

The Rhetorical Constitution of “Civil Society” at the Founding: One Lawyer’s Anxious Vision[†]

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The Author of our existence intended us to be social beings; and has, for that end, given us social intellectual powers. They are original parts of our constitution; and their exertions are no less natural than the exertions of those powers which are solitary and selfish.

—James Wilson, in his *Lectures on Law*¹

INTRODUCTION

The founder James Wilson (1742-1798) in his day was widely regarded as one of the most influential framers and theorists of American constitutionalism.² He was also widely regarded by some of his most discriminating contemporaries as the best lawyer and legal theorist in the early Republic.³ Moreover, so Adam Seligman has argued, the eighteenth century *in America* proved the very “paradigm or model,” the fullest embodiment⁴ of what Marvin Becker has

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1. JAMES WILSON, *THE WORKS OF JAMES WILSON* 230 (Robert G. McCloskey ed., 1967) [hereinafter WORKS]; cf. *id.* at 236, 238, 239, 241 (on the naturalness of human “sociability” and “society”).

2. E.g., MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 197-98 (1913).

3. See the numerous testimonials I have collected for citation in Stephen A. Conrad, *Metaphor and Imagination in James Wilson’s Theory of Federal Union*, 13 LAW & SOC. INQUIRY 1, 9 n.8 (1988).

4. ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* 12, 61 (1992) [hereinafter SELIGMAN, CIVIL SOCIETY]. Compare his complementary study, focusing on seventeenth-century America, found in ADAM B. SELIGMAN, *INNERWORLDLY INDIVIDUALISM: CHARISMATIC COMMUNITY AND ITS INSTITUTIONALIZATION* at ix (1994) [hereinafter SELIGMAN, INNERWORLDLY INDIVIDUALISM] (“[W]hat I have attempted in this study is precisely to analyze the emergence of modern ideas of individual and collective identity in and through the concrete process of institutionalization that characterized ascetic-Protestantism in one seventeenth-century community—that of New England Congregational Puritanism.”).

somewhat more generally called a “privileged moment”⁵ in the history of the Western idea of “civil society.” If only (but not only) on these grounds, I would justify my sustained focus here on a narrowly specific but historically important and otherwise illustrative topic: how this lawyer and framer James Wilson elaborated and used the idea of “civil society” to various purposes and effects in late eighteenth-century America. My aim is largely and generally to convey something of the complexity, ambiguity, and evident anxiety of Wilson’s vision, or visions, of civil society. To that end, I want to examine in particular the problematic relationships between and among Wilson’s ideas about “civil society” on the one hand and, on the other hand, some of his ideas about law, government, individual and social identity, male and female citizenship, and—arching over everything else—his rhetorical approach to the authority of nature. Indeed, Wilson’s arguments from “nature” and the problematics of his naturalistic rhetoric ultimately become my chief concern in this essay.

One of the broader implications of what I say about Wilson is, however, that it lends support to the view of many scholars that the American Revolution (1776-1783) and the subsequent national Founding (1787-1791) were, conceptually at least, much of a piece.⁶ And, to broaden this point about conceptual continuity amid conceptual change even further, careful attention to how Wilson used the idea of “civil society”—as early as 1768 and well into the 1790s—poses a notable exception to Gordon Wood’s recent generalization that the Revolution brought a radical conceptual change, in that “most people in [the] very different distant world [of pre-Revolutionary America] could not as yet conceive of society apart from government.”⁷ Moreover, I note with special

5. See generally MARVIN B. BECKER, *THE EMERGENCE OF CIVIL SOCIETY IN THE EIGHTEENTH CENTURY: A PRIVILEGED MOMENT IN THE HISTORY OF ENGLAND, SCOTLAND, AND FRANCE* (1994).

6. Although each is very different in its argument, see, for example, FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 143-83 (1985); Stanley N. Katz, *The American Constitution: A Revolutionary Interpretation*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 23 (Richard Beeman et al. eds., 1987), see also the encyclopedic brief for the “creation” of American constitutionalism during both the American Revolutionary experience and its aftermath found in GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). Additionally, contrast the classic argument in HANNAH ARENDT, *ON REVOLUTION* 215-81 (1963), and others, from J. Allen Smith, in 1907, onwards to Charles Beard and beyond, with that of Richard Matthews in 1995—as conveniently reviewed in Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *COLUM. L. REV.* 121, 170-72 (1996).

7. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5 (1992) [hereinafter *RADICALISM*]. I do not mean to challenge Wood’s central claim that the American Revolution in many ways “fundamentally altered the character of American society.” *Id.* “To be an American could not be a matter of blood; it had to be a matter of common belief and behavior. And the source of that common belief and behavior was the American Revolution: it was the Revolution, and only the Revolution, that made them one people.” *Id.* at 336. For a contrasting remark, see WOOD, *supra* note 6, at 606 (“Americans had begun the Revolution assuming that the people were a homogeneous entity in society set against the rulers. But such an assumption belied American experience, and it took only a few years of independence to convince the best minds that distinctions in the society were ‘various and unavoidable’ . . .”).

interest that in Professor Jack P. Greene's comment directly following this essay narrowly focused on Wilson, Greene makes a compelling general argument that both the ideas and realities of American "civil society" at the late eighteenth-century "Founding" evinced important continuities with the sum of the colonial British American experience overall.⁸

In any case, as to Wilson himself, not only did he, well before Americans contemplated Independence and Revolution, conceive of society categorically quite apart from government. But, *pace*, Professor Wood, Wilson had an elaborately theoretical, albeit hardly unique,⁹ concept of society in general and American society in particular. Visionary that he was, Wilson is said to have "postulated an American society before one existed, and his constitutional theory in large measure reflected that assumption."¹⁰ The arguable shortcomings of Wilson's postulation as empirically valid sociology are, however, not my concern here.¹¹ I am concerned, rather, with how and why, throughout the changing contexts of the pre-Revolutionary, Revolutionary, and Founding periods, he set forth so much of his civic vision in terms of his social theory. Even more to the point, I want to explore how and why it was that a distinctive concept of "civil society" in America seems to have motivated, justified, and shaped his contributions as a "thinking"¹² American revolutionary and founder. Furthermore, an important theme in the interpretation I offer here is that, despite the distinctive concept of "civil society" that Wilson invoked by and large throughout his public career, there was change within continuity: his particular conceptions of "civil society" varied appreciably to suit the immediate needs to which he was responding consciously or unconsciously, expressly or implicitly.

Not presuming to give here a thorough account of all Wilson's thoughts on "civil society," I want to avail myself of a heuristic organizational device, by taking a single text from his pen as a point of departure and frequent reference.

To be fair, Wood defines the Revolution broadly: "[T]he American Revolution and the social transformation of America between 1760 and the early years of the nineteenth century were inextricably bound together. Perhaps the social transformation would have happened 'in any case,' but we will never know. It was in fact linked to the Revolution; they occurred together." RADICALISM, *supra*, at 7. My complementary not contradictory emphasis is, more than Wood's, on social theory rather than social reality.

8. See Jack P. Greene, *Civil Society and the American Foundings*, 72 *IND. L.J.* 375, 381 (1997); *cf. id.* at 376-77.

9. *Cf. id.* at 380 (quoting Samuel Williams to the effect that political writers like Thomas Paine and Wilson merely placed in "a very clear and striking light" principles that were commonplaces of the day in colonial British America).

10. George M. Dennison, *The "Revolution Principle": Ideology and Constitutionalism in the Thought of James Wilson*, 39 *REV. POL.* 157, 190 (1977).

11. For a review of some of the most compelling "hard" data indicative of "the emerging society of late colonial British America," see JACK P. GREENE, *PURSUIITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE 170-71, 193, passim* (1988).

12. RALPH LERNER, *THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC 1-16* (1987). For a discussion of "the need to come to terms" with the better minds among the founders "in the act of thinking clearly, forcefully, and deliberately," see *id.* at 16. On Wilson specifically, see *id.* at 100 n.15, 103, 106-07, 111, 115, 132.

This text is what has come down to us as his law lecture entitled *Of Man, as a Member of Society*.¹³ It is thus a text from near the end of his public career, when he was in a position to engage in relatively “comprehensive”¹⁴ reflection. It is a lecture from the series of *Lectures on Law*, 1790-1791, that he intended to bequeath as his *summa civica*, on American society, law, government, and constitutionalism.¹⁵ But it is a lecture, like all the others in the series, that he ultimately left unrevised. It fell to his son Bird Wilson to edit and publish the law lectures after the elder Wilson’s death, and also to divide the run-on manuscript into discrete lectures and give each a title that Bird, not his father, formulated. But notwithstanding the possible inauthenticity, strictly speaking, of the contours and the title of this lecture *Of Man, as a Member of Society*, the text is manifestly authentic in sounding or alluding to so much of what Wilson had to say about “civil society” over the course of his public career.

1. “CIVIL SOCIETY” AS NECESSITY AND NORM IN WILSON’S CONCEPTIONS OF “POLITE” SOCIAL CITIZENSHIP

Even within the confines of the short text of the law lecture in question (twenty pages in the modern edition), there is ambiguity, perhaps even internal contradiction, in the ways Wilson uses the term “civil society.” This problematic will strike both students of the idea of “civil society” in general, and students of Wilson in particular, as quite unsurprising. Among the former group, there are many who view the very idea of “civil society” by (whatever) definition as always having been and still today fraught with internal tensions or contradictions.¹⁶ And among students of James Wilson there is a longstanding interest in his concern over apparent contradictions, and in his aim to “synthesize” ideas in order ultimately to “reconcile” what might seem contradictory.¹⁷ In this respect Wilson stands squarely apart from that most prototypically modern social scientist among the founders, Alexander Hamilton,¹⁸ who wrote in *The Federalist No. 23*: “Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative.”¹⁹ Instead, Wilson took his stand with David Hume of the *Essays, Moral and Political*, where Hume had

13. WORKS, *supra* note 1, at 227.

14. On Wilson’s anti-reductive aspirations to be comprehensive, see, for example, *id.* at 200.

15. The best general sustained accounts of the lectures are GEOFFREY SEED, JAMES WILSON 150-59 (1978); CHARLES P. SMITH, JAMES WILSON: FOUNDING FATHER, 1742-1798, at 308-41 (1956); Robert G. McCloskey, *Introduction* to WORKS, *supra* note 1, at 37-40.

16. A convenient exposition and commentary on the ideas of a number of representative leading twentieth-century critics of the idea of “civil society” is provided in JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 177-341 (1992) (Section II: The Discontents of Civil Society).

17. See McCloskey, *supra* note 15, at 24; *cf.* Jan Lewis, “*Of Every Age Sex & Condition*”: *The Representation of Women in the Constitution*, 15 J. EARLY REPUBLIC 359, 375 n.49 (1995).

18. See, e.g., Judith N. Shklar, *Alexander Hamilton and the Language of Political Science*, in THE LANGUAGES OF POLITICAL THEORY IN EARLY-MODERN EUROPE 339 (Anthony Pagden ed., 1987).

19. THE FEDERALIST NO. 23, at 151 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

written: “The Heart of Man is made to reconcile Contradictions.”²⁰ Indeed, in striking contrast to Hamilton, Wilson, in one of his other law lectures (which, taken all together, constitute, one modern editor surmises, “[Wilson’s] pretension to challenge the renown of the *Federalist Papers*, but extending to a far wider terrain”²¹), avows an aim, an overall orientation, at odds with the posture of disinterested rationalism sustained by Publius.²² Wilson confesses, in his lecture entitled *Of Municipal* [what we might now call “man-made”] *Law*, “I search not for contradictions: I wish to reconcile what is seemingly contradictory.”²³ This difference in orientation between Publius and Wilson—between Publius’s “science of politicks” and Wilson’s aspirational and affective civics—is pervasive with Wilson. And the difference is merely but well illustrated by those several instances in which Publius (Hamilton or Madison) spoke of “civil society.”

For as David Epstein aptly conveys in his study *The Political Theory of The Federalist*, Publius tends to speak of “civil society” in a way that reflects not only the positive capability but also the comparatively modest limitations of the Lockean idea of “civil society.”²⁴ Society itself, whether in the condition of natural or civil society, rightfully can and should protect its members from tyrannical government, through concerted social acts of justified rebellion or revolution. But “civil society,” like “civil government,” is for Publius, as for Locke, merely a rationalistic instrumental entity,²⁵ with “justice” as the end to be served. And Publius’s rather minimalist idea of “justice” as an ultimate end is similarly Lockean in that justice is conceived to inhere merely in the protection of each individual’s faculties. Indeed, it is to secure precisely this end that individuals, out of fear and prudence, join together to form a civil society in the

20. James Farr, *Conceptual Change and Constitutional Innovation*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 13, 29 (Terence Ball & J.G.A. Pocock eds., 1988). This is not the utilitarian empiricist, provocatively skeptical Hume of the *Treatise*, but Hume the practical “common sense” social and moral theorist notably interpreted in DAVID F. NORTON, *DAVID HUME: COMMON-SENSE MORALIST, SCEPTICAL METAPHYSICIAN* (1982), and DONALD W. LIVINGSTON, *HUME’S PHILOSOPHY OF COMMON LIFE* (1984).

21. Robert G. McCloskey, *James Wilson*, in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 79, 90 (Leon Friedman & Fred L. Israel eds., 1969); cf. Lewis, *supra* note 17, at 370 (“In their subject matter, the *Lectures* invite comparison with John Locke’s *Two Treatises of Government*, and as such, they are a key text in the history of liberal thought in America. . . . Furthermore, because the lectures attempted to discuss systematically the relationship between society and government, they illuminate connections that others left unstated.”).

22. For analysis of *The Federalist* that posits an interplay there between “Lockean rationalism” and “Humean empiricism,” see MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 13-22 (1987).

