

# Civil Society and the American Foundings

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A commentator is fortunate these days to be able to begin with a compliment. Stephen A. Conrad has provided us with an erudite and authoritative paper. His principal achievement is to explain the function and centrality of the concept of *civil society* in the social, legal, and political thought of the Scottish-born lawyer James Wilson. By doing so, he makes a significant contribution to understanding the relationship between that concept and the construction of the American Republic. Along the way, Professor Conrad also makes a second important contribution. By identifying wisdom, as well as virtue and honesty, as one of the attributes women brought to civil society, he uses Wilson's observations on the role of women in civil society to underline Wilson's belief in the superiority of the social—the domestic—realm to the realm of government and thus to deepen the conception of republican motherhood formulated by Linda Kerber and significantly elaborated by Ruth Bloch. I have no quarrel with Professor Conrad's treatment of these subjects, the principal subjects of his paper, and nothing to add to them. What I propose to explore briefly is the social and cultural context within which James Wilson developed and employed his conception of civil society. More specifically, by engaging in a brief exercise in the social history of ideas, I want to examine somewhat more explicitly than has Professor Conrad some of the possible sources of that conception.

In many respects, James Wilson is an ideal subject for consideration at a symposium on "Law and 'Civil Society.'" Thoroughly educated in the principles of the Scottish Enlightenment, Wilson was an active participant in both the American Revolution and the establishment of the United States, who left behind a relatively large and penetrating body of pamphlets, essays, and speeches on some of the principal issues associated with those events. Equally important, he was a philosophical lawyer, whose *Lectures on Law* in the early 1790s represent perhaps the most extensive and thoughtful commentary on the relationship among society, law, and government produced by any member of the so-called founding generation.

Yet, in one crucial respect, Wilson was an atypical member of that extraordinary group. He was not a creole, not a native-born American. Of course, many British- or European-born people served as generals on the American side during the War for Independence, and an immigrant, J. Hector St. John de Crèvecoeur, played a major role in the intellectual construction of America during that era. Among the most significant political actors on the broad public stage, however, only Wilson and Thomas Paine were immigrants, and, if one extends the inquiry on American uses of the concept of civil society during the Revolutionary era to include a consideration of the sources of those uses, the immigrant presents a special problem. For with all immigrants—with, for instance, both Wilson and Paine—the irresistible tendency among students of

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their thought has been to focus, not upon what they observed or learned from their American experience, but upon the ideas they brought with them from their native countries. Because, especially over the past two decades, scholars have been eager to sort out the ways in which Scottish Enlightenment ideas impinged upon and informed the American Founding and because Wilson's writings seemingly provide a rich venue for addressing this problem, Wilson scholarship is particularly prone to this tendency.

Wilson himself, however, in the essays he wrote with William White in 1768 under the joint pen name "the Visitant," identifies three sources of knowing, or, as he phrased it, "three methods by which" people "may be instructed in virtue": "*precepts, history and experience.*"<sup>1</sup> I suggest that eighteenth-century American conceptions of civil society, Wilson's included, may have derived at least as much from history and experience as from any of the precepts imported from Scotland.

To make this case, I can begin with Adam Seligman's recent observations, referred to by Professor Conrad, that "if the theory of civil society received its fullest articulation in the Scottish Enlightenment, the historical model of this theory was seen to reside across the Atlantic,"<sup>2</sup> and that the United States "provided for the philosophers of the eighteenth and nineteenth centuries (and for many thereafter) the model of civil society, with its voluntary associations, separation of Church and State, federalist (as opposed to statist) concepts, and protection of individual liberties."<sup>3</sup> If this was true for European philosophers, it was even more true, I contend, for social and political theorists who resided in America during the era of the American Revolution.

