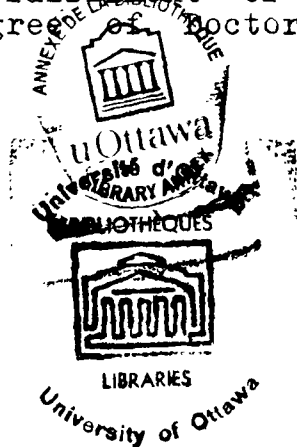


THE PHILOSOPHY OF NATURAL LAW  
ACCORDING TO  
THREE FOUNDING FATHERS OF THE UNITED STATES

by

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## INTRODUCTION

A considerable literature has been written over a period of years concerning the influence of Scholastic or traditional natural law on the political foundations of the United States. One school of thought, inspired by the religious appeal in the Declaration of Independence and other Revolutionary literature, has defended the thesis that traditional law is the soil in which those foundations are rooted.<sup>1</sup> The same conclusion is stated more explicitly when such law is predicated as the philosophy of the Founding Fathers.

The defense of this proposition is argued essentially on two premises. The most popular argument is an appeal to the religious phraseology of the Declaration and other writings of Revolutionary and Constitutional times. These sources are considered a reflection of a Christian heritage cherished by Americans contemporary with such writings, a heritage which preserved the essential propositions of traditional natural law. The proponents of this argument recognize that the philosophical context of the time was not congenial to traditional natural law but still

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<sup>1</sup> Francis P. LEBUFFE, S.J. - J.V. HAYES, The American Philosophy of Law, New York, Jesuit Educational Association, 1953, p. 92. Cf. infra, p. vii. The personnel of Jesuit law schools in the United States have been prominent in defending this proposition.

insist that American political principles are a fortunate or, more forcefully, a quasi-miraculous paradox of their environment. The Constitution, for example, is eloquently described as a "fruit of the perennial Christian life-force", of Christian energies stimulated in reaction to the rationalism of the day to produce "an outstanding lay Christian document tinged with the philosophy of the day".<sup>2</sup> The praises of the Declaration of Independence have also been sung:

[...] this Declaration is so complete, so perfect, that it has the quality of a natural revelation, almost indeed, as though a Divine grace had been conferred upon the American nation.<sup>3</sup>

It is just as confidently asserted that the original political documents of America must be read in the light of traditional Western philosophy.<sup>4</sup> In more personal tones, the philosophy of the Founding Fathers is declared to be substantially and essentially Scholastic natural law as opposed to the "pseudo-natural law of the 19th century which decapitated and deanimated Scholastic natural law". The French concept of natural law developed by Rousseau,

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2 Jacques MARITAIN, Man and the State, Chicago, Phoenix Press, 1951, p. 183.

3 R. L. BRUCKBERGER, Image of America (transl. C. G. Paulding and Virginia Peterson), New York, Viking Press, 1959, p. 99.

4 Ibid., p. 98-99.

which "took God and the soul out of the picture", is explicitly eliminated from the thought of the Founding Fathers.<sup>5</sup>

The certitude with which these statements are made is persuasive and seems almost to close the issue. However, the recognition that the documents were written in the era of the American Enlightenment suggests more caution. Deism was reaching the pinnacle of its popularity in America and was accepted by most of the intellectuals of the day except for the conservative New England clergymen. Jeffersonian Virginia was its stronghold and produced many of the most influential minds whose thought and deeds nurtured American origins. Accordingly, the Declaration of Independence can be read coherently as an expression of the Deism of the time. It could be an outstanding secular document tinged with the Christianity of the day. Moreover, although Rousseau may not have been influential in America until the return of Jefferson from France, the American Constitution was then still young enough to be molded in the image of French liberal democracy.

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<sup>5</sup> Francis E. LUCEY, S.J., "Natural Law and American Realism; Their Respective Contributions to a Theory of Law in a Democratic Society", in Georgetown Law Journal, Vol. 30, No. 6 (Apr. 1942), p. 524; cited by F. P. LEBUFFE, op. cit., p. 65-68. Fr. Lucey recognizes the dependency of traditional natural law on psychology, epistemology, cosmology, ontology, and theodicy. However, in his reasoning he uses only theodicy and psychology.

The transition of traditional natural law to the pioneer political life of America is also attributed to the heritage of political principles and practices received from England. Sometimes the argument appeals only to the factual continuity of the political histories of England and America. A more sophisticated and philosophical format of that reasoning is the tracing of a political genealogy from the Founding Fathers to John Locke and through him to Richard Hooker, the English Thomist of the sixteenth century, who is then linked to John Fortescue whose dependency on Thomist or traditional natural law is universally recognized.<sup>6</sup> That sequence is also considered part of a longer genealogy that reads the tradition of natural law as continuous and essentially unchanging from its beginning in the Stoicism of ancient Greece to its influence on American thought in 1776.

But this genealogy is not as obvious as it seems. Some natural law scholars have insisted that it has undergone an essential permutation in its evolution.<sup>7</sup> A recent work challenges especially the link between Locke and

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<sup>6</sup> This is essentially the sequence presented by Edward S. CORWIN, "The 'Higher Law' Background of American Constitutional Law", in Harvard Law Review, Vol. 42 (1928-1929), p. 370.

<sup>7</sup> A. P. d'ENTREVES, Natural Law, An Historical Survey, New York, Harper, 1965, p. 9-10.

Hooker.<sup>8</sup> Accordingly, the value of this genealogical approach is doubtful unless it recognizes the possibility of this permutation and assimilates it into its reasoning.<sup>9</sup>

The thesis favoring traditional natural law as the original political and legal philosophy of America is effectively challenged by a second thesis that discovers those origins in the modern natural law that evolved from the philosophies of the 17th and 18th centuries, the natural law expressed in the writings of Grotius, Pufendorf, Vattel, Burlamaqui, and Locke. Historically oriented, this school of thought does not see the rights defended by the American Revolution as "a priori" deductions from any philosophical premises nor as defended by any particular rationale. They were simply practical means to human happiness and well-being recognized and demanded as such by the people. They were won after centuries of struggle and

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8 Leo STRAUSS, Natural Right and History, Chicago, Chicago U. Press, 1953, p. 165-166.

9 CORWIN's entire article, referred to above, is a good example of an argument that recognizes the radical change of natural law: "The outstanding feature of Locke's treatment of natural law is the almost complete dissolution which the concept undergoes through his handling into the natural rights of the individual [...] The dissolving agency [...] is the doctrine of the Social Compact, with its corollary notion of the state of nature." (op. cit., p. 383) However, with this recognition, the concepts of "higher law" and "natural law" become rather vague and it is difficult to judge whether Corwin is talking about traditional natural law or not.

enshrined in documents like the Magna Carta, the Petition of Rights from Charles I, and the Bill of Rights of 1689. As metaphysical entities these rights would have been meaningless but as rights won and guaranteed to all Englishmen they were clearly understood and worthy to be fought for again.<sup>10</sup>

In fact, this opinion maintains, the historical guarantees of these rights to all Englishmen were the original premises of the Revolutionary debate with the English King and Parliament. It was only when the demand for independence invalidated such arguments that the colonial intellectuals turned to the concept of natural law as the new premise of their reasoning.<sup>11</sup> The natural law to which they appealed was not the traditional version. To do that would have demanded a radical revision of the sensible empiricism and nominalism of the philosophical thought prevalent in the colonies at the time. The demands of the Revolution permitted no time for adequate philosophizing. Their immediate need was for a philosophical argument that

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<sup>10</sup> Cornelia G. LEBOUTILLIER, American Democracy and Natural Law, New York, Columbia U. Press, 1950, p. 182. This work is one of the strongest denials of any influence of traditional natural law in American political foundations.

<sup>11</sup> Edward CORWIN cites evidence from John Adams that the argument from natural law was familiar to the colonial polemicists and had been considered for use before the Declaration of Independence (op. cit., p. 400-402).

would invest their revolt with moral prestige and there was no need to look very far. They were already familiar with a concept of natural law that had already defended and perpetuated democracy in England. It was to this seventeenth century natural law that they turned, the social contract theory of John Locke.

The proponents of this second school of thought sometimes read a philosophy of extreme hedonism into our original political documents. The "inalienable rights" with which man has been endowed by his Creator are indeed life, liberty, and the pursuit of happiness. But the "liberty" is for the "pursuit of happiness" as interpreted by the individual. He and his needs and wants are the supreme arbiter of morality. There is no need of a Divine Legislator; God is only the creator of conditions of human nature, not a judge. Utility is the measure and test of virtue, personal happiness is its criterion and reward. Ethics basically consists in the rules for the pursuit of one's own version of happiness with the proviso that this pursuit does not interfere with that of another.<sup>12</sup>

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<sup>12</sup> Ursula von ECKARDT, The Pursuit of Happiness in the Democratic Creed, New York, Praeger, 1959, p. 312-325 passim. "These principles, therefore, are inherent in the American political system as its founders established it." (p. 325).

Between these two opinions which categorically affirm or deny the influence of traditional natural law in American political foundations, another alternative is presented which discerns in the philosophical background of those foundations the influence of both traditional and modern natural law, represented by James Wilson and Thomas Jefferson respectively. In somewhat more general terms, the alternative is sometimes presented as a conflict between Jefferson and Congress:

Jefferson was lucky with his style, but perhaps even more lucky with his ideas. The analysis of his philosophy leads to a disillusion amounting almost to dismay [...] There is no doubt that Congress and Jefferson had different concepts of God, and a serious difference on such a point as this implies two profoundly divergent philosophies. The American Congress admired Jefferson's skill with the pen but did not accept his philosophy. Doubtless most of the members of that Congress had not read Rousseau [...] They had read the Bible and believed in it. In the end, these were the men who determined the character of the Declaration, and even of its philosophy.<sup>13</sup>

The quotation is significant for its recognition of a tension between Jefferson influenced by Rousseau and a Congress influenced by the Bible. It reflects the controversy that inflamed Jefferson's candidacy for President — his

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<sup>13</sup> R. L. BRUCKBERGER, *op. cit.*, p. 89, 92. Bruckberger asserts the Congress was "in the tradition of the first New England Puritans." In this he is mistaken. The Puritans had ceased to be a real influence in American political affairs before this time. Cf. Benjamin F. WRIGHT, American Interpretations of Natural Law, Cambridge, Harvard U. Press, 1931, p. 326-328.

involvement with French atheistic materialism and Jacobinism — and raises the question of the evidence for such influence in Jefferson's philosophy. It also implies the problem of the intellectual quality of the Biblicists who led the attack on him. If these were the two dominant influences in the thought of the time, the relationship of both to the traditional concept of natural law becomes important.

But the tension between traditional and modern natural law is presented in a more personal context by opposing James Wilson to Thomas Jefferson as representatives of traditional and modern natural law respectively. It is this statement of the question that serves as the point of departure for the dissertation. It serves to introduce two of the personnel and gives one of the reasons for their selection. The other reason is simply their outstanding importance in the founding of the United States. James Madison is selected as a third representative of Constitutional thought because as the universally accepted "Father of the Constitution" his thought could not be dismissed a priori as of no importance to the question of the philosophical rationale of American political sources.

James Wilson is the most controversial figure of the three. Two scholars especially have seen in his philosophy reasons for describing him as an exponent of

traditional natural law. Charles Page Smith, Wilson's biographer, evaluates him as:

[...] a key figure because he represents the reception into America of a tradition, essentially medieval and Scholastic, that has important implications in our history [...] He represents [...] that strain which, however much its motives have been impugned, made the Revolution and made the Constitution, and then defended the Constitution during its infancy, against all assaults of its enemies. Almost alone among his contemporaries he stood for a vital heritage that was lost in nineteenth-century America although it preserved a precarious life in England.<sup>14</sup>

The most complete argument in favor of Wilson's essential Scholasticism is found in The Philosophy of Law of James Wilson by Reverend W. Obering, S.J. Fr. Obering explicitly denies any attempt to trace an actual influence of St. Thomas Aquinas on Wilson's thought and concludes only to a parallelism between their doctrines. His thesis is founded on the congeniality of certain moral conclusions and arguments presented by Wilson to Thomism and traditional natural law. He also finds many inconsistencies between these conclusions and the rest of Wilson's philosophy. The conflict is resolved by Fr. Obering's insistence that the moral conclusions and the immediate arguments supporting them are the essentials of Wilson's thought while the elements contradicting them are considered as

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14 C. P. SMITH, James Wilson, Founding Father, Chapel Hill, U. of North Carolina Press, p. 319, 322.

"inconsistent with Wilson's fundamental principles."<sup>15</sup> This dissertation, on the contrary, finds in those inconsistencies reasons for a conclusion contradicting Fr. Obering and Charles Page Smith on the question of Wilson's relationship to traditional natural law.

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15 Fr. Obering resolves several conflicts in this fashion:

a. Commenting on Wilson's assertion that the sovereignty of society is the aggregate of the powers and rights of the individuals who formed it, Fr. Obering maintains this is an error inconsistent with Wilson's fundamental principles which are those of Suarez. (The Philosophy of Law of James Wilson, Washington, Catholic U., [no date, but certainly before 1953], p. 177-178.)

b. While Wilson explicitly states that the ultimate ends of human actions are known only by sentiment, not intellect, Fr. Obering insists that the statement is "opposed, not only to his general philosophy, [...] but to his tenet that moral approbation or blame is founded on intellectual perception of moral truth [...]" (op. cit., p. 120-121).

c. "Justice Wilson's further development of the social pact leads him to take positions which but ill accord with his fundamental doctrine concerning the natural origin of society and of civil authority from the natural law." (op. cit., p. 191). The only relation Wilson saw between civil law and divine law was the obligation of keeping one's promise. (Cf. infra, Chapter IV).

d. As to Wilson's fundamental principle that human law does not necessitate a superior, Fr. Obering finds reason to conclude that that principle is "largely a matter of words." (op. cit., p. 194).

e. "In assigning the fundamental reason for this liberty and equality of the nations, Justice Wilson, under the influence of Locke, takes a position, both false, and at variance with his own general moral and political philosophy." (op. cit., p. 153).

In this dissertation we will reason that these positions are, on the contrary, entirely consistent in Wilson's philosophy and that his philosophy is not congenial to Thomism.

The classical analysis of Jeffersonian thought is The Philosophy of Thomas Jefferson by Adrienne Koch in 1943, a work especially well done in regards to his theory of knowledge and his moral philosophy. However, a second look at original sources by someone with a different philosophical background is often valuable and in this instance that second look seemed to be demanded by the publication of a new and more complete edition of Jefferson's writings, The Papers of Thomas Jefferson, edited by Julian Boyd, which in seventeen volumes covers the period up to 1790. This re-examination leaves Koch's work practically unchallenged but adds to it a concentration on Jefferson's political and legal philosophy which gives additional insights into his understanding of the social-contract theory, the political and legal implications of his dictum, "The earth belongs to the living", and a comparative analysis of his relationship to traditional natural law.

The investigation of the writings of James Madison proved a disappointment in terms of philosophical speculation. Only in the field of political philosophy was anything of real value for this dissertation uncovered. But this negative result is of positive value for the problem posed in this dissertation. Because of his importance as the "Father of the Constitution" no conclusion as to the status of traditional natural law in that political charter

could have been valid without a thorough investigation of his thought. The negative result eliminates him as a possible source of traditional natural law influence.

The fundamental presupposition of this dissertation is that the whole discussion centers around a reasoned doctrine or philosophy of traditional natural law. But the recognition that the concept of traditional natural law is open to a distinction based on the ways it can be known demands a justification of that presupposition. Hopefully this can be done without the necessity of a lengthy digression into the theory of natural law itself. Let it simply be agreed that natural law can be known in two ways: first, by appetitive or volitional inclination; secondly, by rational comprehension or reasoned judgment.<sup>16</sup> It can also be admitted that the appetitive knowledge usually, if not always, precedes the reasoned judgment and in some cases is the only knowledge of the natural law attained.

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16 Yves SIMON, The Tradition of Natural Law: A Philosopher's Reflections (Vukon Kuic ed.), New York, Fordham U. Press, 1965, p. 125-136, esp. p. 127. Simon also makes a distinction in knowledge by inclination by dividing it between knowledge by intellectual inclination and knowledge by appetitive or volitional inclination (p. 130-131). Jacques MARITAIN also recognizes that the natural law can be known by inclination (op. cit., p. 91-92). Vernon J. BOURKE also distinguishes knowledge of the natural law into non-scientific and scientific. He identifies Maritain's knowledge by inclination with the non-scientific ("Natural Law, Thomism - and Professor Nielsen", in Natural Law Forum, South Bend, U. of Notre Dame, Vol. V, 1960, p. 114).

However, between these two concepts of natural law there is one salient difference that is most germane to the defence of our presupposition — only natural law as known by reasoned judgment is communicable.<sup>17</sup>

The formation of a society, especially political society, is a work of reason. A society is a union of persons bound together by reasoned and voluntary agreements, by intellectual convictions and the will to perpetuate those convictions. Feelings can stimulate the gathering of a group but feelings must be rationalized and institutionalized to become the foundations of a society. Accordingly, the foundations of a political society must be communicable or reasoned propositions, propositions with reasons so clearly stated that they convince and unite the original members and enable them to perpetuate the society by handing the propositions on to new members.

Now the basic theme of our discussion is the influence of traditional natural law in the foundations of the political society of the United States. Accordingly, if the foundations of any political society must be

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17 Yves SIMON, op. cit., p. 128, 133. Another insight into the necessity for reasoned or intellectual knowledge of morality as opposed to knowledge by inclination is offered by Robert O. JOHANN, S.J., "The Need of the Intellect", in America, Sept. 5, 1964. The article is especially to Jefferson's theory of moral judgment since Johann speaks in the Jeffersonian terms of "heart" versus "head". (Cf. infra, Chapter III, p.

communicable, and therefore reasoned, propositions, it follows that the only concept of traditional natural law worthy of discussion in that context is the reasoned doctrine or philosophy of that law.

The philosophy of traditional natural law then is understood here as a synthesis of metaphysics, epistemology, moral theory, and political and legal philosophy. All the elements of this synthesis must be logically consistent. Accordingly, the thought of the three Founding Fathers is probed, not simply for moral generalities, but rather for the evidence of a philosophical synthesis that includes them. Since neither Jefferson, Wilson, nor Madison developed any ontological metaphysics, the analysis of their thought is reduced to a consideration of their epistemology, moral theory, and political and legal philosophy. The primary question posed for this dissertation is whether any or all of these Founding Fathers could have been the source of traditional natural law philosophy influential in the political foundations of the United States.

The answer to that question is evidently not a conclusion on the general status of traditional natural law in those foundations. Independent of the influence of these three Founding Fathers, that law could still be present in Constitutional thought and traceable to other sources. Yet the recognition of their singular importance as Founding

Fathers is testimony to their outstanding influence in American political origins. Accordingly, to the extent of their influence, the status of traditional natural law in those origins is a reflection of its status in their personal philosophies and of the relative importance of each man in the formation of Constitutional thought. Consequently a secondary purpose of this dissertation is to compare their relationships to traditional natural law and to evaluate the relative importance of each Founding Father to Constitutional thought.

Finally, the distinction between natural law as known by inclination and by the religion of the time as opposed to natural law known as a reasoned doctrine suggests a more general conclusion on the status of traditional natural law in the origins of American political society. The perfect expression of that conclusion requires the terms of Yves Simon's distinction between a philosophy and an ideology:

[...] Ideology imitates philosophy; it uses expressions principally relative to essential, intelligible, and everlasting necessities.

[...] an ideology is a system of propositions which, though indistinguishable so far as expression goes from statements about facts and essences, actually refer not so much to any state of affairs as to the aspirations of a society at a certain time in its evolution [...] When what is actually an expression of aspirations assumes the form of statements about things, when these aspirations are those of a definite group, and when that group expresses its timely aspirations in the language

of everlasting truth — then, without a doubt, it is an ideology we are dealing with [...].<sup>18</sup>

An ideology develops in a situation in which the aspirations of a society creates in its members an eager "will to believe" in certain propositions favorable to its immediate necessities. The society accepts the "sociological weight" of that popular approval in lieu of objective evidence. Such a will to believe can blind the society to possible discrepancies between the philosophy demanded by the propositions and the actual philosophy prevalent in the society.

An ideology in this sense seems a particularly appropriate expression of the real value of traditional natural law in Constitutional America. Some moral propositions known by inclination or emotional religion might have expressed the aspirations of America at the time. Were those propositions contradicted by the philosophy prevalent in America at the time? If so, did their relevancy to the immediate necessities of the Revolution and the task of founding a new political society create in Americans a "will to believe" that blinded them to that contradiction? If these questions are answered affirmatively, then any traditional natural law that influenced American thought

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<sup>18</sup> Yves SIMON, op. cit., p. 16. The rest of my paragraph after the quotation was also developed from Simon's discussion of an ideology, p. 16-27, and p. 39.

under those conditions would be an ideology, not a philosophy. The analysis of the thought of three of the most important Founding Fathers and its relation to thought contemporary with them should yield some insight into the truth of that hypothesis as the final contribution of this dissertation.

## ABBREVIATIONS

- M.E. The Writings of Thomas Jefferson, Memorial Edition, Andrew A. Lipscomb, editor-in-chief; issued under the auspices of the Thomas Jefferson Memorial Association of the United States, Washington, 1903; 20 vols.
- PTJ The Papers of Thomas Jefferson, Julian P. Boyd Ed., Princeton, Princeton University Press, 1950-1965; 17 vols.
- Works (A) The Works of James Wilson, James DeWitt Andrews ed., Chicago, Callaghan, 1896; 2 vols.
- Writings (H) The Writings of James Madison, Gaillard Hunt ed., New York, G. P. Putnam's Sons, 1901; 9 vols.
- Works (H) The Works of Thomas Reid, Sir William Hamilton ed., Edinburgh, Maclochlán and Stewart, 1872; 2 vols.

## CHAPTER I

### SOURCES OF CONSTITUTIONAL THOUGHT

#### I. HISTORICAL BACKGROUND

##### A. English Political History

The genesis of the American Constitution is found in the political traditions of England. To them it owes its general spirit, many of its essential principles, and the political particulars of its first Amendments or Bill of Rights. Those traditions, brought to this country by the English colonists, were so perfected in practice in colonial America of the seventeenth century that they became the warp and woof of our political life a century before the writing of the Constitution. To a great extent the genius of the Constitutional Fathers consisted in their preservation and adaptation of English political practices.

To the colonial Anglo-American the thesis that all government derives its just powers from the consent of the governed and is responsible to the governed to the extent that their's is the right to abolish or alter it was not novel. Historically the crown of England, although theoretically hereditary, had been actually to a great extent elective. In feudal times claimants to the throne faced

the necessity of gaining the recognition and the submission of powerful baronial land-owners. Their power over the throne had gradually evolved into the absolute power of the House of Commons by 1688. Indeed, between the time of William the Conqueror and James I twenty-three kings had occupied the throne with only eight of them gaining it by the right of primogeniture.

The power of the king was further limited by the perennial necessity of granting rights and privileges demanded by powerful combinations of barons as the price of their contributions to the royal treasury. A first and most important example of this technique was the successful demand for the Magna Charta from King John in 1215. From that historic beginning through a political battle of some four hundred years the burden of controlling the king by controlling the purse-strings passed from the barons and the House of Lords to the House of Commons, the representatives of the people.

Nor was the theory of representative government new to those early colonists. In English history the political life of the Anglo-Saxons of the pre-Norman period had been representative at least of the local level, and remained so under the Normans. Representative government certainly found expression on the national level in England as early as the thirteenth century with the meeting at St. Albans in

preparation for the confrontation with King John at Runnymede. The invitation to attend extended to the reeve and four representatives from each township was "the first historical instance of the summons of representatives to a National Council."<sup>1</sup> It was, however, under Edward I that the representative assembly took the form of the modern Parliament of England. In 1295, on the occasion of a French invasion, he summoned what has been called the "Model Parliament" on the principle that "what concerns all should be approved by all." "The great outlines of Parliament have been drawn once and for all."<sup>2</sup>

With the formal structure and the representative nature of Parliament established, the struggle for what the American Constitution enshrined as the "separation of powers" began. In the fourteenth century under the three Edwards the principle of no taxation without the consent of Parliament was definitely established.<sup>3</sup> Under Edward III the right of the House of Commons to share in the imposition of taxes is recognized, as also the rights to share in all legislation, to investigate and demand correction of

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1 Thomas Pitt TASWELL-LANGSMEAD, English Constitutional History, London, Stevens & Haynes, 1890, p. 114.

2 F. MAITLAND, The Constitutional History of England, Cambridge, University Press, 1908, p. 59.

3 25 Edw. I, St. 1, c. 6.

abuses in government, to audit public accounts, and to impeach government officials.<sup>4</sup> Its right to a voice in decisions concerning war and peace was recognized in the wars with Scotland and France.<sup>5</sup> All of these hard-won victories will be perpetuated in the American Constitution.

Besides the debt owed to England for its general spirit the American Constitution is indebted to lessons learned from English history for many of political particulars found in the Constitution proper. The stipulation of Article I, Section 4 that "the Congress shall assemble at least once in every Year [...]" can only be a recognition of the political evils inherent in the English tradition of a Parliament convoked and dissolved at the pleasure of the king.<sup>6</sup> Section 5 of the same article grants to each House of Congress the right to be the sole judge of the elections and qualifications of its members, to determine its rules of proceedings, to punish its own members, to keep a journal of its proceedings, and to refuse to publish anything that in the judgment of the members demands

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4 Rotuli Parliamentorum ii, 200; Rot. Parl. ii, 280; TASWELL-LANGSMEAD, op. cit., p. 283-296.

5 Rot. Parl., ii, 165, 262.

6 In the one hundred and sixteen years between Henry VIII and James I inclusive, Parliament was summoned only thirty times, with four of its sessions covering a total of twenty-nine years.

secrecy. Such political insight was undoubtedly gleaned from the history of royal intrusions on the powers and functions of Parliament.<sup>7</sup> The immunity from arrest and freedom of debate guaranteed to Senators and Representatives during sessions of Congress reflects the long struggle to establish and preserve the prestige and freedom of Parliament which was finally vindicated in the Bill of Rights of 1689.<sup>8</sup> The stipulation that all bills for raising revenue must originate in the House of Representatives (Article I, section 7) and the granting of the sole power of impeachment to the same House (Article I, Section 2)

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7 The best examples of Parliament's definition and defense of its rights and privileges can be gleaned from dialogues between the House of Commons and Crown during the reigns of Elizabeth and James I, e.g. right of judging elections and qualifications of members: Case of Hall, punished for publishing a book vilifying the House of Commons, cf. G. W. PROTHERO, Select Statutes and Other Constitutional Documents, Oxford, Clarendon Press, 1913, p. 131; the contested election in the county of Norfolk (1586), ibid., p. 130; case of Sir Frances Goodwin, ibid., p. 325-331. For right of secrecy see Speech of Peter Wentworth on March 1, 1587, ibid., p. 124. For a general summary of the rights and privileges of the House of Commons, cf. the Protestation of House of Commons, Dec. 18, 1621, ibid., p. 313-314.

8 The defense of freedom of debate is well exemplified in the speech of Peter Wentworth (Feb. 8, 1576), ibid., p. 120-122. Immunity from arrest was claimed and enforced by the House of Commons especially in the case of Thomas Shirley (March, 1603), ibid., p. 296. The forced entry of the House of Commons by Charles I in his futile attempt to arrest five recalcitrant members was the overt act that initiated the civil war of 1642.

recall the increase of power in the House of Commons under Edward III.<sup>9</sup>

Finally, a concordance of the American Bill of Rights (the first ten Amendments to the Constitution) and parallel expressions in English political documents yields added evidence of our political debt to England.

Congress shall make no law respecting [...] the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (First Amendment)

That it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal. (The Bill of Rights, I William and Mary, s. 2, c. 2)

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. (Second Amendment)

That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law. (Bill of Rights 1689)

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law. (Third Amendment)

And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people. (Petition of Right, 3 Charles I, c.1.)

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<sup>9</sup> In the reign of Charles II the House of Commons finally established its exclusive right to determine taxation free from amendments by the House of Lords. Cf. G. B. ADAMS, Constitutional History of England, New York, Henry Holt, 1926, p. 351.

Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted. (Eighth Amendment)

That excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusuall punishment inflicted (Bill of Rights, 1689)

In the light of the evidence accumulated above, it cannot be denied that "in no instance did the resisting colonists prove themselves such faithful children of England as in their sweeping reliance on English political thinkers [...] The colonists [...] were conscious traditionalists."<sup>10</sup>

#### B. American Political History

As indicated above, the political life of colonial America is the vital link between the English and American Constitutions. Not only were English traditions transported to America by the colonists but in seventeenth-century America the emigrants found the ideal political laboratory for an experiment in self-government. The new land was not cluttered with the accumulated debris of past political practices; her distance from the mother country and England's preoccupation with the political turmoil within her own borders left the colonies in what has been

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<sup>10</sup> Clinton ROSSITER, The Political Thought of the American Revolution, New York, Harcourt, Brace and World, 1963, p. 67, and 231. This work is a revised version of Part III of Seedtime of the Republic printed in paperback as a Harvest Book (HB66).

aptly called a condition of "salutary neglect" which permitted democratic rule to evolve more quickly than in England itself.<sup>11</sup>

The colonies originated in three types of venture: the joint-stock company, the proprietary grant, and the socio-religious covenant, each of which contained certain potentialities for democratic self-government.<sup>12</sup>

The joint-stock companies charters and the proprietary grants on which the majority of the colonies were founded usually conferred on the company or the proprietor the full right and duty of governing the colonies with the only proviso that the laws of the colonies not violate the

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11 "Democracy" as used the text above must indeed be taken in the qualified sense and refers mainly to legislation by means of a popular assembly. Even though the right to vote and hold office were limited by substantial property qualifications and in most states by religious qualification, the political structure of America was more democratic than any of the same day in Europe due to the ease with which Americans could acquire the small landholdings that admitted them to full citizenship. For a consideration of the suffrage in colonial America cf. Alfred H. KELLY - Winfred A. HARBISON, The American Constitution, Its Origins and Development, New York, Norton and Co., 1963, p. 28-32.