23. WORKS, *supra* note 1, at 185.

24. See generally DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984).

25. For another reading of *The Federalist* that also stresses “the supremacy of reason,” for Publius, but within a framework of intellectual history more closely identified with the eighteenth-century Scottish Enlightenment than with Locke, see Daniel W. Howe, *The Language of Faculty Psychology in The Federalist Papers*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION*, *supra* note 20, at 107, 119 (discussing “the rationalistic and elitist appeal of *The Federalist*”); see *id.* at 129 (emphasizing the “supremacy of reason”); cf. *id.* at 122.

first place; and it is to further secure this same end of security and self-protection that individuals in civil society proceed to institute civil government, which is by definition a regime of those *laws* necessary for *sustaining over time* just relations—security and protection of rights—among the citizenry.²⁶

As Epstein acknowledges, albeit insufficiently in my view, James Wilson had a very different idea from Publius's of the capability of civil society and civil government.²⁷ Wilson's was a more expansive idea, which virtually posited "civil society"—although not civil government—as an end in itself. In no way derogating from the importance of a civil regime of justice secured through laws, Wilson posited an end beyond and above even justice. This end was, he insisted, nothing less than human happiness. This felicity precept was a recurring motif in Wilson's thought from the 1760s onwards.²⁸ "Happiness is the centre, to which men and nations are attracted," as he put it at one point in his law lectures.²⁹ The motif is characteristically prominent in his lecture *Of Man, as a Member of Society*. There he sets forth yet again his felicity precept, and with a quintessentially naturalistic emphasis unsurpassed elsewhere:

Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections.³⁰

This passage is laden with themes to which I shall return, including the "dictating" authority of nature, and both the "intellectual" and "active" character of the human impulse to sociability—not to mention the repeated allusion here to the special individual happiness realized "especially" in the sphere of domestic family life. But for the moment, I mean to call attention above all to the fundamentality of Wilson's felicity precept in his social thought, and indeed, to his virtual identification of "happiness" with "society." In fact, he goes so far as

26. EPSTEIN, *supra* note 24, at 48, 58, 78-79, 92, 144, 163; *see also* Greene, *supra* note 8, at 380 (quoting Adam Smith's characterization of "the whole system of American Republicanism"); *cf. id.* at 378 ("[T]hey quickly established laws and governments, the principal purposes of which were little more than to protect their settlements against Indians or rival Europeans and to secure the property they were creating and accumulating . . .").

27. EPSTEIN, *supra* note 24, at 210 n.60.

28. *See, e.g.*, The Visitant [No. 1], 2 PA. CHRON., Feb. 1, 1768 (James Wilson & William White) ("Our happiness, which is the final end of our existence, and the mark at which we aim, though sometimes injudiciously, in all our conduct, cannot be obtained without being acquainted with those sentiments and affections, which are to enjoy that happiness."); Greene, *supra* note 8, at 380 (quoting Wilson from a 1774 pamphlet, in which Wilson invokes the authority of Burlamaqui for the proposition that "the happiness of the society" is "the *first* law of every government") (emphasis in original); *cf.* MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 132, 134-36, 227-28, 268 (1978) (discussing Burlamaqui's influence on Wilson).

29. WORKS, *supra* note 1, at 159.

30. *Id.* at 241-42 (punctuation modernized for clarity). But see *infra* notes 205-14 and accompanying text for Wilson's vision of an expanded happiness realized beyond affective family life.

to assert: "Take away society, and you destroy *the basis* on which the preservation and happiness of human life are laid."³¹ And—here is a point likely as strange to us today as it was crucial to Wilson's pre-modern, quite un-modern, social and civic theory—to Wilson, as between mere "preservation" and "happiness," the latter takes on the "greater importance," at least as a matter of express emphasis.³² Wilson is sensible to the at once prudent and reassuring proposition so familiar as one of the litanies of the Scottish Enlightenment, that "[s]ociety is necessary as well as natural to us."³³ Both "our security" and "our enjoyments" depend equally upon living in conditions of society.³⁴ But Wilson's emphasis on human happiness and enjoyments over and above their logical prerequisites—preservation and security of life itself, and of property³⁵—is, however illogical and imprudent it might appear, nonetheless necessarily entailed in his concept of "civil society."

For to Wilson "civil society" denominates much more than what it is in Lockean *histoire raisonné*, that is, a potential agency of libertarian revolution—yet beyond that, then largely but a predicate of just civil government. And, even more important for my instant purposes, Wilson was much less inclined than was Publius to elide the distinction between civil society and civil government—even in the unique case of the United States of America, where "the whole power of the proposed government is to be in the hands of the representatives of the people."³⁶ To Wilson the concept of "civil society" was in and of itself not just an analytical category of historical sociology, jurisprudence,

31. WORKS, *supra* note 1, at 236 (emphasis added) (punctuation modernized for clarity).

32. *Id.* at 236-38.

33. *Id.* at 234. The classic treatment of this central theme of the Scottish Enlightenment remains GLADYS BRYSON, *MAN AND SOCIETY: THE SCOTTISH INQUIRY OF THE EIGHTEENTH CENTURY 148-72* (Augustus M. Kelley ed., Princeton University Press 1968) (1945); cf. Rüdiger Schreyer, "Pray What Language Did Your Wild Couple Speak, When First They Met?"—*Language and the Science of Man in the Scottish Enlightenment*, in *THE "SCIENCE OF MAN" IN THE SCOTTISH ENLIGHTENMENT: HUME, REID AND THEIR CONTEMPORARIES* 149, 159 (Peter Jones ed., 1989).

34. WORKS, *supra* note 1, at 235-36.

35. No single remark by Wilson at the Philadelphia Convention or afterwards is as often quoted by modern scholars as is his astonishing insistence that, orthodox republican theory notwithstanding, "he could not agree that property was the sole or the primary object of Govern. & Society. The cultivation & improvement of the human mind was the most noble object." 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 605 (Max Farrand ed., rev. ed. 1937). For a list of some modern scholars' quotation of this passage, see Conrad, *supra* note 3, at 35 nn.140-41. Compare more recently JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 96-97 (1990) and Lewis, *supra* note 17, at 367.

36. *THE FEDERALIST* NO. 28, *supra* note 19, at 178 (Alexander Hamilton). *But see* *THE FEDERALIST* NO. 84, *supra* note 19, at 583 (Alexander Hamilton) ("I shall only observe, that as it is a plain dictate of common sense, so it is also an established doctrine of political law, that 'States neither lose any of their rights, nor are discharged from any of their obligations by a change in the form of their civil government.'") (emphasis in original) (quoting the eighteenth-century English jurist Thomas Rutherford). For Wilson, see WORKS, *supra* note 1, at 238.

or “the new science of politicks”; civil society was also a transcendently³⁷ *moral* category. In the distinction Wilson made between “natural society” and “civil society” there was little of the Lockean³⁸—much less the Hobbist³⁹—idea of civil society as but a recourse, undertaken out of self-interest, prudence, or fear. Indeed, said Wilson, “nature” and “nature’s God appointed man” such that in pursuing human happiness “self-love and social are the same.”⁴⁰

In Wilson’s view, then, “civil society” was more natural to man than was “natural society,” in that “civil society” realized human nature in its “improved”⁴¹ condition, which was the condition for which mankind had always been and would ever remain destined, by “that divinity which governs the whole universe.”⁴² In such a view “civil society” became a natural and ordained phenomenon with the authority of a fundamental norm that Wilson could and did invoke with such virtuosity in so many discursive contexts that it raises interesting questions about those contexts, even when what Wilson had to say might strike a reader today (who is likely to be less sanguine about human nature and less assured of benign Providence) as unpersuasive at best.

What I have called Wilson’s ultimate felicity precept—his positing human happiness as *the* natural and justifiable end of all human endeavor—and his virtual identification of society, above all “civil society,” with human happiness were notions hardly peculiar to Wilson in his day. Indeed, among historians today, no one more than Jack Greene has elucidated Americans’ “pursuits of happiness”⁴³ as a generalized aspect of colonial and early American “identities.”⁴⁴ In a recent review of an important book on the material consumer culture of colonial America, Greene refers pointedly to “the related culture of politeness” and its “centrality . . . to the fulfillment of individual [American] colonists’ quests for domestic happiness.”⁴⁵

Greene’s familiar reference to the relationship between the “culture of politeness” and individuals’ quests for happiness, particularly (but not only) domestic happiness, could hardly have been better exemplified in late colonial British America than in Wilson’s debut as a published author, in a series of

37. I use this word in the sense found in SELIGMAN, *CIVIL SOCIETY*, *supra* note 4, at 64, 99.

38. For a different, indeed significantly although but partially Lockean, reading of Wilson in this very respect, see Lewis, *supra* note 17, at 372-74. In differing with Lewis’s Lockean reading, I do so for reasons indicated in my text and well-summarized in the following recent study, which I consider thus far unmatched on its topic in the depth of its research and cogency of its argument: KNUD HAAKONSSON, *NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT* 326 (1996).

39. *WORKS*, *supra* note 1, at 228-29.

40. *Id.* at 238.

41. *Id.* at 139; *cf. id.* at 87, 164-65, 200.

42. *Id.* at 239 (punctuation modernized for clarity).

43. *See generally* GREENE, *supra* note 11.

44. JACK P. GREENE, *IMPERATIVES, BEHAVIORS, AND IDENTITIES: ESSAYS IN EARLY AMERICAN CULTURAL HISTORY* 143-73, 290-317 (1992).

45. Jack P. Greene, Book Review, 53 *WM. & MARY Q.* 181, 185 (1996); *cf.* John Brewer, “The Most Polite Age and the Most Vicious.” *Attitudes Towards Culture as a Commodity, 1660-1800*, in *THE CONSUMPTION OF CULTURE, 1600-1800: IMAGE, OBJECT, TEXT* 341 (Ann Bermingham & John Brewer eds., 1995).

“Addisonian”⁴⁶ essays written by Wilson, together with his friend William White,⁴⁷ and printed in the *Pennsylvania Chronicle* in 1768. This was only three years after Wilson’s emigration from Scotland, at age twenty-three. Eager for diversion from their respective studies in law and divinity, Wilson and White published their series of sixteen essays under the archly presumptuous joint pen name “the Visitant.” They wrote from what at least one contemporary reader took to be the point of view of “a very polite sort of a gentleman,”⁴⁸ for “politeness” remained a prominent topic throughout the essays. And it was not least in developing the complex meanings of politeness that the Visitant, in 1768, anticipated much of what Wilson, then the struggling young lawyer, would later say as the first Professor of Law at the College of Philadelphia, in his lecture *Of Man, as a Member of Society*. In fact, in the Visitant’s very first essay *jurisprudence* itself was defined with an expressly sociological emphasis: “The study of the different sciences is only the study of man in different views. Logic considers us as men of sense; ethics, as men of virtue; criticism, as men of taste; *jurisprudence, as members of society.*”⁴⁹

Nevertheless the Visitant, writing in 1768 as “a very polite sort of a gentleman,” therefore by definition did not write from the point of view of a lawyer, jurispude, or any other particular “character.” To the Visitant, participation in “polite” society—which, as we shall see, had for Wilson a meaning synonymous with what he at times meant by “civil society”—enjoined upon every member of society a “complaisance”⁵⁰ that required suppressing any professional or other distinguishing, hence dissociating, elements of an individual’s particular personality in the individual’s presentation of his or her social persona. In the words of a key “maxim” in the second of the sixteen essays:

[E]very one should do what lays [sic] in his power to please his company. Agreeable to this rule, I would have nothing advanced but what may appear to be of general importance, because nothing else can afford general pleasure. No regard should be paid to the particular circumstances of any one; the Lawyer, the Merchant, and the Politician, should each lay aside what distinguishes him from the rest, and appear in no other character than as a man of sense.⁵¹

46. SMITH, *supra* note 15, at 35.

47. See generally AMERICAN COUNCIL OF LEARNED SOCIETIES, *White, William* in 20 DICTIONARY OF AMERICAN BIOGRAPHY 121 (Dumas Malone ed., 1936); SMITH, *supra* note 15, at 28, 32, 35; BIRD WILSON, MEMOIR OF THE LIFE OF THE RIGHT REVEREND WILLIAM WHITE, D.D., BISHOP OF THE PROTESTANT EPISCOPAL CHURCH IN THE STATE OF PENNSYLVANIA (Philadelphia, C.H. Kay & Co. 1839).

48. The Visitant [No. 11], 2 PA. CHRON., Apr. 4-11, 1768 (James Wilson & William White).

49. The Visitant [No. 1], *supra* note 28 (emphasis added).

50. *Id.*

51. The Visitant [No. 2], 2 PA. CHRON., Feb. 1-8, 1768 (James Wilson & William White) (punctuation modernized for clarity); see also JAY FLIEGELMAN, DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, & THE CULTURE OF PERFORMANCE 65 (1993) (“Being sociable and polite was not only the mark of civilized man but the essence of the civilizing process. ‘Personality’ was against order.”) (endnote omitted); compare BECKER, *supra* note 5,

Although in Wilson's classification of the sciences that study human nature it was "logic" that studies "us as men of sense," what Wilson meant by the terms *logic* and *sense* differs greatly from what is typically meant by those terms today. The terms *sense* and *plain sense* and *good sense*—terms the Visitant used interchangeably⁵²—denominated for him not some morally neutral faculty of the mind emblematic of the discipline of "logic" today. Rather, to the Visitant, "sense" was a "polite" social virtue, indeed, the most important of the social virtues, because it was the most polite, and was therefore the human faculty that best realized and justified "civil society" as an active exercise of moral/civic significance.

For the Visitant "civil society" was in nothing better epitomized than in polite conversation, that is, conversation that is at once "pleasant" and "useful,"⁵³ conversation that evinces "*the natural and graceful expression of the social virtues*,"⁵⁴ above all the cardinal social virtue of "sense."⁵⁵ And it was in discussing such conversation that the Visitant ultimately gave his clearest explanation of what he meant by "sense."

This explanation came in an essay in which he contrasted the precarious sequence of mental acts involved in reasoning with the simpler, more immediate, and more trustworthy operations of "sense."⁵⁶ He also made clear that he was using this pregnant term *sense* to denote not only the operations of the physical senses but also, by analogy, something more. He insisted that "sensible conversation" offers its unique opportunities for moral improvement primarily because "the most *important* moral truths are discovered not by *reasoning*, but by that act of the mind" fittingly known as "*perception*" by the "*moral sense*."⁵⁷ Given the Visitant's view of the moral sense as trustworthy, and as commonly endowed among mankind as are the physical senses, then the Visitant evidently fell in with the distinctive tradition of eighteenth-century Scottish moralists from Hutcheson to Hume and Smith that the truths of morality and virtue are—or can

at 56, on the "regulation" of the "matter and manner of conversation": "The periodical essay in Samuel Johnson's view presented general knowledge appropriate for circulation in common talk . . . introducing 'subjects to which faction had produced no diversity of sentiment such as literature, morality and familiar life.'" *Id.*

52. The Visitant [No. 1], *supra* note 28; The Visitant [No. 3], 2 PA. CHRON., Feb. 8-15, 1768 (James Wilson & William White).