On the face of it, the claim that late eighteenth-century American conceptions of civil society were deeply rooted in and informed by American social experience seems so truistic that, in making it, I do no more than state the obvious. Yet, as a historian of the early modern British-American world, I am more than a little embarrassed to acknowledge that the perversity of much scholarship on the American Revolution makes such a statement necessary. So intent have some scholars been upon assimilating the American Revolution to the great European revolutions, upon emphasizing its revolutionary character and radical discontinuity with the American past, that they have by and large neglected to explore the bearing of earlier American social experience upon the events and developments of the American Revolution, including what Professor Conrad calls the "rhetorical constitution of civil society."

This neglect is encouraged by the conception of the Revolution and the creation of a national political system as *the founding* and of the people who presided over those events as *the founders*. If we are thinking only about the founding of the American national state, such language elicits no objection. There was no American state and, hence, no political entity or political society that could be called America before the middle of 1776, and the American state in which we now live, the American state so much celebrated by contemporary

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1. The Visitant, [No. 15], 2 PA. CHRON., May 2, 1768 (James Wilson & William White).

2. ADAM B. SELIGMAN, THE IDEA OF CIVIL SOCIETY 61 (1992).

3. *Id.* at 62.

European philosophers and American political analysts, did not come into being until the late 1780s. Along with Madison, Adams, Franklin, Hamilton, and their associates, Wilson was indeed a founder of that state.

Yet if we are thinking about civil society in those areas of America that became the United States, such a conception is fraught with serious problems. For those civil societies were not "founded" during the late eighteenth century; they had already constructed themselves through a long process lasting, in all but one case, between a century and a century and three-quarters. When these societies came together to form the American nation between 1775 and 1800, what they experienced was a second founding.

This is not merely a semantic or an academic quibble, especially not for a social historian or for any analyst concerned with understanding eighteenth-century American conceptions of civil society. To conceive of the establishment of the colonies as the first founding is to call attention both to their long histories as political societies at the time of the Revolution and to open up the possibility for understanding the important relationship between those histories and the rhetorical constitution, the contemporary understanding of the meaning of civil society in late eighteenth-century America.

From the beginnings of English colonization early in the seventeenth century, both the actual process of settlement—of social formation—and the ways in which that process was conceived facilitated the emergence of such ideas and the priorities they represented. From Barbados north to New England, settlers thought of themselves as involved in a massive civilizing process that would substitute settled agricultural societies of the sort they had left behind in Europe for the hunting societies they encountered among the native Indians and would thereby turn the American wilderness from a barbarous into an improved, a civil, place.<sup>4</sup>

As the first founders of every new society in colonial English America conceived of this process, they crossed the Atlantic, discovered new countries suitable for habitation, secured possession of those countries by dealing with or defeating the Indians, cleared the wilderness, and introduced whatever forms of settled agriculture seemed most appropriate to the new sites in which they found themselves. To supply their wants during the earliest phases of this process, they frequently reverted to more primitive forms of economic and social activity, to hunting, like the Indians, or, in many cases, to grazing and raising livestock. But the larger project in which they were engaged was the establishment of settled agricultural societies, and, as they individually established their mastery over particular pieces of ground, made them fit for European-style agriculture, and built houses and estates for themselves and their families or prospective families, they together reorganized the physical landscape into farms and urban communities and began the slow process of creating the social infrastructures through which they would together live and which would form the foundations for the articulation of a civil society. Whether they entered into formal compacts to which, initially, all settlers explicitly consented (as, for instance, was the case

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4. See JACK P. GREENE, *THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800* (1993).

with the Plymouth colonists) or, whether, far more commonly, they simply adapted the well-known practices and rules of English common law to their new situations, they 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 through their own industry and activities. From these early beginnings, the “natural progress”<sup>5</sup> of agriculture and the development of the commercial networks to make that agriculture profitable both settled “the affairs of the society . . . on an easy and secure foundation,”<sup>6</sup> as Wilson observed, and produced in the colonies, as Adam Smith noted, a “natural progress in the arts”<sup>7</sup> that led ineluctably in the direction of civility and refinement.