12 The right to govern granted to the joint-stock companies and the proprietary lords enabled them to adapt themselves to the colonial demands for self-government by popular assembly; they were not hampered by the weight of traditional political institutions which would have to be overthrown. The compact colonies were obviously more democratic from the beginning, especially Rhode Island.

laws of England.<sup>13</sup> In short time proprietors and companies found that attempts to rule the colonies despotically from headquarters in London or by specially appointed governors were unsuccessful, so the demands of the colonists for popularly elected representative assemblies were granted. From the date of the creation of the Virginia Assembly in 1621 and as early as 1644 in Massachusetts and 1650 in Maryland these assemblies met separately from the governor and his council,<sup>14</sup> thus initiating bicameral legislatures in the colonies. In these replicas of the English Parliament the struggle for power between the colonial assembly and the royal governor paralleled the controversy between the Stuarts and the English House of Commons with the colonial assemblies also using their control of the purse-strings to increase their share in the legislative power.<sup>15</sup> In retaliation the royal governors tried to rule without the assembly and refused to approve legislation. The long list of complaints in the Declaration of Independence is witness to the common strategy of king and governor in

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13 The East India Company, for instance, became practically a state-within-a-state through which England ruled India. Cf. KELLY-HARBISON, op. cit., p. 9.

14 Ibid., p. 12, 14, 23, 29.

15 The colonists resisted the Townshend Revenue Act in 1767 precisely because its purpose was to raise funds for the support of the civil government and struck directly at the assembly's control of the purse-strings.

their futile effort to stem the tide of democracy in England and America.

Meanwhile, colonies, like Rhode Island and Connecticut, were being founded on the basis of a covenant or compact between the settlers and it was these colonies that made the more original contribution to democratic political theory. Their basic principle, i.e. that civil society originates from a covenant between individuals, was simply an application to political life of the Calvinist religious doctrine of congregationalism.<sup>16</sup> In America, these Calvinist Separatists, who had fled from persecution in England, found the perfect opportunity to transfer their religious doctrine to political reality. Their theory first found expression in the foundation of the Plymouth Colony in 1620, in the Fundamental Orders of Connecticut in 1639, and in the Providence Agreement of 1640.

The Fundamental Orders of Connecticut were for all practical purposes the first of modern written constitutions. Like modern American constitutions, they were a written compact of the people by which a fundamental frame of government was erected.<sup>17</sup>

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<sup>16</sup> Congregationalism retained Calvinistic doctrine, but differed from other Calvinists on the question of the government of the church. Fundamental for them is the rejection of any religious authority superior to that of the local congregation. The congregation united by a covenant is the ultimate source under God of all ecclesiastical authority. Cf. Encyclopedia Americana, New York, Americana Corporation, Vol. VII, p. 501-504.

<sup>17</sup> KELLY-HARBISON, op. cit., p. 17-18.

Curiously, the history of Rhode Island and Connecticut is unique among the colonies. Their constitutions were confirmed by a royal charter from Charles II who permitted them a great degree of autonomy; they elected their own governors, were never actually required to send their laws to England for review, and their original constitutions were democratic enough to serve until the nineteenth century.<sup>18</sup>

Rhode Island, especially, made a further contribution to the democratization of America by serving as a sanctuary of tolerance during the religious controversies in New England. Baptist and Quaker refugees from persecution by the intolerant authorities of the theocratic Massachusetts Bay Colony followed their fellow refugee, Roger Williams, to his newly-founded colony. From there they launched their attack on the Massachusetts Bible State, provoking from her ministers and elders the fanatical reaction that eventually undermined their control over the colony. The spectacle of such fanaticism undoubtedly had a sobering effect on all religious sects:

The doctrine of political equality of faiths was not the result of sweet reasoning about the brotherhood of man, but of the plain necessity

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18 KELLY-HARBISON, op. cit., p. 19-20, 94.

that each sect in order to live had also to let live.<sup>19</sup>

In nine of the thirteen colonies the struggle for religious tolerance was also a struggle for political democracy since in them the establishment of a state-supported church represented a sectarian prejudice in political questions. Hence:

The unending struggles for toleration, disestablishment, and liberty of profession were one of the most powerful human-directed forces working for individual freedom and constitutional government [...] the twin doctrines of separation of church and state and liberty of individual conscience are the marrow of our democracy, if not indeed America's most magnificent contribution to the freeing of Western man.<sup>20</sup>

Although the final victory of religious tolerance may have been won by the pragmatic combination of practical necessity, absence of organized religion on the frontiers, and a growing secularistic indifference, much of the credit must go to the Quakers and Baptists who were dedicated to the fight in conscience because of their religious individualism.<sup>21</sup>

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19 Clinton ROSSITER, The First American Revolution, New York, Harcourt, Brace and World, 1962, p. 72-73. This is a revised version of Part I of Seedtime of the Republic. It is published separately as a paperback book, Harvest Book (HB 17).

20 Ibid., p. 66.

21 Large numbers of colonists belonged to no sect or organized religious society. Frontier conditions, poverty, indifference, rationalistic deism combined to produce

American democracy owes its greatest debt to colonial Protestantism for the momentum it gave to the growth of individualism.<sup>22</sup>

This emphasis on theological democracy by the colonists of the sixteenth-century was bound to have important and not always salutary repercussions in the America contemporary with the Constitution.

The final link of the political chain that binds America to England was forged between 1776 and 1780 by the formation of state constitutions. Only Rhode Island and Connecticut found their original constitutions democratic enough to remain unchanged. The new constitutions recognized the written compact as the foundation of civil society and emphasized natural rights. All but Pennsylvania and Georgia created bicameral legislatures with heavy property qualifications for candidates for both Houses but with higher requirements for Senators guaranteeing a more economically elite personnel. The governor was elected by the

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a large percentage of "unchurched" people to any establishment of religion which restricted their civil rights or demanded their financial support as a political obligation. Personally religious, they attacked sectarianism and intolerance without attacking religion itself. Quakers and Baptists, however, were dedicated to a religious crusade in defense of the theological principle of the right of private interpretation of the Scriptures.

22 ROSSITER, The First American Revolution, p. 71. The influence of two great religions, Roman Catholicism and Judaism, which emphasize the role of religious authority "was hardly noticeable in the colonial period." Ibid., p. 88.

legislature in all but three states and his legislative function restricted to a veto subject to nullification by a mere majority of the legislature. He was definitely intended to be the agent of the assembly, the executive of their will.<sup>23</sup> The suffrage in most states was restricted to freeholders with the required holding so small that ownership was well within the capacity of any man. Religious qualifications for suffrage were for the most part abolished.

The Constitutional Fathers of 1787, therefore, had no need of instructing the people in the principles and practices of democracy; that task had already been accomplished by the example of their political ancestors. The Constitution of the United States simply applied established political practices to the problems inherent in the task of federating thirteen existing democracies by creating political institutions and processes uniting them in the established tradition of democracy.

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<sup>23</sup> Thus the colonists by political practices had anticipated the doctrine of separation of powers developed by Baron Montesquieu in his Spirit of the Laws (1748). "Provisions of this kind were in part the product of contemporary political thought as exemplified by Montesquieu; in part they were the product of more than a century of colonial practice [...] in which the differences between the two branches had been accentuated by recurrent conflict." KELLY-HARBISON, op. cit., p. 97.

## II. THE CONSTITUTIONAL FATHERS

From the political personnel influential in the formation of the American Constitution three men, Thomas Jefferson, James Wilson and James Madison, have been selected as representative of the thought that produced it. Such a restriction demands justification.

## A. Thomas Jefferson

The dependence of the Constitution on political antecedents in colonial and Revolutionary America has already been discussed. The Declaration of Independence immortalizes the complaints and the aspirations of Americans. Even though it must be admitted with Jefferson that there was little originality of thought expressed in the Declaration, history is unanimous in admitting his predominance in the formulation and expression of those thoughts. The principles so classically stated in that document were the goals that the Constitutional Convention of 1787 sought to attain.

Jefferson as chief author of the Declaration thus became a chief contributor to our constitutional system of government.<sup>24</sup>

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24 C. P. PATTERSON, The Constitutional Principles of Thomas Jefferson, Austin, University of Texas Press, 1953, p. 29.

While the Constitutional Convention was doing its work Jefferson was serving as the representative of the United States to France. He personally denied any active part in the composition of the Constitution.<sup>25</sup> However, he had an indirect influence on the addition of the Bill of Rights since his immediate reaction on reading the copy of the Constitution sent to him by Madison was a complaint of its failure to provide a guarantee for the rights of the people. In a letter to Madison, after expressing his approval of the Constitution in general, he continues:

I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable [sic] by the laws of the land and not by the law of Nations.<sup>26</sup>

He takes issue with the argument of James Wilson that a Bill of Rights was not necessary since Congress had only those powers explicitly delegated to it.<sup>27</sup> His constant

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25 Thomas JEFFERSON, Letter to Joseph Priestley, June 19, 1802, in The Writings of Thomas Jefferson, Memorial Edition, Andrew Lipscomb and Albert Bergh editors, Washington, D.C., 1903, Vol. X, p. 325. Hereafter this work will be indicated by the abbreviation M.E.

26 Idem, Letter to James Madison, December 20, 1787, in Papers of Thomas Jefferson, Julian P. Boyd, ed., Princeton, Princeton University Press, 1950, XII, p. 439. Hereafter this work will be indicated by the abbreviation PTJ.

27 Ibid.

repetition of this theme in his correspondence<sup>28</sup> may have influenced opinion throughout the country but was certainly influential in the Virginia Convention for Ratification when even Patrick Henry, his constant antagonist, quoting from a letter of Jefferson to Mr. Donald,<sup>29</sup> used Jefferson's objections in an attempt to thwart ratification. Madison was forced to reply to Henry with an appeal to his personal relationship and correspondence with Jefferson to neutralize the effect of Henry's argument.<sup>30</sup>

Aside from his objections to the absence of a Bill of Rights and to the abandonment of the principle of rotation in the office of president, Jefferson enthusiastically

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28 Jefferson's advocacy of a Bill of Rights is repeated in:

a. Letter to William Carmichael, Dec. 15, 1787, in PTJ, XII, p. 425;

b. Letter to William Stephens Smith, Feb. 2, 1788, in PTJ, XII, p. 558;

c. Letter to James Madison, Aug. 28, 1789, in PTJ, XV, p. 367-368;

d. Letter to Noah Webster, Dec. 4, 1790, in M.E., VIII, p. 112-113;

e. Letter to Dr. J. Priestley, June 19, 1802, in M.E., X, p. 325. In this last letter, written during his Presidency, he admits that the Bill of Rights has been "violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people."

29 Idem, Letter to Alexander Donald, Feb. 7, 1788, in PTJ, XII, p. 571.

30 James MADISON, Speech in the Virginia Convention, June 12, 1788, in The Writings of James Madison, Gaillard Hunt, ed., New York, G. P. Putnam Sons, 1901, Vol. V, p. 175. This work will hereafter be referred to as Writings (H).

endorsed the Constitution as consonant with his own political convictions.<sup>31</sup> This fact, together with his outstanding role in the political polemics of the Revolution that prepared the minds of his contemporaries for the Constitution and with his later influence as leader of the Republican Party and President of the United States, amply justify his selection as an exponent and source of Constitutional theory.

#### B. James Madison

The influence of James Madison on the Constitution begins as early as 1783 when, recognizing the need of revising the Articles of Confederation, he was one of the first to broach the idea of a Federal Convention for such a purpose. Two years later he became more importunate in enlisting aid for his project:

I conceive it to be of great importance that the defects of the foederal [sic] system should be amended [...] because I apprehend danger to its very existence from a continuance of defects [...].<sup>32</sup>

His efforts in convening the Convention were surpassed by his work during it.

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<sup>31</sup> Thomas JEFFERSON, Letter to James Madison, Dec. 20, 1787, in PTJ, XII, p. 442.

<sup>32</sup> James MADISON, Letter to James Monroe, Aug., 1785, in Writings (H), II, p. 158.

In the achievement of its [Convention of 1787] task James Madison had been unquestionably the leading spirit. It might be said he was the master-builder of the Constitution [...] When one studies the contemporary conditions and tries to discover how well the men of that time grasped the situation, and when one goes further, and, in the light of our subsequent knowledge, seeks to learn how wise were the remedies they proposed — Madison stands pre-eminent.<sup>33</sup>

Madison's ideas were the predominating factor in the framing of the Constitution.<sup>34</sup>

This evaluation is confirmed by William Pierce, a delegate from Georgia, in his character sketches of the delegates to the Convention:

Mr Madisonn [sic] is a character who has long been in public life; and what is very remarkable every person seems to acknowledge his greatness. He blends together the profound politician with the Scholar. In the management of every great question he evidently took the lead in the Convention.<sup>35</sup>

An enumeration of the proposals, finally incorporated in the Constitution, which either originated with him or for which he successfully argued also testifies to his influence. He favored the popular election of the members of the first branch of the bicameral legislature (our

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33 Max FARRAND, The Framing of the Constitution, New Haven, Yale University Press, 1913, p. 196.

34 Ibid., p. 198.

35 William PIERCE, Notes of Major Wm Pierce in Federal Convention: Heritage of America, H. S. Commager and Allan Nevins ed., Boston, Little, Brown and Co., 1949, p. 197.

present House of Representatives) on the basis of proportional representation.<sup>36</sup> Conscious of the danger of the usurpation of power by the Legislature he argued in favor of an Executive veto over all legislation and proposed the requirement of a two-thirds majority in both Houses as a condition for over-ruling that veto.<sup>37</sup> He helped to block a motion that the Justice of the Supreme Court be elected by the Legislature, fearing that such a procedure would give that body control over the judiciary.<sup>38</sup> He advocated the popular election of the Executive<sup>39</sup> and as a final gesture of concern for republican government argued for the ratification of the Constitution by the people in special conventions rather than by state legislatures.<sup>40</sup>

Additional reasons for the selection of Madison as a representative of constitutional philosophy are his eminent role in the Virginia Convention for Ratification and his authorship of twenty-six of the papers included in The Federalist Papers, a work which has "always commanded

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36 The Records of the Federal Convention, Max Farrand, ed., New Haven, Yale University Press, 1937, Vol. II, p. 49-50.

37 Ibid., I, p. 99-100.

38 Ibid., I, p. 119-120, 232-233.

39 Ibid., II, p. 34-35, 109-110.

40 Ibid., II, p. 92-93.

widespread respect as the first and still most authoritative commentary on the Constitution of the United States.<sup>41</sup>

### C. James Wilson

While the selection of Jefferson and Madison as representatives of the spirit of the Constitution receives the almost unanimous approbation of historians, the selection of James Wilson is more controversial. Until recently history has for the most part ignored him:

It is a grave question whether [...] the muse of history has not been guilty of some partiality and injustice [...] To Wilson's work in this convention and the value of his services in the Pennsylvania convention which ratified the Constitution, due recognition was never accorded by more than a few of his contemporaries, nor by historians until within a time comparatively recent [...]. The fact that historians [...] have returned to the original sources for their materials has thrown new light upon his exceedingly great labor and influence in the shaping of our fundamental law.<sup>42</sup>

He was one of the six Founding Fathers whose signatures are to be found on both the Declaration of

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41 Clinton ROSSITER, in Introduction to Federalist Papers, New York, The New American Library (Mentor Books), 1961, p. vii. Text taken from "the McLean edition" of 1788 and corrected and modernized by Clinton Rossiter.

42 Charles B. LETTON, "James Wilson: His Influence in the Making of the Constitution", in Proceedings of Nebraska Bar Association, Vol. II (1903-1905), p. 65, 70, 81. For another analysis of Wilson's contributions see Lucien H. ALEXANDER, "James Wilson, Nation Builder", in The Green Bag, Vol. XIX (1907), Nos. 1-5.

Independence and the Constitution. Consequently he can be considered an intellectual link between those two documents. His contributions to American political thought, however, antedate even the Declaration. In his Considerations on the Nature and Extent of the Legislative Authority of the British Parliament<sup>43</sup> he presented "perhaps the most far-sighted, coherent, and logical analysis that came from the pen of any colonial disputant [...]. It remains one of the great statements of the principles for which the American Revolution was fought."<sup>44</sup>

Max Farrand ranks him second only to Madison in the work of the Constitutional Convention and even as intellectually superior in some respects, especially in speculative politics.<sup>45</sup> William Pierce again confirms Farrand's evaluation:

Mr. Wilson ranks among the foremost in legal and political knowledge [...] Government seems to have been his peculiar Study, all the political institutions of the world he knows in detail [...]

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43 Considerations etc. was written by James Wilson in 1770 but not published until 1774. It can be found in The Works of James Wilson, James DeWitt Andrews, ed., Chicago, Callaghan & Co., 1896, Vol. II, p.501ff. Hereafter this work will be referred to as Works (A).

44 Charles SMITH, James Wilson, Founding Father, Chapel Hill, University of North Carolina Press, 1956, p. 58.

45 Max FARRAND, ed., The Framing of the Constitution, p. 197-198.

No man is more clear, copious, and comprehensive than Mr. Wilson.<sup>46</sup>

These evaluations are justified by a summary of his work in the Convention of 1787. On many issues he and James Madison proved a formidable combination. It was Wilson who moved that the Executive be a single person<sup>47</sup> and with Madison fought for the popular election of that person.<sup>48</sup> He abetted the efforts of Madison to obtain an executive veto over all legislation, but moved for the necessity of a three-quarter majority of both Houses to overrule it. In his devotion to the democratic principle of government by the consent of the governed he surpassed Madison and continually urged the popular election for all offices except the Judiciary. He anticipated the Seventeenth Amendment of May 31, 1913 by urging in the Convention that Senators be elected by popular choice.<sup>49</sup> He fought against the possibility of control of presidential elections by the Senate; his motion that in case of the failure of any candidate to obtain the required majority the choice of the Executive be referred to the whole

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46 William PIERCE, op. cit., p. 195.

47 The Records of the Federal Convention, Max Fer-  
rand, etc., I, p. 65-66.

48 Ibid., I, p. 69, 80, 406; II, p. 29-32.

49 Ibid., I, p. 51-55.

Legislature failed but it may have inspired the motion of Roger Sherman to refer such cases to the House of Representatives.<sup>50</sup>

To his contribution to Revolutionary polemics and to the formation of the Constitution must be added his successful defense of it in the Pennsylvania ratifying convention. His speeches in that assembly are some of the "most comprehensive and luminous commentaries on the Constitution which has come down to us from that period."<sup>51</sup> His understanding of Constitutional theory was obvious also in his argument in favor of the establishment of a Bank of North America.<sup>52</sup>

He also exercised influence on the development of the Constitution as one of the members of the first Supreme Court. In his law lectures of 1791 he had stated:

The powers of Congress are, indeed, enumerated; but it was intended that those powers, thus enumerated, should be effectual, but nugatory [...] Congress has the power to make all laws, which shall be necessary and proper for carrying into execution every power vested by the Constitution in the government of the United States, or in any of its officers or departments.<sup>53</sup>

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<sup>50</sup> The Records of the Federal Convention, Max Fer-  
rand, ed., II, p. 502, 527.

<sup>51</sup> George T. CURTIS, Constitutional History of the  
United States, New York, Harper Bros, 1859, Vol. I, p. 464.

<sup>52</sup> Works (A), I, xv.

<sup>53</sup> Ibid.

The application of that principle in the *Chisholm vs. Georgia* case in 1793<sup>54</sup> marked the most important decision of his Supreme Court career. His statement in that case has been recognized as fundamental to the development of centralized government and as a model judicial opinion.<sup>55</sup>

With good reason then James Wilson can be considered a source of the political philosophy that engendered the Constitution.

It is from the thinking of these men, considered against the background of English and American political history, that the essentials of the political philosophy prevalent at the birth of our civil institutions will be extracted.<sup>56</sup>

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54 2 Dallas, 419. In this case two citizens of South Carolina brought suit against the State of Georgia in the Supreme Court on behalf of a British creditor. The State of Georgia refused to appear on the grounds that its sovereignty made it immune to such a suit except with its own consent. Despite the fact that this precise guarantee had been affirmed in The Federalist Papers, Number 81 (p. 487 in Mentor Books edition, MT328) the Court led by Wilson ignored this and decided against such immunity and admitted the case of *Chisholm vs. Georgia*.

55 J. O. PIERCE, "The Pioneer of American Jurisprudence", in The Dial, Vol. XX (1896), p. 236.

56 They do not express themselves equally on each of the questions that will be considered and differed on some. Hence a composite will be formed that will include conclusions common to all and, in cases of difference, the opinion that prevailed.

## CHAPTER II

### EPISTEMOLOGICAL FOUNDATIONS

#### I. ORDER OF THE SCIENCES

The Constitutional Fathers thought in a definite context, familiar to their time, which originated in Cartesian dualism and descended to them modified by the empiricism of Locke and Hume, but finally shaped by the Scottish philosophy of Common Sense.<sup>1</sup> In this tradition the study of the human mind becomes first philosophy or "metaphysics" and is considered propaedeutic to all other knowledge.

David Hume summed up the tradition in the Introduction to his Treatise of Human Nature:

It is evident, that all the sciences have a relation, greater or less, to human nature [...]. It is impossible to tell what changes and improvements we might make in these sciences were we thoroughly acquainted with the extent and forces of human understanding, and could explain the nature of the ideas we employ and of the operations we perform in our reasonings [...].

In pretending, therefore, to explain the principles of human nature, we in fact propose a

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<sup>1</sup> The "Common Sense" school of philosophy was founded by Thomas Reid (1710-1796) with the publication in 1764 of An Inquiry into the Human Mind on the Principles of Common Sense. In 1785 he published a volume of essays entitled Essays on the Intellectual Powers of Man, followed in 1788 by Essays on the Active Powers of Man. His work was the result of his reaction to the scepticism he considered implicit in Descartes, Locke, Berkeley, but especially Hume.

complete new system of the sciences, built on a foundation almost entirely new, and the only one upon which they can stand with any security.<sup>2</sup>

Current also at the time of the foundation of the Constitution was a profound interest in moral philosophy, the study of the natural law as the ultimate ethical norm and its foundation in the nature of man. If the study of the human mind was the necessary preamble to all knowledge, for many scholars the study of moral philosophy was the necessary prerequisite for the study of law and politics because of their foundation in the natural law. The conclusions on the nature of man discovered in moral philosophy served as the foundation for a description of that state of nature which was considered the logical, if not the historical, antecedent of the civil society which man created by social compacts or covenants.<sup>3</sup>

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2 David HUME, A Treatise of Human Nature, London, J. M. Dent (Everymans Library), 1959, I, p. 4-5.

3 The emphasis on this premise in the political theories of Thomas Hobbes, John Locke, Jean-Jacques Rousseau is universally recognized. Two other authors, highly respected by early American political theorists, who accepted the premise were: a. Samuel PUFENDORF, Of the Law of Nature and Nations, (transl. 2nd ed. corrected and compared to Barbeyrac's French transl.), Oxford, L. Lichfield, 1710; b. J. J. BURLAMAQUI, The Principles of Natural and Politic Law (Transl. by Mr. Nugent), 3rd ed., London, printed for C. Nourse in the Strand, 1784. For an evaluation of the prestige of these works, cf. KELLY-HARBISON, op. cit., p. 44 and ROSSITER, op. cit., p. 71.

This sequence of knowledge was certainly acceptable to James Wilson. In his Lectures on Law he emphasized the fundamental importance of the study of the human mind as a foundation for the science of law:

[...] it will not, I am sure, be forgotten that metaphysical knowledge, or the philosophy of the human mind, formed a very conspicuous part of that outline; one of those "vantage grounds" which everyone must climb, who aims to really be a master in the science of law [...].<sup>4</sup>

Actually his Lectures began with five talks on the nature of law and obligation in general and moved to a classification of law. But these introductory lectures served the purpose of emphasizing the importance of founding the principles of law in "Man, as an individual - abstractly considered." The more precise principles of municipal and international law were to be founded on man, as a member of society, as a member of a confederation, and as a member of the commonwealth of nations.<sup>5</sup>

Especially noteworthy in Wilson's outline is the identification of the study of the human mind with metaphysics and his congeniality with Hume in this.

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4 The Works of James Wilson, James deWitt Andrews ed., Chicago, Callaghan and Co., 1896, p. 204. Hereafter this work will be referred to as Works (A). The emphasis is mine.

5 James WILSON, Lectures on Law, Part I, Chap. I, "On the Study of Law", in Works (A), I, p. 36.

Thomas Jefferson did not state explicitly any preference as to the sequence of knowledge, but would seem implicitly to accept the order proposed by Dugald Stewart and DeStutt de Tracy since he pays high tribute to both:

I consider him [Stewart] and Tracy as the ablest metaphysicians; by which I mean investigators of the thinking faculty of man.<sup>6</sup>

Stewart began his Outlines of Moral Philosophy with a thorough analysis of the intellectual powers of man, the moral faculty and its operation, moral obligation and free-will. Only after this analysis did he proceed to the investigation of man's duties to God, others, and self.<sup>7</sup>

Tracy observed somewhat the same order by dividing the elements of his ideology into three sections:

The first is properly the history of our means of knowledge or what is commonly called our understanding. The second is the application of this study to that of our will and its effects, and it completes the history of our faculties. The third

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6 Thomas JEFFERSON, Letter to John Adams, Mar. 14, 1820, in M.E., XV, p. 240. For information on Dugald Stewart and DeStutt de Tracy cf. below.

7 The Collected Works of Dugald Stewart, Sir W. Hamilton ed., Edinburgh, Thomas Constable, 1854-1858, 11 vols. Dugald Stewart (1753-1828) was professor of moral philosophy at University of Edinburgh after Adam Ferguson resigned in 1785. Stewart published three volumes of Elements of the Philosophy of the Human Mind between 1792 and 1827. His Outlines of Moral Philosophy appeared in 1793 and his Philosophical Essays in 1810. Finally, his Philosophy of the Active and Moral Powers was published posthumously in 1828. He was one of the more important followers of Thomas Reid.

is the application of this knowledge of our faculties to the study of those beings which are not ourselves, that is to say, of all the beings that surround us. If the second section is an introduction to the moral and political sciences, the third is that to the physical and mathematical; and both, preceded by a scrupulous examination into the nature of our certitude and the causes of our errors, appear to me to form a respectable whole, and to encompass what we ought really to call the first philosophy.<sup>8</sup>

Jefferson then, like Wilson, agreed with the trend of the time in equating the study of the mind or analysis of knowledge with metaphysics. Both therefore have rejected ontological metaphysics since it receives no mention in the order of knowledge.

## II. METHODOLOGY

There can be no doubt that Jefferson and Wilson were men of their age in their dedication to the methodology of sensible empiricism, and indeed to a strict

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<sup>8</sup> DESTUTT DE TRACY, Political Economy, Georgetown, J. Milligan, 1817, p. ix. Antoine Louis Claude Destutt de Tracy (1754-1836), Member of a noble French family, DeStutt (as he is referred to), was the most important of the Ideologues who were essentially followers of Condillac's sensationalist interpretation of John Locke. DeStutt published his Eléments d'Idéologie in 1827. His Political Economy and Commentary and Review of Montesquieu's Spirit of Laws (Philadelphia, William Duane, 1811) were particular favorites of Jefferson: "It [Political Economy] goes forth, therefore, with my hearty prayers that while the Review of Montesquieu, by the same author, is made with us the elementary book of instruction in the principles of civil government, so the present work may be in the particular branch of Political Economy." (JEFFERSON, Letter to J. Milligan, Oct. 25, 1818, in M.E., XIX, p. 263)

interpretation of it in theory at least. The rejection of traditional metaphysics consequent to such a methodology was completely acceptable to them.

Jefferson's identification with sensible empiricism is implied in his approval of Stewart and DeStutt. The former, in agreement with the dedication of the Scottish philosophers to the method of Francis Bacon,<sup>9</sup> simply rejected as impossible any other method of knowing nature; true knowledge of nature is entirely the result of observation and experiment. The order of the universe exhibited certain "established conjunctions" and it was the primary business of the philosopher to observe and record such phenomena; general laws were only the expression of observed relationships. The mistake of the ancient philosophers was their attempt to make philosophy a science of causes and as such a speculation beyond the power of human faculties.<sup>10</sup>

DeStutt was even more stringent in his concept of the true inductive method of science. The cognitional conquest of nature could be attained only by extremely careful and accurate observation of facts. Beyond the limits of

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9 Francis Bacon (1561-1626), the herald of modern experimental science. In 1605 he published Advancement of Learning and in 1620 Novum Organon.

