property appears inconsistent with post-revolutionary notions of the sovereignty of the people. If the goal of constitutional struggle is membership in 'We, the People,' then it hardly seems appropriate to found one's constitutional identity on a meta-

In the same vein, and also citing Reich's approach as apposite, Professor Tribe, in the new edition of his treatise *American Constitutional Law*, continues to insist on "the importance of property and contract in protecting the dispossessed no less than the established"[37]—this despite the availability of legal forms and concepts other than those of property and contract that undoubtedly do mark an enormous "distance" between our contemporary "constitutional rights consciousness"[38] and the more "vigilant" rights consciousness that Burke ascribed to the *authentic* Anglo-American whig mentality in 1775: "In other countries," he said in reference to America, "the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an *actual* grievance; here they *anticipate* the evil and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance, and snuff [*sic*] the approach of tyranny in every tainted breeze."[39]

From the perspective of some modern constitutional lawyers, theorists, or historians, to dwell on questions about degrees of differential intuition and vigilance can become an unfortunate distraction from the doctrinal *and other*, less direct significances of the vestigial common-law mind that still informs our constitutionalism. After all, even in a legal culture where the *private* law of contract, if not yet quite "dead" and gone, has nevertheless been marginalized, "contract," as a concept and symbol, has shown remarkable staying power as a point of departure for the constitutional theorizing of neo-whigs, or liberals, of many varieties. And it may well be that this idea of contract, as a whig legacy to motley modern liberalism, owes its origins as much to the common-law as to the Lockean tradition. Greene suggests as much in, again, nodding gratefully to Reid and the neo-whig legal historians: "Because," says Greene, "historians have tended to trace the colonists' use of [the idea of a constitutional contract between the ruled and their rulers] to the writings of John Locke and various other natural law theorists, they have mostly failed to appreciate, as Reid writes, that [this idea] had also been 'a central dogma in English and British constitutional law since time immemorial.' "[40]

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phorical image of rights as possessions that isolate the holder from the larger political community" (citing Reich et al.).

37. Laurence H. Tribe, *American Constitutional Law* 1374 (2d ed. Mineola, N.Y.: Foundation Press, 1988). Cf. the first edition (1978) at 949.

38. Cf. Hartog, The Constitution of Aspiration, 74 *J. Am. Hist.* at 1014ff. (cited in note 6), and more generally Part II of the symposium for which Hartog's article serves as a concluding overview: Hartog et al. (special advisory board), The Constitution and American Life: A Special Issue, 74 *J. Am. Hist.*, No. 3 (Dec. 1987).

39. Emphasis added. Quoted in Reid, *Rights* at 170 (from a Mar. 22, 1775 speech of Burke in the Commons Debates, as reprinted in Elliott Robert Barkan, ed., *Edmund Burke on the American Revolution: Selected Speeches and Letters* 70, 86 (New York: Harper Torchbooks, 1966)). Cf. Reid, *Tax* at 42.

40. Greene, *Peripheries and Center* at 147, quoting Reid, The Irrelevance of the Declaration at 72 (cited in note 6).

And yet Reid's own work prompts the additional thought that, at least to some lawyers, the antiquarian issue of origins per se might not be the most interesting issue. In *The Authority of Rights* Reid has assembled such a treasury of common-law contractarian argument in support of the rights claims of the American revolutionaries that it is hard to imagine a modern contractarian who would not find anything in this book provocative of a new thought or two. Reid abundantly documents—although neither he nor anyone else can ever quite *prove*—what Anthony Pagden and Nicholas Canny contend in a recent essay: that for the American rebels, "the language of contractualism was *morally* the only valid one, and that the language was based upon Magna Carta [and] English common law" as well as "Lockean" philosophy.[41] To the extent, then, that many of us may still be contractarians but can never be *true-believing* contractarians in the original mold, we should, I think, be more not less interested in what Reid scrupulously represents to us without pretending to "recapture"[42] completely.

Consider Reid's assemblage of resourceful claims of contractual authority that the American revolutionaries invoked against the metropolitan campaign of parliamentary rule in the 1760s.