53. The Visitant [No. 14], 2 PA. CHRON., Apr. 25-May 2, 1768 (James Wilson & William White).

54. The Visitant [No. 4], 2 PA. CHRON., Feb. 15-22, 1768 (James Wilson & William White) (emphasis in original).

55. *Cf.* BECKER, *supra* note 5, at 57 ("The 'severe virtues' were rivaled by those virtues measured by the yardstick of culture and taste. Instead of more demanding criteria for measuring truth, the English vocabulary favored the looser usage derived from 'common sense' and 'good sense,' both of which became hardy staples in literary and philosophical discourse.").

56. The Visitant [No. 13], 2 PA. CHRON., Apr. 18-25, 1768 (James Wilson & William White).

57. *Id.* (emphasis in original); *cf.* WORKS, *supra* note 1, at 133.

and should be—matters of consensus.⁵⁸ In fact, by the time Wilson came more fully under the sway of the prevalent “moral Newtonianism” of the day, and the Scottish philosopher Thomas Reid’s moral Newtonianism in particular,⁵⁹ he had moved from a vision of consensus to one of unanimity. In his law lectures, only several paragraphs before he moved to the topic that he or his filial editor formulated as *Of Man, as a Member of Society*, Wilson, following Reid, averred:

All first principles must be the immediate dictates of our natural faculties; nor is it possible that we should have any other evidence of their truth. In different sciences the faculties which dictate these first principles are very different: the eye in astronomy and opticks; the ear, in musick; the moral sense in morals.⁶⁰

And then after a Reidian encomium to the epochal progress that Bacon and Newton had achieved in establishing the incontestable validity of certain first principles in mathematics and physics, Wilson, specifically citing Reid, held out this vision: “If the same unanimity concerning first principles could be introduced into the other sciences as in those of mathematicks and natural philosophy, this might be considered as a new era in the progress of human reason.”⁶¹ As Wilson had said earlier, “[o]ur progress in virtue should certainly bear a just proportion to our progress in knowledge. Morals are undoubtedly capable of being carried to a much higher degree of excellence than the [natural] sciences, excellent as they are.”⁶²

Thus the science that most concerned Wilson was “moral science,” built on the “axioms” perceived by the moral sense. This moral sense the Visitant assumed,

58. The Visitant, [No. 13], *supra* note 56; *cf.* BECKER, *supra* note 5, at 56; FLIEGELMAN, *supra* note 51, at 74 (stating the belief that Jefferson and Wilson and others shared in “a natural rhetoric of consensus”).

59. The literature on this topic is as significant in scope and provocativeness as it is in its refinement. See WILLIAM P. JONES, *THE RHETORIC OF SCIENCE: A STUDY OF SCIENTIFIC IDEAS AND IMAGERY IN EIGHTEENTH-CENTURY ENGLISH POETRY passim* (1966); DOUGLAS BUSH, *Newtonianism, Rationalism, and Sentimentalism, in SCIENCE AND ENGLISH POETRY: A HISTORICAL SKETCH, 1590-1950*, at 51, 51-87 (1950); J.H. Randall, Jr., *The Newtonian World Machine, in SCIENCE & IDEAS: SELECTED READINGS 138, 158-64* (Arnold B. Arons & Alfred M. Bork eds., 1964).

Of special interest for my present purposes: L.L. Laudan, *Thomas Reid and the Newtonian Turn of British Methodological Thought, in THE METHODOLOGICAL HERITAGE OF NEWTON 103* (Robert E. Butts & John W. Davis eds., 1970); LOUISE MARCIL-LACOSTE, *Reid’s Understanding of Newton’s Methodological Rules, in CLAUSE BUFFIER AND THOMAS REID: TWO COMMON SENSE PHILOSOPHERS 124, 124-31* (1982); David F. Norton, *George Turnbull and the Furniture of the Mind*, 36 *J. HIST. IDEAS* 701 (1975); and I. BERNARD COHEN, *SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF JEFFERSON, FRANKLIN, ADAMS, AND MADISON 36-38, 121, 133* (1995).

By the point in Wilson’s law lectures in which he addresses, as Bird Wilson put it, *Man, as an Individual*—that is, when Wilson turned to his basic theory of human nature, Wilson praised Reid above all other philosophers of the age. See *WORKS, supra* note 1, at 213-16; *cf. id.* at 193-94; McCloskey, *supra* note 15, at 15. Wilson also cited Reid prominently in his opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453-54 (1793).

60. *WORKS, supra* note 1, at 225 (punctuation modernized for clarity).

61. *Id.* at 226 (punctuation modernized for clarity).

62. *Id.* at 147 (punctuation modernized for clarity).

in line with the prevailing view of most eighteenth-century British moral sense theorists, to be a common, if not quite universal, attribute of mankind.⁶³ Indeed, as I have indicated above, the idea of commonality lay at the heart of what “sense” generally signified to the Visitant. Nevertheless, in one of his most arresting remarks, prominently placed at the end of his first essay and echoed throughout the series, the Visitant professed: “One particular more in my disposition I must mention, because it is a particular on which I greatly value myself—I prefer the conversation of a fine woman to that of a philosopher.”⁶⁴ The Visitant was quick to explain:

The reflections of the philosopher are deduced in a chain of abstract reasoning, from principles which he has acquired either by reading or observation; hence the connexion between his principles and his conclusions (upon which the truth of the latter depends) is generally slight and uncertain—and frequently erroneous. But the sentiments of a sensible woman, arise in an easy and *natural* way from matters of *common observation*, without the intervention of many intermediate ideas—hence your fair companion will entertain you with more plain, agreeable and just [that is, empirically valid] reflections than [will] the profound philosopher.⁶⁵

Here we have the earliest intimations from James Wilson’s pen of what he was to develop into a distinctive variation on the theme of “the gendered meanings of virtue in Revolutionary America,” to quote the title of a now classic article by Ruth Bloch.⁶⁶ And what was most distinctive about Wilson’s variation on the theme was not only his polite view that “civil society”—as a theater of “common observation” shared through “polite conversation”—in its sociological, moral, and felicitous significances was most perfectly realized “in small companies . . . best when they are composed of near an equal of both sexes,” under the predominating influence of “Ladies” of “sense.”⁶⁷ Going further, Wilson eventually came to expound a view of female citizenship in the American Republic that put such a premium on “sensible” female eloquence *per se* that such eloquence seemed virtually indispensable for securing the felicity of individuals and society in the Republic, and perhaps indispensable for the preservation of the Republic itself.

Yet a corollary of this indispensability was that female citizenship, in order to serve its necessary *civic* function in the Republic, must be exclusively social, or, more precisely, cultivated in and confined to “*civil society*”—civil society most broadly construed, but nevertheless categorically segregated not only from the public domains of government and politics but also from some of the constituent domains of civil society. So closely did Wilson identify society, especially “civil society,” with happiness itself that to him the realization of the felicity

63. The Visitant [No. 13], *supra* note 56; see also WILLIAM L. ROWE, THOMAS REID ON FREEDOM AND MORALITY 129-30 (1991); cf. D. DAICHES RAPHAEL, THE MORAL SENSE 23, *passim* (1947).

64. The Visitant [No. 1], *supra* note 28 (punctuation modernized for clarity).

65. The Visitant [No. 3], *supra* note 52 (emphasis added).

66. Ruth H. Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 SIGNS: J. WOMEN CULTURE & SOC’Y 37 (1987).

67. The Visitant [No. 1], *supra* note 28.

principle—the first principle of society and government in the American Republic—meant exalting the hearth—and, even more, the parlor—above the forum and the agora.

II. THE “NEW” POLITICS OF “CIVIL SOCIETY” AT THE FOUNDING

Professor Bloch, in the above-mentioned article, offers some fascinating observations that she there only began to elaborate and illustrate. In her 1987 article she said:

The movement toward a more personal, domestic, and feminized definition of [social] morality in the 1780s and 1790s was linked to a greater acceptance of institutionalized public order. . . .

...
The political order produced by the Constitution was designed more to protect private virtue than to be the arena for the expression of manly *virtù*.⁶⁸

I need not challenge these generalizations of Bloch's in arguing here that James Wilson's social and constitutional theory—especially where they were “synthesized” or “reconciled” in his ideas about “civil society”—do not fully comport with her generalizations. Indeed, the changes, or developments, in his ideas about the political significance of the social citizenship⁶⁹ of men and women, respectively, *do* illustrate her general appreciation of the “greater acceptance of institutionalized public order” and a certain privatization—or at least socialization—of civic virtue for both men and women. But what her generalizations importantly overlook are the ramifications for reconceptualizing the political significance of social citizenship that Professor Becker has so effectively highlighted with his boldly synoptic account of changing conceptions of “civil society” in the eighteenth century.

For example, in exploring what Becker sees as a largely eighteenth-century transformation, albeit fitful, in which the term “society” . . . lost something of its active and immediate sense” and took on more significance as a “new social space,” Becker takes notice of some of the multiple conceptualizations of this new social space.⁷⁰ Even a single thinker like David Hume could “think” society as an entity transcending its individual parts” in terms of vastly different paradigms—for example, as a “market” or as a “club.”⁷¹ Moreover, the recent work of Peter and Nicholas Onuf, like that of Becker, adds something further that is essential (at least to understanding James Wilson's thought) in accounting for the “movement”—the conceptual changes—about which Bloch attempted to generalize. In discussing the Ratification debates between the Federalists and

68. Bloch, *supra* note 66, at 55.

69. On the liberal conception of social citizenship, especially in the context of the Founding, see Lewis, *supra* note 17, at 384, *passim*. For both a convenient exposition and challenging critique of T.H. Marshall's classic liberal welfare state conception of social citizenship, see Eric Gorham, *Social Citizenship and Its Fetters*, 28 *POLITY* 25 (1995).

70. BECKER, *supra* note 5, at 56.

71. *Id.* at xiii-xiv, 55-58.

Anti-Federalists and the famous “novelty” of a “compound” national republic that compassed a principle of dual sovereignty at the national and state levels, the Onufs press this insight:

Both [the Federalist and Anti-Federalist camps] could fall back on a compound republic novel less in conception than in particular features hammered out in Philadelphia. Historians and political theorists who emphasize the novelty of these arrangements fail to appreciate the founders’ predilection for an old-fashioned way of thinking in which political arrangements, however novel, *must always take into account the purposive, corporate character of social life*. . . .

The political arrangements identified with a compound republic depend on a teleological vision in which purposive association is at the center of human experience and social meaning.⁷²

In my aim here to better understand Wilson’s conceptions of “civil society,” especially in their civic significances, I thus want to heed especially Becker’s emphasis on multiple, simultaneous, or chronologically overlapping paradigms of society, and to heed the Onufs’ emphasis on the significant vestiges of the “old-fashioned” purposive, even teleological notions of social life that survived in the admittedly novel *liberal* republic ingeniously contrived at the Founding.

In an earlier essay on Wilson that I wrote without the benefit of what I now find so provocative and illuminating in the work of Bloch, Becker, the Onufs, and others to which I shall turn here, I tried to shed some light on the political significance for Wilson of the “polite citizenship” *of men* in what Wilson considered to be a new model of civil society in America—even before the Revolution, but all the more so as a dispensation of the Founding period. In that earlier essay I acknowledged Wilson’s “liberal creed that ‘domestick society,’ that is the private social life of each individual, must be deemed intrinsically superior in dignity to all public matters, including law and government.”⁷³ But there, in restricting my focus to male citizenship, I was able to offer an account of how Wilson could harmonize the “liberal” self-regarding aspect of citizenship in America with what he “plainly envisioned” as a “conscientious regard for the public welfare as essential to everyday civic life in the Republic.”⁷⁴

Drawing on remarks that Wilson made repeatedly on different occasions, my earlier work stresses the effects that Wilson thought an unprecedented extension of the right of suffrage would have in inspiring *men* to develop habits of reading newspapers and the like, and addressing—in social settings—civic matters of importance, in conversations no less pleasing and “agreeable” because they were at the same time “instructive” and “disinterested.”⁷⁵ I have previously argued that Wilson’s vision of the galvanizing civic ramifications *in social life* of a suffrage

72. PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814*, at 69-70 (1993) (emphasis added).

73. Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson’s Republican Theory*, 1985 SUP. CT. REV. 359, 383.

74. *Id.*

75. WORKS, *supra* note 1, at 404-05 (from a passage in the 1790-1791 law lectures); *id.* at 787-89 (from Wilson’s speech of December 31, 1789, to the Pennsylvania state ratifying convention).

that was extended to greater numbers of the male citizenry, who under the new national Constitution would be exercising a suffrage that would inspire an expanded patriotism,⁷⁶ was in his day a coherent vision (however naive and optimistic) because of the theory of human nature and conception of "civil society" on which his vision was predicated.

But, among other things, what the ensuing work of many scholars like Ruth Bloch, Marvin Becker, and Peter and Nicholas Onuf now demands is that, in order to give a more historically faithful account of Wilson's elaborately expounded social and civic theory, I must take more account of his ideas about civil society. To Wilson, although lawyer and framer *par excellence*, "civil society" was a concept even less instrumental, even more significant in itself, than I have previously suggested. To note that Wilson, like Publius, subscribed to the basic Lockean tenet that "civil society" precedes "civil government" in point of time and of dignity and authority⁷⁷ is to risk overlooking the centrality to Wilson of his concept of "civil society" as a matter both of first principle and of political discourse.⁷⁸

This centrality becomes clearer, as do the problems it raises, when we compare and contrast what Wilson had to say, first as the Visitant and then decades later as a law professor, on the sociology and civics of gender differentiation. Wilson's leading modern biographer says flatly that in the essays of the Visitant the recurrent discussions of "sex," that is, the distinctiveness of "the Fair Sex," proved the "most successful theme" of the essays overall.⁷⁹ On the basis of the readers' correspondence that the Visitant came to incorporate in some of the later essays, this conclusion seems well justified.⁸⁰ But the matter of gender differentiation seems quite different—less "successful" and more problematic—from the very outset of Wilson's law lectures.