10 Dugald STEWART, Outlines of Moral Philosophy, in Works (H), II, p. 6.

these observations and the generalizations which expressed them one should be prepared to admit his ignorance, preferring this to probability.<sup>11</sup>

Jefferson agreed completely with his two favorites and confessed himself an empiricist whose faith went no further than the facts of sensible experience and some hypotheses based on and carefully limited by such experience.<sup>12</sup> In rejecting all organs of information except the senses he condemned "hyperphysical" and "anti-physical" speculations as leading only to "pyrrhonism."<sup>13</sup> He criticized severely a certain Dr. Ingenhausz for drawing general conclusions from partial observations and in this criticism stated his personal agnosticism concerning matters beyond sensible observation.<sup>14</sup> He reiterated such agnosticism in replying to a request from Rev. Isaac Story for his opinion on the question of the transmigration of souls, giving as reason his conviction that the laws of nature did not give us the means of such knowledge:

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11 DESTUTT, Métaphysique de Kant, cited in George BOAS, French Philosophers of the Romantic Period, Baltimore, Johns Hopkins Press, 1925, p. 24-25.

12 Thomas JEFFERSON, Letter to G. E. Hopkins, Sept. 5, 1822, in M.E., XV, p. 394-395.

13 Idem, Letter to John Adams, Aug. 15, 1820, in M.E., XV, p. 275-276.

14 Idem, Letter to James Madison, July 19, 1788, in PTJ, XIII, p. 379, 381.

When I was young I was fond of the speculations which seemed to promise some insight into that hidden country, but observing at length that they left me in the same ignorance in which they had found me, I have for many years ceased to read or think concerning them, and have reposed my head on that pillow of ignorance which a benevolent Creator made so soft for us, knowing how much we would be forced to use it.<sup>15</sup>

James Wilson, a convinced disciple of Thomas Reid,<sup>16</sup> would certainly subscribe to the latter's conclusion that "there is but one way to the knowledge of nature's works - the way of observation and experiment."<sup>17</sup>

Natural philosophy must be built upon the phenomena [sic] of the material system, discovered by observation and experiment.<sup>18</sup>

The first efforts of men to philosophize led them to conjectures beyond the scope of sensible observation, but such conjectures were never the source of any new scientific discoveries.<sup>19</sup>

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15 Thomas JEFFERSON, Letter to Isaac Story, Dec. 5, 1801, in M.E., X, p. 298-299.

16 For Wilson's relationship to Reid, cf. below, note 21.

17 Thomas REID, An Inquiry into the Human Mind, Chap. I, Section 1, in The Works of Thomas Reid, Sir William Hamilton ed., Edinburgh, 1872, 2 vols. Reid's work will hereafter be referred to as Inquiry and the collection of his works as Works (H).

18 Idem, Essays on the Intellectual Powers of Man, in Works (H), I, p. 234.

19 Ibid., p. 235.

There is then in the methodology of Jefferson and Wilson a definite strain of sensible empiricism, indeed of a positivism that denied validity to any knowledge of nature not verifiable in sensible experience. Historically the consequences of such a position have been the renunciation of any effort to know essences and a denial of the very possibility of metaphysics in any ontological sense.

### III. THE COGNITIVE POWERS AND THEIR OPERATION

Since Madison had nothing of value to say on the topic, the emphasis in this area falls on Wilson and Jefferson. While Wilson was the "one early American statesman who deliberately set out to provide a systematic metaphysical basis for American political institutions",<sup>20</sup> Jefferson's contribution must be gleaned from random comments which can be better analyzed by tracing them to their origins in Stewart and DeStutt.

#### A. James Wilson and "Common Sense" Philosophy

A native of Scotland and product of the University of Edinburgh, James Wilson placed himself squarely within the tradition of the Scottish school of "Common Sense" as

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<sup>20</sup> A. B. LEAVELLE, *op. cit.*, p. 394. In view of Wilson's use of "metaphysics" to mean "study of human mind", its meaning here is ambiguous.

represented by Thomas Reid. His acceptance of Reid is obvious from his use of certain passages which he had taken almost verbatim from the Introduction to Reid's An Inquiry into the Human Mind;<sup>21</sup> frequent references to Reid emphasize his personal tribute to him:

What I shall say upon this head [principles of general jurisprudence] I beg to introduce by an observation of an original and profound Writer, who, in the Philosophy of Mind [...] has formed an Aera, not less remarkable and far more illustrious than that formed by the justly celebrated Bacon, in another science.<sup>22</sup>

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21 "Yet there be some systems, which are offered to us, with pretensions the most lofty and magnificent, a few laws of association, joined to a few original feelings, explain the whole mechanism of sense, imagination, memory, belief, and of all the actions and passions of the mind. Is this the man that nature made? Is is a puppet surely, contrived to mimic her work." (Lectures on Law, Part, I, Chap. VI, "Of Man as an Individual", in Works (A), I, p. 212.

"If this is the philosophy of human nature; my soul! enter thou not into her secrets. It is surely the forbidden tree of knowledge: I no sooner taste of it, than I perceive myself naked." (Ibid., p. 213)

"The fabric of the human mind, however, is more astonishing still. The faculties of this are, with no less wisdom, adapted to their several ends, than the organs of the other. Nay, as the mind is of an order higher than that of the body, even more of the wisdom and skill of the Divine Architect is displayed in its structure." (Ibid., p. 214)

All of these passages can be found practically verbatim in Reid's Inquiry, in Works (H), I, p. 102 and 97 respectively.

22 James WILSON, [Chisholm] vs. Georgia, mss., p. 2, in Papers of James Wilson, Historical Society of Pennsylvania, Philadelphia, Vol. 2, p. 112.

Accordingly, although Wilson gave a developed account of his theory of knowledge, it will be considered legitimate to clarify or amplify that theory by an appeal to Reid when necessary or useful.

### 1. External Sensation

All the writers of that Scottish school were dedicated to the refutation of the scepticism they considered implicit in Hume's Treatise of Human Nature. Reid was probably the first to propose an answer by means of a direct attack on the basic principles of the Treatise and by an indirect attack on Descartes and Locke as the precursors of that scepticism,<sup>23</sup> however opposed they themselves would have been to it.

Recognizing that Hume's position was unassailable once his first premises were granted, Reid centered his attack upon them. He challenged the privileged position of sensation and reflection as the only sources of ideas and the definition of judgment as an assertion of the agreement or disagreement of ideas. If experience was to be the starting point for a science of the human mind, Reid demanded that all the facts of experience be recognized and among these facts he placed the universal

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<sup>23</sup> Thomas REID, Inquiry, Chap. I, Section VI, in Works (H), I, p. 103.

conviction of the existence of the extra-mental world, of a mind as a substratum of thought, of the consciousness of personal identity, of the distinction of mental operations from their proper objects, and of the principle of causality and the uniformity of nature and its laws.<sup>24</sup> Since these convictions are just as factual as consciousness of our own sensations and ideas, any epistemology must find a place for them in its explanation of the origin of knowledge.

Wilson's epistemology was equally insistent on the recognition of all the facts. His theory of sensation was thoroughly realistic and he recognized the scepticism implicit in the theories that made our sensations or "ideas" the objects of knowledge rather than the means of knowledge:

Many philosophers allege that our mind does not perceive external objects themselves; that it perceives only ideas of them; and that those ideas are actually in the mind. When it has been intimated to them, that [...] the necessary consequence must be, that we cannot be certain that anything, except those ideas exists; the consequence has been admitted in its fullest force.<sup>25</sup>

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24 Thomas REID, Essays on the Intellectual Powers of Man, Essay I, Chap. III, 4-6, in Works (H), I, p. 232-3. Hereafter these Essays will be referred to as Essays IPM.

25 James WILSON, Lectures on Law, Part I, Chap. VI, "Of Man as an Individual", in Works (A), I, p. 215.

He rejects "these castles, which have not even air to support them" in no uncertain terms:

[...] the existence of the objects of our external senses, in the way and manner in which we perceive that existence, is a branch of intuitive knowledge, and a matter of absolute certainty [...] a contrary determination would finally lead to the total subversion of all human knowledge.<sup>26</sup>

He admitted, however, that he could offer no argument in defense of his position; our convictions concerning the existence and nature of objects of our senses is "a simple and original, and therefore an inexplicable act of the mind. It can neither be described or defined."<sup>27</sup> In lieu of any argument, he suggested a practical test:

You look at me: now I call for your conscious verdict. Are you conscious, that you really see me: or are you conscious, that you see, not me, but only a certain image or picture of me, imprinted upon your own minds? If the latter, your consciousness decides in favor of Mr. Locke: if the former, it decides in favor of me.<sup>28</sup>

His theory of sensation was more realistic than Reid's inasmuch as it made no distinction between our knowledge of the primary and that of the secondary qualities. For Wilson all sensible qualities were perceived as

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<sup>26</sup> James WILSON, Lectures on Law, Part I, Chap. VI, in Works (A), I, p. 216.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid., p. 242. It is noteworthy to point out that here Wilson approaches the concept of the formal sign of Thomistic philosophy.

really existing in bodies "in the way and manner in which we perceive their existence", i.e. as objective qualities of bodies.<sup>29</sup>

Confusion entered his theory of sensation when, in an attempt to defend the dignity of the external senses, he attributed to them a power of judgment:

[...] they judge, as well as inform: they are not confined to the task of conveying impressions; they are exalted to the office of deciding concerning the nature and the evidence of the impressions, which they convey.<sup>30</sup>

Such a failure to discriminate precisely between sensation and judgment is a reflection of an ambiguity that colored his whole analysis of judgment.

## 2. Judgment

In his analysis of judgment, Wilson took as his point of departure the definition of knowledge given by John Locke in his Essay Concerning Human Understanding, in which Locke equated knowledge to the perception of the agreement or disagreement of ideas.<sup>31</sup> Ignoring Locke's later reflections on our knowledge of the extra-mental

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<sup>29</sup> James WILSON, Lectures on Law, Part I, Chap. VI, in Works (A), I, p. 216.

<sup>30</sup> Ibid., p. 217.

<sup>31</sup> Essay Concerning Human Understanding, Alexander Campbell Fraser ed., New York, Dover Publications, 1959, 2 vols.; Vol. II, p. 167.

existence of sensible particulars,<sup>32</sup> Wilson rejected him as a subjectivist:

[...] if knowledge consists solely in the perception of the agreement or disagreement of ideas, there can be no knowledge of any proposition, which expresses either the existence, or the attributes, or the relations of things; which are not ideas [...] If we have knowledge of anything else, the theory of ideas must be unfounded. For the knowledge of anything else than ideas must arise from something else than the perception of the agreement or disagreement of ideas [...] I then showed, I hope, satisfactorily, that this theory [Locke's] has no foundation in reason, in consciousness, or in other operations of our minds; but that, on the contrary, it is manifestly contradicted by all these, and would, in its necessary consequences lead to the destruction of all truth, and knowledge, and virtue [...].<sup>33</sup>

In rejecting Locke, Wilson rightly demanded that a correct definition of knowledge must include within its extension those propositions which express our convictions concerning the existence of extra-mental objects and their conformity to our notions of them. For a more satisfactory theory of knowledge he continued to rely on Reid and "Common Sense" Philosophy.

Essential to Reid's theory of knowledge was his division of judgment into those which resulted from reasoning or argument and judgments of first principles or

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<sup>32</sup> Essay Concerning Human Understanding, Vol. II, p. 171, 187-188.

<sup>33</sup> James WILSON, op. cit., Part I, Chap. XIII, "The Nature and Philosophy of Evidence", in Works (A), I, p. 485-486.

self-evident truths. The latter judgments are intuitive, "the work of nature, and the result of our original powers."<sup>34</sup> His proof for the necessity of these judgments was the traditional one of the impossibility of an infinite sequence of demonstrable premises.<sup>35</sup>

Intuitive judgments were in turn divided into judgments that yield the first principles of necessary truths and those asserting the first principles of contingent truths. Included in the scope of the former were all truths whose contrary is impossible such as the first principles of grammar, Logic, mathematics, metaphysics, and morals. Truths of this kind are abstract; they consider only the relations of ideas and prescind from any questions concerning the extra-mental existence of their objects.<sup>36</sup> For future consideration it is practical here to enumerate the necessary truths of metaphysics and morals. Under metaphysical Reid enumerates: the necessity of a subject for the existence of qualities; the necessity of a cause for anything that has a beginning; and the necessity of an

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34 Thomas REID, Essays IPM, Essay VI, Chap. IV; also Essay VI, Chap. I, in Works (H), I, p. 434, 416.

35 Ibid., Essay VI, Chap. IV, in Works (H), I, p. 435.

36 Ibid., Chap. VI, p. 452-454.

intelligent effect.<sup>37</sup> As the necessary truths of morals he lists: an unjust action merits more blame than an ungenerous one, while a generous action merits more reward than a just one; the lack of responsibility for actions not under one's control; and the "golden rule" of not doing to others what we think unfair and unjust if done to us.<sup>38</sup>

The first principles of contingent truths, on the other hand, deal with real existents and concern: the existence of all objects of consciousness; the existence of self as the subject of its thoughts; the fact of personal identity in continuous existence; the existence of objects perceived by our senses and their conformity to our notions of them; the personal possession of power over our actions and the determinations of our will; the trustworthiness of our natural faculties; and the probability that the future will be like the past under similar conditions.<sup>39</sup>

Although all judgments concerning first principles are intuitive "judgments of nature", those judgments which discover the first principles of contingent truths are natural "suggestions" accompanying sensation, while judgments

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<sup>37</sup> Thomas REID, Essays IPM, Essay VI, Chap. VI, in Works (H), I, p. 454-457.

<sup>38</sup> Ibid., p. 453.

<sup>39</sup> Ibid., Chap. V, p. 442-451.

concerning necessary truths are simply the recognition of the impossibility of the contradictory.<sup>40</sup> Despite these "judgments of nature", controversy over first principles is still possible and "labours under a peculiar disadvantage". Solution of such controversies can be found in a reduction to the absurd or in an appeal to universal consent and universal linguistic practices.<sup>41</sup>

Wilson's own analysis of judgment began with Reid's basic distinction between judgments resulting from reason and judgments of first principles.<sup>42</sup> With Reid, he agreed that the latter were intuitive "judgments of nature".<sup>43</sup> But it was with what Reid had classified as judgments of contingent truth, or judgments concerning real existents, that Wilson was mainly concerned. His analysis of those judgments, however, lacked precision and its ambiguity permeated his whole theory of knowledge.

His zeal in defending the existential value of sensation led him to the extreme of attributing to the external senses the power of judging:

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40 Thomas REID, Inquiry, Chap. II, Sec. 7, in Works (H), I, p. 111.

41 Idem, Essay IPM, Essay VI, Chap. III, in Works (H), I, p. 438-439.

42 James WILSON, op. cit., Part I, Chap. VI, "Of Man as an Individual", in Works (A), I, p. 226.

43 Ibid., p. 226.

[...] they judge, as well as inform: they are not confined to the task of conveying impressions; they are exalted to the office of deciding concerning the nature and evidence of the impressions, which they convey.<sup>44</sup>

By our senses, we have certain sensations and perceptions. But to furnish us with these, is not the only, nor is it, indeed, the principal office of our senses. They are powers, by which we judge, as well as feel and perceive.<sup>45</sup>

Each of the external senses judges concerning the existence and nature of its own proper object but the existence and nature<sup>46</sup> of the whole sensible object is reserved to the judgment of consciousness:

Judgment exercises its power concerning the evidence of consciousness, as well as concerning the evidence of the senses. The man, who is conscious of an object, believes that it exists, and is what he is conscious it is.<sup>47</sup>

Admittedly this text suggests a judgment being exercised on the evidence of consciousness, not by consciousness; but later in listing of types of judgments, Wilson included judgments by consciousness among others:

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44 James WILSON, op. cit., Part I, Chap. VI, in Works (A), I, p. 217.

45 Ibid., Part I, Chap. XIII, "The Nature and Philosophy of Evidence", in Works (A), I, p. 514.

46 "Nature" here must not be taken in the sense of a universalized essence. Wilson means simply that the sensible quality which is the object of a given external sense is the kind of a thing we sense it to be.

47 Ibid., p. 514. Emphasis mine.

In short, we judge of the qualities of bodies by our external senses; we judge what passes in our minds by our consciousness; we judge concerning beauty and deformity by our taste; we judge concerning virtue and vice by our moral sense.<sup>48</sup>

These judgments could be defined then as acts, respectively, of the external senses, of consciousness, of taste, and of the moral sense. But Wilson also suggested the possibility that, instead of being an act of the powers named, judgment could be a "necessary concomitant [...] of these operations of the mind." He dismissed the problem as irrelevant but added significantly:

[...] one thing is certain; they [acts enumerated above] are accompanied with a determination that something is true or false, and with a consequent belief. This determination is not simple apprehension; it is not reasoning; it is a mental affirmation or negation; it may be expressed by a proposition affirmative or negative; and it is accompanied with the firmest belief. These are the characteristics of judgment.<sup>49</sup>

The concept of an existential judgment as an act accompanying sensation, consciousness, taste, moral sense, and its description as a mental affirmation distinct from simple apprehension and reasoning could identify it as an intellectual existential judgment. But Wilson's propensity to multiply powers or faculties in proportion to different

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<sup>48</sup> James WILSON, op. cit., Part I, Chap. XIII, in Works (A), I, p. 515. Emphasis mine.

<sup>49</sup> Ibid. Emphasis mine.

acts blinded him to this possibility. Existential judgment must be referred to a power proper to it:

[...] the conception of judgment should be referred to the faculty of judgment [...] The power of reasoning is somewhat allied to the power of judging [...] There is, however, a very material distinction between them.<sup>50</sup>

With the power of judging, the power of reasoning is very nearly connected. Both powers are frequently included under the general appellation of reason. But reasoning is strictly the process, by which we pass from one judgment to another, which is the consequent of it.<sup>51</sup>

However, the distinction between the powers of judgment and reasoning does not necessarily exclude the possibility of both being intellectual powers. But two principles essential to Wilson's theory of knowledge argue against that possibility. First, his dedication to sensible empiricism<sup>52</sup> and its dictum that objects of nature can be known only by sensible experience deny to the intellect any capacity for existential knowledge of those objects. This denial is confirmed by his habit of equating "reason" with deduction and coupling it with simple apprehension, the power of forming mental images of no existential

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<sup>50</sup> James WILSON, op. cit., Part I, Chap. XIII, in Works (A), I, p. 517.

<sup>51</sup> Ibid., Part I, Chap. VI, "Of Man as an Individual", in Works (A), I, p. 226. Emphasis mine.

<sup>52</sup> Cf. above, p. 33.

value.<sup>53</sup> Second, his distinction of reasoning into demonstrative and moral is really a distinction between existential and non-existential thought.<sup>54</sup> The exemplar of demonstrative reasoning has always been mathematics which because of its universality and necessity has always been accepted as "intellectual" but only at the expense of its existential value. Thus the more reasoning approaches the mathematical, the more "intellectual" but non-existential it becomes and the more existential reasoning becomes, the less "intellectual" and more sensible it is. Wilson, by making the distinction, accepts its consequences. Since his judgments of contingent truths are emphatically existential, they must be described as non-intellectual or sensible.

As sensible, the power of existential judgments would have to be an internal sense, especially if its judgments accompany external sensation, consciousness, taste, and moral sense. There is evidence that Wilson identified it with a "common sense" but paradoxically the argument for that identification would be based on his equivocal use of the term "sense". A particularly clear example of that equivocation was presented in his discussion of liberty:

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53 Cf. below, p. 51.

54 Cf. below, p. 55.

It has been asserted, that we have no sense of moral liberty; and that, if we have such a sense, it is fallacious [...] Have I a sense of moral liberty? Have I a conviction that I am free? If you have; this sense — this conviction — is a matter of fact, or an object of intuition [...] If it exists why is it to be deemed fallacious? [...] Can any reason be assigned why we should suspect it, and not every other sense or power of our nature?<sup>55</sup>

The equivocation between "sense" as a conviction and "sense" as a power is obvious and is significant for an interpretation of another passage in which, after using "sense" as a power, he continued:

Sense and judgment are sometimes used, especially by some modern philosophers, in contradistinction to each other — very improperly. In common language, and in the writings of the best authors, sense always implies judgment: a man of sense is a man of judgment: common sense is that degree of judgment, which is expected in men of common education and common understanding.<sup>56</sup>

Following the same pattern of equivocation exemplified in his discussion of the sense of moral liberty, Wilson could here conclude, by using "judgment" as a middle term, that the sense which judges is the common sense; or, by using "common sense" as the middle term can conclude that to judge is to sense. However, since the power of existential judgments is the subject of the discourse, either argument

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<sup>55</sup> James WILSON, op. cit., Part I, Chap. VI, in Works (A), I, p. 229. Emphasis mine.

<sup>56</sup> Ibid., p. 226. Emphasis mine.

confirms previous conclusions that the power of existential judgment is sensible, not intellectual.

The detailed analysis of the source and nature of existential judgments is important for its consequences especially in relation to the analysis of the moral sense. Since that power is usually listed as a parallel of the faculties that judge the existential value of external sensation, consciousness, and taste, a conclusion on one is applicable to the others. Thus a conclusion that the existential judgment accompanying external sensation is not intellectual but sensible can serve as evidence of the sensible nature of the moral sense.

It is also important to note here that in the Reid-Wilson theory of judgment, knowledge of the first principles of morality is listed also as a judgment of necessary truths.<sup>57</sup> Such truths are the foundation of demonstrative reasoning and this listing of moral principles points to a science of morality that has no existential value.

### 3. Abstraction and General Terms

In contrast to the realism of his theory of sensation Wilson's analysis of abstraction and reasoning is nominalistic.

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<sup>57</sup> Cf. above, p. 42.

All things in nature are individuals. But when a number of individuals have a near and striking resemblance, we, in our minds, class them together, and refer them to a species, to which we assign a name.<sup>58</sup>

Here it may be worth while to note a difference between our own abstract notions, and objects of nature. The former are the productions of our own minds; we can therefore define and divide them, and distinctly designate their limits. But the latter run so much into one another, and their essences, which discriminate them, are so subtle [sic] and latent, that it is always difficult difficult, often impossible, to define or divide them with the necessary precision.<sup>59</sup>

The quotations cited above are the only valuable references in Wilson's works to the power of the mind to abstract i.e. to form universal or class concepts. In another passage he did discuss "conception" which he equated with "simple apprehension" and then confused with imagination and recall:

Conception is an operation of the mind, by which we apprehend a thing, without any belief or judgment concerning it, without referring it to present or past existence. Everyone is conscious that he can conceive a thousand things, of whose present or past existence he has not the least belief. You have seen a mountain: you have seen gold: you can conceive a golden mountain: but can you believe its existence? Conception enters into every operation of the mind. Our senses and our consciousness cannot convey to us information concerning any object, without, at the same time, giving some conception of that object [...] In conception there is neither truth nor falsehood; for conception neither affirms nor denies. But though all

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<sup>58</sup> James WILSON, op. cit., Part I, Chap. IV, "Of the Law of Nations", in Works (A), I, p. 149-150. Emphasis mine.

<sup>59</sup> Ibid., Part I, Chap. II, "Of Law and Obligation", in Works (A), I, p. 52. Emphasis mine.

the other operations of the mind include conception; conception itself may exist, detached from all the others, excepting consciousness. By logicians, conception is frequently called simple apprehension.<sup>60</sup>

"Conception" for Wilson was simply the production of a mental representation or phantasm which prescinded from any reference to actual existence. As such it is of little value in a discussion of intellectual abstraction and universal concepts.

In view of the fundamental importance of this epistemological problem to the question of natural law, a more detailed clarification of Wilson's position is necessary and can be gleaned from an appeal to his exemplar, Reid. It is significant to note here that Wilson in epistemology appealed constantly to Reid while in moral philosophy he practically ignored him.<sup>61</sup> Precisely then in relation to epistemology the appeal to Reid is justified by Wilson's

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60 James WILSON, op. cit., Part. I, Chap. VI, "Of Man as an Individual", in Works (A), I, p. 224-225. All emphases except the last one are mine.

61 In his Lectures on Law, Part I, Chap. II, "Of Law and Obligation" and in the following chapters that deal with the law of nature, the law of nations, and municipal law, a span of some 157 pages, Reid is referred to only twice and both times for epistemological conclusions. It is in these chapters that Wilson presents his moral and legal philosophy and the conspicuous absence of reference to Reid indicates that Wilson's acceptance of him was limited to questions of knowledge. In Chapters VI and XIII of Part I which concentrate on those questions there are 18 references to Reid and his authority in epistemology is unique.

own references to the Essays on the Intellectual Powers of Man and An Inquiry into the Human Mind.<sup>62</sup>

Observing that general words make up the greatest part of all languages, Reid thought this phenomenon was easily explained. Every object known has various attributes and it is these attributes alone that we know; "we know not the essence of any individual object."<sup>63</sup> The observation that many individuals have attributes in common leads to our uniting them in a common class to which a name is given, which signifies all the attributes common to that class. In this process there are three stages: first, abstraction, "the resolving or analyzing of a subject into its known attributes, and giving a name to each, which name will signify that attribute and nothing more." Secondly, generalization, "the observing one or more such attributes to be common to many subjects." Thirdly, "the combining into one whole a certain number of those attributes, and giving a name to that combination."<sup>64</sup> His

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62 Cf. especially Works (A), I, p. 485, 507, 514-515.

63 Thomas REID, Essays IPM, Essay V, Chap. I and Chap. II, in Works (H), I, p. 389, 392. Reid explicitly equated abstract ideas and definition to Locke's "nominal essences." (p. 392) "Nominal essences" are analyzed by Locke in Essay Concerning Human Understanding, Bk. III, Chap. III, p. 15-20 and Chap. VI. (Cf. Essay Concerning Human Understanding, New York, Dover, 1959, Vol. II, p. 28-31 and 57-97.)

64 Ibid., Chap. III, in Works (H), I, p. 394.

conclusion as to the existential status of a general conception is significant. He emphasized that abstraction does not necessarily mean generalization since the consideration of one attribute of an individual to the exclusion of other attributes would be abstraction without generalization as long as that attribute were not applied to other subjects.

The first [abstraction] signifies an individual quality really existing, and is not a general conception, though it be an abstract one: the second [generalization] signifies a general conception, which implies no existence.<sup>65</sup>

Such a theory of abstraction or generalization is consistent with the sensible empiricism or positivism of both Reid and Wilson. All knowledge of sensible reality is a knowledge of attributes gained by observation and experiment. Since Hume's analysis of knowledge it has been a truism that no relationship of necessity in nature can be discovered by that method. Wilson's agreement with that position is indicated in his analysis of causality:

If an object is remembered to have been frequently, still more, if it is remembered to have been constantly, succeeded by certain particular consequences; the conception of the object naturally associates to itself the conception of the consequences; and on the actual appearance of the object, the mind naturally anticipates the appearance of the consequences also [...] If the consequences

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<sup>65</sup> Thomas REID, Essays IPM, Essay V, Chap. III, in Works (H), I, p. 395.

have followed the object constantly, and the observations of this constant connection have been sufficiently numerous; the evidence, produced by experience, amounts to a moral certainty.<sup>66</sup>

But an existential knowledge of essences demands the ability on the part of the intellect to distinguish between attributes necessary or essential to a species and non-essential attributes. The valid comprehension of a definition must include all the attributes necessary for the inclusion of an individual in a class. Hence, in order that a definition have existential value the relationship of necessity between certain attributes and their subject must be discoverable in reality. Moreover, to deny to human cognition the capacity for an existential knowledge of essences is to eliminate effectually any quality of necessity from our conclusions about reality. Such a denial is not necessarily disastrous in those sciences that deal with subhuman subjects since in them the compulsory subjection of the beings to the laws of their natures is reflected in the constancy of the conjunctions sensibly observable. That constancy supplies a substitute for necessity in those sciences, whether their practitioners admit it or not. But in any science dealing with man, who is under no such compulsion of nature, a denial to man of the capacity for an

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66 James WILSON, Part I, Chap. XIII, "The Nature and Philosophy of Evidence", in Works (A), I, p. 508.

existential knowledge of essences, eliminates any quality of necessity from our conclusions and negates any theory of moral obligation claiming to be founded on natural knowledge.

#### 4. Reasoning

Wilson's conclusions on reasoning were entirely consistent with this theory of abstraction. Reason is distinguished from all the other powers of the mind and its function is limited strictly to "the process by which we pass from one judgment to another, which is the consequence of it."<sup>67</sup> Wilson was aware of the close relationship between judgment and reasoning, as has been noted, but explicitly refused to accept them as different acts of the same power, preferring to refer them to distinct faculties.<sup>68</sup>

Wilson distinguished two types of reasoning, demonstrative and moral:

Demonstrative evidence [reasoning]<sup>69</sup> has for its subject abstract and necessary truths, or the unchangeable relations of ideas [...] Abstract

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<sup>67</sup> James WILSON, op. cit., Part I, Chap. XIII, in Works (A), I, p. 517; also Chap. VI, "Of Man as an Individual", in Works (A), I, p. 226.

<sup>68</sup> Cf. above, p. 46.