There was, first and most important, the whig theory of the "original contract" between those who are governed, the People, and their government, which originates from them. It was only by means of the idea of such a contract that the common-law mind could even reach a jurisprudential definition of limited government in the first place. In other words, this contract was necessary authority for a legalistic concept of rights in general.[43]

Second, and in 18th-century Anglo-American legal culture almost as widely accepted as the basic idea of an "original," or "constitutional," contract, was the idea of what Reid calls "the original American contract." It was conceived to be a contract of "migration," or "settlement," that had been concluded between the English crown and the first settlers of the colonies. Whether it was an "implied" or a "real" contract was not altogether clear even to the colonists themselves. In either case, the existence of this original American contract was, in the minds of the American whigs, so historically determinate—from the historical record of the migration and settlement—that even a prudent American lawyer like James Wil-

41. Anthony Pagden & Nicholas Canny, Afterword: From Identity to Independence, *in* Nicholas Canny & Anthony Pagden, eds., *Colonial Identity in the Atlantic World, 1550–1800*, at 276 (Princeton, N.J.: Princeton University Press, 1987). Pagden and Canny do, however, endorse Bailyn on the wide "range of authorities used by the revolutionaries." *Id.* at n.9. And at 275 they also agree with Bailyn on the importance to the American revolutionaries of what he terms "a continuing belief in original sin and the need for grace."

42. Cf. Reid, *Rights* at 216.

43. *Id.* at 134–37 & *passim*. Cf. Greene, *Peripheries and Center* at 85.

son could argue in 1775, under the authority of the British constitution itself, that "it is the easiest thing imaginable to prove [an original American contract] in our constitution and to ascertain some of the material articles of which it consists."[44] While Reid must point out that Wilson and other colonial whigs exaggerated in their claims to legal certitude about the exact provisions of such a contract, Reid also points to a 1774 case decided in King's Bench, *Campbell v. Hall*, which does demonstrate "that the original colonial contract, in its special form of an [actual] prior promise made to induce settlement, could be an enforceable contract, and that it was a contract in positive, not natural, law."[45]

Even more interesting, if less surprising, are the myriad arguments that Reid shows us were adduced on the basis of an *implied* migration contract. With reference to it the American whigs formulated arguments in the terms of virtually every possible aspect of contract doctrine: for example, offer and acceptance, elaborate formal consideration analysis of mutual promises, encouragement (inducement) and reliance, and even *quantum meruit*.[46]

V

Ultimately, however, nothing is more important to and interesting about Reid's and Greene's accounts of the 18th-century American constitutionalism of "the common-law mind" than the sense they convey of the early American constitutional authority of *custom*. Indeed, as Professor Pocock has shown us, it was *the primacy of the authority of custom* that epitomized the common-law mind of the 17th century. Thus, from the outset this "mind" (variously as generalized mentality or salient ideology) could hardly have been less Lockean.[47] "[A]t best," said Locke, "an Argument from what has been, to what should of right be, has no great force."[48] This is not a friendly attitude toward deriving rights or principles (or anything else) from historical experience. Yet for all their much avowed Lockeanism, the American whigs of the revolutionary generations embraced no constitutionalist principle more warmly than that taught by Thomas Rutherforth, the 18th-century English legal theorist who at times sounded more like Coke or Davies than did any other: As Professor Greene notes, Rutherforth taught that "the best 'way of determining what form [of constitution] has been established in any particular nation' was to examine

44. Reid, *Rights* at 141.

45. *Id.* at 158.

46. *Id.*, e.g., at 142–45. Cf. Greene, *Peripheries and Center* at 115.

47. Pocock, *Ancient Constitution and Feudal Law* at, e.g., 236ff. (cited in note 1).

48. John Locke, Second Treatise of Government *in Two Treatises of Government*, ed. Peter Laslett, at 380 (par. 103) (rev. ed. New York: New American Library, 1963).

'the history and customs of that nation. A knowledge of its present customs will inform us what constitution of government obtains now, and a knowledge of history will inform us by what means this constitution was introduced and established.' "[49] Moreover, as Greene and Reid both point out, the customary-, common-law mind of Rutherforth compassed a "right" of "rebellion" as carefully justified as—and incomparably more constitutionalist than—the same "right" as it had been philosophically propounded by Locke.[50]

What Locke did share with the whig *constitutional* tradition was a concern to exalt the political authority of "consent." Certainly Greene and Reid leave no room for doubt about the centrality of the "hallowed British doctrine of consent" to 18th-century Anglo-American whig constitutionalism.[51] The proposition that "customary," or common, law imports the authority of consent better than does any other form of law was, after all, precisely what had led Sir John Davies to extol the common law as "the most perfect and most excellent, and without comparison the best, to make and preserve a Commonwealth."[52] And 18th-century whigs, from Thomas Rutherforth to William Blackstone to James Wilson faithfully echoed Davies in reserving their highest (sometimes almost rapturous) praise for the common law in its constitutional importance—and for precisely Davies's reason: to all these whigs the *common* law, more than any other "species of law," appeared to rest on the authorizing "consent" of "civil society."[53]