Taken alone, Wilson's inaugural lecture, delivered on December 15, 1790, affords an amply problematic case in point. Although the balance of the lecture series was composed for delivery to fee-paying law students, this inaugural lecture partook of a ceremonial address before a public audience of newsworthy distinction. In attendance were President Washington, his wife, and a host of other national and local dignitaries and "their ladies," who had come to pay their respects to Wilson (by then an Associate Justice of the United States Supreme Court) as he thus assumed his chair as the first professor of law at the College of Philadelphia. As his biographer again surmises, "[t]he moment was, in a sense, the climax of [Wilson's] public career."⁸¹

The ceremonial context of the occasion should hardly be ignored as part of the explanation for what Wilson said or how he said it. In the wider context of

76. See generally Conrad, *supra* note 3.

77. See *id.*; see also text accompanying notes 124-26.

78. For the best and most recent development of essentially this same point with respect to Wilson and Madison—as a matter of fundamental principle to them both—see Lewis, *supra* note 17, at 368-69 & n.30.

79. SMITH, *supra* note 15, at 32-33.

80. See The Visitant [No. 7], 2 PA. CHRON., Mar. 7-14, 1768 (James Wilson & William White).

81. SMITH, *supra* note 15, at 310.

Wilson's public career as a whole, however, there are grounds for interpreting Wilson's inaugural remarks as more than mere ceremonial rhetoric.⁸² If only in light of the earlier essays of the *Visitant*, Wilson's remarks should not be passed over as unconsidered formulaic civility. Indeed, they call to mind the pithy formulation that "[c]ivility, the mutual recognition of each individual's innate human dignity and membership in the political community is, as Edward Shils has argued, at the heart of civil society and, in his words, 'at bottom the collective consciousness of civil society.'"⁸³ But for Wilson on this occasion there were complex and interrelated problems of civility as problems of "mutual recognition" between speaker and audience. These problems began with simple conventional complaisance, but they did not end there. Wilson began:

Ladies and gentlemen, though I am not unaccustomed to speak in public, yet, on this occasion, I rise with much diffidence to address you. The character in which I appear is both important and new. Anxiety and selfdistrust are natural on my first appearance. These feelings are greatly heightened by another consideration, which operates with peculiar force. I never before had the honour of addressing a *fair* audience. Anxiety and selfdistrust, in an uncommon degree, are natural, when, for the first time, I address a fair audience so brilliant as this is. There is one encouraging reflection, however, which greatly supports me. The whole of my very respectable audience is as much distinguished by its politeness as a part of it is distinguished by its brilliancy.⁸⁴

Beyond the manifest allusion in these opening remarks to a presumption of a relationship of "trust,"⁸⁵ a relationship that has figured prominently in what not only Adam Seligman, but others in the Durkheimian tradition too, have lately written about the pre-conditions and indicia of "civil society,"⁸⁶ these opening remarks by Wilson climax with an explicit presumption of universal "politeness." This presumption of the politeness of the entire audience implicates nothing less than Wilson's elaborately considered theory of what "civil society" was and must be—as fact, necessity, and norm—in the New Republic.

Indeed, in the lecture *Of Man, as a Member of Society*, Wilson, so unlike Locke and Publius, in his sharply distinguishing "civil society" from "civil government," nevertheless thoroughly identifies the concept of "civil society" with his concept of "the state." And by the time Wilson came to pen his most famous judicial opinion in the 1793 case of *Chisholm v. Georgia*, he had come

82. For an expert assessment of Wilson's rhetorical virtuosity and versatility, considered in the context of late eighteenth-century Atlantic culture, see David Daiches, *John Witherspoon, James Wilson and the Influence of Scottish Rhetoric on America*, 15 *EIGHTEENTH-CENTURY LIFE* 163, 173 (1991) (describing Wilson's "somewhat grandiloquent and exhibitionist opening public [law] lecture").

83. SELIGMAN, *CIVIL SOCIETY*, *supra* note 4, at 172.

84. *WORKS*, *supra* note 1, at 69 (punctuation modernized for clarity).

85. See *id.* at 232, for further, more general remarks from Wilson on "trust."

86. See SELIGMAN, *CIVIL SOCIETY*, *supra* note 4, at 120-21 (discussing "'precontractual' trust"); see also ADAM B. SELIGMAN, *THE PROBLEM OF TRUST* (forthcoming June 1997); cf. ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS 188-89* (1994). See generally FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995).

to use even the ultimate constitutive term *the People* as equally synonymous with *civil society* and *the state*.⁸⁷

So thoroughly did Wilson absorb into his concept of civil society so many other keywords of contemporary civic theory that in his view, even without benefit of civil "government" or a "constitution," a civil society/a state/a People could become a complete "body politick" for all fundamental civic purposes:

A state [and thus a "civil society" or "a People"] may be described—a complete body of free persons, united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an *artificial* person: it has an understanding and will peculiar to itself; it has its affairs and its interests; it deliberates and resolves; it has its rules [indeed, by definition it has laws]; it has its obligations; and it has its rights. It may acquire property, distinct from that of its members; it may incur debts, to be discharged out of the publick stock . . . ; it may be bound by contracts, and for damages arising *quasi ex contractu*.⁸⁸

So strong was Wilson's conception of the integral identity and practical capability of "civil society" that it became in his view a supreme agential⁸⁹ "moral person."⁹⁰ "Let government—," he said, "let even the constitution be, as they ought to be, the handmaids; let them not be, for they ought not to be, the mistresses of the state," or of civil society.⁹¹ What necessarily creates the supreme identity and capability of "civil society" is a union of "the wills and powers of all the members," as manifested by "convention or consent." Were it not for Wilson's deprecation of constitution and government in respect to society, Wilson's social contract theory could at some points tempt one to think of Rousseau,⁹² in its emphasis on the respective constitutive roles of the actively

87. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793); WORKS, *supra* note 1, at 238-39; cf. WORKS, *supra* note 1, at 109, 270, 401; J.G.A. Pocock, *States, Republics, and Empires: The American Founding in Early Modern Perspective*, in CONCEPTUAL CHANGE AND THE CONSTITUTION, *supra* note 20, at 55, 60-61.

88. WORKS, *supra* note 1, at 239 (first emphasis added) (punctuation modernized for clarity). Nothing in the passage quoted in the text, however, gainsays Wilson's earlier remark in his law lectures that "[g]overnment is, indeed, highly necessary; but it is highly necessary to a fallen state. Had man continued innocent, society, without the aids of government, would have shed its benign influence even over the bowers of Paradise." *Id.* at 87. Moreover, as I indicate *infra*, at 360-61, especially at note 145, Wilson considered law and legal institution to be necessary, essential elements of "civil society" *per se*, before and without the institution of "civil government."

89. See, e.g., ROWE, *supra* note 63, at 129-30; Timothy Duggan, *Active Power and the Liberty of Moral Agents*, in PHILOSOPHICAL MONOGRAPHS—THOMAS REID: CRITICAL INTERPRETATIONS 103, 103-12 (Stephen F. Barker & Tom L. Beauchamp eds., 1976); see also FLIEGELMAN, *supra* note 51, at 153 (discussing the "dominance" in American culture of Reid's strong position on human agency).

90. On the conception of "the state" as "a moral person"—and also as a "legal person"—generally shared by Hobbes, Pufendorf, and Vattel, but not shared by Hume, see Frederick G. Whelan, *Hume and Contractarianism*, 27 POLITY 201, 223 (1994).

91. WORKS, *supra* note 1, at 239.

92. Cf. Garry Wills, *James Wilson's New Meaning for Sovereignty*, in CONCEPTUAL CHANGE AND THE CONSTITUTION, *supra* note 20, at 99-106. But see my reservations of the volume in question expressed in Stephen A. Conrad, *Conceptual Change and the Constitution*, 7 CONST. COMMENTARY 197, 202 (1990) (book review).

consenting individual and the agential collective whole: "In the social compact, each individual engages with the whole collectively, and the whole collectively engage with each individual. These engagements are obligatory because they are mutual. *The individuals who are not parties to them are not members of the society.*"⁹³ Thus Wilson's "account of the formation of civil society,"⁹⁴ as he gives it in his lecture *Of Man, as a Member of Society*, would seem distinctly voluntarist and purposive: "For by a civil society we properly understand the voluntary union of persons in the same end, and in the same means requisite to obtain that end."⁹⁵

III. BEYOND THE "REPUBLICAN MOTHER"

This understanding of civil society as an actively consensual union of persons seeking a shared "end" or "purpose" pursued by means upon which there is also common agreement is of a piece with Wilson's vision of an empirically valid "moral science" of axiomatic first principles. It augments Wilson's credentials as the leader among the Federalist persuasion who had the strongest faith in direct, participatory democracy.⁹⁶ But even in Wilson's early writings as the *Visitant* there was an essential problematic in Wilson's recurring tendency to conceptualize civic obligation in particular and citizenship in general as a matter of individual, active, volitional consent. This problematic was nowhere more evident than in the *Visitant's* categorical differentiation between men and women in their roles in any public sphere, civic or social.⁹⁷ Jay Fliegelman has gone so far as to generalize about this gender differentiation in late eighteenth-century America that, "[b]ecause [a woman] could never occupy the same positions in the public sphere as a man, a public woman was always an object and never a subject."⁹⁸ But though Wilson, amid so many of his gallant remarks as the *Visitant*, left merely implicit in his Addisonian essays of 1768 his own variation on this tendency towards the objectification of women, he addressed the matter directly in his inaugural law lecture.

Both the acute self-consciousness and the somewhat anxious consciousness of his audience that he displayed in his opening remarks, which I have already quoted, were recurrently evident in his lecture. He was quick, for example, to pay conventionally allusive homage to President Washington as "THE MOST

93. WORKS, *supra* note 1, at 239 (emphasis added) (punctuation modernized for clarity).
94. *Id.* at 240.

95. *Id.* at 239 (punctuation modernized for clarity); *cf. id.* at 242 ("[S]ociety is constituted for a certain purpose."); Greene, *supra* note 8, at 379 ("The products of necessity and volition, the free segments of the new societies of colonial British America were, preeminently, societies of independent freeholding families composed of 'free and independent m[e]n' and women deeply engaged, as I have argued elsewhere, in their pursuits of individual happiness.") (footnotes omitted).

96. See McCloskey, *supra* note 15, at 14-17. The most convenient collection of documentary evidence for this point is GEOFFREY SEED, JAMES WILSON 42-69, 122-40 (1978).

97. See, e.g. The *Visitant* [No. 9], 2 PA. CHRON., Mar. 21, 1768 (James Wilson & William White).

98. FLIEGELMAN, *supra* note 51, at 130. *Contra* Lewis, *supra* note 17, at 367 ("In some clear, if unspecified way, women were members of political society . . .").

WORTHY" figure in the already illustrious historic pantheon of American patriots and heroes.⁹⁹ But his manifestly calculated rhetoric did not, as I have said, remain conventionally formulaic throughout. In the entire lecture what might have been most distinctive is how and why Wilson went out of his way to justify categorically excluding from any agential presence in one very important element of the public sphere, *the element of legal culture*—an element in which, in his view, "civil society" and "civil government" profoundly informed one another—those persons he since 1768 had and still professed to esteem as the better half of the American population. As one scholar who has surveyed the topic tells us of the Founding era more generally, "[t]he exclusion of females from the body politic was rarely discussed," at least by the founding fathers;¹⁰⁰ Wilson, like John Adams and Thomas Jefferson, was one of the "few exceptions" in this respect.¹⁰¹

On December 15, 1790, Wilson's by then well-known advocacy of popular democracy, in his political and constitutional theory, and his professedly egalitarian¹⁰² concept of "civil society," which he was to develop in his law lectures, posed for him a complex problem: how *both* to welcome the sizable number of distinguished women in the audience for his inaugural lecture, *and* at the same time to explain why none of these women, no matter how "brilliant," belonged in his audience once the regular course of lectures in legal education got underway. Indeed, after he had dwelled on the importance of education in general, but especially civic education, in a republic—with his remarks couched, unsurprisingly, in terms of respect for classical antiquity as exemplar¹⁰³—he confronted the problem that little he had said thus far, since his opening salutation "Ladies and gentlemen," had been addressed to the many women in his audience. He said abruptly:

99. WORKS, *supra* note 1, at 71-72.

100. Linda Kerber, "History Can Do It No Justice": *Women and the Reinterpretation of the American Revolution*, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION 3, 35 (Ronald Hoffman & Peter J. Albert eds., 1989); *cf.* Lewis, *supra* note 17, at 381; *id.* at 360 (quoting Richard B. Morris).

101. Leslie F. Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51, 54 n.4 (1986); *cf.* MARY BETH NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800, at 247 (1980) ("In the introduction to his course of law lectures, delivered to a sexually mixed audience in 1790, the distinguished attorney James Wilson even felt compelled to discuss the maternal role, under circumstances that had never before seemed to call for commentary on women."). On Adams, see, for example, Joan R. Gundersen, *Independence, Citizenship, and the American Revolution*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y 59, 63-64 (1987), no. 1, 59-77, at 63-64, and ELLEN C. DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869, at 45 (1978). On Jefferson, a number of relevant citations are conveniently collected in Rogers M. Smith, "One United People": *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229, 244 n.42 (1989).