<sup>69</sup> The identity of "evidence" with "reasoning" is obvious from the context in which this passage is found.

truths have no respect to time or place; they are universally and eternally the same [...] Truths alone [...] which depend on abstract principles, are susceptible of demonstrative evidence.<sup>70</sup>

Moral evidence [reasoning] has for its subject the real but contingent truths and connections, which take place among things actually existing [...] The objects of our senses are objects of moral, but not of demonstrative evidence. Truths, that depend on matters of fact, however complete the evidence by which they are established, can never become demonstrative.<sup>71</sup>

The consistency between his theory of abstraction and his analysis of reasoning is evident. The subjects of demonstrative reasoning are those same "general conceptions" or "abstract notions" which prescind completely from existence and are perfectly defineable because they are the products of our own minds.<sup>72</sup>

This theory of reasoning is definitely in the tradition of John Locke and David Hume,<sup>73</sup> and indicates

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<sup>70</sup> James WILSON, op. cit., Part I, Chap. XIII, in Works (A), I, p. 518.

<sup>71</sup> Ibid., p. 518.

<sup>72</sup> Cf. above, p. 49, 51.

<sup>73</sup> Locke divided knowledge into intuitive, demonstrative, and sensitive, considering the first two as knowledge properly speaking while the third is, strictly speaking, opinion. Knowledge proper is either the intuitive or demonstrative perception of the agreement or disagreement of ideas. It alone is capable of certitude and is especially characteristic of mathematics, but exclusive to it. Knowledge proper considers only "archetypes of the mind's own making, not intended to be copies of anything, nor referred to the existence of anything [...]" (Essay,

clearly that Wilson's rejection of Locke and Hume<sup>74</sup> was partial and limited to the problem of the existential value of sensible perception and our knowledge of individual existents. He cannot escape, therefore, from the logical consequences of that tradition, even though he himself was perhaps unconscious of them. The tradition effectually

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Bk. IV, Chap. IV, 5: II, p. 230; emphasis mine). Such knowledge must be "real", i.e. it cannot but conform to the only reality intended, the archetypes "which the mind, by its free choice, puts together, without considering any connexion they have in nature." (Ibid., p. 231)

"[...] comes short of one of these [intuition and demonstration], with what assurance soever embraced, is but faith or opinion." (Bk. IV, Chap. II, 14: II, p. 185). Another perception of the "particular existence of finite beings" has enough probability to pass as knowledge. That we have ideas apparently received from external objects is a matter of intuition and therefore certain, and for Locke the existence of the corresponding external particular object can with certitude be inferred. Hence such knowledge can be included in intuition. (Ibid., p. 188) However no general conclusions concerning extra-mental reality can ever exceed probability. "Certainty and demonstration are things we must not, in these matters, pretend to." (Bk. IV, Chap. III, 26: II, p. 218) "Whence we may take notice, that general certainty is never to be found but in our ideas. Whenever we go to seek it elsewhere [...] our knowledge goes not beyond particulars. It is contemplation of our own abstract ideas that alone is able to afford us general knowledge." (Bk. IV, Chap. VI, 16: II, p. 266; emphasis mine.)

The distinction between demonstrative and moral or probable reasoning on the basis of their respective objects, namely, relations of ideas and matters of fact is made explicitly by Hume in the Enquiry concerning Human Understanding, Section II, Part I, Yalden-Thomas edition, London, Nelson, 1951, p. 24.

74 Cf. above, p. 37.

negates the possibility of any demonstrative science of reality and denies necessity to any conclusion whose subject is a real existent. Ultimately that tradition culminates in modern empiricism or logical positivism which openly acknowledges its debt to Hume:

[...] it is characteristic of an empiricist to eschew metaphysics, on the ground that every factual proposition must refer to sense-experience [...] Having admitted that we are empiricists, we must now deal with the objection [...] that it is impossible on empiricist principles to account for our knowledge of necessary truths. For, as Hume conclusively showed no general proposition whose validity is subject to the test of actual experience can ever be logically certain [...] And this means that no general proposition referring to a matter of fact can ever be shown to be necessarily and universally true. It can at best be a probable hypothesis.<sup>75</sup>

This discussion of the distinction between demonstrative and moral reasoning, a distinction explicitly accepted by Wilson, more than offsets the lack of personal testimony to prove his nominalism. To summarize the argument, first, for Wilson, the authority of Thomas Reid is final and unique in epistemology, and Reid is a nominalist. Secondly, Wilson accepts the theory of demonstrative and moral reasoning exactly as presented by Locke and Hume — a dominant theme of nominalism. His personal observation that demonstrative reasoning is possible only in

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75 A. J. AYER, Language, Truth and Logic, New York, Dover, 1957, p. 71-72.

mathematics and his explicit acceptance of the conclusion that all existential reasoning is moral or probable are consistent with nominalism. They contradict the realistic theory of universals which alone gives demonstrative reasoning existential value. Thirdly, nowhere in his epistemology does Wilson even suggest a realistic theory of universals. Fourthly, Wilson's epistemology is logically systematic only if it is nominalistic. Therefore, Wilson's nominalism stands confirmed.

#### B. Thomas Jefferson — Ideology and Common Sense

The writings of Thomas Jefferson reveal no systematic nor fully developed epistemology, but rather a number of insights whose variation point to either an eclecticism or naivete. His acceptance of Dugald Stewart of the Common Sense school and of DeStutt deTracy, the French ideologue, has already been noted and at first sight seems to present the problem of harmonizing two conflicting theories of knowledge. While Ideology accepted the basic principles of John Locke, Common Sense philosophy professed to be the antithesis of both Locke and Hume in its opposition to their scepticism. However, as revealed in the analysis of the epistemology of James Wilson, the opposition between Common Sense philosophers and Hume is essentially a difference on theories of sensation only and will have little effect on

the more important problem of Jefferson's concept of abstraction and reasoning.

### 1. Jefferson's Materialism

The question of the degree of materialism adopted by Jefferson is an open one. At times he expressed himself as a complete materialist:

To talk of immaterial existences, is to talk of nothings. To say that the human soul, the angels, God, are immaterial, is to say they are nothings [...] At what age of the church this heresy of immaterialism, or masked atheism, crept in, I do not exactly know. But a heresy it certainly is. Jesus taught nothing of it. He told us indeed, that "God is a spirit", but He has not defined what a spirit is, nor said it is not matter.<sup>76</sup>

He could conceive of thought as an "action of a particular organization of matter, formed for that purpose by its Creator"<sup>77</sup> and congratulate Cabanis on "having conducted us as far on the road to materialism as we can go."<sup>78</sup> Later he commented on the "most extraordinary of all books [...] the most demonstrative by numerous and unequivocal facts" written by Flourens describing his experiments on the nervous systems of vertebrates:

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<sup>76</sup> Thomas JEFFERSON, Letter to John Adams, Aug. 15, 1820, in M.E., XV, p. 274.

<sup>77</sup> Ibid.

<sup>78</sup> Idem, Letter to Monsieur Cabanis, July 12, 1803, in M.E., X, p. 404.

Cabanis has proved [...] that they might be capable of receiving from the Creator the faculty of thinking; Flourend [sic] proves that they have received it; that the cerebrum is the thinking organ [...] I wish to see what the spiritualists will say to this [...].<sup>79</sup>

It must be admitted that in much of his correspondence he speaks of revelation,<sup>80</sup> the after-life,<sup>81</sup> a future and different state of being,<sup>82</sup> but in view of his statement to John Adams, quoted above, there is no reason for assuming that he thought of these things as immaterial. To limit his materialism to methodology is arbitrary.<sup>83</sup> His materialism, however, did not lead him to the traditional conclusions; he retained his belief in God the Creator and Ruler, morality, heaven, etc. even though he may have mistaken their nature.<sup>84</sup>

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79 Thomas JEFFERSON, Letter to John Adams, Jan. 8, 1825, in M.E., XVI, p. 90-92.

80 Idem, Letter to Rev. Isaac Story, Dec. 5, 1801, in M.E., X, p. 300.

81 Idem, Letter to John Dickinson, Mar. 6, 1801, in M.E., X, p. 217; also, Letter to Gov. John Page, June 25, 1804, in M.E., XI, p. 31.

82 Idem, Letter to Dupont de Nemours, Feb. 1, 1803, in M.E., X, p. 351.

83 Such a limitation is suggested by Adrienne KOCH, The Philosophy of Thomas Jefferson, New York, Columbia University Press, 1943, p. 99-100, also p. 35.

84 Cf. below, p.

## 2. External Sensation

Despite his approbation of both DeStutt and Stewart as the "ablest [...] investigators of the thinking faculty of man"<sup>85</sup> Jefferson was forced to chose between them with regards to their theories of sensation. Stewart was aware of the work of the French philosophers and explicitly rejected as erroneous their reduction of all operations of the mind to "Feeling".<sup>86</sup> He also rejected the effort of Dr. Joseph Priestley to reduce mind to matter,<sup>87</sup> and thus is in conflict with Jefferson's approbation of Cabanis' efforts along the same lines, and also of Priestley for his Corruptions of Christianity.<sup>88</sup> Because of these differences and Jefferson's testimony to DeStutt as "the ablest writer living on intellectual subjects, or the operation of the understanding,"<sup>89</sup> the following quotation

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85 Cf. above, p. 29.

86 Essay III, "Locke's Influence in France", in Works (H), V, p. 121-125.

87 Essay IV, "Hartley, Priestley, Darwin", in Works (H), V, p. 138, 144.

88 "I have read his Corruptions of Christianity [2nd. ed., 1793] & Early Opinions of Jesus, over and over again, and I rest on them [...]." Letter to John Adams, Aug. 22, 1813, in Catalogue of the Library of Thomas Jefferson, compiled and edited by Millicent E. SOWERBY, Washington, 1952, II, p. 120. Hereafter this will be referred to as SOWERBY, Catalogue.

89 Thomas JEFFERSON, Letter to John Adams, Oct. 14, 1816, in SOWERBY, Catalogue, II, p. 3.

can be justifiably interpreted as a decision on Jefferson's part in favor of DeStutt and Ideology on the question of sensation:

And to give rest to my mind, I was obliged to recur to my habitual anodyne, "I feel therefore I exist." I feel bodies which are not my self; there are other existences then. I call them matter, I feel them changing place. This gives me motion [...] On the basis of sensation, of matter and motion, we may erect the fabric of all the certainties we can have or need.<sup>90</sup>

DeStutt reduced all thinking to sensation or feeling<sup>91</sup> with the slight distinction that "sentir" was reserved for the activity of the external senses while "penser" signified properly the operations of the internal senses, that is, the awareness of those secondary impressions of memory, judgment, and desire, of which the primary sensations of the external senses are the occasion and original source.<sup>92</sup>

In common with Locke, the Ideologists accepted the fundamental premise that our "ideas" are the objects of

90 Thomas JEFFERSON, Letter to John Adams, Aug. 15, 1820, in M.E., XV, p. 273-274.

91 "Penser, comme vous voyez, c'est toujours sentir, et ce n'est rien que sentir." Eléments d'Idéologie, Paris, MMe. Levi, 1827, I, p. 16-17.

92 "[...] destine le mot sentir à exprimer l'action de sentir des premières impressions qui nous frappent, celles que l'on nomme sensations; et le mot penser à exprimer l'action de sentir les impressions secondaires que celles-là occasionnent, les souvenirs, les rapports, les désirs, dont elles sont l'origine." (Ibid., p. 17)

knowledge. DeStutt, seeking an escape from the subjectivism implicit in this, appealed to the fact of our voluntary activity and our frequent inability to achieve what we thus will for a guarantee of the objectivity of sensation. No sensation of itself can tell us anything about the existence of an extra-mental object, but sensation combined with a voluntary desire to continue or renew the experience in addition to an awareness of our inability to fulfill this desire beget in us a feeling of the resistance and consequently the existence of an extra-mental object.

Voluntary and sensible activity on one part, and resistance on the other is, indeed, the link between ourselves and other beings, between things sensing and the things sensed.<sup>93</sup>

Such a cognitional medium can yield a knowledge of the existence of an object but can reveal nothing of its nature, except that it is the unknown cause of our sensations.

Such vagueness was probably the reason why Jefferson enlisted the aid of Stewart and Common Sense in formulating his theory of knowledge. For Stewart our sensations of the primary qualities, namely, the quantitative aspects

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93 "En un mot, quand un être organisé de manière à vouloir et à agir sent en lui une volonté et une action, et en même temps une résistance à cette action voulue et sentie, il est assuré de son existence et de l'existence de quelque chose qui n'est pas lui. Action voulue et sentie d'une part, et résistance de l'autre, voilà le lien entre notre moi et les autres êtres, entre les êtres sentans et les êtres sentis." Eléments d'Idéologie, I, p. 291.

of a sensible object, are objective and correspond exactly to those qualities as they are in reality.<sup>94</sup> The evidence for this knowledge are the same "judgments of nature" to which Wilson appealed.<sup>95</sup>

In the final analysis, perhaps the best way to evaluate Jefferson's epistemology of external sensation is to recognize his simple conviction of the objectivity of sense knowledge:

Rejecting all organs of information, therefore, by my senses, I rid myself of the pyrrhonisms which such an indulgence in speculations hyperphysical and antiphysical so uselessly occupy and disquiet the mind. A single sense may be deceived, but rarely; and never all our senses together, with the faculty of reasoning. They evidence realities. I am sure that I really know many, many things [...].<sup>96</sup>

He was probably not vitally interested in any theoretical justification of such knowledge:

His [DeStutt] three 8vo volumes on Ideology, which constitute the foundation of what he has since he has since written, I have not entirely read; because I am not fond of reading what is merely abstract, and unapplied to some useful science.<sup>97</sup>

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94 Outlines of Moral Philosophy, Part I, Section 2, in Works (H), III, p. 18.

95 Ibid., p. 19-20.

96 Thomas JEFFERSON, Letter to John Adams, Aug. 15, 1820, in M.E., XV, p. 275-276.

97 Idem, Letter to John Adams, Oct. 14, 1816, in SOWERBY, Catalogue, II, p. 3.

### 3. Abstraction and Reasoning

Again, in the absence of any explicit treatment by Jefferson of these two questions, the theories of Ideology and Common Sense must be presumed as acceptable to him and substitute for his own reflections on abstraction and reasoning. The nominalism of Common Sense philosophy was demonstrated adequately in relation to Wilson's theory of abstraction and reasoning. The conclusions of that demonstration are applicable to Jefferson because of his approval of Dugald Stewart.<sup>98</sup> The analysis need not be repeated here.

Ideology included the operations of abstraction and generalization under the consideration of the formation of composed ideas. Specifically, general ideas are formed when a sensible experience evokes a memory of similar experiences and merges with them into one composed idea. Because the idea abstracts from all characteristics of time and place peculiar to each memory, it becomes applicable to any and all similar experiences.<sup>99</sup> It must be kept in

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98 Cf. above, p. 50-59.

99 "Quand ensuite nous avons éprouvé une sensation pareille, à l'occasion d'autres êtres, le souvenir de cette sensation est devenu une idée générale et commune à toutes les sensations semblables, dans laquelle ne sont pas comprises les circonstances de temps et de lieu, et autres particulières à chacune d'elles." DESTUTT, Elémens d'Idéologie, I, p. 287.

mind, however, that the only real existents are individuals and that general ideas are the creations of our mind and constitute a means of classifying our ideas of individuals.<sup>100</sup> Further, general ideas contribute nothing to the truth and certitude of affirmations, but, on the contrary, certitude arises completely a posteriori from the particular and individual facts involved.<sup>101</sup> In other words, the certitude of a conclusion applies only to the individual or collection of individuals which were the objects of the sensible experiences involved. On the basis of that principle there would be no justification for a scientific conclusion that would attempt to generalize with a priori necessity concerning all other individuals like those subjects.

Accordingly, Ideology and Common Sense are in essential agreement concerning abstraction and reasoning. Jefferson, therefore, who accepted both by his approbation of DeStutt and Stewart must be placed in the ranks of Nominalism and accept the consequences of that position.

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100 "Il est seulement à remarquer qu'il n'existe réellement que des individus, et que nos idées ne sont point des êtres réels existans hors de nous, mais de pures créations de notre esprit, des manières de classer nos idées des individus." DESTUTT, Elémens d'Idéologie, I, p. 288.

101 "[...] mais cela ne fait pas que ce soit l'idée générale qui soit la cause de la vérité de l'affirmation; c'est, au contraire, des faits particuliers que vient toujours la certitude." Ibid., p. 289.

## C. Comparative Summary of Wilson and Jefferson

After this consideration of the various epistemological theories fundamental to the thinking of Jefferson and Wilson, a summary emphasizing their common principles and conclusions is of value for future consideration. Both Jefferson and Wilson were realistic in their theories of sensation, with Wilson justifying his position more adequately. Both rejected the subjectivism implicit in the premise that our sensations are the objects of knowledge; Jefferson appealed to the internal phenomenon of "feeling" while Wilson based his objectivity on "judgments of nature", judgments "accompanied by feeling" which form "that complex operation of the mind, which is denominated sentiment."<sup>102</sup> Whether "feeling" can be interpreted in such a way as to equate the two positions is a moot question.

Both Founding Fathers were convinced sensible empiricists who recognized only the senses as the root of any judgment claiming existential value. Neither admit any intellectual grasp of reality within sensible experience; all existential judgments are sensible. Their conclusions concerning the existential value of general concepts are a common denial of the capacity of the mind to acquire any

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<sup>102</sup> James WILSON, Lectures on Law, Part I, Chap. XIII, "The Nature and Philosophy of Evidence", in Works (H), I, p. 516. Emphasis mine.

knowledge of the essences of real objects. All general definitions are products of the mind which prescind from existence and are closely akin to concepts of mathematics.

For Wilson these definitions are the subjects of demonstrative reasoning, as distinguished from moral or probable reasoning, which is concerned with real existents. Although Jefferson does not subscribe explicitly to Wilson's theory of reasoning, his approbation of Dugald Stewart and Common Sense and the absence of any evidence to the contrary are strong evidence of his conformity to Wilson. Hence, for neither Wilson nor Jefferson can there be any generalized demonstrative or necessary knowledge of reality. Whether either of them realized and accepted the consequences of their epistemological position in its application to the fields of ethics, law, and politics remains to be seen. Their theory of general concepts and the reasoning concerning these concepts certainly puts them in a tradition of nominalism which receives its most recent expression in logical positivism — a position consistent with their dedication to the method of observation and experiment and with their rejection of an ontological metaphysics.

## CHAPTER III

### MORAL PHILOSOPHY

#### I. VALUE OF MORALITY AND MORAL PHILOSOPHY

There can be no doubt about the convictions of our Constitutional fathers on the value of a life of virtue.

Jefferson counseled his nephew, Peter Carr, that the best approach to public esteem was integrity in the pursuit of the interests of one's country, friends, and self. No attainments of body or mind could compensate for the defect of virtue; neither money, fame, science, indeed nothing on earth could justify an immoral act. A life of virtue would yield "the most sublime comforts in every moment of life and in the moment of death."<sup>1</sup> Identical advice was given to Thomas Mann Randolph Jr.<sup>2</sup>

Wilson was thoroughly in agreement with Jefferson as to the value of morality, insisting that our moral perception "is, indeed, a most important part of our constitution."<sup>3</sup> The detailed and prolonged consideration he gave

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<sup>1</sup> Thomas JEFFERSON, Letter to Peter Carr, Aug. 19, 1785, in PTJ, VIII, p. 405-406.

<sup>2</sup> Idem, Letter to Thomas Randolph Jr., Nov. 25, 1785, in PTJ, IX, p. 60.

<sup>3</sup> James WILSON, Lectures on Law, Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 106.

to the problem of our knowledge of ethical principles is further evidence of his favorable evaluation of the importance of the subject.<sup>4</sup>

Madison added his convictions by denying emphatically that the destinies of neither individuals nor nations could be injured by compliance with the maxims of virtue. "To suppose it, would be to arraign the justice of Heaven and the order of nature."<sup>5</sup>

But, as to the value of the study and science of morality Jefferson's attitude was negative. Despite the fact that he allotted a place to moral philosophy in his proposed reform of the curriculum of the College of William and Mary<sup>6</sup> and prescribed the reading of Epictetus, Xenophantis, Plato, and Cicero for the moral formation of his nephew,<sup>7</sup> he considered attendance at lectures in moral philosophy a waste of time:

I think it is lost time to attend lectures in this branch [moral philosophy]. He who made us would have been a pitiful bungler, if he had made the rules of our moral conduct a matter of science.

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4 Moral considerations permeate his Lectures but are treated in detail in Chapters II and III, in Works (A), I, p. 49-127.

5 James MADISON, Letter to John Armstrong, June 6, 1805, in Writings (H), VII, p. 183.

6 Thomas JEFFERSON, Bill No. 80, in PTJ, II, p.540.

7 Idem, Letter to Peter Carr, Aug. 10, 1785, in PTJ, VIII, p. 407-408.

For one man of science there are thousands who are not. What would become of them?<sup>8</sup>

Such a position was entirely consonant with his acceptance of the emotional nature of ethical judgments.<sup>9</sup>

In contrast to Jefferson, Wilson placed definite emphasis on the study of moral philosophy. He granted it the status of a science<sup>10</sup> and assigned it an important place in his outline for the study of law. This outline, an attempt to order the study of law, demanded the knowledge of divine law, the law of nature, and the nature and origin of moral obligation as prerequisites to the understanding of human law.<sup>11</sup> Such questions are traditionally proper to moral philosophy. Hence, his proposed sequence testifies to his convictions as to the importance of that study. Moreover, such knowledge was proper not only for future lawyers but also for all citizens since some grasp of the science of law was obligatory on every free citizen

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<sup>8</sup> Thomas JEFFERSON, Letter to Peter Carr, Aug. 10, 1787, in M.E., VI, p. 256; also PTJ, XII, p. 14-15.

<sup>9</sup> Cf. infra, p. 84.

<sup>10</sup> James WILSON, Lectures on Law, Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 105, 111.

<sup>11</sup> Idem, Lectures on Law, Part I, Chap. I, "The Study of Law in the United States", in Works (A), I, p. 36.

who desired to participate intelligently in the democratic process.<sup>12</sup>

Yet Wilson would agree with Jefferson that a virtuous life was possible for the uneducated. In his analysis of the role of reason in moral judgments, Wilson questioned its necessity for all men and consequently the importance of the science of morality to which reasoning would be fundamental. For men "who have not the means of cultivating the power of reasoning to any high degree" a moral life is still possible since "the cases that require reasoning are few, compared to those that require none."<sup>13</sup> The premises for such a conclusion will be presented in an analysis of Wilson's concept of the moral sense.<sup>14</sup> However, in view of his conclusion of the necessity of moral science for intelligent cooperation in a democratic society, there would seem to be some question as to the civic capabilities of uneducated men. Accordingly, Wilson's denial of the necessity of the study of moral philosophy would not be as complete as Jefferson's since the former recognized its importance for society in general.

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<sup>12</sup> James WILSON, Lectures on Law, Part I, Chap. I, in Works (A), I, p. 7.

<sup>13</sup> Idem, Lectures on Law, Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 111.

<sup>14</sup> Cf. infra, p. 100.

## II. PRESUPPOSITIONS OF MORAL PHILOSOPHY

## A. Relation of Religion and Morality

Traditionally, the presuppositions of moral science have been the answers proposed to the questions of the existence of God, the destiny of man, and his possession of freedom of the will. The problem of the relationship between morality and religion depends especially on answers proposed to the first two questions. If a personal God is recognized as the creator of the universe, and especially of man, then on the grounds that an intelligent artist works for a purpose and incorporates that purpose in the nature of the artefact, all creation becomes a revelation from God and all true morality must be theonomous. A rejection of theonomic ethics necessarily affirms the autonomy of man and all the consequences of that position; law is of its very nature a product of intelligence and choice and therefore must find its origin in either God or man. The views of the Founding Fathers on these questions are then of basic importance.

Jefferson, personally a religious man, accepted many of the traditional religious truths such as the existence of God, creation, and the reality of a future

life.<sup>15</sup> He rejected, however, any doctrine that surpassed the bounds of natural reason.<sup>16</sup> Although full of admiration for the ethical doctrines of Christ<sup>17</sup> he denied His divinity<sup>18</sup> and rejected any possibility of

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15 a. Existence of God — Thomas JEFFERSON, Letter to John Adams, April 8, 1816, in M.E., XIV, p. 469.

b. Creation — Idem, Letter to Charles Thomson, Dec. 17, 1786, in PTJ, X, p. 608-609.

c. Resurrection, Heaven, etc. — Letter to John Page, July 15, 1763, in PTJ, I, p. 10; Letter to John Page, June 25, 1804, in M.E., XI, p. 3; Letter to Dupont de Nemours, Feb. 1, 1803, in M.E., X, p. 351; Letter to John Dickinson, Mar. 6, 1801, in M.E., X, p. 217; Letter to Uriah Gregory, Aug. 13, 1800, in M.E., X, p. 171-172.

16 "Read the bible then, as you would Livy or Tacitus. The facts which are within the ordinary course of nature you will believe on the authority of the writer [...]. But those facts in the bible which contradict the laws of nature must be examined with more care [...]. You are Astronomer [sic] enough to know how contrary it is to the law of nature that a body revolving on its axis, as the earth does, should have stopped." Thomas JEFFERSON, Letter to Peter Carr, Aug. 10, 1787, PTJ, XII, p. 15-16. Emphasis mine.

17 Idem, Letter to Benjamin Rush, April 21, 1803, in M.E., X, p. 384-385.

18 "You will next read the new testament. It is the history of a personage called Jesus Christ. Keep in your eyes the opposite pretensions. 1. Of those who say he was begotten by god, born of a virgin, suspended and reversed the laws of nature at will, and ascended bodily into heaven; and 2. those who say he was a man, of illegitimate birth, of a benevolent heart, enthusiastic mind, and was punished capitally for sedition by being gibbeted according to Roman law [...]." Idem, Letter to Peter Carr, Aug. 10, 1787, in PTJ, XII, p. 16.

"That Jesus did not mean to impose himself on mankind as the Son of God, physically speaking, I have been convinced by the writings of men more learned than myself in that lore. But that he might conscientiously believe

miracles.<sup>19</sup> He considered the teachings of Christ to be counsels worthy of imitation but not obligatory.

Jefferson's moral philosophy, however, was essentially non-religious to the extent that he saw no necessary connection between morality and religion. Despite his own religious convictions he cited what he considered the virtuous lives of atheists like Diderot, D'Alembert, Condorcet, etc. to argue that morality could have a foundation other than religion.<sup>20</sup> This position was one of long standing; a quarter of a century earlier, while exhorting his nephew to strive for personal intellectual independence, he advised him to submit everything, especially religion, to the tribunal of his own reason without fear of consequences which as far as morality was concerned were of small importance. If such an inquiry should result in a belief that there is no God "you will find incitements to virtue in the comfort and pleasantness you fell in its

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Himself to be inspired from above is very possible [...] He might readily mistake the coruscations of his own fine genius for inspiration of an higher order." Thomas JEFFERSON, Letter to Wm. Short, Aug. 4, 1820, in M.E., XV, p. 261. Emphasis mine.

"[...] ascribing to himself every human excellence; and believing he never claimed any other." Idem, Letter to Dr. B. Rush, April 21, 1803, in M.E., X, p. 382. Emphasis mine.

19 Cf. above, p. 75, note 16.

20 Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 139-140.

exercise, and the love of others it will procure you."<sup>21</sup>  
The man possessed of a moral sense had no need of the enticements in terms of heavenly reward which were necessary for those devoid of that sense.<sup>22</sup> In place of a personal destiny divinely-willed Jefferson substituted social utilitarianism.<sup>23</sup>

The moral philosophy of James Wilson was more religiously orientated than that of Jefferson. His belief in a personal God and a Creator is implicit in his conviction that the primary purpose of man was the fulfillment of God's will:

This is the supreme law. His just and full right of imposing laws, and our duty in obeying them, are the sources of our moral obligations.<sup>24</sup>

But the right of God to legislate presumes a teleology in His creation:

Has the all-gracious and all-wise Author of our existence formed us for such great and such good ends; and has he left us without a conductor to lead us in the way, by which those ends may be attained?

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21 Thomas JEFFERSON, Letter to Peter Carr, Aug. 10, 1787, in PTJ, XII, p. 16.

22 Idem, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 141.

23 Ibid., p. 143. Cf. also infra, p. 107-112.

24 James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 105.

His infinite power enforces his laws, and carries them into full and effectual execution. His infinite wisdom knows and chooses the fittest means for accomplishing the ends which he proposes.<sup>25</sup>

Wilson also accorded more authority to the Sacred Scripture which he considered not merely hortatory but obligatory inasmuch as they are "oracles" of the Divine Will to which man owes the duty of obedience.<sup>26</sup> Since, in referring to Scripture he never distinguished between the Old and New Testaments, he must have accorded equal authority to them; indeed, in a singular reference to the New Testament he spoke of the "sacred history of the resurrection."<sup>27</sup>

That reference is significant also because it contains what is apparently his only reference to Jesus Christ and testified to his belief in Christ's divinity and Incarnation:

In the sacred history of the resurrection, a beautiful and emphatical reference is had to this distinct but corresponding and reciprocally corroborating evidence of the senses, by him, by whom our nature was both made and assumed.<sup>28</sup>

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25 James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 95, 99. Emphasis mine.

26 Ibid., p. 106.

27 Idem, op. cit., Part I, Chap. XIII, "Of the Nature and Philosophy of Evidence", in Works (A), I, p. 489. Emphasis mine.

28 Ibid. Emphasis mine.

For Wilson then the teaching of Jesus Christ would participate in the sacred authority of divine law.