This notion—whether a whig insight or a whig delusion—that *consuetudines* import consent is not easily accessible to modern constitutional lawyers, at least not in its authentic formulation. Professor Reid continually remarks on this problem and warns us not to think that in reexamining the original American whig tradition we fully understand what we do not and probably cannot. But we are not without avenues of partial access to this peculiar whig conception of an essentially customary constitutionalism so common-law-minded that it could derive the principle of consent—and progressive constitutional development—from the authority of "what [had] been." Professor Pocock has told us repeatedly that one of the most important avenues of access for us lies in the constitutional theory of that

49. Greene, *Peripheries and Center* at 96.

50. *Id.* at 145; Reid, *Rights* at 80.

51. Greene, *Peripheries and Center* at 119; but see Reid, *Rights* at, e.g., 50.

52. Quoted in Greene, *Peripheries and Center* at 38.

53. *Id.* at 39. Cf. 1 William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769, with an Introduction by Stanley Katz* 74 (Chicago: University of Chicago Press, 1979). Cf. Gerald Stourzh, William Blackstone: Teacher of Revolution, 15 *Jahrbuch für Amerikastudien* 184 (1970). 1 Robert Green McCloskey, ed., *The Works of James Wilson* 102 (Cambridge, Mass.: Harvard University Press, Belknap Press, 1967); and see at 183 for an example of Wilson's near-rapturous encomiums to the common law. Cf. Stephen A. Conrad, James Wilson's "Assimilation of the Common-law Mind," 83 *Nw. U.L. Rev.* (1988) (forthcoming).

great friend of both the "ancient constitution" and the "American cause" Edmund Burke. In Pocock's view, Burke, with his rehabilitation of "prescriptive" conservatism as a constitutional ideal, accomplished the translation of some of the elements and attitudes of the traditionalist common-law mind into terms both meaningful and useful to the less legalistic constitutional idiom of modern liberalism.[54]

There have probably always been American constitutional lawyers who have understood Pocock's general point—even if not always in Pocock's terms—about the survival of the common-law mind in modern constitutionalism. Among prominent constitutional lawyers of late, Alexander M. Bickel seems to have come to understand the general point most fully—if, indeed, Bickel did not understand it all along (as Professor Kronman has persuaded me that Bickel did).[55] In his final book, revealingly entitled *The Morality of Consent*,[56] Bickel explored the possibility of a neo-Burkean approach to mediate between the Enlightened rationalist impulse in our modern liberal constitutionalism and the whiggish prudence that is also part of it as a "living tradition."[57]

Professor Greene's archival research has uncovered in the surviving papers of one Sir George Saville, an English member of Parliament in the 1760s, an especially provocative whig restatement of this constitutionalist idea of living tradition. And Greene compares it with Burke's idea. But Saville's words have a wry candor that may well be more representative of authentic whiggery than Burke's: In commenting on the nature of constitutional change within the British Empire, Saville observed, "No government ever was built at once or by the rules of architecture, but like an old house at 20 times up & down & irregular. . . . I believe principles have less to do than we suppose. The Critics[']] rules were made after the poems. The Rules of architecture after ye houses, Grammar after language and governments go *per hookum & crookum* & then we demonstrate it *per bookum*."[58]

For a modern constitutional lawyer to contemplate Saville's arch restatement of the 18th-century constitutionalism of the common-law mind is, then, to return to the old question whether—as I say, for good, or ill, or both—there doesn't remain in our constitutional jurisprudence an authority beyond principle, and even beyond "reason," at least in the Lockean

54. Pocock, Burke and the Ancient Constitution: A Problem in the History of Ideas, 3 *Hist. J.* 125 (1960); Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* at 15, 24, 404–5, & esp. 547–48 ("prescriptive" conservatism) (Princeton, N.J.: Princeton University Press, 1975); Pocock, *Ancient Constitution and Feudal Law* 382 & *passim* (cited in note 1).

55. See generally Anthony T. Kronman, Alexander Bickel's Philosophy of Prudence, 94 *Yale L.J.* 1567 (1985).

56. New Haven, Conn.: Yale University Press, 1975.

57. Cf. Kronman, 94 *Yale L.J.* at 1609 n.187, quoting Alasdair MacIntyre.

58. Greene, *Peripheries and Center* at 65.

sense of the word. As unblinking historians, Professors Reid and Greene have served very well those of us who want to continue to ponder this question, because they have shown us in more detail and on a grander scale than anyone ever has before that the originators of American constitutionalism were so convinced of the fundamental importance of such authority that they took it for granted even—nay, especially—when it was denied.