102. WORKS, *supra* note 1, at 241.

103. See generally CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994).

Methinks I hear one of the female part of my audience exclaim—What is all this to us? We have heard much of societies, of states, of governments, of laws, and of legal education. Is every thing made for your sex? Why should not we have a share? Is our sex less honest, or less virtuous, or less wise than yours?¹⁰⁴

And he immediately began to answer these presumed challenges, after he rather congratulated himself for doing so: “Will any of my brethren be kind enough to furnish me with answers to these questions?—I must answer them, it seems, myself? and I mean to answer them most sincerely.”¹⁰⁵

That Wilson forthrightly confronted this matter of exclusion is interesting in itself; his strategy for answering his questions is even more interesting. He began by saying to his female audience: “Your sex is neither less honest, nor less virtuous, nor less wise than ours. With regard to the two first of these qualities, a superiority on our part will not be pretended: with regard to the last, a pretension of superiority cannot be supported.”¹⁰⁶ In so saying Wilson distinguished his approach to the problem at hand from that taken by some others of his era. Much of the difference turns on his distinction between “honesty” and “virtue,” on the one hand, and “wisdom,” on the other.

As many historians have persuasively argued, especially since 1980, when Linda Kerber published *Women of the Republic: Intellect and Ideology in Revolutionary America*,¹⁰⁷ it seems that virtually all the men¹⁰⁸ of Wilson’s day saw the exclusion of women from participatory political citizenship as a requisite means of protecting a unique and essential wellspring of civic virtue from the corrupting effects of direct exposure to the forum and the agora. This view found its fullest expression in what Kerber has explicated as the pervasive myth and iconography of the “Republican Mother.” Historians like Ruth Bloch,¹⁰⁹ Mary Beth Norton,¹¹⁰ Carroll Smith-Rosenberg,¹¹¹ Jan Lewis,¹¹² Rosemarie Zagarrri,¹¹³ and others including Kerber herself,¹¹⁴ have elaborated upon and refined Kerber’s

104. WORKS, *supra* note 1, at 85.

105. *Id.* at 86.

106. *Id.* (punctuation modernized for clarity).

107. LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980).

108. On the views in this matter of an American woman of the time who achieved exceptional civic distinction, even prominence, see ROSEMARIE ZAGARRI, *A WOMAN’S DILEMMA: MERCY OTIS WARREN AND THE AMERICAN REVOLUTION* 72-77 (1995).

109. In addition to the article already cited, see Ruth H. Bloch, *American Feminine Ideals in Transition: The Rise of the Moral Mother, 1785-1815*, 4 *FEMINIST STUD.*, June 1978, at 101.

110. In addition to the book cited above, see Mary Beth Norton, *The Evolution of White Women’s Experience in Early America*, 89 *AM. HIST. REV.* 593 (1984).

111. See Carroll Smith-Rosenberg, *Dis-Covering the Subject of the “Great Constitutional Discussion,” 1786-1789*, 79 *J. AM. HIST.* 841 (1992).

112. Jan Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 *WM. & MARY Q.* 689 (1987).

113. Rosemarie Zagarrri, *Morals, Manners, and the Republican Mother*, 44 *AM. Q.* 192 (1992).

114. See, e.g., Linda K. Kerber et al., *Forum—Beyond Roles, Beyond Spheres: Thinking About Gender in the Early Republic*, 46 *WM. & MARY Q.* 565 (1989).

original insights. And Gordon Wood has incorporated these insights into his Pulitzer-Prize-winning reconsideration of the last several decades of scholarship on the American Revolution.¹¹⁵ But Kerber's classic original formulation is still worth quoting at length:

The paired female images of so many engravings of the Revolutionary era that show both Minerva . . . and Columbia, surrounded by emblems of domestic work and prosperity, suggest the difficulty of merging the two themes [of citizenship and domesticity. During the early republic a] synthesis was needed that would facilitate women's entry into politics without denying women's commitment to domesticity. The search for this synthesis has permeated women's history in America from the time of the Revolution to our own [In the early Republic the] role of guarantor of civic virtue . . . could not be assigned to a formal branch of government. Instead it was hoped that other agencies—churches, schools, and families—would fulfill that function. And within families, the crucial role was thought to be the mother's: the mother who trained her children, taught them their early lessons, shaped their moral choices. . . . Motherhood was discussed almost as if it were a fourth branch of government, a device that ensured social control in the gentlest possible way. . . . The Republican Mother was to encourage in her sons civic interest and participation. She was to educate her children and guide them in the paths of morality and virtue. But she was not to tell her male relatives for whom to vote. She was a citizen but not really a constituent.¹¹⁶

Kerber's understanding of female citizenship in the new American nation as derived from, or at least analogized to, the role of Republican Motherhood has become a prevailing—although not altogether unchallenged¹¹⁷—historiographical orthodoxy, at least as far as it goes.¹¹⁸ But when Kerber's interpretation, as she

115. RADICALISM, *supra* note 7, at 356-57.

116. KERBER, *supra* note 107, at xii, 199-200, 283 (footnote omitted).

117. The most significant challenge, or alternative perspective, has come recently from Jan Lewis, in her article largely devoted to Wilson. Emphasizing "the distinction between a republican and liberal understanding of citizenship" and highlighting the liberal rather than the republican character of Wilson's civic theory, Lewis writes:

According to the tenets of republicanism, participation in the republic, and not simply voting, should have been restricted only to those who held enough property to secure a stake in the community and maintain their independence. Nascent liberals such as Wilson and Madison thought of the nation in much more expansive terms. Every free person who inhabited it was, in fact, a citizen, deserving of its protection and entitled to representation in the halls of government. In this context, women, who explicitly were to be represented but who just as explicitly were not permitted to represent themselves, became the touchstone of the modern, liberal state. By construing women as interested citizens incapable of representing themselves, liberalism provided a justification for the state: protecting those who could not protect themselves.

Lewis, *supra* note 17, at 368-69 & n.30.

118. For a recent, wide-ranging sample of scholarship that reviews and reconsiders the general topic in question, see Carole Shammas, *Anglo-American Household Government in Comparative Perspective*, 52 WM. & MARY Q. 104, 128-44 (1995). And of special interest for my purposes is the following criticism of Kerber: "In her treatment of the Enlightenment, Kerber scants the contributions of the Scots, devoting only one highly critical paragraph to Lord Kames." Zagari, *supra* note 113, at 211 n.5 (citations omitted).

and others have elaborated it, is reexamined on its own terms and especially in light of Wilson's words, it would seem that Kerber's interpretation and its progeny all slight something that they nonetheless recognize. And it is something that Wilson, for one, pointedly emphasized: Even more than the "virtue," that is, the other-regarding neo-classical civic virtue associated during the early Republic with the female sex (or at least with white, middle-class women at some times and in some regions¹¹⁹), and even more than women's "honesty," which in Wilson's day was still a synonym for civic rectitude and probity, Wilson emphasized that, as an empirical matter—as an evident social fact—women were hardly less "wise" than men.

As explicitly indicated in the long passage quoted above, Professor Kerber recognizes the prominence of the image of Minerva in the iconography of the early national period; and yet she and those who have followed her lead omit from their interpretive matrix (perhaps because of a recent historiographical climate that has made so much of the problematics of "domesticity" and of allocentric "civic virtue"¹²⁰) any sustained attention to this essential element of "wisdom" in republican citizenship. For the American founding fathers, however, anxious concern about where to find sufficient *wisdom* to secure and cultivate republicanism in the new nation was a fundamental problem in classical and early-modern republican theory.¹²¹ As Wilson put the matter, while the "goodness," or virtue, of "the people at large"—that is American society—must be the basis of the Republic, "wisdom," together with "strength," must be one of the twin "pillars" upon which any truly republican government would be "erected."¹²²

Immediately faced with another problem, the awkward task of greeting and then virtually dismissing his female audience on December 15, 1790, Wilson turned this problem of wisdom into a rhetorical opportunity. It was an opportunity for Wilson to begin to explain how and why he could postulate as a developing empirical reality the sort of "civil society" in America that was to him the necessary foundation of American republicanism.

For in digressing from his introductory remarks on the importance of the study of the "science" of law, he adverted to his female audience with the

119. See, for example, some of the recently emphasized distinctions as to race, class, religion, region, and time period including SUSAN JUSTER, *DISORDERLY WOMEN: SEXUAL POLITICS AND EVANGELICALISM IN REVOLUTIONARY NEW ENGLAND* (1994) (addressing religion, region, and men using the feminine language of community) and Norton, *supra* note 110. On class, see ELIZABETH BLACKMAR, *MANHATTAN FOR RENT, 1785-1850*, at 117 & n.13 (1989).

120. *E.g.*, MARK E. KANN, *ON THE MAN QUESTION: GENDER AND CIVIC VIRTUE IN AMERICA* 245-69 (1991) ("The Keepers of Civic Virtue").

121. *See, e.g.*, THE FEDERALIST NO. 6, *supra* note 19, at 35 (Alexander Hamilton) (discussing "[p]erfect wisdom and perfect virtue"); THE FEDERALIST NO. 10, *supra* note 19, at 62 (James Madison) (discussing "wisdom" of the chosen body); THE FEDERALIST NO. 37, *supra* note 19, at 230 (Alexander Hamilton) ("[I]f we have wisdom and virtue enough . . ."); THE FEDERALIST NO. 85, *supra* note 19, at 591 (Alexander Hamilton) (discussing "good sense and wisdom").

122. *WORKS*, *supra* note 1, at 303.

Montesquieuean¹²³ question, "What are laws without manners?"¹²⁴ Thus, to borrow language that Professor Pocock has used with reference to Edmund Burke,¹²⁵ Wilson at a stroke removed the topic of law "from the key of jurisprudence [as traditionally conceived] to that of culture."¹²⁶ The way was then open for Wilson to attenuate his problem of postulating an American civil society sufficient to the needs of his republican constitutional theory by sublimating¹²⁷ female *social* citizenship above even the "economics of virtue"¹²⁸ into the essential political resource of "wisdom."

Wilson was no Burkean (although in some respects he might be understood as something of a republican American counterpart of Burke¹²⁹). Wilson thoroughly subscribed to the late eighteenth-century natural rights doctrine that Burke so thoroughly and eloquently rejected. Thus Wilson abhorred nothing more than the prescriptive constitutionalism of which Burke became one of the most insidious (because one of the most eloquent) advocates, just at the moment when Americans, in Wilson's view, were trying to redeem the full promise of republicanism for the first time in human history. He was convinced that the American Founding and its survival depended on the precious, if not historically miraculous, resource of "the politics of discussion."¹³⁰ Wilson proudly remarked of the Philadelphia Convention of 1787 and the ensuing Ratification process:

After a period of six thousand years has elapsed since the Creation, the United States exhibit to the world the first instance, as far as we can learn, of a nation, unattacked by external force, unconvulsed by domestic insurrections, assembling voluntarily, deliberating fully, and deciding calmly,

123. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 7 (Thomas Nugent trans., Hafner Publishing Company 1949) (1748), where Montesquieu stated that throughout his study he had by design:

[N]ot separated the political from the civil institutions, as I do not pretend to treat of laws, but of 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 laws as that of these relations and objects.

124. WORKS, *supra* note 1, at 85.

125. In *Letters on a Regicide Peace* (1790), Burke wrote, "Manners are of more importance than the laws . . . [because manners] aid morals, they supply them, or they totally destroy them." J.G.A. POCKOCK, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, in *VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY* 37, 49 (Richard Rorty et al. eds., 1985).

126. J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW—A REISSUE WITH A RETROSPECT* 382 (1987).

127. For Wilson's sublimating conception of marriage, see Lewis, *supra* note 17, at 379-80. For Wilson's sublimating conception of "revolution," see Dennison, *supra* note 10, at 175-76. See generally George Dargo, *Parties and the Transformation of the Constitutional Idea in Revolutionary Pennsylvania*, in *PARTY AND POLITICAL OPPOSITION IN REVOLUTIONARY AMERICA* 98, 111 (Patricia U. Bonomi ed., 1980) (discussing the "sublimation of politics" in late eighteenth-century America).

128. I borrow this term from Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1031 (1984).

129. See Stephen A. Conrad, *James Wilson's "Assimilation of the Common-Law Mind"*, 84 *Nw. U. L. REV.* 186, 196, 208 (1989).

130. I borrow this phrase from Samuel H. Beer in conversation.

concerning that system of government under which they would wish that they and their posterity should live.¹³¹

This American breakthrough in accomplishing a civic founding by means of the politics of discussion, which had been and continued to be inculcated by the habits and resources of life in a polite, civil society, was thus hardly something Wilson took for granted. In fact, during the course of his lecture *Of Man, as a Member of Society*, he adverted to one of the most effective contemporary challenges to his characterization of the American Revolutionary settlement as a civic founding achieved by an established civil society that had harnessed its deliberative and discursive resources to the task. The challenger was William Paley, an otherwise “sensible and ingenious writer,”¹³² who had written in his *Principles of Moral and Political Philosophy* (1785) that it was idle fancy to imagine that the formation of a “civil government” could ever originate from an “antecedent” civil society based on an “original convention of the people.”¹³³ It is interesting to read the passage from Paley that Wilson cited but did not quote, because how Wilson would have answered Paley—or did answer him implicitly in his discussion of civil society in the law lecture in question—raises into sharp relief the problems with which Wilson had to cope in his optimistic yet anxious faith in the constitutive capability of civil society. Paley had insisted:

[N]o government in the universe began from this original [a merely social convention of the people]. Some imitation of a social compact may have taken place at a *Revolution*. The present age has been witness to a transaction which bears the nearest resemblance to this political idea of any of which history has preserved the account or memory. I refer to the establishment of the united states of *North America*. We saw the *people* assembled to elect deputies, for the avowed purpose of framing the constitution of a new empire. We saw this deputation of the people deliberating and resolving upon a form of government, erecting a permanent legislature, distributing the functions of sovereignty, establishing and promulgating a code of fundamental ordinances, which were to be considered by succeeding generations, not merely as laws and acts of the state, . . . but as limitations of power, which were to controul and regulate the future legislature.—Yet even here much was presupposed.—In settling the constitution many important parts were presumed to be already settled—the qualifications of the constituents who were admitted to vote in the election of members of Congress, as well as the mode of electing representatives, were taken from the old forms of

131. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VOLUME II: RATIFICATION BY THE STATES—PENNSYLVANIA 353 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY] (punctuation modernized for clarity). Compare a quite similar passage in the law lectures, WORKS, *supra* note 1, at 284.