Wilson was also in opposition to Jefferson on the question of the relationship between morality and law on one hand and religion on the other:

The law eternal, the law celestial, and the law divine, as they are disclosed by that revelation, which has brought life and immortality to life, are the more peculiar objects of the profession of divinity.

The law of nature, the law of nations, and the municipal law form the objects of the profession of law [...] Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other. The divine law [...] forms an essential part of both.<sup>29</sup>

#### B. Freedom of the Will

Concerning the freedom of the will it is obvious that neither Jefferson nor Wilson had any doubts about it. Jefferson did not discuss it explicitly but his emphasis on selflessness and devotion to duty as the marks of the moral man, and his appeal to legal penalties and the prospects of reward in a future state as inducements to moral behaviour would be useless for a subject incapable of self-controlled activity.<sup>30</sup>

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<sup>29</sup> James WILSON, op. cit., Part I, Chap. II, "Of the General Principles of Law and Obligation", in Works (A), I, p. 93-94. Emphasis mine.

<sup>30</sup> Cf. supra, p. 74.

Wilson described liberty as a "power of the mind by which it modifies, suspends, continues, or alters its deliberations and actions."<sup>31</sup> Objection could be taken to a lack of precision in his terminology which describes liberty as a "power" but there is no doubt of his intention of ascribing the quality of freedom to man's activity. In defense of his conclusion he offered two basic facts of experience: our capacity of conforming to a rule which makes us accountable for our conduct, and our conviction of being free in our human activity. He challenged the objection that our intuition of freedom could be fallacious by insisting that such an intuition cannot be doubted except at the cost of a denial of all other facts of consciousness.<sup>32</sup>

James Madison evidently discussed the question of human freedom at some length with Samuel Stanhope Smith, the founder and first president of Hampden-Sydney Academy. In two letters to Madison, Smith argued in favor of free will. Madison's replies are lost but the letters of Smith suggest that the controversy was rather about the proof of freedom rather than freedom itself:

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31 James WILSON, *op. cit.*, Part I, Chap. VI, "Of Man as an Individual", in Works (A), I, p. 229.

32 Ibid.

I have read your theoretical objections against the doctrine of moral liberty; for practically you seem to be one of its disciples [...].

But the letter also implies that Madison was of the opinion that the will is necessitated by the stronger motive:

You will say if the sentiments of duty are more pleasing than others they will have their necessary effect; otherwise they will make but a vain opposition against their fatal antagonists [...].

Madison also questioned the validity of the argument from our consciousness of freedom:

You ask, might we not have had the same feeling [of freedom] in acting under an absolute and irresistible inspiration from Heaven? And if so, no valid argument can be derived from thence in favor of moral freedom.<sup>33</sup>

Despite his questions about the operation of free will and his reservations as to the validity of some arguments in favor of freedom Madison then seems to have affirmed the freedom of the will in practice. His constant concern for law and responsibility in civil society would alone have been ample testimony to that conclusion.

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<sup>33</sup> Samuel Stanhope SMITH, Letter to James Madison, Sept. 15, 1778, in The Papers of James Madison, Chicago, U. of Chicago Press, 1962-1965, 4 Vols., I, p. 253-256. Emphasis mine.

## III. KNOWLEDGE OF MORALITY

## A. Jefferson and the Moral Sense

Jefferson's convictions concerning the existence and nature of the moral sense were life-long. His social utilitarianism and acceptance of the moral sense places him in the ranks of those moralists of the first half of the eighteenth century represented by Anthony Ashley (1671-1713), third earl of Shaftesbury, and by Frances Hutcheson (1694-1746), professor of moral philosophy at Glasgow. Jefferson's moral theory is entirely consistent with his devotion to Dugald Stewart and DeStutt since the moral sense was an essential principle of the Common Sense philosophy of the former and could only be confirmed by the emphasis the latter placed on "feeling." In his letter to Thomas Law in 1814 he affirmed his belief in the existence and value of the moral sense:

I sincerely, then, believe with you in the general existence of a moral instinct. I think it the brightest gem with which the human character is studded, and the want of it more degrading than the most hideous of bodily deformities.<sup>34</sup>

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<sup>34</sup> Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 144. Also Letter to John Adams, Oct. 14, 1815, in M.E., XV, p. 76. His convictions on the moral sense were life-long; it was prominent in the letter to Peter Carr in 1787 (cf. supra, p. 77, note 21), in his Notes on Virginia, and in a letter to his daughter, Martha, Dec. 11, 1783 (PTJ, VI, p. 380).

His basic argument in favor of the moral sense was the necessity of morality for social life, so natural and necessary for men. The Creator must have given the average man some means of distinguishing good and evil, a means independent of intellectual ability and degree of education.<sup>35</sup> Admittedly there were some men who were defective in this regard, but this no more argued against the existence of the moral sense than blindness and deafness in some would deny the existence of those faculties of sight and hearing.<sup>36</sup> The privation of the moral sense could be remedied by education and appeals to various motives,<sup>37</sup> and this conclusion reveals a lack of precision in Jefferson's concept of the moral sense. If it is a faculty such as sight or hearing, no motivation or education could compensate or substitute for it; if such remedies are effective, the moral sense cannot be a faculty but must be merely a quality of natural sensitivity and acumen in moral knowledge. Certainly the faculties of sight and hearing could not be replaced by education or proper motivation.

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35 Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 144. Also Letter to Peter Carr, Aug. 10, 1787, in PTJ, XII, p. 15.

36 Idem, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 143.

37 Ibid.

Jefferson was more definite about other aspects of the moral sense. It is emotional rather than intellectual; Wollaston's theory that truth is the foundation of morality was described as "whimsical."<sup>38</sup> Jefferson summed up his concept of the moral sense in his "Head and Heart" letter to Maria Cosway. To the head or the intellect is allotted the field of science, but to the heart the field of morals. Morality was too important to the welfare of mankind to be trusted to the "uncertain combinations of the head" and so its foundations are sunk more firmly in sentiment. Too often virtuous impulses are stifled by objections presented by the intellect; even the Revolution would have been aborted if the hearts of the colonists heeded the advice of their heads and their evaluation of the struggle as an impossible task. No good is ever done at the suggestion of the mind and no evil without it. Therefore the heart must "forever disclaim [the intellect's] interference in [its] province."<sup>39</sup> So fundamental to morality is the emotional nature of the moral sense that Jefferson agreed with Kaims

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<sup>38</sup> Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 143.

<sup>39</sup> Idem, Letter to Maria Cosway, Oct. 12, 1786, in PTJ, X, p. 450-451.

in his conclusion that "a man owes no duty to which he is nor urged by some impulsive feeling."<sup>40</sup>

Another essential feature of the moral sense for Jefferson was its social orientation. For him the necessities of social intercourse were synonymous with morality:

I consider our relations with others as constituting the boundaries of morality [...] To ourselves, in strict language, we can owe no duties [...].<sup>41</sup>

Earlier, in recognition of the First Amendment as an expression of the right of man to freedom of conscience he had voiced the same sentiment:

[...] I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced that he has no natural right in opposition to his social duties.<sup>42</sup>

He reasoned to that conclusion from the social nature of man:

Man was destined for society. His morality, therefore, was to be formed to this object. He was endowed with a sense of right and wrong, merely relative to this.<sup>43</sup>

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40 Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 144. Emphasis mine.

41 Ibid., p. 140. Emphasis mine.

42 Idem, Reply to Address of the Danbury Baptist Association, Jan. 1, 1802, in M.E., XVI, p. 281. Emphasis mine.

43 Idem, Letter to Peter Carr, Aug. 10, 1787, in PTJ, XII, p. 15. Emphasis mine.

Due to this reduction of all morality to social morality Jefferson definitely belongs to the school of those British moralists of the eighteenth century who founded their ethics on a social rather than private end and in doing so laid the foundations also of the utilitarianism of J. S. Mill, Jeremy Bentham, etc., in short of modern secular humanism.<sup>44</sup>

#### B. Wilson and the Three Sources of Moral Knowledge

James Wilson postulated three sources of moral knowledge: conscience or moral sense, reason, and Sacred Scripture.<sup>45</sup> Their relative importance and their mutual relations were considered in detail.

##### 1. Moral Sense

His conclusions concerning the existence and nature of the moral sense were the logical consequences of his enumeration and analysis of the cognitive operations of man.<sup>46</sup> In that analysis he restricted the function of reason to deduction, the passing from one judgment to

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44 For further information on the social utilitarians of the eighteenth century, cf. F. COPLESTON, A History of Philosophy, Vol. V, Chap. X, p. 171-184 especially.

45 James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 106.

46 Cf. supra, p. 34-55.

another which was its consequent.<sup>47</sup> Recognizing the impossibility of an infinite regress in such a process, he conceded that "man cannot begin to reason, till we are furnished, otherwise than by reason, with some truths on which we can found our arguments."<sup>48</sup> These foundational truths or first principles are discovered by intuitive "judgments of nature" or "judgments of common sense."<sup>49</sup> In the realm of moral knowledge also, reason functions only deductively and presupposes a knowledge of the first principles of morality attained by some power other than reason; such a power is the moral sense or conscience.

Morality, like mathematics, has its intuitive truths, without which we cannot make a single step in our reasonings upon the subject [...] The power of moral perception is, indeed, a most important part of our constitution. It is an original power, a power of its own kind [...] We have the same reason to rely on the dictates of this faculty, as upon the determination of our senses, or of our other natural powers.<sup>50</sup>

Wilson recognized the objections to the existence of the moral sense and to the uniformity and certitude of its judgments. The variations of morality in different

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47 James WILSON, op. cit., Part I, Chap. VI, "Of Man as an Individual", in Works (A), I, p. 226.

48 Idem, op. cit., Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 105. Emphasis mine.

49 Cf. supra, p. 40-43.

50 James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 105-106. Emphasis mine.

cultures, different ages, different religions would seem to indicate that the moral sense was synonymous with custom and education. Admitting that education, social institutions, corrupt rulers, etc., had "obliterated or distorted the basic moral principles and fettered the moral sense", he condemned the evaluation of human nature and its moral qualities based only on a consideration of savages and immoral men, pleading that the evidence be garnered from "human nature in her improved, and not in her most rude or depraved forms."<sup>51</sup> The fact that some actions are esteemed more than others by mankind and that approbation of them is general, if not universal, testifies to the existence and reliability of the moral sense. It is in fact more reliable than reason since the defects alleged against the moral sense are actually defects of reasoning which has been substituted for that sense.<sup>52</sup>

He met the objections against the moral sense with an argument from language also. "Where all languages make a distinction there must be a similar distinction in universal opinion or sentiment." Such a universal effect presumes a universal cause which can be nothing but an "intuitive perception of things, which is distinguished by the

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<sup>51</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 115.

<sup>52</sup> Ibid., p. 117.

name of common sense." Since all languages speak of good and evil in actions, affections, and character they must all suppose a moral sense, a species of common sense, by which these qualities are perceived.<sup>53</sup>

The validity of Wilson's arguments for the existence of the moral sense can be questioned. If their basic premise is a definition of reason as deductive knowledge, the disjunction actually established is between deductive and non-deductive knowledge. If it were argued that the understanding or intellect were capable of both types of knowledge the conclusion to the existence of a separate moral sense or power would be invalid. Nor would the argument from the necessity and fact of virtue in the lives of those incapable of reasoning be any more effective; it concludes validly only to the existence of some sources of moral knowledge other than deduction such as custom or religion. The arguments from the general approbation of mankind or the universal practice of language conclude only to a similarity of moral judgments but not to the cause of such judgments.

If, however, reasoning or deductive knowledge is considered the only function of the understanding (or intellect) Wilson's arguments from the necessity of

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<sup>53</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 108-109.

non-deductive knowledge and from the fact and necessity of morality in the lives of the uneducated are validated and yield a valuable hint as to the nature of the moral sense.

Wilson's reflections on the nature of the moral sense reveal more evidence of his relationship to Hume. The similarity between his theory of reasoning and that of Locke and Hume has been indicated.<sup>54</sup> Wilson's position on reasoning occasioned no conflict with his acceptance of Thomas Reid and Common Sense Philosophy since Reid opposed Locke and Hume only on the questions of the objectivity of sensation and the sources of knowledge; his theory of reasoning was completely in agreement with theirs.<sup>55</sup> However, in his analysis of the moral judgment, Wilson seems to have debated between Reid and Hume with his final decision in favor of the latter. The first evidence of his rejection of Reid is the conspicuous absence of any appeal to him on moral questions.<sup>56</sup> Further evidence is suggested by Wilson's rejection of the opinion that moral evaluations are founded on reason:

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54 Cf. supra, p. 55-57.

55 Ibid.

56 James Wilson presented his theory of morality especially in Part I, Chap. III, "Of the Law of Nature" of his Lectures on Law, in Works (A), I, p. 95-128. In that chapter there is no reference to Thomas Reid.

It will be proper to examine a little more minutely the opinion of those, who allege reason to be the sole directress of human conduct. Reason may, indeed, instruct us in the pernicious or useful tendency of qualities, and actions: but reason alone is not sufficient to produce any moral approbation or blame [...] It is requisite that sentiment should intervene, in order to give a preference to the useful above the pernicious tendencies.<sup>57</sup>

In that text Wilson seems almost to be rejecting point by point an argument of Reid:

That it is part of the office of reason to determine what are the proper means to any end which we desire, no man ever denied. But some philosophers, particularly Mr. Hume, think that it is no part of the office of reason to determine the ends we ought to pursue, or the preference due to one end above the other. This, he thinks, is not the office of reason, but of taste and feeling [...]. The ends of human actions I have in view are two — to wit, what is good for us upon the whole, and, what appears to be our duty. They are very strictly connected, lead to the same course of conduct, and cooperate with each other; and on that account, have commonly been comprehended under one name — that of reason.

[...] It appears, therefore, that the very conception of what is good or ill for us upon the whole, is the offspring of reason. And if this conception give rise to any principle of action in man, which he had not before, that principle may very properly be called a rational principle of action.<sup>58</sup>

The very essence of Wilson's theory of moral judgments was presented in a passage strikingly similar to a parallel

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<sup>57</sup> James WILSON, op. cit., Part. I, Chap. III, in Works (A), I, p. 118. All emphasises except "sentiment" are mine.

<sup>58</sup> Thomas REID, Essays on the Active Powers of Man, in Works (H), II, p. 581. Emphasis mine.

discussion by Hume. In it Wilson selects the same example, ingratitude, and reasons similarly, especially from the absence of morality in non-human agents.<sup>59</sup>

In the discussion under consideration Hume's argument is based on a complete disjunction between reason and passion as the possible sources of moral knowledge. "Reason" here is not restricted to deductive knowledge but is identified with understanding (or intellect):

As the operations of human understanding divide themselves into two kinds, the comparing of ideas, and the inferring of matter of fact, were virtue discovered by the understanding, it must be an object of one of these operations; nor is there any third operation of the understanding which can discover it.<sup>60</sup>

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59 The passages on which the claim of similarity is based are: James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 118-120, and David HUME, A Treatise on Human Nature, Bk. III, Part I, Section I, "Moral Distinctions Not Derived From Reason", London, J. M. Dent & Sons, 1962, II, p. 175-176.

60 David HUME, op. cit., Bk. III, Chap. I, Sec. I, ibid., p. 172. Emphasis mine. Hume's use of the term "understanding" is subject to ambiguity and demands clarification, especially in view of its application to Wilson's theory of the moral sense. For Hume "understanding" in its widest meaning applies to all the psychic acts of man, including impressions (of sensations and reflection), ideas resulting from memory, imagination, and reasoning; affective functions, i.e. passions, desires, and emotions, are included under ideas of reflection (op. cit., I, p. 11, 17). For future reference then let "understanding" be divided into:

- a. "Understanding<sup>1</sup>" — which will include sensation, memory and, imagination;
- b. "Understanding<sup>2</sup>" — which will include passions, desires, and emotions;

In fact then the disjunction will be between the understanding and the passions; the moral sense must be either intellectual or emotional in nature.<sup>61</sup> Hume himself leaves no doubt about his conclusion: "Moral distinctions are not derived from reason."<sup>62</sup>

He first argues that reason alone has no influence on our actions, but morals do influence them. Hence, "the rules of morality, therefore, are not conclusions of reason."<sup>63</sup>

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c. "Understanding<sup>3</sup>" — which will include acts of reasoning, i.e. the comparison of ideas and the discovery of their relations of identity, situation in time and place, and causation (op. cit., I, p. 77). Reason can be simply defined as the "discovery of truth or falsehood. Truth or falsehood consist in an agreement or disagreement either to real relations of ideas, or to real existence and matter of fact." (op. cit., II, p. 167) "Understanding" in this sense can be subdivided into intuition, demonstration and probable reasoning or inferring of matters of fact (op. cit., I, 73-77 and II, 167). To the extent that "understanding<sup>3</sup>" is identified with deductive reasoning and intuition of ideas it can be identified with the "intellect" of Aristotelian-Thomistic thought. Hence, "U<sup>3</sup>" = "reason" = "intellect".

In this passage Hume is eliminating the possibility of any knowledge of morality by means of understanding in the sense of "U<sup>3</sup>".

61 Knowledge of morality is certainly not acquired by "U<sup>1</sup>" or sensation; hence the only alternatives are "U<sup>2</sup>" or "U<sup>3</sup>".

62 David HUME, op. cit., II, p. 165 (Title of Section I, Part I, Book III, "Of Morals"). Emphasis mine.

63 Ibid., p. 167.

His second argument is based on the premise that the human understanding is limited to the comparing of ideas and the inferring of matters of fact. Therefore if morality does not depend on the relations of ideas nor on matters of fact then moral knowledge is not an operation of the understanding. But morality does not depend on relations of ideas:

Animals are susceptible of the same relations with respect to each other as the human species, and therefore would also be susceptible of the same morality, if the essence of morality consisted in these relations. Their want of a sufficient degree of reason may hinder them from perceiving the duties and obligations of morality, but can never hinder these duties from existing; since they must antecedently exist, in order to their being perceived. Reason must find them, and can never produce them. This argument deserves to be weighed, as being, in my opinion, entirely decisive.<sup>64</sup>

Here Hume used the example of ingratitude, just as Wilson will do, to clarify his reasoning.<sup>65</sup>

Nor can morality consist in any matter of fact open to the understanding:

But can there be any difficulty in proving that vice and virtue are not matters of fact, whose existence we can infer by reason? [...] In whichever way you take it, you can find only certain passions, motives, volitions, and thoughts. There is no other matter of fact in the case. The

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64 David HUME, op. cit., Book III, Part I, Sect. I, in J. M. Dent, II, p. 176.

65 Ibid., p. 175.

vice entirely escapes you, as long as you consider the object. You can never find it, till you turn your reflection into your own breast, and find a sentiment of disapprobation, which arises in you, towards this action. Here is a matter of fact; but it is the object of feeling, not of reason.<sup>66</sup>

Since, therefore, moral distinctions cannot be founded on relations of ideas nor on matters of fact open to the understanding, the making of such distinctions, i.e. the formulation of moral judgments, is not a function of the understanding. "Morality, therefore, is more properly felt than judged of."<sup>67</sup> For Hume the moral sense is definitely emotional in nature, not intellectual.

In his own discussion of the problem Wilson agreed that "reason judges either of relations or of matters of fact."<sup>68</sup> Then working also from the example of ingratitude Wilson argued that morality cannot consist in matters of fact:

This [ingratitude] has place, when good will is expressed and good offices are performed on one side, and ill will or indifference is shown on the other. The first question is — what is that matter of fact, which is here called a vice? Indifference or ill will. But ill will is not always, nor in all circumstances a crime: and indifference may, on some occasions be the result of the most

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66 David HUME, op. cit., Book III, Part I, Section I, in J. M. Dent, II, p. 177. Emphasis mine.

67 Ibid., p. 178. Emphasis mine.

68 James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 118.

philosophic fortitude. The vice of ingratitude, then, consists not in matter of fact.<sup>69</sup>

Nor does it consist in relations:

Objects in the animal world, nay inanimate objects, may have to each other all the same relations, which we observe in moral agents; but such objects are never supposed to be susceptible or merit or demerit, of virtue or vice.<sup>70</sup>

Because of this similarity to Hume's discussion of the source of moral distinctions and Wilson's implicit rejection of Reid it is only logical to place Wilson's arguments in the context of Hume's disjunction between understanding and passion and justifiably conclude that he conceived the moral sense as emotional.<sup>71</sup> That conclusion is corroborated by a significant passage in which Wilson opposed the moral sense to reason in reference to moral knowledge:

Thus are the offices of reason and moral sense at last ascertained. The former conveys the knowledge of truth and falsehood; the latter, the sentiments of beauty and deformity, of vice and virtue. The standard of one, founded on the nature of things, is eternal and inflexible. The standard of the other is ultimately derived from that supreme will, which bestowed on us our peculiar nature, and arranged the several classes and orders of existence. In this manner, we return to that great principle, from which we set out. It is necessary that reason should be fortified by

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<sup>69</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 119. Emphasis mine.

<sup>70</sup> Ibid., p. 119-120.

<sup>71</sup> Cf. discussion of two uses of moral sense, infra, p. 102-105.

the moral sense; that without the moral sense, a man may be prudent, but he cannot be virtuous.<sup>72</sup>

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<sup>72</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 120-121; emphasis mine. Rev. William OBERING, S.J., in The Philosophy of Law of James Wilson (Washington, D.C., Catholic University), identifies Wilson's concept of natural law as being in close agreement with Thomistic natural law quotes from this passage in an effort to refute the anti-intellectualism of the following passage from Wilson's Lectures on Law, Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 120, which states: "The ultimate ends of human actions can never be accounted for by reason. They recommend themselves entirely to the sentiments and affections of men, without dependence on the intellectual faculties." Commenting on this text, Fr. Obering says: "Such a view is opposed, not only to his [Wilson] general philosophy [...] but is opposed to his tenet that moral approbation or blame is founded on intellectual perception of moral truth [...] whose standard 'founded on the nature of things is eternal and inflexible.'" First, Fr. Obering begs the issue in his conclusion that Wilson's "general philosophy" bases moral approbation or blame on the intellectual perception of moral truth. The text on which he is commenting ("The ultimate ends...") challenges precisely that conclusion since the power that "accounts for" the ultimate ends, i.e. the "sentiments and affections" must be considered essential in moral judgments. Fr. Obering's conclusion is challenged also by Wilson's statement that "[...] reason alone is not sufficient to produce any moral approbation or blame [...] It is requisite that sentiment should intervene [...]" (cited supra, p. 91). Second, Fr. Obering's cites only a portion of the text to which this footnote refers ("Thus are the offices...") and his use of that portion does not accurately reflect the meaning of the passage. In it Wilson distinguished between the roles of reason and moral sense in regards to moral judgments. Reason judges concerning truth and falsehood by means of the nature of things while the moral sense judges concerning vice and virtue according to the supreme will. Fr. Obering's use of the passage emphasizes the role of reason and ignores the role of the moral sense while the text refers to both but, in my opinion, emphasizes the role of the moral sense, which emphasis is certainly consistent with Wilson's general moral philosophy. Confusion could arise from the ambiguity of the grammatical relationship of "The standard of one..." to either "reason"

## 2. Moral Sense and Reason

Despite his evaluation of the moral sense as emotional, Wilson still conceived of a role for reason in the formation of moral judgments, but his attempt to clarify that role resulted in confusion.

First, reason was denied any role in the discovery of the first principles of morals<sup>73</sup> or the ultimate ends of human actions;<sup>74</sup> the former are discovered by the moral sense<sup>75</sup> and the latter "recommend themselves entirely to the sentiments and affections of men, without dependence on the intellectual faculties."<sup>76</sup>

Second, in morality "reason is usefully introduced, and performs many important services" and Wilson lists these services in detail:

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or "moral sense" but the text indicates a sequence of "reason" — "the former" — "standard of one, founded on the nature of things" as opposed to "moral sense" — "the latter" — "standard of the other [...] supreme will." (Emphasis is mine)

The detailed analysis of this passage was necessary since it will be significant in the evaluation of Wilson's relationship to Thomistic natural law theory.

73 Cf. supra, p. 41, 87.

74 Cf. supra, p. 97, note '2.

75 Cf. infra, p. 102-103.

76 James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 120. Emphasis mine.

She determines the proper means to any ends; and she decides the preference of one end over another [...] She may be necessary to ascertain the circumstances and determine the motives of an action [...] She judges concerning subordinate ends [...]

Farther, reason serves to illustrate, to prove, to extend, to apply what our moral sense has already suggested to us [...]

[...] reason contributes to ascertain the exactness, and to discover and correct the mistakes, of the moral sense.

Reason performs an excellent service to the moral sense in another respect. It considers the relations of actions, and traces them to the remotest consequences. We often see men, with the most honest hearts and most pure intentions, embarrassed and puzzled, when a case, delicate and complicated, comes before them. They feel what is right; they are unshaken in their general principles; but they are unaccustomed to pursue them through their different ramifications, to make the necessary distinctions and exceptions, or to modify them according to the circumstances of time and place. 'Tis the business of reason to discharge this duty.<sup>77</sup>

An initial ambiguity in the roles of reason and moral sense is their conflict in relation to ultimate authority. Reason must discover and correct the mistakes of the moral sense while at the same time "the dictates of reason are neither more general, nor more uniform, nor more certain, nor more commanding than the dictates of the moral sense."<sup>78</sup> Indeed, when moral judgments are mistaken, in many instances, "it is our reason which presents false

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<sup>77</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 111-112.

<sup>78</sup> Ibid., p. 117. Emphasis mine.

appearances to our moral sense."<sup>79</sup> Finally, although we may reason on the propriety of conduct "these reasonings must always, in the last resort, appeal to the moral sense."<sup>80</sup>

A second ambiguity is implicit in the functions of reason and moral sense in the application of general moral principles to particular actions. On the one hand it is reason that traces the consequences, makes the necessary distinctions, exceptions, and modifications which circumstances of time and place demand while on the other hand "the cases that require reasoning are few, compared with those that require none, and a man may be very honest and virtuous, who cannot reason [...]."<sup>81</sup> On many occasions "it were well for us [...] if we laid our reasoning systems aside" and listened instead to our moral instinct, our conscience, which is "the voice of God within us."<sup>82</sup> Hence, most of our moral decisions are made by the moral sense, and even in the rare cases when reason aids in the decision there would seem to be no moral value attached to its work:

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<sup>79</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 117. Emphasis mine.

<sup>80</sup> Ibid., p. 113. Emphasis mine.

<sup>81</sup> Ibid., p. 111.

<sup>82</sup> Ibid., p. 118.

Reason may, indeed, instruct us in the pernicious or useful tendency of qualities and actions: but reason alone is not sufficient to produce any moral approbation or blame [...] It is requisite that sentiment should intervene, in order to give a preference to the useful above the pernicious tendencies.<sup>83</sup>

The reason assigned for the necessity of the intervention of sentiment as the decisive influence in moral problems effectively negates the moral value of any of the functions assigned to reason.

Utility is only a tendency to a certain end; and if the end be totally indifferent to us, we shall feel the same indifference towards the means.<sup>84</sup>

Reason then seems capable only of postulating hypothetical imperatives in the moral order, of directing the activity by which those imperatives would be implemented, and of detecting the motives involved in a given human action. However, since moral evaluation depends on the ultimate end to which an action is ordered and since reason has no role in the evaluation of ultimate ends<sup>85</sup> its function is completely utilitarian and pragmatic, completely subject to the ethical evaluations of the moral sense which is the final arbiter of moral approbation or blame. To repeat the argument:

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<sup>83</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 118. Emphasis mine.

<sup>84</sup> Ibid. Emphasis mine.

<sup>85</sup> Cf. supra, p. 98

Reason may, indeed, instruct us in the pernicious or useful tendencies of qualities and actions [... but] utility is only a tendency to a certain end; and if the end be totally indifferent to us, we shall feel the same indifference toward the means [... therefore] It is requisite that sentiment should intervene, in order to give [moral] preference to the useful above the pernicious tendencies.<sup>86</sup>

In short, whatever power makes the judgment on the moral value of the ultimate ends of human actions, that power is the final arbiter of morality. But for Wilson that power is a moral sense emotional in nature. Therefore, for him emotion is the final arbiter of morality and the role of reason in moral judgments is subordinated to it as its executive agent.

The source of the confusion in defining the roles of reason and moral sense is the fact that Wilson, whether he realizes it or not, is using moral sense in two different ways. A careful distinction is necessary and can be made by setting the problem into the context of demonstrative and moral reasoning. Wilson first speaks of the moral sense as a power of moral perception which discovers the first principles of morality.<sup>87</sup> He describes these

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<sup>86</sup> The role of reason indicated here is the formation of hypothetical imperatives i.e. if such an end is desired then certain actions will be useful for the attainment of that end. The judgment as to whether the end should be desired is the function of sentiment or moral sense.

<sup>87</sup> Cf. supra, p. 87.

principles as akin to the first principles of mathematics, a description which puts him in agreement with Reid who listed such first truths as necessary truths, the first principles of a demonstrative science of morality.<sup>88</sup> Let this moral sense, the source of judgments of necessary moral truths, be the "speculative moral sense." Its judgments are the first principles of demonstrative reasoning which prescinds from existence. Such judgments are simply the recognition of the impossibility of the contrary, i.e. the recognition of the agreement or disagreement of "ideas". As abstract or non-existential they need no verification in sensible experience; they are "mathematical" in nature. Traditionally they would have been considered functions of "reason" — "intellectual" judgments. However, Wilson's emphatic identification of reason with deduction and his sparing and ambiguous use of "intellect" and "understanding" make it practically impossible to classify the "speculative moral sense" in his terms. At least, since its judgments are universal, necessary, and "mathematical", the speculative moral sense is, in his terms, non-sensible.