In the experience of colonial British Americans, moreover, this process was not limited to the earliest, or first, founding. Rather, as many late eighteenth-century observers pointed out—among them Crèvecoeur and Samuel Williams, whose 1794 *The Natural and Civil History of Vermont* contains what is certainly the most extensive, systematic, and sophisticated contemporary analysis of what he referred to as the “state of society” in America<sup>8</sup>—as settlers marched toward the “interior parts of the country,” they again and again repeated the experience of the first settlers, first reverting to hunters but slowly, in Crèvecoeur’s words, changing the “hideous barbarous country” of the “great woods” into “fine, well-regulated district[s],” until “a general decency of manners” prevailed.<sup>9</sup> In its various zones—from the primitive frontier, to what Crèvecoeur referred to as middle zones (of the sort in which Wilson himself resided in Carlisle, Pennsylvania, when he first came to the colonies), to the polite and more heavily commercialized east—colonial British North America thus at once and thereafter at almost every moment up to Wilson’s time exhibited the full range of stages through which societies passed in their advance to commercial civilization.

Dating from the first founding and deeply rooted in the American experience, this understanding of the process of social development as a progress from rudeness to refinement, from lesser to more advanced forms of social organization, was, by the time Wilson reached the colonies in the 1760s, so thoroughly engraved in the collective consciousness of free Americans that Wilson and White’s brief recapitulation, in one of the Visitant’s essays, of the four-stage theory so dear to Scottish conjectural historians, must have seemed to most readers a restatement of the obvious.<sup>10</sup> Long before the American Revolution, American social development had indeed been a blueprint, an elaborate historical demonstration, evident in literally thousands of cases, of the

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5. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 565 (R.H. Campbell et al. eds., 1976) (1766).

6. JAMES WILSON, THE WORKS OF JAMES WILSON 227, 231 (Robert G. McCloskey ed., 1967) [hereinafter WORKS].

7. 2 SMITH, *supra* note 5, at 565.

8. 2 SAMUEL WILLIAMS, THE NATURAL AND CIVIL HISTORY OF VERMONT 352 (2d ed., Burlington, Vt., Samuel Mills 1809).

9. J. HECTOR ST. JOHN DE CRÈVECOEUR, LETTERS FROM AN AMERICAN FARMER 72-73 (John Seelye ed., 1981) (1782).

10. The Visitant, [No. 5], 2 PA. CHRON., Feb. 29, 1768 (James Wilson & William White).

process by which civil society took shape. The history of the colonies was only incidentally about war and politics or, other than in New England, which was atypical of colonial British American cultural development, about religious successes and failures. Rather, it was the greater story of the *social* transformation in little more than a century and a half of significant portions of North America and the West Indies, a grand story which could be richly and endlessly illustrated in the successful rise of individuals to competence, substance, and fortune, as in Crèvecoeur's recounting of the career of Andrew, the Hebridean: "a poor man, advancing . . . from oppression to freedom, from obscurity and contumely to some degree of consequence—not by virtue of any freaks of fortune, but by the gradual operation of sobriety, honesty, and emigration."<sup>11</sup>

Moreover, the characteristics associated with the societies that had taken shape as a result of this transformation must have seemed to a learned Scottish immigrant like Wilson almost a perfect demonstration of Scottish Enlightenment theories of civil society. 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"<sup>12</sup> and women deeply engaged, as I have argued elsewhere, in their pursuits of individual happiness.<sup>13</sup> Notwithstanding the fact that many of those men and women found their happiness in the possession of black slaves, the societies they created were characterized, said one observer after another, 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; mild, if not always "perfect freedom and equality"<sup>14</sup> of religion; mild, cheap, and highly participatory government that was suspicious of the intrusions of foreign power and intent on keeping authority in local hands; a small civil establishment and low taxes; and a "warm and uniform attachment to liberty."<sup>15</sup>

In these essentially self-regulating societies, society, in Wilson's words, was evidently not "the scaffolding of government" but government was "the scaffolding of society."<sup>16</sup> The end of government and law was to "protect and to improve social life"<sup>17</sup> by making sure that the lands, goods, chattels, and rights "collected by the labour and industry of individuals" remained, inviolably, "their property,"<sup>18</sup> and the measure of a good government was the extent to which it promoted "the peace, happiness, and prosperity, the increase, and the affections

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11. CRÈVECOEUR, *supra* note 9, at 90.