132. WORKS, *supra* note 1, at 240. Compare Professor Pocock’s pithy generalization about Britain in the mid-1780s: “In the domain of philosophy, the reality of divine will and the autonomy of moral values were being asserted in terms calculated to reinforce the *authority of society*; the advent of Scottish commonsense philosophy and the rapid adoption of William Paley’s writings into the Cambridge curriculum are instances of this.” J.G.A. POCOCK, *The Varieties of Whiggism From Exclusion to Reform*, in VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY, *supra* note 125, at 215, 278 (emphasis added).

133. WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 416-17 (photo. reprint 1978) (London, n.p. 1785).

government. That was wanting from which every social union should set off, and which alone makes the resolutions of the society the act of individual, the unconstrained consent of all, to be bound by the decision of the majority; and yet, without this previous consent, the revolt, and the regulations which followed it, were compulsory upon dissentients.¹³⁴

As I have remarked, Wilson repeatedly insisted that the formation of a distinctive American civil society predated the Revolution. Indeed, he insisted at the 1787 Philadelphia Convention that when the American colonies had declared their independence from Britain they had done so “Unitedly” as one People, one integral civil society already functioning as a body politic.¹³⁵ And Wilson characteristically professed an ardent optimism about the capability of that pre-Revolutionary and enduring American civil society to meet the civic demands of the regime of republican government projected by the several state constitutions and the Federal Constitution of 1787. His fundamental reliance on “civil society” in this respect made it all the more important for him to distinguish conceptions of civil society that were proper to American constitutional republicanism from conceptions that posed a threat to it. He thought that one of the greatest threats to American republicanism came from the conception of civil society espoused by Burke and Blackstone, precisely because they estimated the constitutive capability of civil society to be even greater than, or at least very different from, what he felt it ever could or should be.

It was this problem—the challenge from Burke and Blackstone and their epigones—that required Wilson ultimately to acknowledge and even emphasize the constitutive limitations of civil society. Indeed, he did so with a vehemence that might seem at odds with so much of what he otherwise had to say about the *immanent* “original powers of Society,” as the source and genius of American republicanism, that superseded in authority even the Constitution—and even “a scrupulous regard to *ordinary* rights.”¹³⁶ But the explanation for Wilson’s occasional relegation of “society” to a second order of authority in his civic theory turns precisely on his idea of immanence. It was an idea of immanence that he took, again, from the Scottish Enlightenment in America. This was an idea that synthesized and exalted the authority of Nature and Nature’s God in a way that preserved for American republicanism the “*natural* rights” tradition from its English detractors.¹³⁷

When Burke said, as Wilson quoted him, “‘It is the *civil social* man . . . and *no other*, whom I have in my contemplation,’”¹³⁸ it was crucially important for Wilson to distinguish that point of view from his own. Wilson went as far as to say, “it is but candid to consider human nature in her improved, and not in her most rude or depraved forms. ‘The good experienced man,’ says Aristotle, ‘is the

134. *Id.* (punctuation modernized for clarity).

135. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 35, at 324.

136. 2 *id.* at 469 (emphasis added).

137. I use this crucial word “immanence” in the sense in which it is so aptly applied to Thomas Reid’s theistically informed idea of the authority of nature in P.M. Heimann, *Voluntarism and Immanence: Conceptions of Nature in Eighteenth Century Thought*, 39 J. HIST. IDEAS 271, 278-79 (1978).

138. WORKS, *supra* note 1, at 589 (emphasis in original).

last measure of all things.”¹³⁹ For all Wilson’s reliance on the authority of civil society, properly conceived—that is, conceived with an emphasis on individual human nature as reciprocally constituting and constituted by civil society—nevertheless, in his civic theory he could not rely on the authority of civil society *per se* exclusively, as did Burke and Blackstone—or, better to say, he could not rely on it in the way that they did.

In a word, their conception of “civil society” was essentially *artificial*, whereas Wilson’s was essentially *naturalistic*, albeit in ways that “historicized” the authority of nature by portraying civil society as “a process by which fundamental [that is, natural] principles were made concrete in the course of history itself.”¹⁴⁰ To Wilson, the excellence and capability of civil society derived from its immanent character and function: Civil society was the institutionalization and the process—the immanence—of *individual* human nature and *natural* society in the process of reaching their intrinsic potential for improvement. In civil society, then, nature was not transcended but, rather, was itself ever more fully realized. To assert to the contrary, as did Burke and Blackstone, was to deny the reality¹⁴¹ of “natural law” and “natural liberty” and “natural rights.” All these, Wilson insisted—law, liberty, and fundamental rights—must never be dislodged from “the stable foundation of nature.”¹⁴² If Burke and Blackstone’s deracinated conception of civil society:

be a just view of things, then . . . [t]he connexion between man and his natural rights is intercepted by civil society. . . . [And] then, under civil society, man is not only made *for*, but made *by* the government: he is nothing but what the society frames: he can claim nothing but what the society provides. His natural state and his natural rights are withdrawn altogether from notice.¹⁴³

IV. NATURE, “SENSE,” AND THE RHETORICAL CONSTITUTION OF CIVIL SOCIETY

Against the artificial, positivist conception of civil society in its civic significance as espoused by those arch anti-republicans Burke and Blackstone, Wilson posited and defended a conception of civil society that he claimed to derive largely from that paragon of republican lawyers Cicero.¹⁴⁴ In Wilson’s Ciceronian conception of civil society, law and legal institutions—although again, *not* civil government—were necessary, essential elements:

139. *Id.* at 139. On Wilson’s conception of “the good experienced,” as taken from Aristotle *via* Francis Hutcheson, see WHITE, *supra* note 28, at 134-35; *cf. id.* at 101.

140. Lester H. Cohen, *The American Revolution and Natural Law Theory*, 39 J. HIST. IDEAS 491, 497 (1978); *cf.* Dennison, *supra* note 10, at 178.

141. For background on eighteenth-century “realism,” see 1 ELIZABETH FLOWER & MURRAY G. MURPHEY, *A HISTORY OF PHILOSOPHY IN AMERICA* 215-241 (1977).

142. WORKS, *supra* note 1, at 587-88.

143. *Id.* at 589 (emphasis added).

144. See Stephen Botein, *Cicero as Role Model for Early American Lawyers: A Case Study in Classical “Influence”*, 73 CLASSICAL J. 313 (1978).

To civil society, indeed, without including in its description the idea of civil government, the name of *state* may be assigned, by way of excellence. It is in this sense that Cicero seems to use it in the following beautiful passage. "Nothing, which is exhibited on our globe, is more acceptable to that divinity which governs the whole universe than those communities and assemblages of men, which, *lawfully* associated,—*jure sociati* [*sic*—are denominated states."¹⁴⁵

Cicero, together with the Alexander Pope of *The Essay on Man* and so many of the less poetic British moralists of the eighteenth century, ranked among Wilson's favorite expositors of the naturalness of social life by locating the basis for society in individual human nature.¹⁴⁶ Wilson accorded distinctive authority to Cicero's guidance because Cicero "knew so well how to illustrate law by philosophy."¹⁴⁷ As in the case of the poet Pope, so in the case of Cicero, it was masterful rhetoric that was the chief object of Wilson's admiration. To Wilson Cicero excelled so greatly not in his originality, reasoning, or even his erudition, but rather in his skill at "illustrating"—in the Latinate sense, bringing to light—with his eloquence those "truths" and "certainties" the authority of which was, when thus illustrated, utterly self-evident. This authority, as Wilson quoted Cicero, partook of an epistemology of self-evident truth that Cicero ascribed to Plato.¹⁴⁸ In our own day Hannah Arendt has similarly associated Plato's concept of an effectively legitimating "source of authority" for government and laws with a "subsuming" naturalistic "rule of reason or *common sense*," which, "like the law of nature or the commands of God, must not be man-made."¹⁴⁹

In any event, Wilson's social and constitutional theory were suffused with the authoritativeness of common sense naturalism. It is fitting, then, for Adam Seligman to select Wilson as a spokesman for late eighteenth-century American notions that:

[T]he law of nature, posited as superior to any other, is woven into the fundamental terms of the civic polity. . . . For Wilson, as for other judges and lawyers of the last decade of the eighteenth century, the law of nature was "immutable, not by the effect of arbitrary disposition but because it has its foundation in the natural constitution and mutual relations of men and things."¹⁵⁰

145. WORKS, *supra* note 1, at 238-39 (emphasis added) (punctuation modernized for clarity); *cf. id.* at 280 (discussing judicial administration of the law). Additionally, compare various remarks by Wilson in the Pennsylvania Ratification debates found 2 DOCUMENTARY HISTORY, *supra* note 131, at 344-45, 346, 356, 358-59.

146. *See, e.g.,* WORKS, *supra* note 1, at 236-37. This is a point of special interest and importance to Adam Seligman in his "Afterword" to this Symposium. *See* Adam B. Seligman, *Individualism as Principle: Its Emergence, Institutionalization, and Contradictions*, 72 IND. L.J. 503 (1997).

147. WORKS, *supra* note 1, at 236.

148. *See id.*

149. HANNAH ARENDT, *What is Authority, in BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 91, 110-11 (Viking Press 1968) (1954) (emphasis added).

150. SELIGMAN, CIVIL SOCIETY, *supra* note 4, at 81 (quoting Wilson, in his *Lectures on Law*).

And so subsuming was Wilson's naturalism, as Seligman also notes, that it reflected the "unique interweaving of religious and civil traditions that characterized the civil society tradition in the United States" by taking as axiomatic the "unity" of "the law of nature and the law of revelation."¹⁵¹

Cicero's eloquence and his legendary republican stature thus served Wilson well in his attempt, in his own republican theory, to preserve "law" as a hallmark of "civil society."¹⁵² At the same time Wilson, invoking Cicero, mitigated the importance of legalism¹⁵³ by elucidating ("illustrating") the basis of civil society in human nature and the natural sociability in human relations as phenomena "acceptable to that divinity, which governs the whole universe." Hence it was all the more appropriate that Wilson turned extensively to Cicero in explaining the exclusion of women from the legal culture—as a necessary function of their unique contribution to maintaining the society that in the Republic was, and must *naturally* take its place, above the civic arena.

In his inaugural law lecture Wilson laid the groundwork for this characteristically Ciceronian turn by acknowledging that there were historically well-known women who had proved not only by opportunity "accomplished" but by character "able" as civic leaders. He cited three uncontestable examples: "Semiramis of Ninevah; Zenobia, the queen of the east; and Elizabeth of England."¹⁵⁴ Yet, to Wilson, all three of these "characters . . . had . . . too much of the masculine in them."¹⁵⁵ Women, Wilson contended, were not made [by the "governing divinity"] for "the management of publick affairs. . . . [T]hey were made for something better." And of that something better, he told his female audience, "you form the better part—I mean society—I mean particularly domestick society: there the lovely woman shines with superiour lustre."¹⁵⁶

In short order Wilson proceeded to invoke the liberal republican tenet that the realm of society is superior to the realm of government, and that government is necessary to society only because humankind exists on earth in "a fallen state."¹⁵⁷ Thereupon Wilson rhapsodized at length, gallantly and poetically (quoting

151. *Id.* at 83. I believe that the most extensive treatment of this topic in print remains MAY G. O'DONNELL, *JAMES WILSON AND THE NATURAL LAW BASIS OF POSITIVE LAW* (1937); see also HAAKONSSSEN, *supra* note 38, at 312-13 (discussing Wilson's embrace of "the usual combination of moral realism and Christian utilitarianism" of Thomas Rutherford, whom Wilson took "as a household name amongst his educated audience"); cf. WHITE, *supra* note 28, at 227.

152. WORKS, *supra* note 1, at 238-39, 280; cf. 2 DOCUMENTARY HISTORY, *supra* note 131, at 344-46, 356, 358-59.

153. At times Wilson went beyond mitigating the importance of legalism to express evident reservations about legalism *per se* as a value or end itself. After all, said Wilson at one point, "the citizen was made for the sake of the man. . . . If a law is even harmless, the very circumstance of its being a law, is itself a harm." WORKS, *supra* note 1, at 579.

154. *Id.* at 86.

155. *Id.* This passage is noticed by ZAGARRI, *supra* note 108, at 72 and Zagarrì, *supra* note 113, at 207-08.

156. WORKS, *supra* note 1, at 86; see also *infra* text accompanying notes 203-14 (discussing both Wilson and Greene on the constitutive importance of the wider domains of civil society beyond the family).

157. WORKS, *supra* note 1, at 87.

Milton for a poetic climax), upon the theme of female beauty as evinced most compellingly “[t]hough the bloom of youth be faded [in] the beaming emanations of the mind” of a mature woman.¹⁵⁸ To acknowledge these distinctive emanations of the female mind was to acknowledge “the important purposes which female virtue is fitted and intended to accomplish [in] a good system of law and government.”¹⁵⁹

With all this said, Wilson was prepared at last for his Ciceronian turn, a turn that economizes to good effect on the recurring argument of “social feminism”¹⁶⁰ that women are more virtuous than men, provided women remain removed from the competition of the marketplace,¹⁶¹ the contentiousness of politics, and the conflict of the battlefield. But the historically recurring paradigmatic argument of social feminism is not precisely the argument Wilson ultimately makes. Nor, for all he says, is his argument faithfully Ciceronian. Wilson’s is an argument that takes Cicero’s words out of their own context and changes their meaning by using Cicero’s rhetoric in a way Wilson thought justified by the best principles of the scientific Common Sense philosophy of his time.

Here in its entirety is Wilson’s ostensibly Ciceronian encomium to his female audience:

To protect and to improve social life, is, as we have seen, the end of government and law. If, therefore, you have no share in the formation, you have a most intimate connexion with the effects, of a good system of law and government.

That plan of education which will produce, or promote, or preserve such a system is consequently, an object to you particularly important. But if you would see such a plan carried into complete effect, you must, my amiable hearers, give it your powerful assistance. The pleasing task of forming your daughters is almost solely yours. In my plan of education of your sons, I must solicit you to cooperate. Their virtues, in a certain proportion—the refinement of their virtues, in a much greater proportion, must be moulded by your example.

In your sex, too, there is a *natural*, an easy, and often a pure flow of diction, which lays the best foundation of that eloquence, which, in a free country, is so important to ours.