Let "practical moral sense" be the term for that power which judges the morality of an existent act, an act which is a matter of fact. Such judgments are judgments

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88 Cf. supra, p. 40-42.

of contingent truths, the first principles of moral or existential reasoning. Hence, in Wilson's spectrum of knowledge, they belong at the opposite end from judgments of necessary or non-existential truths and are necessarily involved with sensible experience. It can be recalled that Wilson listed the moral sense with the powers that judge the existential value of external sensation, consciousness and taste; judgments ultimately defined as non-intellectual or sensible.<sup>89</sup> Accordingly, the practical moral sense makes an existential judgment which demands verification in sensible experience. But not in external sensation, since morality is not a color, odor, sound, etc. Rather the practical moral sense must be an internal sense whose object is the feeling of approval or disapproval referred to by Hume. This is the "matter of fact" from which the practical moral sense infers the morality of an act.

Applying the distinction to the problem of the roles of reason and moral sense in ethical knowledge, the former can be identified with the speculative moral sense, the non-sensible or "intellectual" source of an abstract science of morality. "Moral sense", as opposed to "reason", can be taken as the practical moral sense, the source of factual or existential moral knowledge. It is this

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89 Cf. supra, p. 47.

emotional moral sense that is the final arbiter of morality. Any attempt, therefore, to make the science of morality practical necessarily subjects the abstract judgments of the speculative moral sense to the control of the practical moral sense. "[...] reasonings must always, in the last resort, appeal to the moral sense."<sup>90</sup>

### 3. Sacred Scripture

Wilson's analysis of the role of Scripture in the formation of moral judgments also testified to the superiority of the moral sense, i.e. practical moral sense. The Sacred Scriptures are frequently necessary to clarify the conclusions of reason and conscience and to strengthen and extend their influence. Without the Scriptures "great and sublime truths, indeed, would appear to a few; but the world at large would be dark and ignorant." These revelations from God are our clearest and most certain oracles whose instructions, when given, are "supereminently authentic."<sup>91</sup> Yet, this commendation of Scripture should not be construed as a mitigation of the primacy of the moral sense. The Scriptures generally presuppose a knowledge of

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90 Cf. supra, p. 100.

91 James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nations", in Works (A), I, p. 121, 123.

the principles of morality, teach nothing new, and only reinforce what is already known.

These considerations show, that the Scriptures support, confirm, and corroborate, but do not supersede the operations of reason and the moral sense.<sup>92</sup>

Wilson's analysis of the role of Sacred Scripture in the formulation of moral judgments leaves the supremacy of the moral sense unchallenged.

#### C. James Madison and the Moral Sense

There is evidence that Madison also accepted an emotional moral sense as the ultimate source of moral judgments. An account of a speech given by him in Congress, February 2, 1790, referring to the payment of national debts reported him as pleading:

[...] gentlemen would not yield too readily to the artificial niceties of forensic reasoning; that they would consider not the form but the substance [...] It was a great and extraordinary case; it ought to be decided on the great and fundamental principles of justice. He had been animadverted upon for appealing to the heart as well as the head: he would be bold, nevertheless, to repeat that, in great and unusual questions of morality, the heart is the best judge.<sup>93</sup>

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<sup>92</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 123. Emphasis mine.

<sup>93</sup> James MADISON, Speech in Congress, Feb. 18, 1790, in Writings (H), V, p. 449; emphasis mine. Compare to Jefferson's "Head and Heart" letter to Maria Cosway (cf. supra, p. 84).

Admittedly the reference is to great and unusual questions of morality, but the fact that he had been challenged on other occasions for "appealing to the heart as well as the head" suggests that this appeal to the emotions as a criterion of morality was not singular.

#### IV. THE CRITERION OF MORALITY

##### A. Jefferson and Social Utilitarianism

In formulating his moral criterion, Jefferson first eliminated personal well-being from consideration:

Self-love, therefore, is no part of morality. Indeed, it is exactly its counterpart. It is the sole antagonist of virtue, leading us constantly by our propensities to self-gratification in violation of our moral duties to others [...] Take from man his selfish propensities, and he can have nothing to seduce him from the practice of virtue.<sup>94</sup>

Egoism even in a broader sense, i.e. altruism for the sake of the personal pleasure resulting, was also rejected as inadequate because it could not answer the question as to why the doing of good to others begets pleasure in the doer.<sup>95</sup>

The essential characteristic of Jefferson's moral standard was altruism in a non-egoistic sense:

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<sup>94</sup> Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 140.

<sup>95</sup> Ibid., p. 141.

But I consider our relations with others as constituting the boundaries of morality.<sup>96</sup>

[...] nature has constituted utility to man, the standard and test of virtue.<sup>97</sup>

The essence of virtue is in doing good to others.<sup>98</sup>

His convictions on altruism were the reasons for his rejection of the Mosaic code as "repulsive and anti-social" and his acceptance of the ethical teachings of Christ, which he considered the acme of morality because of their universal philanthropy.<sup>99</sup>

Jefferson's altruism, in fact, blinded him to other ethical considerations to the extent of his accepting the principle that the end justifies the means:

[...] for virtue does not consist in the act we do, but in the end it is to effect. If it is to effect the happiness of him to whom it is directed, it is virtuous [...].<sup>100</sup>

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96 Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 140. Emphasis mine.

97 Ibid., p. 143. Emphasis mine.

98 Idem, Letter to John Adams, Oct. 14, 1816, in M.E., XV, p. 77.

99 Idem, Letter to Joseph Priestley, April 9, 1803, in M.E., X, p. 374. Also, Letter to Dr. Benjamin Rush, April 21, 1803, in M.E., X, p. 382; Letter to Wm. Short, Aug. 4, 1820, in M.E., XV, p. 260.

100 Idem, Letter to John Adams, Oct. 14, 1816, in M.E., XV, p. 77. Emphasis mine.

But the "utility to man", "good to others", "happiness" are terms that demand further interpretation. Jefferson's interpretation was relativistic; he understood them as necessarily subject to variations according to local and social circumstances to the extent that acts deemed virtuous in one society could be vicious in another. Jefferson here was not referring merely to the subjective evaluations of the same act in different societies, i.e. that an action considered morally good in one society might be considered morally evil in another. He was convinced that the objective morality of all actions varied according to circumstances:

[...] as the circumstances and opinion of different societies vary, so the acts which may do them right or wrong must vary also [...] The essence of virtue is in doing good to others, while what is good may be one thing in one society, and its contrary in another.<sup>101</sup>

Nature has constituted utility to man the standard and test of virtue. Men living in different countries under different circumstances, different habits and regimens, may have different utilities; the same act, therefore, may be useful and consequently virtuous in one country which is injurious and vicious in another differently circumstanced.<sup>102</sup>

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<sup>101</sup> Thomas JEFFERSON, Letter to John Adams, Oct. 14, 1816, in M.E., XV, p. 76-77. Emphasis mine.

<sup>102</sup> Idem, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 143. Emphasis mine.

He could have mitigated this relativism by making some distinction of acts on the basis of their relative necessity to human nature; some acts are not as essential to it as others and therefore allow variance in relation to morality according to circumstances. But Jefferson made no such distinction; his moral criterion of utility applied indiscriminately to all actions.

He was aware of the moral relativism implicit in his ethics and tried to guard against it. While agreeing with Lord Kaims that we owe only the duties imposed by feeling, he qualified his agreement with the stipulation that Kaims was correct if feeling "referred to the standard of general feeling [...] and not the feeling of the individual."<sup>103</sup> Again, commenting on the authority of writers on the natural law, he judged them as declaring only "what their own moral sense and reason dictate" unless they were in agreement among themselves and coincided with the opinion of the "wise and honest part of mankind."<sup>104</sup> Such conditions emphasize the a posteriori and positivistic tone of his moral doctrine to the extent that they equate the morality of an act with what is considered to be moral at the

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<sup>103</sup> Thomas JEFFERSON, Letter to Thomas Law, June 13, 1814, in M.E., XIV, p. 143. Emphasis mine.

<sup>104</sup> Idem, Opinion of French Treaties, in M.E., III, p. 228. Emphasis mine.

time by the qualitative majority or the "best part" of mankind. The problem of determining the "best part" remained unanswered.

A certain objectivity and universality of moral principles seems to be demanded for the administration of government:

But when we come to the moral principles on which the government is to be administered, we come to what is proper for all conditions of society [...] Liberty, truth, probity, honor, are declared to be the four cardinal principles of your society. I believe with you that morality, compassion, generosity, are innate elements of the human constitution; that there exists a right independent of force; that a right to property is founded on our natural wants [...] that no one has the right to obstruct another, exercising his faculties innocently for the relief of sensibilities made a part of his nature; that justice is the fundamental law of society; that the majority, oppressing an individual, is guilty of a crime, abuses its strength, and by acting on the law of the strongest, breaks up the foundations of society.<sup>105</sup>

However, the seeming objectivity of this conclusion must be qualified by the fact that the moral principles enumerated here are, with the exception of the right to property, moral generalities which demand further clarification, and such clarification would have to be consonant with his more

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<sup>105</sup> Thomas JEFFERSON, Letter to Dupont de Nemours, April 14, 1816, in M.E., XIV, p. 490. Emphasis mine.

basic moral principles which were emotional, positivistic, and relativistic.<sup>106</sup>

#### B. Wilson and the Natural Law

There can be no doubt of the sincere desire of James Wilson to formulate a standard of morality founded on natural law which was the expression of the divine plan for human nature and therefore universally obligatory:

In this immense ocean of intelligence and action, are we left without a compass and without a chart? Is there no pole-star, by which we may regulate our course?<sup>107</sup>

When we view the inanimate and irrational creation around and above us, and contemplate the beautiful order observed in all its motions and appearances; is not the supposition unnatural and improbable — that the rational and moral world should be abandoned to the frolics of chance, or to the ravage of disorder? [...] Is it probable — we repeat the question — is it probable that the Creator, infinitely wise and good, would leave his moral world in this chaos and disorder?<sup>108</sup>

Wilson was certain that such a state of affairs would be a contradiction of the Divine Wisdom:

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106 For an interesting and enlightening study of Jefferson's failure to reduce these generalities to practice, and of the inconsistency between his writings and his practices, cf. Leonard W. LEVY, Jefferson and Civil Liberties, The Darker Side, Cambridge, Belknap Press of Harvard University, 1963.

107 James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nature", in Works (A), I, p. 95.

108 Ibid., p. 100-101.

His infinite wisdom knows and chooses the fittest means for accomplishing the ends which he proposes. [...] By his wisdom, he knows our nature, our faculties, and our interests: he cannot be mistaken in the designs which he proposes, nor in the means he employs to accomplish them. By his goodness, he proposes our happiness: and to that directs the operations of his power and wisdom [...] The same principle, that moved his creating, moves his governing power.<sup>109</sup>

[...] to direct the more important parts of our conduct, the bountiful Governor of the universe has been graciously pleased to provide us with a law [...].<sup>110</sup>

This law, divinely imposed, is for Wilson the ultimate source of all distinction between right and wrong:

[...] what is the efficient cause of moral obligation — of the eminent distinction between right and wrong? [...] the will of God. This is the supreme law.<sup>111</sup>

Aware that this principle, which made the will of God the foundation of all moral distinctions, was open to a voluntaristic interpretation<sup>112</sup> Wilson anticipated and refuted that interpretation by uniting God's will to His creation:

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<sup>109</sup> James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 99.

<sup>110</sup> Ibid., p. 95.

<sup>111</sup> Ibid., p. 104-105. Emphasis mine.

<sup>112</sup> The "voluntaristic interpretation" conceives God's will as the ultimate norm of morality; by the very fact that God wills something, it is right for it to be done. If God so willed, even hatred of God could be meritorious. Cf. F. COPLESTON, A History of Philosophy, Vol. III, Chap. VII, p. 104-105.

The law of nature is immutable; not by the effect of an arbitrary disposition, but because it has its foundation in the nature, constitution, and mutual relations of men and things [...] Since he himself is the author of our constitution; he cannot but command or forbid such things as are necessarily agreeable or disagreeable to this very constitution. He is under the glorious necessity of not contradicting himself.<sup>113</sup>

Human nature, therefore, as the incarnation of God's will for men, is the expression of the supreme law and the ultimate source of all moral distinctions, and as such it constitutes a moral criterion or standard that is universal and immutable; universal because human nature is essentially the same in all mankind<sup>114</sup> and immutable as long as human nature remains essentially unchanged.<sup>115</sup> However, the constancy of human nature and therefore of the moral law does not forbid progress in morality:

Morals are undoubtedly capable of being carried to a much higher degree of excellence [...] Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. Indeed, the same immutable principles will direct this progression. In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the cotemporary [sic] degree, but will be calculated to produce, in the future, a still higher degree of perfection.<sup>116</sup>

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113 James WILSON, op. cit., Part I, Chap. III, in Works (A), I, p. 124. Emphasis mine.

114 Ibid., p. 125.

115 Ibid., p. 127.

116 Ibid. Emphasis mine.

In short, James Wilson, if his conclusions on the question are taken at face-value, proposed in his moral philosophy a criterion of morality that was objective, immutable, and universal; he was apparently an exponent of traditional natural law ethics. Whether his epistemology and theory of moral knowledge provide the logical premises demanded by those conclusions is a problem worthy of consideration in its own right.<sup>117</sup>

Wilson, in contrast to Jefferson, descended from the general principles of his moral theory to a consideration of particular precepts which flowed from them. He considered man's right to life and his obligation to preserve it "so plain, that [it] cannot be proved."<sup>118</sup> Yet he did offer a traditional argument:

[...] it was not by his own voluntary act that man made his appearance on the theatre of life; he cannot therefore [...] by his own voluntary act [...] make his exit [...] He alone, whose gift this state of existence is, has the right to say when and how it shall receive its termination.<sup>119</sup>

Man is by nature a free agent, i.e. he has the right to the free exercise of his intellect and "active powers" in the quest of happiness for himself and others.

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117 Cf. infra, p. 236-241.

118 James WILSON, op. cit., Part II, Chap. XII, "Natural Rights of Individuals", in Works (A), II, p. 315.

119 Idem, op. cit., Part I, Chap. IV, "Of the Law of Nations", in Works (A), I, p. 139.

But there are limitations to the freedom; he cannot injure others nor ignore public interests. In the state of nature the natural law is the rule and measure of his liberty, while in civil society it is subject also to the dictates of civil law.<sup>120</sup>

In a more detailed classification of man's natural obligations and rights Wilson viewed him in three dimensions: 1. as "unrelated to others"; 2. as "peculiarly related to some"; 3. as "bearing a general relation to all." From each dimension follow rights and duties proper to it. From his unrelated state man derives his rights to property, liberty, character, and safety; from his peculiar relations as husband, father, or son flow the rights necessary to the fulfillment of the duties relative to those states; and finally, from his general relations to all he acquires two rights, "simple in their principle but, in their operation, fruitful and extensive", namely the right to be free from injury and to receive the fulfillment of promises while incurring the corresponding obligation of not injuring others and of fulfilling his own promises.<sup>121</sup>

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120 James WILSON, op. cit., Part I, Chap. XII, "Natural Rights of Individuals", in Works (A), II, p. 299-300.

121 Ibid., p. 308-309.

It is significant to note that Wilson here recognized as a source of moral obligation the person "as unrelated to others." Morality is not synonymous with our obligations to others, as Jefferson proposed,<sup>122</sup> but also includes our obligations to ourselves. In a context in which he envisaged the law of nations as analogous to the application of the law of nature to individuals, he argued:

Let us recur to what the law of nature dictates to an individual. Are there not duties which he owes to himself? Is he not obliged to consult and promote his preservation, his freedom, his reputation, his improvement, his perfection, his happiness? From the duties [of states, as well as] of individuals, to themselves, a number of corresponding rights will be found to arise.<sup>123</sup>

In this recognition of duties to one's self and rights consequent upon them, Wilson's moral theory was at least open to the possibility that the obligation of a person to himself could transcend in some instances his obligations to others.

The last lines of the above quotation, "From duties... a number of corresponding rights will be found to arise", take on added significance when joined to the following conclusion:

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122 Cf. supra, p. 108.

123 James WILSON, op. cit., Part I, Chap. IV, "Of the Law of Nations", in Works (A), I, p. 138. Emphasis mine.

The law of nature prescribes not impossibilities: it imposes not an obligation, without giving a right to the necessary means of fulfilling it.<sup>124</sup>

These quotations must be recognized as evidence that in Wilson's moral philosophy there remained a vestige at least of the pre-modern natural law doctrine which conceived of rights as derivative from obligations, and not vice versa.<sup>125</sup>

### C. Madison and "Ultimate Happiness"

Whatever the moral criterion of Madison was, it was definitely not the interests of the majority, or the greatest happiness of the greatest number. Majority interests were denied the prestige of being even a political criterion, much less a moral standard:

There is no maxim, in my opinion, which is more liable to be misapplied and which, therefore, needs more elucidation than the current one, that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "ultimate happiness" in which sense it is qualified with every moral ingredient, the proposition is no doubt true. But taking it in the popular sense as referring to the

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<sup>124</sup> James WILSON, op. cit., Part I, Chap. IV, in Works (A), I, p. 141. Emphasis mine.

<sup>125</sup> "The premodern natural law doctrine taught the duties of man; if they paid any attention at all to his rights, they conceived of them as essentially derivative from his duties." Leo STRAUSS, Natural Right and History, Chicago, University of Chicago Press, 1953, p. 182.

immediate augmentation of property and wealth  
nothing can be more false.<sup>126</sup>

It is regrettable that nowhere does Madison enlarge on "ultimate happiness... qualified by every moral ingredient". His quick transition to property and wealth emphasizes his preoccupation with economic interests in the Constitutional Convention.

Madison also intimated that his moral criterion was to some extent objective:

That which is wrong in itself cannot be made right by considerations of expediency or advantage.<sup>127</sup>

This rejection of the principle that a good end justifies the means suggests an affinity for Wilson rather than Jefferson in moral issues.

#### V. SUMMARY

Wilson and Jefferson, although agreeing on the value of morality as an important ingredient of human character, differ as to the value of the study of moral philosophy. Jefferson denied it any substantial value, a logical conclusion in the light of his acceptance and

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126 James MADISON, Speech in Constitutional Convention, in Records of the Federal Convention, M. Farrand ed., I, p. 250-251. Emphasis mine.

127 Idem, Letter to James Monroe, Jan. 5, 1804, in Writings (H), VII, p. 96. Emphasis mine.

interpretation of the moral sense. Wilson, on the other hand, granted moral philosophy the status of a science and made it a necessary prerequisite for the study of law.

With little formal discussion of the problem both agree that man possesses free will.

While Jefferson saw no necessary relationship between religion and morality, ignoring man's relationship to God as a source and part of morality, Wilson's moral theory was more religiously orientated and considered obedience to the commands of God as the ultimate foundation of man's moral obligations.

For Jefferson, the source of moral knowledge was the moral sense, emotional in nature. Wilson endeavored to assign to reason and Sacred Scripture, along with the moral sense, some role in the acquisition and perfecting of moral knowledge. In final analysis, however, he too advocated the supremacy of an affective moral sense and was in essential agreement with Jefferson.

On the final question of the moral criterion, there was theoretically at least important differences of opinion. Jefferson's standard, in his final and mature judgment, was altruistic, social, and relative while Wilson sought to establish an objective, immutable and universal criterion rooted in the nature of man. His recognition of the duty of an individual to himself was in opposition to

Jefferson's social altruism and while Jefferson was a man of his age in emphasizing the natural rights of man, Wilson reflected an earlier tradition of natural law in his recognition of natural obligations as the foundation of natural rights to fulfill them. There remains, however, a definite question as to the consistency of his ethical, epistemological, and political theories.

To the moral philosophy that influenced the work of these Constitutional Fathers, James Madison made little explicit theoretical contribution. That scant contribution offers no alternative to or variation of the moral philosophies of Jefferson and Wilson.

## CHAPTER IV

### POLITICAL PHILOSOPHY

Jefferson, Wilson, and Madison were in common agreement with the prevailing political philosophy of their time, Social Contract theory, which viewed political society as the end result of a transition from a primitive individualistic "state of nature." But just as that theory itself permits a variety of interpretations, so the political theories of the Constitutional Fathers while in general agreement differed in numerous and important details. These similarities and differences merit a more detailed analysis.

#### I. THE STATE OF NATURE

In their consideration of the state of nature, the state in which each man is his own sovereign, the Founding Fathers rejected the Hobbesian concept of that state as necessarily war-like.<sup>1</sup>

James Wilson was explicit in his rejection of any a-social state as natural to man:

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<sup>1</sup> This point will be developed in the body of the chapter.

Some philosophers, however, have alleged that society is not natural, but is only adventitious to us; that it is a mere consequence of direful necessity [...] Their conclusion is, that a state of nature, instead of being a state of kindness, society, and peace, is a state of selfishness, discord, and war [...] The narrow and hideous representation of these philosophers is not founded on the truth of things.<sup>2</sup>

For Wilson the only state natural to man was social:

To a state of society, then, we are invited from every quarter. It is natural; it is necessary; it is pleasing; it is profitable to us. The result of all is, that for a state of society we are designated by Him, who is all-wise and all-good.<sup>3</sup>

But society can be distinguished into two kinds, natural and civil, and since civil society is the result of a social compact<sup>4</sup> the society proper to the state of nature must be natural society.

As proof of his thesis that society is natural to man, Wilson offered a variety of arguments. The first, drawn from his theory of knowledge, is premised on the fact that traditional enumerations of the operations of the mind or understanding have omitted a whole class of

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2 James WILSON, Lectures on Law, Part I, Chap. VII, "Of Man as a Member of Society", in Works (A), I, p. 225. Emphasis mine.

3 Ibid., p. 270.

4 Ibid.

"intellectual"<sup>5</sup> acts. Only "solitary" functions of the mind have been listed, i.e. simple apprehension, judgment, reasoning, memory, sensation, moral perceptions, etc., all of which can be performed by a single individual. But there are also "social" acts of the mind, such as testimony, commands, promises, and questions which have been ignored because they could not be classified in the traditional categories of mental acts. He concludes therefore to the existence of distinct "social intellectual powers" and to the social nature of man:

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.<sup>6</sup>

Secondly, language is evidence of the social nature of man; indeed, progress in linguistics reflects and stimulates

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<sup>5</sup> James WILSON, op. cit., Part I, Chap. VII, in Works (A), I, p. 257. Wilson's use of "intellectual" here does not constitute an objection to the conclusions of Chapters II and III, but merely emphasizes the ambiguity of the term as he uses it. He complains that the division of "intellectual powers" into simple apprehension, judgment, and reasoning omits many "operations of the understanding" such as consciousness, moral perception, taste, memory, and external sensation. Hence for Wilson, "intellect" must be equated to "understanding" and includes many operations not usually considered intellectual. Wilson's use of "intellectual" and "understanding" is completely in harmony with the post-Cartesian use of "mind" or "thought".

<sup>6</sup> Ibid., p. 258. Emphasis mine.

social progress.<sup>7</sup> Thirdly, our consciousness of our moral obligations to veracity and fidelity to promises,<sup>8</sup> our natural aversion to harming the innocent, and our innate respect for the property of others<sup>9</sup> are additional testimony to our conviction that human nature is essentially social. Finally, the difficulties of satisfying our physical needs, of protecting our lives and property, of increasing our knowledge, of perfecting our culture, of satisfying our emotional need to give and receive love, are all evidence that society is indispensable to man.<sup>10</sup>

In this state of natural society all men are equal in rights and obligations, equally subject to laws of God and of nature. It is a state of natural liberty in which each man has the right to use his powers "for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct, provided he does no injury to others; and provided more public interests do not demand his labors." The measure and rule of this natural liberty is the law of nature.<sup>11</sup>

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7 James WILSON, op. cit., Part I, Chap. VII, in Works (A), I, p. 259-260.

8 Ibid., p. 261-262.

9 Ibid., p. 262.

10 Ibid., p. 264-270.

11 Ibid., p. 276; also Part I, Chap. VIII, "Man as a Member of a Confederation", ibid., p. 290-300.

A question can be raised as to whether the term "society" can be validly applied to Wilson's state of natural liberty. His arguments certainly conclude to man's need for society and to his natural potentiality for social living. But whether unorganized coexistence of individuals, harmonized to some extent by an essentially negative law of nature, can qualify as societal is a question reserved for future discussion.<sup>12</sup>

Jefferson's concept of the state of nature is difficult to determine precisely due to his successive approval of differing political philosophies.<sup>13</sup> Various

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<sup>12</sup> Cf. infra, p. 242.

<sup>13</sup> In 1791 Jefferson assumed the "mantle of opprobrium" cast about Thomas Paine, by admitting his profession of the same principles (Letter to Col. Monroe, July 10, 1791, in M.E., X, p. 207). This approval was reiterated in a letter to Thomas Paine himself (March 8, 1801, in M.E., X, p. 223). In that same year Jefferson was praising the Sketches of the Principles of Government by Nathaniel CHIPMAN as containing "sound and excellent principles" (Letter to James Magoffin, May 3, 1801, in SOWERBY, Catalogue, III, p. 26), despite the fact that in his work Chipman explicitly repudiates the foundation of Paine's classification of the rights of man on which Jefferson depended so heavily (N. CHIPMAN, op. cit., p. 106-112). He had given earlier approval to this work as a "very excellent elementary book indeed" (Letter to Wm. Montfort, Feb. 27, 1798, in SOWERBY, Catalogue, III, p. 26) and later recommended it for the investigation by Alexander I of Russia into the principles of our government (Letter to J. Priestley, Nov. 29, 1802, in SOWERBY, Catalogue, III, p. 26). In 1804 Discourses Concerning Government by Algernon SIDNEY was recommended as "a rich treasure of republican principles [...] adorned with the finest flowers of science" as the "best elementary book of the principles of government, as founded on natural

interpretations of the state of nature are involved. Thomas Paine presented it as a state of natural liberty in which the inadequacy of the individual would make the necessity of mutual cooperation evident. "In this state of natural liberty, society will be their first thought. A thousand motives will excite them thereto [...]."<sup>14</sup> His natural liberty consists essentially in his natural rights of thought and action, i.e. the right of personal opinion and of acting as an individual for his own comfort and happiness subject to the obligation of not injuring others. Paramount among these rights is that of judging in his own cause, a right of the mind which he always retains even though his inability to execute those judgments forces him

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right which has ever been published in any language" (Letter to Locke Weems, Dec. 13, 1804, in SOWERBY, Catalogue, III, p. 13). Again, it must be noted that there are essential differences between Sidney and Chipman. From 1813 to 1819 Jefferson seems to have settled on the political works of DeStutt de Tracy, especially his Commentary and Review of Montesquieu's "Spirit of the Laws" as the "ablest political work which the last century of years has given to us." He urged its adoption as a text for the College of William and Mary from which "it will spread and become a political gospel for a nation open to reason" (Letter to DeStutt, Nov. 28, 1813, in SOWERBY, Catalogue, III, p. 9). For a solution to such seeming inconsistency, cf. infra, p. 132.

<sup>14</sup> Thomas PAINE, Commen Sense; The Selected Work of Tom Paine, (Modern Library), New York, Random House, 1945, p. 7.

to cede the power of execution, and therefore the power of judgment in foro externo, to society.<sup>15</sup>

Algernon Sidney, another of Jefferson's favorites, viewed the state of nature as a state in which everyone has an equal right to everything and which, precisely because of that right, inevitably degenerated into a "fierce barbarity of a loose multitude, bound by no law, and regulated by no discipline."<sup>16</sup> In such a condition "controversies [...] will be so many and great, that mankind cannot bear them."<sup>17</sup> Reason then leads men to take "the first step towards the cure of this pestilential evil" which is "to join in one body, that everyone may be protected by the united force of all."<sup>18</sup> Curiously, Sidney insisted that natural liberty, that equal right to everything, was God-given even though its consequence was a condition intolerable to man:

[...] there is nothing of absurdity in saying, that man cannot continue in the perpetual and entire fruition of the liberty that God hath given him. The liberty of one is thwarted by that of

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15 Thomas PAINE, Rights of Man, in The Selected Work of Tom Paine, p. 121-122.

16 Algernon SIDNEY, Discourses Concerning Government, London, printed for A. Millar, 1751 (3rd ed.), p. 64.

17 Ibid., p. 23.

18 Ibid., p. 64.

another; and while they are all equal, none will yield to any, otherwise than by general consent. This is the ground of all just governments [...] It were folly hereupon to say, that the liberty for which we contend is of no use to us, since we cannot endure the solitude, barbarity [...] that accompany it whilst we live alone, nor can enter society without resigning it; for the choice of that society and the liberty of framing it according to our own wills, for our own good, is all we seek. This remains to us whilst we form governments, that we ourselves are judges how far it is good for us to recede from our natural liberty.<sup>19</sup>

The argument can be considered an effort to establish the absolute individualism of the state of nature as something of divine origin, and as a necessary condition of human nature which makes the formation of civil society by social compact the natural remedy for the evils inevitable to such a condition.