12. WORKS, *supra* note 6, at 81.

13. See JACK P. GREENE, *PURSUIITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE* (1988).

14. 2 WILLIAMS, *supra* note 8, at 423.

15. WORKS, *supra* note 6, at 777.

16. *Id.* at 86.

17. *Id.* at 88.

18. *Id.* at 233.

of the people.”<sup>19</sup> What better demonstration could there have been of that fundamental principle of civil society: that “the happiness of the society” ought to be “the *first* law of every government”?<sup>20</sup>

In America, Samuel Williams emphasized at length the foundations for freedom thus derived directly out of the “state of society.”<sup>21</sup> The “natural, easy, independent situation, and spirit, in which the body of the [free] people were found, when the American war came on”<sup>22</sup> and the broad “civil freedom” they enjoyed, Williams explained, were the “constant product and effect”<sup>23</sup> of the operation of the societies that the founders, that is, the *first* founders, and their descendants and later immigrants had constructed. In such conditions, he thought, “the common farmer in America had a more comprehensive view of his rights and privileges, than the speculative philosopher of Europe, ever could have of the subject.”<sup>24</sup> Political writers during the Revolution, Williams asserted in remarks that he specifically applied to Paine and might have extended to Wilson, met with such “amazing success,” not “because they taught the people principles, which they did not before understand; but because they placed the principles which they had learned” from “the state of society in America . . . in a very clear and striking light, on a most critical and important occasion.”<sup>25</sup> Long before they formally became republican in 1776, the British colonies in America, as Adam Smith pointed out in *The Wealth of Nations*, were republican in their manners and their governments.<sup>26</sup> The “whole system of American Republicanism,” which Williams defined as the belief that government should limit itself to the three simple functions of “do[ing] justice, protect[ing] property, and defend[ing] the country,” was founded less on some “artificially contrived” system “of political checks, balances, and arrangements” than on the distinctive social conditions Americans had created during their earlier histories.<sup>27</sup>

From the perspective of the broader literature of social analysis in colonial and Revolutionary America, one can readily understand that colonial British Americans had, long before they could have read the works of the Scottish Enlightenment, subscribed to the ideas that society—what the Scots meant by the term *civil society*—was anterior to government; that the functions of law, governments, and constitutions were to promote the ends of civil society, especially the great end of facilitating the pursuit of happiness by the 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 arenas that characterized the colonies.

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19. 2 WILLIAMS, *supra* note 8, at 415.

20. WORKS, *supra* note 6, at 723 (emphasis in original).

21. 2 WILLIAMS, *supra* note 8, at 426.

22. *Id.* at 429-30.

23. *Id.* at 431.

24. *Id.* at 430.

25. *Id.* at 430.

26. 2 SMITH, *supra* note 5, at 585.

27. 2 WILLIAMS, *supra* note 8, at 358-59.

What I have argued here is that during the late eighteenth century, at the time of the *second* founding, the experiential roots—and contemporary historical understanding—of such attitudes were probably more important than philosophy in shaping American conceptions of civil society and its relationship to government. Somewhat less confidently, I have also suggested that Wilson's own involvement in that powerful experiential tradition may have had considerable weight in his formulations. After all, he is the man who explicitly traced the superior sensibilities and wisdom of women, not to their mastery of philosophy or polite learning, but to their understanding of "matters of common observation."<sup>28</sup> Finally, I wish to observe that a comprehension of the important bearing of American social experience upon contemporary understandings of that experience powerfully suggests that, both experientially and conceptually, the first and second foundings were much of a piece and that the conceptual discontinuities emphasized by so many scholars might better be seen as little more than an elaborate working out of some of the political and intellectual implications of the radical civil societies that colonial Americans had constructed between 1607 and 1776, societies that, precisely because of their radical character, could make such a profoundly conservative revolution.

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