The style of some of the finest orators of antiquity was originally formed on that of their mothers, or of other ladies to whose acquaintance they had the honour of being introduced. I have already mentioned the two Scevolae among the illustrious Roman characters. One of them was married to Laelia, a lady whose virtues and accomplishments rendered her one of the principal ornaments of Rome. She possessed the elegance of language in so eminent a degree that the first speakers of the age were ambitious of her company. The

158. *Id.* at 87-88.

159. *Id.* (punctuation modernized for clarity).

160. See generally NAOMI BLACK, *SOCIAL FEMINISM* (1989); JEAN B. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (1981).

161. For telling evidence of the social reality of women’s complex roles in “commerce” in the 1790s in America, see the recent article by Susan Branson, *Women and the Family Economy in the Early Republic: The Case of Elizabeth Meredith*, 16 *J. EARLY REPUBLIC* 47 (1996).

graces of her *unstudied* elocution were the purest model by which they could refine their own.

Cicero was in the number of those who improved by the privilege of her conversation. In his writings he speaks in terms of the warmest praise concerning her singular talents. He mentions also the conversation of her daughters and grand daughters as deserving particular notice.

The province of early education by the female sex was deemed, in Rome, an employment of so much dignity that ladies of the first rank did not disdain it. We find the names of Aurelia and Attia, the mothers of Julius Caesar and of Augustus, enumerated in the list of these honourable patronesses of education. The example of the highly accomplished Cornelia, the daughter of the great Africanus, and the mother of the Gracchi, deserves uncommon attention. She shone, with singular lustre, in all these endowments and virtues that can dignify the female character. . . . Cicero had seen her letters: his expressions concerning them are very remarkable. "I have read," says he, "the letters of Cornelia, the mother of the Gracchi; and it appears, that her sons were not so much nourished by the milk, as formed by the style of their mother."¹⁶²

Here Wilson is drawing on Cicero's philosophical essay *Brutus*, composed in 46 B.C. as a survey of Greek and Roman eloquence. When one consults Cicero's own text, however, one sees that Wilson, in his selective quotation and paraphrase of Cicero, changes Cicero's meaning¹⁶³ when Wilson associates exclusively with women the eloquence and conversational style that Wilson praises. Cicero for his part finds it "obvious" that Laelia's eloquence "echoed the elegance of her father's diction."¹⁶⁴

Thus, to Cicero, there was nothing necessarily distinctive or unique about women's capacity with respect to *sermo*, which Wilson translates as *style*, and which he correctly associates with ordinary and informal speech—that is, conversation—as contrasted with *oratio*, oratory, which proceeds by formal rules.

The language of common speech *in a social setting* is what *sermo* denotes, as contrasted with the setting of *contentio*, which is the assertive, argumentative context of *oratio*. Thus the Latin word *sermo* does connote *style* and can be so translated. It is style of a particular sort. It is style that aims at elegance in the social significance of the term *elegance*, in other words, the achievement of complaisance, which itself is a procedure of mediating between and among individuals, as conversational interlocutors, by putting a premium on the associative, often shared even if unconsciously shared, standards of taste.¹⁶⁵

162. WORKS, *supra* note 1, at 88-89 (emphasis added) (punctuation and paragraph structure modernized for clarity). On parts of this passage, see the comments of RICHARD, *supra* note 103, at 72-73.

163. Compare the more general remark in PAUL A. RAHE, *REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* 565 (1992) ("Wilson thought it proper to exalt the status of women in a fashion utterly foreign to classical antiquity. . .").

164. MARCUS TULLIUS CICERO, *BRUTUS; ON THE NATURE OF THE GODS; ON DIVINATION; ON DUTIES* 131 (Hubert M. Poteat trans., University of Chicago Press 1950).

165. The Visitant [No. 2], *supra* note 51.

In the pre-Revolutionary Addisonian essays of the *Visitant* in 1768, Wilson had made his case that the conversation of women generally offers more “good sense,” more wisdom, than that of philosophers precisely because the moral perception evinced in the sensible woman’s conversation is closer to nature. By 1790, in a greatly changed civic context, where both the manners and the constitutional regime of Americans had become thoroughly republican,¹⁶⁶ the significance of female conversation and eloquence as a fund of social wisdom¹⁶⁷ had accordingly become so much more important as to seem to Wilson—in theory—a civic necessity. In the new American nation, civil society as an institution took on a significance epitomized by Wilson’s defense of natural rights, natural law, and the sociability intrinsic to human nature—in response to various challenges. These challenges came not only from the anti-republican arguments of Burke and Blackstone, but also from friendly skeptics like Paley, who doubted that even in America any civil society, as a social union, had the constitutive capability to create a republic by means of a “conservative”¹⁶⁸ revolution. Yet it was this constitutive capability of civil society, conserving and economizing on its cultivated natural civic resources, that was thus fundamental to Wilson’s American republicanism:

In many parts of the world, indeed, the idea of revolutions in government is, by mournful and indissoluble association, connected with the idea of wars, and all the calamities attendant on wars. But joyful experience teaches us, in the United States, to view them in a very different and much more agreeable light—to consider them only as progressive steps in improving the knowledge of government and increasing the happiness of society and mankind. It is true that institutions which depend on the form or structure of the preceding government must fall when that form or structure is taken away. But establishments *whose foundations rest on the society itself* cannot be overturned by any alteration of the government which the society can make.¹⁶⁹

To Wilson the institution of “civil society” in the new Republic was not only fundamental, and not only “interwoven,” as Seligman shows, with the authority of nature—including the moral authority of the original “natural language” of mankind¹⁷⁰ and of revealed religion—but also with a style that the *Visitant* and others called “politeness.” American Independence and American Republicanism notwithstanding, in the shared extra-political Atlantic culture of the late eighteenth century,¹⁷¹ in America, as in Britain, there remained some truth to the

166. See Russell L. Hanson, “*Commons*” and “*Commonwealth*” at the American Founding: Democratic Republicanism as the New American Hybrid, in *CONCEPTUAL CHANGE AND THE CONSTITUTION*, *supra* note 20, at 165, 167.

167. See *infra* note 180 and accompanying text (discussing Wilson’s view of the common law as “funded social wisdom”).

168. See Dennison, *supra* note 10, at 177-78; cf. TERENCE MARTIN, *THE INSTRUCTED VISION: SCOTTISH COMMON SENSE PHILOSOPHY AND THE ORIGINS OF AMERICAN FICTION* 12 (1961).

169. *WORKS*, *supra* note 1, at 284 (emphasis added) (punctuation and paragraph structure modernized for clarity); cf. *id.* at 770-71 (Wilson’s November 26, 1787, speech in the Pennsylvania convention).

170. Schreyer, *supra* note 33, at 157-58.

171. *WORKS*, *supra* note 1, at 229.

late Augustan maxim that “[s]tyles and institutions [were] ultimately the same thing.”¹⁷²

To borrow a cleverly phrased insight from the literary historian Daniel Cottom, in Wilson’s view of the social, and thus also necessarily the civic, significance of the polite style and good sense of the female citizenry of the Republic, “taste” became more than “an alphabetical anagram” of “state”; it became a metaphor or analog for what Wilson meant by “state.”¹⁷³ Cottom quotes Schiller as saying of “the beautiful”—but, in different words, Wilson’s master Thomas Reid argued for the same proposition:¹⁷⁴ “[T]aste alone brings harmony into society, because it gives harmony to the individual. . . . [O]nly communication of the beautiful unites society, because it refers to that which is common to all.”¹⁷⁵ As we have seen, what Wilson found distinctively beautiful in this respect was something he identified with the good sense, and more particularly with the sensible, conversational eloquence of the mature (that is, well socialized) members of the “fair sex.” In Wilson’s vision of American civil society at the Founding, as he said in one of his law lectures: “A union of hearts and affections, as well as a union of counsels and interests, is the very soul of a confederated republic. This is a subject on which it is almost impossible to say too much, or to speak with too much zeal.”¹⁷⁶ And in his inaugural lecture he attempted at least to begin to explain how and why such a civil society as an affective union must be rhetorically constituted in a way that relied on women to cultivate and inculcate social wisdom and socializing eloquence by eschewing any “particular character”—even the character of one knowledgeable (as every American male citizen should be¹⁷⁷) in a matter so essential to civil society as law.

172. PAUL FUSSELL, *THE RHETORICAL WORLD OF AUGUSTAN HUMANISM: ETHICS AND IMAGERY FROM SWIFT TO BURKE* 232 (1965).

173. DANIEL COTTOM, *THE CIVILIZED IMAGINATION: A STUDY OF ANN RADCLIFFE, JANE AUSTEN, AND WALTER SCOTT* 24 (1985).

174. Peter Kivy, *The Logic of Taste: Reid and the Second Fifty Years*, in THOMAS REID: *CRITICAL INTERPRETATIONS* 113, 120 (Stephen F. Barker & Tom L. Beauchamp eds., 1976).

175. COTTOM, *supra* note 173, at 24.

176. WORKS, *supra* note 1, at 266 (punctuation modernized for clarity); *cf.* FLIEGELMAN, *supra* note 51, at 74 (on “the belief that there is a larger perspective (a greater good) that comprehends the interests of all parties”).

177. WORKS, *supra* note 1, at 73.

The knowledge of those rational principles on which law is founded ought, especially in a free government, to be diffused over the whole community. In a free country every citizen forms a part of the sovereign power: he possesses a vote, or takes a still more active part in the business of the commonwealth. The right and the duty of giving that vote, the right and the duty of taking that share, are necessarily attended with the duty of making that business the object of his study and inquiry.

Id. (punctuation modernized for clarity).

CONCLUSION

In this essay I have by no means intended to reduce Wilson's constitutional theory entirely to his social theory. I do endorse, and hope I have contributed something to, Samuel Beer's interpretation of Wilson's idea of "social union" as fundamental to Wilson's constitutional theory.¹⁷⁸ But in so saying I do not and need not disagree with J.C.D. Clark's emphasis on Wilson's express belief that "[n]ot until the Constitution of 1787 did the inhabitants of the thirteen states find a master symbol which rallied a national consciousness and encouraged *the ascription of their culture to a prior Americanism.*"¹⁷⁹

And here I have hardly meant to reduce the problematics of Wilson's republicanism to what he had to say about female social citizenship and its function in what I have called the rhetorical constitution of civil society. I have argued at length in the past, and still believe, that it is impossible to understand not only Wilson's legal but also his constitutional theory without important reference, among other things, to the authority he accorded to the institution of Anglo-American common law, an institution he elaborately portrayed as yet another "fund" of "social wisdom" quite as necessary to American republicanism as was any other.¹⁸⁰ But as much store as Wilson put in "the constitutionalism of the common-law mind,"¹⁸¹ there is no gainsaying that Wilson was a true believer in "the constitutive function of language," to use a phrase much in fashion in academic circles for some time now. In the lecture *Of Man, as a Member of Society*, Wilson, reflecting both the tendency of early American political culture and the teachings of Thomas Reid,¹⁸² unambiguously linked rhetoric with reality and improvement in language with the improvement of society:

The attention paid to language is one distinguishing mark of the progress of society towards its most refined period: as society improves, influence is acquired by the means of reasoning and discourse: in proportion as that influence is felt to increase, in proportion will be the care bestowed upon the methods of expressing conceptions with propriety and elegance. In every

178. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 341-77 (1993).

179. J.C.D. CLARK, *THE LANGUAGE OF LIBERTY, 1660-1832: POLITICAL DISCOURSE AND SOCIAL DYNAMICS IN THE ANGLO-AMERICAN WORLD* 60 (1994) (emphasis added); cf. 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH*, 21 n.1 (Chicago, Charles H. Sergel & Co. 1891) (quoting James Wilson); John M. Murrin, *A Roof without Walls: The Dilemma of American Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY*, *supra* note 6, at 333.

180. Conrad, *supra* note 129, at 214.

181. Stephen A. Conrad, *The Constitutionalism of "the Common-Law Mind"*, 13 *LAW & SOC. INQUIRY* 619 (1988).

182. See generally JOHN ZVESPER, *POLITICAL PHILOSOPHY AND RHETORIC: A STUDY OF THE ORIGINS OF AMERICAN PARTY POLITICS* (1977); cf. Lewis, *supra* note 17, at 368 (relating her use of the concept of "imagined communities" in interpreting the thought of both Madison and Wilson). On Reid, see Schreyer, *supra* note 33, at 155 and STEPHEN K. LAND, *THE PHILOSOPHY OF LANGUAGE IN BRITAIN: MAJOR THEORIES FROM HOBBS TO THOMAS REID* 215-35 (1986).

polished community, this study has been considered as highly important

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Because Wilson placed so much emphasis on the social and civic significance of language, and because he agreed with the widely held view that law was a necessary constituent element not only of any just civil government but also of any “civil society,” his categorical dissociation from legal culture of the “fair sex,” characteristically disposed to eloquence and wisdom, presents an evident problem, even an apparent contradiction. I have taken note of the extent to which Wilson tried to address the problem—or resolve the contradiction—in his inaugural lecture, with a theory of conservation of female virtue and wisdom and eloquence by means of a salutary exclusion of women, to leave them not so much innocent of but undistracted by the *materia* of legal culture. Yet I think Wilson’s attempt to explain and justify this exclusion is not only unsuccessful as a resolution of the apparent contradiction between the roles of social and political citizenship. More importantly, it shows Wilson yet again as a founder who, although painstakingly erudite and painfully ambitious as a theorist, at times does much more to reveal the problems of early American republicanism than to resolve them.¹⁸⁴

Wilson’s law lectures, taken as a whole, and I trust, even as selectively quoted and otherwise represented in this essay, exemplify the problem of many late eighteenth-century Americans’ anxious ambivalence about the nature and legitimacy of law. Gordon Wood remarks, in a section entitled “The Ambiguity of American Law,”¹⁸⁵ in his indispensable book on the development of American constitutionalism in the early Republic:

It began to seem to some [in America] 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. . . . 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.¹⁸⁶

And Wood singles out Wilson for Wilson’s recognition of the problem and the “need” in question.¹⁸⁷

At the Philadelphia Convention of 1787 and in his law lectures, Wilson did articulate with a distinctive candor and clarity the need to understand law as taking its legitimacy from three sources, all of which were necessary and interrelated, but none of which was sufficient unto itself—that is: politics, morality, and consent.