Nathaniel Chipman, also a theorist approved by Jefferson, presented a concept of the state of nature sharply in contrast to those of Paine and Sidney. First, he emphatically rejected primitive man as the criterion of what is natural to man:

The pursuit and attainment of happiness, is agreeable to the laws of man's nature, and dictated by them. If this be true, is it not sufficient to suggest a doubt, whether the state in which that end is most perfectly answered, be not the true state of nature?<sup>20</sup>

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<sup>19</sup> Algernon SIDNEY, Discourses Concerning Government, p. 23. Emphasis mine.

<sup>20</sup> Nathaniel CHIPMAN, Sketches of the Principles of Government, Rutland, J. Lyon (printed for the author), 1793, p. 72. Emphasis mine.

[...] let me premise, that with man, a state of improvement is not opposed to a state of nature [...].<sup>21</sup>

If then "improved" man is the criterion of what is proper to human nature, the true state of nature is societal:

When applied to man, the laws of nature are the laws of social nature [...] In society, in civil society only, can man act agreeably to the laws of his nature [...] The more perfect this state is, the more it harmonizes with the whole state of man; or rather the more general operation it gives to the laws of his nature.<sup>22</sup>

[...] man is, by the laws of his common nature, as constituted by the author of his being, fitted for a state of society, and of social improvements [...] his happiness depends on the right use of his passions, appetites, powers, and faculties, agreeably to the law of his social nature.<sup>23</sup>

He anticipated a possible objection to his arguments by dismissing hermits "as deviating from [...] the common standard of man" from whom the idea of human nature cannot be taken.<sup>24</sup> However, although civil society is man's nat-ural state, it was not his primitive state. Initially, due to his immaturity, man existed in a state which did not abound in virtue nor happiness<sup>25</sup> and in which each man possessed the right of judging his own case:

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21 Nathaniel CHIPMAN, Sketches of the Principles of Government, p. 33. Emphasis mine.

22 Ibid., p. 225. Emphasis mine.

23 Ibid., p. 50. Emphasis mine.

24 Ibid., p. 36.

25 Ibid., p. 31.

[...] this right of judging in his own case, is a temporary right entrusted to man from necessity, until he shall have arrived at a maturity [...] of his nature, which makes him accountable to the judgment of others, and which dictates, in all controversies, a submission to an impartial judge.<sup>26</sup>

Hence, any state other than society is temporary and unnatural for man, and society for Chipman meant only civil society. Explicitly rejecting Paine's distinction of natural and civil rights,<sup>27</sup> he argued that since society was the natural state of man there could be no such distinction:

It surely affords a much more agreeable reflection to suppose, that, arising from human nature, taking in a capacity for improvement, which makes a part of the constitution, there is no such opposition between natural and civil rights.<sup>28</sup>

The greater part of his rights [except those connected with existence ...] arise in society and are relative to it. Antecedently they could exist only potentially.<sup>29</sup>

This and other differences with Paine<sup>30</sup> will be significant in evaluating Jefferson's commendation of Chipman.

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26 Nathaniel CHIPMAN, Sketches of the Principles of Government, p. 108; emphasis mine. Also p. 72.

27 Ibid., p. 112.

28 Ibid., p. 72-73. Emphasis mine.

29 Ibid., p. 111. Emphasis mine.

30 Another basic difference is Chipman's conclusion that government and laws are not merely consequences of man's wickedness. Even in a society of virtuous men, they would be necessary since individual members are not gifted with the ability to know what others are going to do; government and laws coordinates communal activity (ibid., p. 91-98).

A final enigma is presented by Jefferson's praise of the political theories of Destutt de Tracy, especially his Commentary and Review of Montesquieu's "Spirit of the Laws" which rejected the theory that man emerges from a state of nature to the social state by means of a social compact,<sup>31</sup> an implicit denial of the state of nature.

Despite his general recommendations of Paine, Sidney, Chipman, and DeStutt, Jefferson could not logically have accepted conflicting theories of the state of nature. Since there are no important differences between Paine and Sidney, and since the recommendation of DeStutt was bestowed especially for his refutation of Montesquieu, the alternatives actually are Paine-Sidney or Chipman. In view of the emphatically personal tone of his recommendation of Paine and of their agreement on other political questions<sup>32</sup> the decision must be in favor of Paine. That decision is corroborated negatively by the absence of any further reference to Chipman by Jefferson and by his

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31 p. 74-75.

32 Two examples of their agreement are:

a. Their opposition to the law of primogeniture (PAINE, Rights of Man, in Selected Work of Tom Paine, p. 133; JEFFERSON, Autobiography, in Works (Ford), I, p. 68-69;

b. "Earth belongs to the living." The theory is stated by Paine: "Every age and generation is, and must be, competent to all the purposes which its occasions require. It is the living, not the dead, that are to be accomodated." (op. cit., p. 99)

neglect of Chipman's theories in his political writings. This evaluation of the relationship between the political theories of Paine and Jefferson will be a basic premise justifying the reasonable use of Paine to interpret Jefferson's political thought. The brief exposé of Chipman's political philosophy was, nevertheless, useful to the extent that what is rejected often delineates more precisely that which is accepted.

Finally, a personal comment by Jefferson on the state of nature is significant:

The moral duties which exist between individual and individual in a state of nature, accompany them into a state of society [...] their maker not having released them from those duties on their forming themselves into a nation.<sup>33</sup>

Jefferson, therefore, recognized a moral law governing the relations between individuals in the state of nature.

This limitation to the natural liberty of man, common to Jefferson and Paine,<sup>34</sup> was a salutary difference between them and Sidney.<sup>35</sup> It was also an important similarity between Jefferson and Wilson.<sup>36</sup>

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<sup>33</sup> Thomas JEFFERSON, Opinion on French Treaties, in M.E., III, p. 228. Emphasis mine.

<sup>34</sup> Cf. supra, p. 127.

<sup>35</sup> Cf. supra, p. 128. Sidney is Hobbesian.

<sup>36</sup> Cf. supra, p. 125.

James Madison presented no detailed analysis of the state of nature. His political theory, essentially a social contract theory, did envisage it as a state of man prior to that contract.<sup>37</sup>

## II. FORMATION OF CIVIL SOCIETY

All three exemplars of foundational American political theory agreed that civil society originates in a social compact and that there is a real distinction between civil society and civil government, with civil society considered prior to and essentially independent of civil government.

Because of his explicit and detailed treatment of the formation of civil society, the theory of James Wilson will be considered first. For him, society resulted from a formal compact in which each equally sovereign individual engaged with the whole, and the whole with each individual, to act and desire the same thing in relation to the end for

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<sup>37</sup> James MADISON, Speech in First Congress, May 22, 1789, in Writings (H), V, p. 368. Also Letter to Geo. Washington, Oct. 18, 1787, in Writings (H), V, p. 12; Speech at Constitutional Convention, June 16, 1787, in The Records of Federal Convention (Farrand, editor), I, 314-315.

which the society was organized.<sup>38</sup> The theory is essentially individualistic.

[...] if a number of people, who had hitherto lived independent of each other, wished to form a civil society, it would be necessary to enter into an engagement to associate together in one body [...] These engagements are obligatory, because they are mutual. The individuals who are not parties to them, are not members of society.<sup>39</sup>

The social compact binds only the members originally consenting and is therefore unanimous. Children and other dependents are temporarily bound through their obligation of obedience to their elders or masters. But each, upon reaching maturity or acquiring freedom, has the right to examine the society and, in view of economic necessity, or the failure of the society to fulfill the original compact, the right to migrate after making recompense for past advantages.<sup>40</sup> Indeed, if continued residence is to be construed as tacit consent, the right to migrate must be presumed.<sup>41</sup> Whether the right to withhold consent from the original compact and the right to migrate constitute a denial of any obligation to live in society was not clarified

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38 James WILSON, Lectures on Law, Part I, Chap. VII, "Of Man as a Member of Society", in Works (A), I, p. 272.

39 Ibid., p.           Emphasis mine.

40 Ibid., p. 280.

41 Ibid., p. 283.

in Wilson's theory; they might involve only the choice of a particular society and still presume a general obligation to live in some civil society. Certainly, the consent given to a social compact is indissoluble as long as the society fulfills its obligations, but the fact that the original consent must be voluntary argues the right to withhold it and consequently the right to live outside of all civil society, i.e. in natural society subject to the law of nature. The latter type of society would fulfill any moral obligation to mutual cooperation arising from the inability of the individual to live alone. Therefore life in civil society is not obligatory but subject to the voluntary decision of each individual.

A necessary consequence of the consent to the social compact is voluntary submission to the decision of the majority:

[...] society is constituted for a certain purpose; [...] each member of it consents that this purpose shall be carried on; and, consequently, that everything necessary for carrying it on shall be done. Now a number of persons can jointly do business only in three ways — by the decision of the whole, by the decision of the majority, or by the decision of the minority. The first case is not here supposed [impossible for a large population ...] The only remaining question [...] is [... whether] the minority should bind the majority — or that the majority should bind the minority. The latter, certainly. It is most reasonable [...] The minority are bound without their immediate consent; they are bound by their consent originally given to the establishment of

the society, for the purposes which it was intended to accomplish.<sup>42</sup>

Wilson recognized that the principle of majority rule seemed to be in conflict with his principle that in civil society men still retained possession of their natural liberty, a principle he had emphasized:

In civil society, previously to the institution of civil government, all men are equal [...] we mean not to apply this equality to their virtues, their talents, their dispositions, or their acquirements. In all these respects, there is, and it is fit for the great purposes of society that there should be, great inequality among men.<sup>43</sup>

But however great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements; there is still one aspect, in which all men in society, previous to civil government, are equal [...] there is an equality in rights and in obligations [...]. The natural rights and duties of man belong equally to all.<sup>44</sup>

As in civil society, previous to civil government, all men are equal; so, in the same state, all men are free. In such a state, no one can claim, in preference to another, superior right: in the same state, no one can claim over another superior authority.<sup>45</sup>

But majority rule does not violate this natural liberty since the duty of obedience to the majority was self-

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42 James WILSON, Lectures on Law, Part I, Chap. VII, in Works (A), I, p. 272. Emphasis mine except "immediate consent".

43 Ibid., p. 273. Emphasis mine.

44 Ibid., p. 275. Emphasis mine.

45 Ibid. Emphasis mine.

imposed as a foreseen consequent of our consent to the original social compact. Nothing voluntarily consented to can be considered inconsistent with natural liberty. Since he considered government only a remedy for the defect of virtue in human nature,<sup>46</sup> Wilson's argument here is founded on the idealistic hypothesis of a civil society of completely virtuous citizens. Only in such a society could the original consent be considered voluntary consent to all future majority decisions because the justice and morality of those decisions could be presumed.

For Wilson the majority was quantitative:

It [majority rule] is most reasonable; because it is not so probable, that a greater number, as that a smaller number, should be mistaken. It is most equitable; because the greater number are presumed to have an interest in the society proportioned to that number.<sup>47</sup>

Due to his concept of "civil society previous to civil government", the traditional question of whether the surrender, in whole or in part, of his natural rights is the necessary price of man's entrance into civil society was for Wilson more proper to the problem of civil government. His views on natural liberty in civil society<sup>48</sup>

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46 Cf. infra, p. 143.

47 James WILSON, op. cit., Part I, Chap. VII, in Works (A), I, p. 277. Emphasis mine.

48 Cf. supra, p. 137.

argue to the conclusion that the social compact initiating civil society simply formalizes the already existing natural society.<sup>49</sup> No natural rights are surrendered.

Thomas Jefferson was also a social contract theorist; three of the political philosophers approved by him, Paine, Chipman, Sidney, were all in agreement on that principle.<sup>50</sup> The personal admission of his identification with the political theories of Paine puts the conclusion beyond doubt.

He would agree with Wilson that the social compact bound only those consenting to it and their dependents. One of his favorite political principles was that no generation could bind a succeeding one:

[...] no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation [...] The constitution and the laws of their predecessors then in their natural course with those who gave them being.<sup>51</sup>

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49 James WILSON, op. cit., Part II, Chap. XII, "Natural Rights of Individuals", in Works (A), II, p. 299.

50 Thomas PAINE, Rights of Man, in Selected Work of Tom Paine, p. 6-7; Algernon SIDNEY, Discourses Concerning Government, p. 81; Nathaniel CHIPMAN, Sketches on the Principles of Government, p. 116-117.

51 Thomas JEFFERSON, Letter to James Madison, Sept. 6, 1789, in PTJ, XV, p. 395-396. There is some controversy concerning the occasion of this letter. Julian BOYD, editor-in-chief of The Papers of Thomas Jefferson, suggests it was written, not as a theoretical disquisition, but as a response to some immediate need for theory on the part of

He also conceded to individuals the right to separate from society.<sup>52</sup>

For Jefferson also consent to the social compact implied consent to majority rule "for the law of the majority is the natural law of every society of men."<sup>53</sup>

An important difference of opinions is found between Jefferson and Wilson on the question of the relationship of natural rights and civil society. Presuming upon his previously established relationship to Paine, Jefferson's thinking can be presented more specifically in the words of Paine:

Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights or rights of the mind, and also those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil

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his friends involved in the French Revolution. It was written in Paris but was never mailed to Madison. Jefferson personally gave it to Madison on Jefferson's return to the United States (PTJ, XV, p. ). Such a dual use of the statement would emphasize the depth of Jefferson's conviction on the topic. This was also an enduring conviction. Even in the face of Madison's astute objections to it, Jefferson, as late as 1816, was still seeking means to implement his theory. (Letter to Samuel Kercheval, July 12, 1816, in M.E., XV, p. 42)

52 Thomas JEFFERSON, Letter to John Breckenridge, Aug. 12, 1803, in M.E., X, p. 42.

53 Idem, Opinion on the Question [...] declaring that the seat of government should be transferred to the Potomac, July 15, 1790, in M.E., III, p. 60.

rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent.

The natural rights which he retains [on entrance into civil society] are all those in which the power to execute is as perfect in the individual as the right itself [...] The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective [...] He therefore deposits this right in the common stock of society.<sup>54</sup>

That this use of Paine is not arbitrary is corroborated by the similarity of terms in a quotation from Jefferson:

We think experience has proved it safer, for the mass of individuals composing the society, to reserve to themselves the exercise of all rightful powers to which they are competent, and to delegate those to which they are not competent [...].<sup>55</sup>

Thus, for Jefferson entrance into civil society does demand the surrender of some natural rights which are transformed into civil rights to be exercised according to the terms of the social compact.<sup>56</sup> Concerning civil rights or rights

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54 Thomas PAINE, op. cit., p. 123. Emphasis mine except "power" in line 15 of the quotation.

55 Thomas JEFFERSON, Letter to Dupont de Nemours, April 24, 1816, in M.E., XIV, p. 487-488. Emphasis mine.

56 There is a difference between Jefferson and Wilson on this point. Wilson concluded that no natural rights were surrendered (cf. supra, p. 137). Although theoretically a distinction was made between the compact establishing the civil society and the pact establishing the government, which was added as a "necessary evil", Clinton ROSSITER concludes that, practically speaking, all fundamental social compacts were compacts to organize the

transferred to society Paine mentioned only two: the right to acquire and hold property<sup>57</sup> and the right to render public judgment and punish transgressors in cases of personal injury.<sup>58</sup> That there are others, however, was implied in his opinion "that the more of those imperfect natural rights, or rights of imperfect power we [...] exchange the more securely we possess."<sup>59</sup>

For James Madison also, society originated in a social compact "which [...] in its theoretic origin at least, must have been the unanimous act of the component members."<sup>60</sup> It bound only those consenting to it and their dependents.

In contrast to Wilson and Jefferson, Madison was not convinced that consent to majority rule was necessarily implied in the compact. Such a rule "does not result from the law of nature, but from a compact founded on

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government (The Political Thought of the American Revolution, p. 145, 153, 157).

57 Moncure CONWAY, Life of Thomas Paine, I, p. 235; cited by Gilbert CHINARD, Thomas Jefferson, The Apostle of Americanism, p. 81.

58 Thomas PAINE, op. cit., p. 121.

59 Thomas PAINE, as quoted in Conway and Chinard (cf. note 57).

60 James MADISON, Speech in Federal Convention, June 19, 1787, in The Records of Federal Convention (M. Farrand ed.), I, p. 314. Emphasis mine.

conveniency." Prior to the establishment of that principle and in strict theory, unanimous consent is necessary for any rule, even that of decision by majority vote.<sup>61</sup> This reflects his enduring suspicion of majority decisions and his anxiety for the rights of the minority to which he was more sensible than either Jefferson or Wilson. A more detailed analysis of his thinking on rule by majority will be given in the consideration of it as an instrument of government.<sup>62</sup>

### III. FORMATION AND FUNCTION OF CIVIL GOVERNMENT

#### A. Necessity of Government

The distinction between civil society and civil government was common to the three Founding Fathers as it was to most political theories of the time.<sup>63</sup> Theoretically civil society was possible without government but practically the realization of the existential defects of men made it a necessity. Wilson was convinced that if man had continued innocent "society, without the aids of government, would shine its benign influence even over the

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61 James MADISON, Letter to Thomas Jefferson, Feb. 4, 1790, in PTJ, XVI, p. 149.

62 Cf. infra, p. 170-174.

63 Cf. Clinton ROSSITER, Political Thought of the American Revolution, p. 153.

bowers of paradise."<sup>64</sup> Jefferson, familiar with the Indians, considered their communal life an example of society without government and wistfully admitted in 1787 that he was "not clear in my mind, that [this] is not the best condition of society" but regretfully evaluated it as incompatible with any great degree of population.<sup>65</sup> Practically he would agree with Paine that government is "a mode rendered necessary by the inability of moral virtue to govern the world."<sup>66</sup> Certainly by 1800, after his personal experience with the terrors of the French Revolution, he looked askance at the theory of Wishaupt<sup>67</sup> that man would in time become so perfect as "to leave government no occasion to exercise their powers [...] to render political government useless."<sup>68</sup> James Madison also recognized the distinction of government from society implicitly in his

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64 James WILSON, op. cit., Part I, Chap. I, "On the Study of Law", in Works, I, p. 31. Also p. 270-271, 343-344. Emphasis mine.

65 Thomas JEFFERSON, Letter to James Madison, June 30, 1787, in PTJ, XI, p. 92-93.

66 Thomas PAINE, Common Sense, in Selected Work of Tom Paine, p. 8.

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68 Thomas JEFFERSON, Letter to Bishop James Madison, Jan. 31, 1800, in SOWERBY, Catalogue, III, p. 25.

conclusion that a civil society does not collapse with a change in government.<sup>69</sup>

#### B. Purpose of Government

Again all three were in fundamental agreement as to the purpose of government; it is to promote the happiness and welfare of the people. For Wilson "this role is founded on the law of nature: it must control every political maxim."<sup>70</sup> Jefferson stated it in the simple terms so common to his time: "[...]the equal rights of man, and the happiness of every individual, are now acknowledged to be the only legitimate objects of government."<sup>71</sup> Madison asserted that the "fundamental principle in all lawful Governments [was][...]that all the rights of sovereignty are for the benefit of those from whom they are derived [...]."<sup>72</sup>

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69 James MADISON, Speech in First Congress, Feb. 11, 1790: Writings (H), V, p. 441-442. Also, Letters to Helvidius, III: Writings (H), VI, p. 164.

70 James WILSON, Nature and Extent of the Legislative Authority of the Parliament of Great Britain: Works, II, p. 508. Also, Speech in Convention of 1775: Papers of James Wilson (Mss), Vol. 2, p. 5, Historical Society of Pennsylvania. Emphasis mine.

71 Thomas JEFFERSON, Letter to A. Coray, Oct. 31, 1823: M.E., XV, p. 482. Emphasis mine.

72 James MADISON, Letter to John Jay: The Papers of James Madison, Berkeley, University of California Press, II, p. 128.

Their concepts of the role of the government in the attainment of that purpose were not as unanimous. Wilson anticipated the modern trend to social legislation, rejecting the idea of the "vast apparatus of government [...] having ultimately no other object or purpose, but the distribution of justice."<sup>73</sup> He had only contempt for anyone who inverted the order of nature by making his property an end instead of a means.<sup>74</sup> His insistence that the "cultivation and improvement of the human mind was the most noble object" of government was visionary.<sup>75</sup>

James Madison was in opposition to him, emphasizing the function of government as the guarantor of private rights and the dispenser of justice.<sup>76</sup> His commitment to the principle of minimal government was obvious:

In the first place, I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive and impolitic; it is also a truth that if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive,

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73 James WILSON, Lectures on Law, Part I, Chap. X, "Of Government": Works, I, p. 364.

74 Ibid., Part I, Chap. I, "On the Study of Law": Works, I, p. 27.

75 Idem, Speech in Federal Convention, July 13, 1787: RFC, I, p. 605.

76 Ibid.

and this in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out.<sup>77</sup>

An exception to this general rule was his advocacy of a protective tariff for the infant manufacturing industry of the United States, but even this is prefaced by a recognition of the wisdom "which leaves to the sagacity and interest of individuals the application of their industry and resources [...]."<sup>78</sup>

Jefferson can also be ranked among the "laissez-faire" theorists; "A free competition between buyers and sellers is the most certain means of fixing the true worth of merchandize [sic]."<sup>79</sup> He reaffirmed that conclusion by his approval of the theories of Adam Smith,<sup>80</sup> and the French Physiocrats under the leadership of Anne Robert Turgot.<sup>81</sup>

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77 James MADISON, Speech in First Congress, 1790: Writings (H), V, p. 342. Emphasis mine.

78 Idem, Seventh Annual Message to Congress, Dec. 5, 1815: Messages and Papers of the Presidents (James RICHARDSON ed.), New York, Bureau of National Literature, II, p. 552.

79 Thomas JEFFERSON, Letter to de Thulemier, March 14, 1785: PTJ, VIII, p. 27.

80 Idem, Letter to Thomas M. Randolph, May 30, 1790: SOWERBY, Catalogue, III, p. 438.

81 Idem, Letter to Dupont de Nemours, Nov. 29, 1813: SOWERBY, Catalogue, III, p. 52-53.

## C. Sovereignty of the People

Because of their agreement on the distinction between society and government, Jefferson and Madison would take no objection to Wilson's description of the process of forming a government. The initial step is the formation of civil society by means of the social compact. In fact, for all practical purposes the social compact was, in the minds of the Constitutional Fathers, strictly a necessary prerequisite to the formation of government.<sup>82</sup> Essential to that compact is a means of discovering and expressing the will of the society created by it; for Wilson and Jefferson that means was necessarily majority rule which was also acceptable to Madison if it had been accepted unanimously.<sup>83</sup> The second step, then, in the formation of government is the establishment, by majority consent, of the offices or institutions necessary for effective communal life. But Wilson definitely rejected a third step proposed by many political

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82 Cf. supra, this chapter, footnote 56. Also James WILSON, op. cit., Part I, Chap. X, "Of Government": Works, I, p. 344.

83 Cf. supra, this chapter, p. 142

theorists of the time.<sup>84</sup> He saw no need of creating a "sovereign" on whom the whole power of the society was conferred nor the necessity of a further contract between the society and that sovereign. Such a contract "is derogatory [...] from the genuine principles of legitimate sovereignty and inconsistent [...] with the best exercise, too, of supreme power."<sup>85</sup>

While those, who were about to form a society, continued separate and independent men, they possessed separate and independent powers and rights. When the society was formed, it possessed jointly all the previously separate and independent powers and rights of the individuals who formed it, and all the other powers and rights which result from the social union. The aggregate of these powers and these rights composes the sovereignty of the society or nation [...] Is it necessary for the benefit of the society or nation, that the moment it exists, it should be transferred? [...] Has it ever been evinced, by unanswerable arguments, that it is necessary [...]? I think such a position

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84 This third step consisted of a contract between the society and a sovereign considered at least the equal of the society to whom all the rights of the society were transferred. Such a theory was proposed by:

a. Jean Jacques BURLAMAQUI, The Principles of Natural and Political Law, (transl. Mr. Nugent) 3rd ed., London, printed for C. Nourse, in the Strand, 1784, Part II, Chap. VI, p. 193-194.

b. Samuel PUFENDORFF, Of the Law of Nature and Nations, (Transl. from Latin to English) 2nd ed., corrected and compared to Barbeyrac's French Edition, Oxford, L. Lichfield, 1710, Book VII, Chap. IV, esp. p. 512-513.

85 James WILSON, op. cit., Part I, Chap. V, "Municipal Law": Works, I, p. 167.

has never been evinced to be true. Those powers and rights were, I think, collected to be exercised and enjoyed, not to be alienated and lost.<sup>86</sup>

The retention of sovereignty by the people was the principle that rendered the American Constitution superior to the English:

Permit me to mention one great principle, the vital principle I may call it, which diffuses animation and vigor through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution.<sup>87</sup>

Any contract supposing an equality between the people and ruler was impossible:

No prerogative or government can be set up as co-equal with the authority of the people. The supreme power is in them.<sup>88</sup>

Wilson recognized, of course, that in a country as large as the United States the people could not exercise their sovereignty personally but would have to delegate it to their representatives. Within his theory of delegation Wilson included the principle of separation of powers; the legislative, executive, and judicial powers could be

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<sup>86</sup> James WILSON, op. cit., Part I, Chap. V, "Municipal Law": Works, I, p. 168-169. Emphasis mine.

<sup>87</sup> Ibid., Part I, Chap. I, "On the Study of Law": Works, I, p. 14. Emphasis mine.

<sup>88</sup> Ibid., Part I, Chap. XI, "Comparison of the Constitution of the United States and that of Great Britain": Works, I, p. 397. Emphasis mine.

delegated to different persons for different periods and under different conditions and limitations.<sup>89</sup> Of paramount importance, however, in this theory of delegation was the inalienable right of the people to reclaim, in virtue of their enduring sovereignty, any power thus delegated.<sup>90</sup>

Wilson pointed with pride to the originality of these "principles concerning the reservation, the distribution, the arrangement, the direction, and the uses of public authority, of which even the just theory is still unknown in other nations [...]"<sup>91</sup>

Neither Jefferson or Madison would quarrel with Wilson's concept of the sovereignty of the people and its exercise by delegation. Jefferson especially advocated it emphatically:

I consider the people who constitute a society or nation as the source of all authority in that nation; as free [...] to change these agents [of government] individually, or the organization of them in form or function whenever they please.<sup>92</sup>

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89 James WILSON, op. cit., Part I, Chap. V, "Municipal Law": Works, I, p. 169.

90 Ibid.

91 Ibid., p. 170. Emphasis mine.

92 Thomas JEFFERSON, Opinion on French Treaties: M.E., III, p. 227. Emphasis mine.

He too considered it necessary that the power of the people be exercised by representatives; the people are not capable of exercising the executive, legislative, or judicial functions but only of electing the representatives to whom those powers would be delegated.<sup>93</sup> Indeed, the judiciary should not be elected by the people who are not competent to judge concerning the necessary qualifications for that office.<sup>94</sup>

This concept of government, in which a sovereign people exercise their powers by delegating them to their representatives while still retaining a sovereign right to recall that delegation at will, poses a question concerning the relationship of the power of the representative to the power of the people which will be discussed later.<sup>95</sup> Jefferson's premise that the people are incapable of exercising their sovereign power or even choosing the judiciary further confuses the issue.

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93 Thomas JEFFERSON, Letter to Abbe Arnoux, July 19, 1789: PTJ, XV, p. 283.

94 Idem, Letter to A. Coray, October 31, 1823: M.E., XV, p. 482.

95 Cf. infra, chapter V, p. 228, 244, 250-252.

## 1. Sovereignty of the Majority

Although speaking of the sovereignty as rooted in the people at large, the Constitutional Fathers actually assigned it to the majority of the people. For Wilson, the sovereignty of the majority is the inevitable consequence of his fundamental principle that an essential condition of the original social compact was an irrevocable consent to the decisions of the majority.<sup>96</sup> Any reference to the sovereignty of the people must be interpreted as a sovereignty of the majority. Such was Jefferson's conviction also, a conviction so profound that he recognized the majority opinion as an ultimate argument even against his own reasonings: "I readily therefore suppose my opinion wrong, when opposed by the majority."<sup>97</sup> Madison likewise admitted that "the majority alone have the right of decision."<sup>98</sup>

## 2. Limitations on the Majority

Their conclusions, however, were not as simple or unanimous as they first sound. None of them, as we have

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96 Cf. supra, this chapter, p. 136-137.

97 Thomas JEFFERSON, Letter to James Madison, July 31, 1788: PTJ, XIV, p. 678-679.

98 James MADISON, Letter to Geo. Washington, April 16, 1787: Writings (H), II, p. 346.

seen, were in favor of simple democracy; the people, though sovereign, could only exercise their powers through representatives duly elected by them, and subject to their approval or disapproval by means of periodic elections.

Within the compass of this political principle common to all three, Wilson, Jefferson, and Madison expressed various degrees of confidence in the people and their personal opinions are reflected in their judgments on questions of suffrage, structure of government, terms of office, and popular control over the Constitution.

a. Wilson's Limitation of the Majority

James Wilson's confidence in the popular majority was expressed by his stubborn advocacy of the popular election of both Houses of Congress and of the President.<sup>99</sup> He sought the extension of the suffrage to all freemen but this was no clarion call for universal suffrage. The very term "freemen" implied his first limitation on the power of the majority since it limited the franchise to "every citizen, whose circumstances do not render him necessarily dependent on the will of another."<sup>100</sup> He approved of the

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99 Cf. supra, p. 23.

100 James WILSON, op. cit., Part II, Chap. I, "Of the Constitutions of the United States and Pennsylvania, Of the Legislative Department": Works (A), II, p. 15.