It was this last element “consent” that Wilson most often expressly emphasized as both the touchstone of legitimate law and the core idea of popular sovereignty

183. WORKS, *supra* note 1, at 231.

184. Cf. HAAKONSSON, *supra* note 38, at 337 n.67 (discussing Wilson’s “tortuous but remarkable discussion of self-imposed obligation”).

185. WOOD, *supra* note 6, at 291-305.

186. *Id.* at 303, 305.

187. *Id.* at 304-05.

in a true republic.¹⁸⁸ But Wilson's operative conception of "consent," like Locke's,¹⁸⁹ was so egregiously complex as to be ambiguous at best, if not irreconcilably self-contradictory. His discussion of "consent" in his lecture *Of Man, as a Member of Society* is an especially telling case in point. For there he says repeatedly that membership in "civil society" entails "voluntary," indeed volitional, active, individual consent:

The only rational *and natural* method . . . of constituting a civil society is by the convention or consent of the members who compose it. For by a civil society we properly understand the voluntary union of persons in the same end. . . . This union is a benefit, not a sacrifice: civil is in addition to natural order. . . . In the social compact, each individual engages with the whole collectively, and the whole collectively engage with each individual. These engagements are obligatory because they are mutual. *The individuals who are not parties to them are not members of the society.*¹⁹⁰

But membership in civil society—what in this essay I have called "social citizenship"—is evidently for Wilson analytically quite distinct from what he himself calls (political?) "citizenship." In his inaugural lecture Wilson said plainly that "[i]n every free country, every citizen . . . possesses a vote"¹⁹¹—a political right possessed by women nowhere in the early American republic (except briefly in New Jersey¹⁹²). And he hastened to clarify, and attempted to explain, that in his civic vision "the fair sex" was properly to "have no share in the formation . . . of law and government."¹⁹³

Yet in his lecture *Of Man, as a Member of Society*, Wilson ultimately revealed that his evident distinction between social and political citizenship was not a distinction he wanted to maintain. Nor could he have maintained it, I would add, unless he had been willing to depart from the prevailing American attitude—which even he could not fully articulate in a coherent and comprehensive theory—that considered politics, morality, and consent as necessarily inseparable sources of legitimation for law and government. For example, in this lecture in question, which I have taken throughout this essay as Wilson's principal set piece on the topic of "civil society," Wilson went farther than he ever did elsewhere towards expounding a conception of "volitional citizenship," based on active and immediate consent, that James Kettner has

188. See, e.g., WORKS, *supra* note 1, at 187 ("Consent is the sole principle on which any claim, in consequence of human authority, can be made upon one man by another.") (punctuation modernized for clarity); cf. Dennison, *supra* note 10, at 180 ("This idea of consent was the kernel of the concept of popular sovereignty, a concept Wilson called the '*panacea*' in politics.") (citation omitted).

189. See Julian H. Franklin, *Allegiance and Jurisdiction in Locke's Doctrine of Tacit Consent*, 24 POL. THEORY 407 (1996).

190. WORKS, *supra* note 1, at 239 (emphasis added) (punctuation and paragraph structure modernized for clarity).

191. *Id.* at 73.

192. See Judith A. Klinghoffer & Lois Elkis, "*The Petticoat Electors*": *Women's Suffrage in New Jersey, 1776-1807*, 12 J. EARLY REPUBLIC 159 (1992).

193. WORKS, *supra* note 41, at 88.

shown us was *eventually* to become *the* prevailing conception of American citizenship in the new nation.¹⁹⁴

But even in this lecture Wilson equivocates, by alluding to an alternative conception of “consent”—a conception neither “immediate,” nor “active,” nor strictly “volitional,” *nor even individual*. He says in a key passage, which “comprehends” in general terms but does not here explain the complex theory of consent that emerges in his law lectures overall, “In a free state [that is, a free society], *the consent of every citizen* to its [the society’s] institution and government ought to be evinced *either* by express declarations *or* by the strongest and justest presumptions.”¹⁹⁵

Here Wilson at last leaves no doubt that for him membership in society is a conception of “citizenship,” social citizenship. While this social citizenship entails “consent,” that consent need not be express at all—as long as it is otherwise evinced by the “strongest” and “justest” presumptions. Here Wilson is using the eighteenth-century vocabulary of empirical evidence; and, indeed, for Wilson the very best empirical evidence of consent is not an express declaration of will at all. As he had said in an earlier lecture:

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 [group, social, rather than individual] *consent*; and that this consent rests upon the most solid basis—experience as well as opinion.¹⁹⁶

Throughout the law lectures Wilson repeats his preference for this conservative conception of consent manifested in “custom”—social customs of the undifferentiated society at large.¹⁹⁷ As I have noted in passing, above,¹⁹⁸ and at length elsewhere,¹⁹⁹ Wilson tended to associate this social phenomenon of custom with the institution of the common law. But legal institutionalization was hardly essential to Wilson’s basic conception of the superior authority of custom as the corporate agency that most effectively and legitimately forms and governs a society.

After all, as Gordon Wood has recently reminded us, it was not until “the Revolution of 1800” (when the Jeffersonian Republicans swept the Federalist “party” from power) that “the age-old unity between social authority and political

194. See James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 28 AM. J. LEGAL HIST. 208, 242 (1974) (“By the beginning of the nineteenth century, then, Americans had only begun to discover the complexity of the question, ‘Who are the People?’”); cf. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 247, *passim* (1978).

195. WORKS, *supra* note 1, at 246 (emphasis added) (punctuation modernized for clarity). On the “place” Wilson found “for women in the social compact,” and for their “important role,” in his view, “in constituting society,” see Lewis, *supra* note 17, at 373, 375-76, *passim*.

196. WORKS, *supra* note 1, at 102 (emphasis in original) (punctuation modernized for clarity).

197. *E.g.*, *id.* at 122, 123, 184, 190.

198. See *supra* text accompanying note 180.

199. See generally Conrad, *supra* note 129.

authority was broken."²⁰⁰ And as to the distinctive historical "moment" of Wilson's law lectures, Wood warns against simple or determinate interpretations: "The decade of the 1790s—the decade of Federalist dominance—is the most awkward in American history, a decade seemingly unrelated to what preceded or followed it, a fleeting moment of heroic patriarchal dreams"²⁰¹

Even if Wood somewhat overstates the exceptional awkwardness of the 1790s, his general point is well taken and quite in accord with what I have tried to add here to Adam Seligman's and Marvin Becker's remarks about the "paradigmatic," even "privileged," character of the end of the eighteenth century in America, as one "moment" in the long and continuing history of the idea of "civil society."

At such an "awkward," unsettled, not to mention contentious, moment in the era of Revolutionary settlement of liberal republicanism in America, Wilson in his law lectures was hardly in a position—and had never been inclined—to lay the foundation of American law and government exclusively in constitutive acts of will or even of political process. Thus, for example, even though he begins to develop his conception of (male, political) citizenship as derived from immediate, active, and freely given and "discretionary" consent, he does not end there. Ultimately for Wilson, citizenship (notwithstanding, for example, the contingent "right of emigration" at will that citizenship entails under any truly free government) is not only an achievement of individual, political will, it is, while very much a matter of "rights," just as much a matter of "gratitude" and "debt" to "the state" for its protection and benefits.²⁰² Thus Wilson ultimately, characteristically, and necessarily "interweaves," to use Seligman's word, his jural conception of "citizenship" with an affective conception of membership in civil society ("the state"). Without this rhetorical interweaving of political and social citizenship, the former would prove wanting in the natural, moral dimension that is necessary in a republic to fully legitimate it. Or, at the least, Wilson leaves us with his apparent conclusion that political citizenship and social citizenship are necessary complements of one another.

This same conclusion about the necessary, complementary nature of political and social citizenship—and, indeed, the primacy of the latter—is twice suggested in Professor Greene's "Comment." And Greene's remarks call to mind, even though they do not fully correspond with, what I take to be the single most important recurring argument of Wilson's lecture *Of Man, as a Member of Society*: that the greatest good—the greatest quantum of human happiness—is to be realized not in the "domestick sphere" and not in even the noblest endeavors

200. Gordon S. Wood, *The Would-Be Gentleman*, N.Y. REV. BOOKS, August 8, 1996, at 36, 38 (reviewing ALAN TAYLOR, WILLIAM COOPER'S TOWN: POWER AND PERSUASION ON THE FRONTIER OF THE EARLY AMERICAN REPUBLIC).

201. *Id.* at 37. Compare generally the magisterial volume that I have reason to surmise was very much in Professor Wood's mind when he wrote the sentence quoted, STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993).

202. WORKS, *supra* note 1, at 243, 245.

in politics and government, but rather in the innumerable and expansible "associations" (as both Wilson and Greene call them²⁰³) of "civil society."²⁰⁴

At one point Professor Greene says of the "societies" created over time by the settlers in colonial British America that "one observer after another" characterized those societies as having been created "by a concentration on agriculture; economic prosperity; well-regulated families; *concentric circles of neighborhoods, associations, and institutions that fostered social hospitality, industry, activity, and a powerful impulse towards improvement . . .*"²⁰⁵ Shortly thereafter, Greene avers, again from the perspective of the social historian, that for colonial British Americans, among "the ends of civil society," of special importance was "the great end of facilitating the pursuit of happiness by individuals who composed that society; and that, that pursuit would be, for most people, conducted far more satisfyingly in the society of the family, neighborhood, or local civic institutions than in the small political arena that characterized the colonies."²⁰⁶

At least by the time Wilson composed his law lectures, if not, indeed, by the time he helped pen the essays of *The Visitant*,²⁰⁷ Wilson's vision of "civil society" would seem to have focused on the universal, pervasive nature of "sociability"—and on its tendency to embrace ever expanding spheres of realization. Wilson, in exalting "society" over "publick affairs," had said in his inaugural lecture that he meant "particularly domestick society."²⁰⁸ Indeed, Wilson made such an important place for what Professor Greene calls "well-regulated families" that Wilson at one point in his lectures posited the very "origin" of all "society" in "the institution of marriage"; yet, again he invoked Cicero as authority.²⁰⁹ But Wilson's forward-looking vision of "civil society" emphasized not the superseded matters of origins but the promising intrinsic principles of society, above all the "improvement," the "progress," and "enlarge[d] . . . sphere of pleasure and enjoyment" that those principles promised.²¹⁰ For "sociability . . . insinuates herself into the hearts of every rank and class of men, and mixes in *all* the various modes and arrangements of life."²¹¹ Thus Wilson concluded that within the sphere of:

203. *Id.* at 235.

204. Contrast the well-considered interpretation of Wilson in RAHE, *supra* note 163, at 565, 568, 1046 n.84, and in the index entry at 1200, *s.v. Wilson, James* ("Wilson . . . denies primacy to politics . . . exalts politics nonetheless").

205. Greene, *supra* note 8, at 379 (emphasis added).

206. *Id.* at 380.

207. See those passages in the essays of "The Visitant" in which felicity is closely associated with expansible circles of "conversation": *The Visitant* [No. 1], *supra* note 28; *The Visitant* [No. 2], *supra* note 51; and *The Visitant* [No. 4], *supra* note 54. See especially, for the general proposition regarding material and immaterial "wants and desires," that "we are perfect in proportion as our pleasures are multiplied," found in *The Visitant* [No. 5], 2 PA. CHRON., Feb. 22-29, 1768 (James Wilson & William White).

208. See *supra* note 156 and accompanying text.

209. WORKS, *supra* note 1, at 598.

210. *Id.* at 236 and 235, in the order cited.

211. *Id.* at 234 (emphasis added).

a single family . . . [no doubt] some room will be afforded for social enjoyments, and for the finer operations of the mind. Still greater pleasures and advantages would be obtained by the union of a few families in the same neighborhood. They would undertake and execute laborious works for the common good of all; and social emotions would operate in a less contracted circuit. Associations still larger will enlarge the sphere of pleasure and enjoyment, and will furnish more diversified and delightful exercise to our powers of every kind.²¹²

This is a vision of maximizing felicity in civil society that puts little more premium on the “domestick sphere” than it does on “politicks,” and that is a vision not so much of the pursuit of *individual* happiness as of the “reciprocal”²¹³ experience of happiness as a function of enlarged social life. It is a vision of happiness more social than it is either private or “publick”; more “republican,” perhaps, than “liberal”; more a professor’s adduced ideal than an emergent nation’s reality; and, accordingly, more a vision of the powerful, albeit briefly powerful, capability of rhetoric than of the capability of human behaviors too otherwise absorbed to be guided by theory.

If considered in this light, Wilson’s general concept of “civil society”—positing its origins and its destined progress in individual human nature and the naturalness of social relations—and his occasional, derivative conceptions of “civil society”—such as the Visitant’s idealization of polite society and the law professor’s hypostatization of a neo-Ciceronian rhetorical constitution of “civil society”—all can take on meaning as symptoms. They can seem to be symptoms of the ordeal of one of the most prominent lawyers and most ambitious—although ultimately unsuccessful²¹⁴—theorists among the founders in the enterprise of trying to understand and explain the meaning of law and government in a new, indeed, still nascent liberal republican society. To the historian of ideas—of early American law, government, or civil society—Wilson’s anxious ordeal and his failure in this definitive enterprise of the late eighteenth-century “Founding” are interesting matters in and of themselves. Yet even to engaged theorists today whose concerns lie with what they take to be the persistent, inherent problem of “the ambiguity, and the choices, behind all rule systems”²¹⁵ in law, politics, and government, Wilson’s example might also be interesting, as a case study drawn from the “moment” when the problem was just coming to be recognized but not yet fully acknowledged in America.

212. *Id.* at 235 (punctuation modernized for clarity).

213. *Id.*

214. See, in agreement, HAAKONSSON, *supra* note 38, at 340-41; *cf.* Conrad, *supra* note 3, at 64-70.

215. Kathleen B. Jones, *On Authority: Or, Why Women Are Not Entitled to Speak*, in NOMOS XXIX: AUTHORITY REVISITED 152, 165-66 (J. Roland Pennock & John W. Chapman eds., 1987).