English practice of not permitting the poor to vote, at least "those [...] whose poverty is such, that they cannot live independently, and must therefore be subject to the undue influence of their superiors."<sup>101</sup> Hence, the quantitative majority he advocated<sup>102</sup> was at least minimally selective.<sup>103</sup>

Wilson is singular as the only one of our three Founding fathers who voiced explicitly the limitation of the power of the majority by natural and revealed law. He first applied that principle to the power of the legislature. In comparing that power to the power of the English Parliament, which Sir William Blackstone considered "absolute and uncontrollable" Wilson commented:

His [Blackstone's] meaning is obviously, that he knew no human power sufficient for the purpose. But the parliament may, unquestionably, be controlled by natural or revealed law, proceeding from divine authority.

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101 James WILSON, The Nature and Extent of the Legislative Authority of the British Parliament: Works, II, p. 511.

102 Cf. supra, this chapter, p. 138.

103 Wilson seems to reflect here a political opinion common to Constitutional America. Suffrage requirements were such as to disqualify the landless and propertyless. Artisans, squatters, and debtors could not vote. "In 1788, indeed, the idea of a mass democratic popular majority had hardly been entertained." (KELLY-HARBISON, The American Constitution, p. 162.)

Continuing, he recognized the same limitation on the power of Congress:

In the United States, the legislative authority is subject to another control, beside that arising from natural and revealed law; it is subject to control arising from the Constitution.<sup>104</sup>

Finally, he limited the power of the people on the same grounds:

When I say that, in free states, the law of nations is the law of the people; I mean not that it is a law made by the people [...] I mean that it is the law of nature, in other words, as the will of the nation's God it is indispensably binding upon the people, in whom the sovereign power resides; and who are, consequently, under the most sacred obligations to exercise it, in a manner agreeable to those rules and maxims, which the law of nature prescribes to every state, for the happiness of each and for the happiness of all. How vast [...] how important [...] these truths. They announce to a free people how exalted their rights; but at the same time [...] how solemn their duties are.<sup>105</sup>

For Wilson, the "sovereign power of the people" was in reality the power of a quantitative majority of a somewhat selective class whose political power was to be exercised only within restrictions laid down by the Divine Will and expressed by natural and revealed law.

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104 James WILSON, op. cit., Part I, Chap. XI, "Comparison of the Constitution...": Works, I, p. 415. Emphasis mine.

105 Ibid., Part I, Chap. IV, "Of the Law of Nations": Works, I, p. 136. Emphasis mine.

## b. Jefferson's Popular Democracy

Jefferson's confidence in the people evolved from early misgivings to complete faith. In 1776 he had observed:

[...] that a choice by the people themselves is not generally distinguished for it's [sic] wisdom. This first secretion from them is usually crude and heterogeneous. But give those so chosen by the people a second choice themselves, they generally chuse [sic] wise men.<sup>106</sup>

In other words, the people could not be trusted with the ultimate voice in the selection of government officials but only with the selection of those who would choose for them. Ten years later he compared the "animosities of sovereigns" to "those which seize the whole body of a people [...] who dictate their own measures" and found the latter more dangerous because of their longer duration and the difficulties of correcting them.<sup>107</sup> For the ordinary conduct of government his confidence in the people was restricted to their ability to select their representatives. His considered opinion was expressed in a letter to Abbe Arnoux:

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<sup>106</sup> Thomas JEFFERSON, Letter to Edmund Pendleton, August 26, 1776: PTJ, I, p. 503.

<sup>107</sup> Idem, Letter to C.W.F. Dumas, May 6, 1786: PTJ, IX, p. 463.

We think in America that it is necessary to introduce the people into every department of government as far as they are capable of exercising it[...].<sup>108</sup>

He considered them unqualified to exercise the executive, legislative, or judicial functions but qualified to choose the executive and legislators, and to judge questions of fact on juries.<sup>109</sup> The selection of judges "of whose [...] qualifications they [the people] are not competent judges" was to be left to the representatives.<sup>110</sup>

But such diffidence was in contrast to his insistence at the same time that "the good sense of the people will always be found to be the best army."<sup>111</sup> This confidence in the ultimate triumph of the good sense of the people was constantly reaffirmed by his apologies for their temporary aberrations:

[...] the will of the majority, the Natural law [sic] of every society, is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But it's [sic] errors are honest, solitary, and shortlived. Let us then, my dear friends, forever bow down to the general

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108 Thomas JEFFERSON, Letter to Abbe Arnoux, July 19, 1789: PTJ, XV, p. 283. Emphasis mine.

109 Ibid.

110 Idem, Letter to A. Coray, October 31, 1823: M.E., XV, p. 482.

111 Idem, Letter to Edward Carrington, January 16, 1787: PTJ, XI, p. 49.

reason of the society. We are safe with that, even in it's [sic] deviations, for it soon returns again to the right way.<sup>112</sup>

They may be led astray for the moment, but will soon correct themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution.<sup>113</sup>

His trust in the people was climaxed by his dedication to the principle of perpetual revolution which demanded from the representatives a constant fidelity and responsiveness to the will of the people under penalty of repudiation:

If the happiness of the mass of the people can be secured at the expense of a little tempest now or then, or even of a little blood, it will be a precious purchase.<sup>114</sup>

God forbid we should ever be 20 years without such a rebellion [...] The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its' [sic] natural manure.<sup>115</sup>

I hold that a little rebellion now and then is a good thing [...] It is medicine [sic] necessary for the sound health of government.<sup>116</sup>

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112 Thomas JEFFERSON, Response to Address of Welcome by the Citizens of Albemarle: PTJ, XVI, p. 179.

113 Idem, Letter to Edward Carrington, January 16, 1787: PTJ, XI, p. 49.

114 Idem, Letter to Ezra Stiles, December 24, 1786: PTJ, X, p. 629.

115 Idem, Letter to William Smith, November 13, 1787: PTJ, XII, p. 356.

116 Idem, Letter to James Madison, January 30, 1787: PTJ, XI, p. 93.

[...] every nation has a right to govern itself internally under what forms it pleases, and to change these forms at will.<sup>117</sup>

I consider the people who constitute a society or a nation as the source of all authority in that nation; as free [...] to change these agents individually, or the organization of them in form or function whenever they please.<sup>118</sup>

But the "people" in whom Jefferson placed his confidence were those with at least a minimal education. He constantly campaigned for the education of the people:

It is an axiom in my mind that our liberty can never be safe but in the hands of the people themselves, and that too of the people with a certain amount of instruction.<sup>119</sup>

An educated people was a necessary presumption of his devotion to the freedom of the press:

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.<sup>120</sup>

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117 Thomas JEFFERSON, Letter to Thomas Pinckney, December 30, 1792: M.E., IX, p. 7-8. Emphasis mine.

118 Idem, Opinion on French Treaties: M.E., III, p. 227. Emphasis mine.

119 Idem, Letter to Geo. Washington, January 1, 1786: PTJ, IX, p. 151. Emphasis mine.

120 Idem, Letter to J. Carrington, January 16, 1787: PTJ, XI, p. 49. Emphasis mine.

Yet as late as 1816 he had not considered limiting the suffrage to those who could read and was agreeably surprised to find such a requirement in the Constitution of Spain (1812):

[...] In the Constitution of Spain [...] there was a principle entirely new to me [...] that no person born after that day, should ever acquire the rights of citizenship until he could read or write. It is impossible sufficiently to estimate the wisdom of this provision.<sup>121</sup>

Jefferson's evolution from his earlier position as a moderate democrat to a more liberal populist can be traced by his opinions on the judiciary; his confidence in judges declined in inverse proportion to his confidence in the people. In 1776 he considered an independent judiciary as essential for good government:

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society, depend so much upon an upright and skilful [sic] administration of justice, that the judicial power ought to be distinct from both the legislature and executive [...] so it may be a check upon both [...]. The judges, therefore, should always be men of learning and experience in the laws, of exemplary morals [...] they should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words, their commissions should be during good behaviour, and their salaries ascertained and established by law.<sup>122</sup>

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<sup>121</sup> Thomas JEFFERSON, Letter to Dupont de Nemours, April 24, 1816: SOWERBY, Catalogue, III, p. 47. Emphasis mine.

<sup>122</sup> Idem, Letter to Geo. Wythe, June, 1776: PTJ, I, p. 410. Emphasis mine.

In 1791, Jefferson still considered the judiciary "the last appeal of reason" with "the weight of the conflict on their hands."<sup>123</sup> But in 1804 he found:

[...] the opinion which gives the judges the right to decide what laws are constitutional, and what not, not only for themselves [...] but for the legislatures and executive also [...] would make the judiciary a despotic branch.<sup>124</sup>

In his Autobiography, written in 1821, Jefferson scored the Supreme Court as a "corp of sappers and miners, steadily working to undermine the independent rights of the States", as being "effectually independent of the nation [which] ought not to be":

I deem it indispensable to the continuance of this government, that they should be submitted to some practical and impartial control.<sup>125</sup>

In 1819:

The Constitution [...] is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.<sup>126</sup>

In 1820 he took issue with William Charles Jarvis who considered the judges the ultimate arbiters of all constitutional questions:

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<sup>123</sup> Thomas JEFFERSON, Letter to Archibald Stuart, December 23, 1791: M.E., VIII, p. 277.

<sup>124</sup> Idem, Letter to Mrs. John Adams, September 11, 1804: M.E., XI, p. 51. Emphasis mine.

<sup>125</sup> Idem, Autobiography, 1821: M.E., I, p. 121.

<sup>126</sup> Idem, Letter to Spencer Roane, September 6, 1819: Writings (Ford), X, p. 141.

You seem [...] to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy [...] their power [is] the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control [...]. The exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society but the people themselves.<sup>127</sup>

Jefferson's opposition to the power of a judiciary not subject to the control of the people symbolizes his dedication to the principle of the rule of the popular majority, a dedication that reveals him as a more radical democrat than either Wilson or Madison. For him judicial review was simply a political device to frustrate the will of the majority, leaving the people no recourse except amendment, a process too complex to be practical. He could not brook such a limitation on the will of the people.

Another testimony to his dedication to the absolute power of the majority was his insistence on a periodic revision of the Constitution, a politically more acceptable version of his doctrine of perpetual revolution. The basic premise of his argument was "that the earth belongs in usufruct to the living: that the dead have neither powers nor rights over it."<sup>128</sup> He applied his principle first to

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<sup>127</sup> Thomas JEFFERSON, Letter to William C. Jarvis, September 9, 1820: M.E., XV, p. 277-278. Emphasis mine.

<sup>128</sup> Idem, Letter to James Madison, September 6, 1789: PTJ, XV, p. 392. Emphasis in original.

lands owned by private individuals. Such lands revert to the society on the death of the owner and are to be distributed according to the rules laid down by the society. He denied to anyone a natural right of inheritance:

The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to society. If the society has formed no rules for the appropriation of its lands in severality, it will be taken by the first occupants. These will generally be the wife and children of the decedent. If they have formed rules of appropriation, those rules may give it to the wife and children, or to some one of them, or to the legatee of the deceased. So they may give it to his creditor. But the child, the legatee, or creditor takes it, not by any natural right, but by a law of the society of which they are members [...]. Then no man can, by natural right, oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment [*sic*] of debts contracted by him. For if he could [...] the lands would belong to the dead, and not to the living, which would be the reverse of our principle.<sup>129</sup>

He recognized and accepted the extremes to which his argument could be carried:

[...] it renders the question of reimbursement a question of generosity and not of right [...] and the present holders, even where they, or their ancestors, have purchased, are in the case of bona fide purchasers of what the seller had no right to convey.<sup>130</sup>

The transition from the rights of the individual to the

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129 Thomas JEFFERSON, Letter to James Madison, September 6, 1789: PTJ, XV, p. 392-393. Emphasis mine except for "natural right".

130 Ibid., p. 396-397. Emphasis mine.

rights of society was made by an individualistic concept of society:

What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals.<sup>131</sup>

The political consequences of Jefferson's theory were clearly stated:

On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation [...]. The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being [...]. Every constitution then, and every law, naturally expires at the end of 19 years.<sup>132</sup>

Jefferson was emphatic in refusing to equate this natural extinction of constitutions and laws to the right of repeal:

It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited to 19 years only. In the first place, this objection admits the right [of binding], in proposing an equivalent [of repealing]. But the power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form [...] a law of limited duration is much more manageable than one which needs repeal.<sup>133</sup>

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131 Thomas JEFFERSON, Letter to James Madison, September 6, 1789: PTJ, XV, p. 393. Emphasis mine. Note again the consistency with the principles of Paine (op. cit., p. 121-122).

132 Ibid., p. 395-396. Emphasis mine.

133 Ibid., p. 396. Emphasis mine.

Jefferson's teaching on popular sovereignty and majority rule provides the opportunity of pointing to certain similarities between him and Jean Jacques Rousseau. That there are similarities is not surprising since Jefferson alone, of all his contemporaries, was the one American who had been exposed to the radical democracy of the French Revolution and Rousseau's Social Contract. First, Jefferson's affective submission to the will of the majority is voiced in terms similar to Rousseau's statement of his own submission to the general will.<sup>134</sup> Both of them agree that the will of the people or general will can be in error, but it can never be corrupt. A simple instruction in the true state of affairs will always recall that will from its error.<sup>135</sup>

Secondly, their concepts of the relationship of civil society to ownership are essentially the same. Rousseau is explicit in arguing that, after the formation of civil society, all property is held by individuals only as

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134 "I readily therefore suppose my opinion wrong, when opposed by the majority." (Thomas JEFFERSON, Letter to James Madison, July 31, 1788: PTJ, XIV, p. 678-679.)

"If then a view contrary to my own carries the day, that merely proves that I was mistaken." (J.J. Rousseau, The Social Contract, Bk. IV, Chap. II: Gateway ed., Chicago, H. Regnery Co., 1954, p. 169.)

135 J.J. ROUSSEAU, op. cit., Bk. II, Chap. III, p. 38-40. For Jefferson's comments, cf. supra, this chapter p. 157-161.

"depositories of the common wealth." Society gains title to property in either of two ways. If a man possesses property at the time of his consent to the social contract, he surrenders that property to society as a condition of the contract and receives in return "ownership" of the property, a right now protected by the full force of the society for which he now holds the land in trust. On the other hand, if a man owns no property at the time of his consent but is given title to a portion of the land owned in common by the society, it is obvious his ownership is "always subservient to the community's rights over the holdings." In both cases, private ownership is a "depository".<sup>136</sup> Jefferson's theory, that the property of an original owner reverts to society at his death to be disposed of as society deems fit is also founded on the surrender of the natural right to ownership, as a condition of the social compact. In exchange the original owner receives his property back to be held in trust for society which guarantees his possession with the civil power.<sup>137</sup>

Thirdly, Jefferson's proposal that the validity of all laws, including the Constitution, terminate every nine-

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<sup>136</sup> J.J. ROUSSEAU, op. cit., Bk. I, Chap. IX, p. 31-32.

<sup>137</sup> Cf. supra, this chapter, p. 142.

teen years is a conservative version of Rousseau's demand that every periodic assembly of the people open with a vote on the question of revalidating the social contract itself.<sup>138</sup> The essence of both proposals is an emphasis and guarantee of the sovereign power of the people. Rousseau is more explicitly radical: "Evidently, then, there is — and can be — no type of fundamental law that is binding upon the people as a body [...]."<sup>139</sup> But Jefferson, in defining law as "the will of the nation"<sup>140</sup> is implicitly just as radical since nowhere in his writings does he expressly limit the power of the people.

Jefferson's position on the popular majority cannot be better stated than in the words of Vernon L. Parrington:

Jefferson was never greatly concerned about stable government; he was very much more concerned about responsive government — that it should faithfully serve the majority will. He made no god of the political state. He had no conventional reverence for established law and order [...]. In asserting the principle of the majority will, Jefferson [...] found himself countered by the argument of abstract justice [...]. The people may legislate, but it remains to determine the validity of statutes in the light of justice; that which is unjust is ipso facto null and void. It was Coke's

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<sup>138</sup> J.J. ROUSSEAU, op. cit., Bk. III, Chap. XVIII, p. 160-161.

<sup>139</sup> Ibid., Bk. I, Chap. VII, p. 23. Cf. also Bk. II, Chap. IV, p. 41.

<sup>140</sup> Thomas JEFFERSON, Letter to Edmund Randolph, Aug. 18, 1799: M.E., X, p. 125.

doctrine of judicial review, set up in America after its repudiation in England, and Jefferson's hostility to it was bitter [...] The government he desired would not rest on the legal fiction of an abstract justice above statutes and constitutions [...] It would be like Paine's "a plain thing, and fitted to the capacity of many heads"; for "where the law of the majority ceases to be acknowledged, there government ends [...]".<sup>141</sup>

Concerning the character of the "people" in whom he would place ultimate political sovereignty, Jefferson had a definite ideal:

Those who labor in the earth are the chosen people of God, if he ever had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue [...] Corruption of morals in the mass of the cultivators is a phaenomenon [sic] of which no age nor nation has furnished an example. It is the mark set on those, who not looking up to heaven, to their own soil and industry, as does the husbandman, for their subsistence, depend for it on casualties and caprice of customers. Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition [...] While we have land to labor then, let us never wish to see our citizens occupied at a workbench, or twirling a distaff.<sup>142</sup>

[...] it is not too soon to provide [...] that as few as possible shall be without a little portion of land. The small landholders are the most precious part of a state.<sup>143</sup>

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141 Vernon L. PARRINGTON, Main Currents in American Thought, Vol. I, "The Colonial Mind", New York, Harcourt Brace, 1927 (Harvest Books), p. 357-359. Emphasis mine.

142 Thomas JEFFERSON, Works (Ford), IV, p. 85-86. Emphasis mine.

143 Idem, Letter to James Madison, October 28, 1785: PTJ, VIII, p. 682. Emphasis mine.

Jefferson was fortunate to find his ideal actualized in the American people of his time. Colonial economy had been predominantly agrarian:

Something like eight in ten colonists took their living from the soil [...] Many merchants, fishermen, and craftsmen were themselves part-time cultivators of the soil [...] The land itself was the most important single economic factor in early American history [...] Politics took on a decidedly rural flavor.<sup>144</sup>

In short, the colonists had come to the New World in search of land; distribution of land was the first order of business in a new colony and hence ownership of at least a small freehold was the natural foundation of citizenship. The abundance of land to be had for the asking, especially on the frontier, perpetuated the agrarian nature of American political society into the nineteenth century. These small landholders constituted the "people" to whom Jefferson attributed the ultimate sovereignty in political society.

#### c. Madison's Economic Restrictions

Madison agreed with the principle that "the majority alone have the right of decision"<sup>145</sup> but not without qualification. His misgivings on the subject of

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<sup>144</sup> Clinton ROSSITER, The First American Revolution, New York, Harcourt Brace, 1956 (Harvest Book), p. 33.

<sup>145</sup> James MADISON, Letter to George Washington, April 16, 1787: Writings (H), II, p. 346.

majority rule ranged from doubts about the principle to questions about its application in government:

There is no maxim in my opinion which is more liable to be misapplied, and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "ultimate happiness" in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense it would be the interest of the majority in every community to despoil and enslave the minority of individuals [...]. In fact it is only re-establishing under another name and a more specious form, force as the measure of right.<sup>146</sup>

In the Virginia Convention for the ratification of the Constitution, Madison reiterated his convictions in replying to Patrick Henry's challenge that licentiousness had seldom produced a loss of liberty:

Since the general civilization of mankind, I believe there are more instances of the abridgment of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations; but, on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism.<sup>147</sup>

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146 James MADISON, Letter to James Monroe, October 5, 1786: Writings (H), II, p. 273. Emphasis mine.

147 Idem, Speech in Virginia Convention for Ratification, June 5, 1788: Writings (H), V, p. 126. Emphasis mine.

Turning his attention to the function of the majority in a republican democracy, Madison gave it careful attention. First, he eliminated as a chimera the hypothesis of a "simple democracy or pure republic, actuated by a sense of the majority, and operating within narrow limits." Such a homogeneous society in which the interests of the majority and the minority would be identical would render the rule of simple majority feasible. But in reality all civilized societies breed inevitable class distinctions due to the very protection of the equal rights of the individuals to acquire property. Equally inevitable is the creation of a propertyless majority not averse to despoiling the landed minority. Since no one can be a just judge in his own case it would be unjust to submit the controversies between the two classes to the court of majority opinion. Three motives, namely: regard for their own individual welfare, self-respect, and religion which could function as restraints have, in actual practice, proved inadequate. He suggested two possible solutions: first, a republican government must be spread over such a large area that no "common sentiment" is likely to arise and form a bond of union for an oppressive majority; second, the "great desideratum in Government" is to divide the sovereignty between the opposing factions so that neither can invade the rights of the other nor can

both form a combination adverse to the society as a whole.<sup>148</sup>

There is no doubt that Madison's fear of the popular majority stemmed from a concern for property interests and he was frank enough to champion their right to representation in the government along with personal rights:

In a general view I see no reason why the rights of property which chiefly bears the burden of government and is so much an object of Legislation should not be respected as well as personal rights in the choice of Rulers.<sup>149</sup>

During the hectic years of the Revolution personal and property rights had found common cause, but with peace had come the inevitable economic distinctions and the necessity of taking political means to guarantee justice to all. The framing of a new constitution furnished the opportunity of providing adequate legislative protection for property while "the bulk of the people have a sufficient interest in possession or in prospect to be attached to the rights of property, without being insufficiently attached to the right of persons."<sup>150</sup> If political power be allowed to fall into

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148 James MADISON, Letter to Thomas Jefferson, October 10, 1787: Writings (H), V, p. 28-32.

149 Idem, Letter to Caleb Wallace, August 23, 1785: Writings (H), II, p. 172.

150 Idem, Letter to J. Brown, October, 1788: Writings (H), V, p. 287.

the hands of a landless majority liberty will suffer either from the ambitions of the propertyless or from their manipulation by unscrupulous demagogues.<sup>151</sup> In final analysis:

Whatever respects may be due to the rights of private judgment, and no man feels more of it than I do, there can be no doubts that there are subjects to which the bulk of mankind are unequal, and on which they will and must be governed by those with whom they have acquaintance and confidence.<sup>152</sup>

Political institutions should be ordered to insure the wisdom of the majority opinion. Madison attempted to reduce that principle to practice by proposing a bicameral legislature composed of one house representative of the people at large and another elected on a restricted suffrage and representative of property interests. The latter body, stabilized by a six year term of office, could:

[...] withstand the occasional impetuositities of the more numerous branch [...] It ought do supply the defect of knowledge and experience incident to the other branch [...] correcting the infirmities of popular government.<sup>153</sup>

Madison, then, did not have the enthusiasm for popular government so sacred to Wilson and more so to

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151 James MADISON, Letter to J. Brown, October, 1788: Writings (H), V, p. 288.

152 Idem, Letter to Edmund Randolph, January 10, 1788: Writings (H), V, p. 81. Emphasis mine.

153 Idem, Letter to J. Brown, October, 1788: Writings (H), V, p. 288. Emphasis mine.

Jefferson. His differences with Jefferson were pointedly revealed in their correspondence on the question of the right of one generation to bind another. In general Jefferson denied any generation that right; "every constitution then, and every law, naturally expires at the end of 19 years", the political life-span of a generation. The simple right to repeal was not the equivalent of his proposal which demanded that the law be presumed to have lapsed unless it were reaffirmed by the new generation.<sup>154</sup> In a reply to Jefferson's proposal Madison first summarized it as advocating that the validity of every act of a political society be limited to the period of nineteen years. He then divided these acts into: the fundamental constitution, laws irrevocable by an act of the legislature, and laws involving no such irrevocability. As applied to the constitution the proposal might be theoretically correct but was practically fraught with danger. A too frequent opportunity for the revision of the government would weaken its foundation in tradition, create periodic opportunities for factional controversy, and render political society subject to the "casualty and consequences of an actual interregnum."<sup>155</sup>

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154 Thomas JEFFERSON, Letter to James Madison, September 6, 1789: PTJ, XV, p. 396.

155 James MADISON, Letter to Thomas Jefferson, February 4, 1790: PTJ, XVI, p. 148.

Considering the second class of political acts, i.e. laws not revocable by the legislature, he questioned the proposal in theory and in practice:

If the earth be the gift of nature to the living their title can extend to the earth in its natural state only. The improvements made by the dead form a charge against the living who take benefit of them. This charge can no otherwise be satisfied [sic] than by executing the will of the dead accompanying the improvements.<sup>156</sup>

Debts may be incurred by the present generation for the benefit of posterity, e.g. repelling a conquest. Justice requires the fulfillment of such obligation under the sole condition that the debt did not exceed the benefits. For this conclusion "there seems to be a foundation in the nature of things, in the relation which one generation bears to another [...]."<sup>157</sup>

Madison's objections to the theory as applied to laws of the third class (laws involving no irrevocability) were practical. All rights depending on positive law would periodically become defunct without the renewed consent of society to them. Such a condition would generate violent class struggles, render property rights hazardous and depreciate property, weaken the reverence for obligation and

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156 James MADISON, Letter to Thomas Jefferson, February 4, 1790: PTJ, XVI, p. 148. Emphasis mine.

157 Ibid., p. 148. Emphasis mine.

encourage licentiousness, discourage industry and promote opportunism.<sup>158</sup>

In general Madison was convinced that the principle of a presumption in favor of the continuance of laws, based on tacit consent, could not be attacked "without subverting the foundation of civil society." The alternative would be the explicit unanimous consent of each new generation to the principles of majority rule and the reaffirmation of every law by that majority, an impractical if not impossible procedure.<sup>159</sup> Hence, if the Constitution of the United States frustrates to some extent the principles of perpetual revolution and of government by a popular majority it is due to the political genius of James Madison especially. His proposals during the Constitutional Convention reveal him as a conservative democrat, seeking constantly for the means that would permit the voice of the people to be effective in government but which would also guarantee stability and wisdom to legislation. For him the House of Representatives was to be the voice of the people but he was convinced that "if the federal Government should lose its proper equilibrium [...] the effect will proceed from

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158 James MADISON, Letter to Thomas Jefferson, February 4, 1790: PTJ, XVI, p. 149.

159 Ibid., p. 149.

the Encroachments of the Legislative department [...] [in which] the numerous and immediate representatives of the people will decidedly predominate."<sup>160</sup> The real danger to republican liberty has lurked in that cause.<sup>161</sup> Consequently the Legislature must be bi-cameral; a single legislature "would prove the most deadly blow ever given to Republicanism."<sup>162</sup> The second House would be the Senate whose members should be relatively independent of the people, enlightened and firm,<sup>163</sup> capable of withstanding the occasional impetuosities of the House of Representatives,<sup>164</sup> of supplying the defect of knowledge and experience of that branch,<sup>165</sup> and of giving wisdom and steadiness to legislation.<sup>166</sup> To assure the independence and experience required

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160 James MADISON, Letter to Edmund Pendleton, June 21, 1789: Writings (H), V, p. 406.

161 Idem, Observations on "Draught of a Constitution for Virginia" Sent to J. Brown of Kentucky, October, 1788: Writings (H), V, p. 285.

162 Idem, Letter to Philip Mazzei, December 10, 1788: Writings (H), V, p. 315.

163 Idem, Speech in Constitutional Convention, 1787: RFC, I, p. 421-423.

164 Idem, Observations on "Draught of a Constitution for Virginia": Writings (H), V, p. 285.

165 Ibid.

166 Idem, Letter to Caleb Wallace, August 23, 1785: Writings (H), II, p. 167.

for that task a long term of office, at least seven years, was necessary.<sup>167</sup> His intention of restraining and refining the popular will was implicit also in his continued effort to create a revisionary council or council of review, composed of the Executive and the Judiciary, to which all proposed legislation would be submitted for approval;<sup>168</sup> to give the Federal Government a veto over all state laws (he was aware that State legislatures were dominated by the popular majority);<sup>169</sup> to restrict the appointment of justices of the Supreme Court to the Senate or the Executive with the approval of the Senate.<sup>170</sup>

Like Jefferson, his concept of the "people" was agrarian:

'Tis not the country that peoples either the Bridewell or the Bedlams [...] The class of citizens who provide at once their own food and their own raiment, may be viewed as the most truly independent and happy. They are more: they are the best basis of public liberty, and the strongest bulwark of public safety. It follows, that the greater the portion of this class to the whole society, the more free, the more independent, the more happy must be the society itself.<sup>171</sup>

<sup>167</sup> James MADISON, Journal of Federal Convention, June 12, 1787: Records of Federal Convention, I, p. 218.

<sup>168</sup> Proposed by Madison in Federal Convention, June 4, 6, July 21, August 15. Cf. ibid.

<sup>169</sup> Proposed June 8 and July 17. Ibid.

<sup>170</sup> Proposed June 13 and July 21. Ibid.

<sup>171</sup> Idem, Republican Distribution of Citizens: Writings (H), VI, p. 97-99. Emphasis mine.

When the question of the suffrage on a national level arose in the Constitutional Convention Madison agreed theoretically with John Dickinson of Delaware who sought to restrict it to landholders:

[...] the right of suffrage is certainly one of the fundamental articles of republican Governments [...] A gradual abridgment of this right has been the mode in which Aristocracies have been built on the ruins of popular forms [...] Viewing the subject in its merits alone, the freeholders of the country would be the safest depositories of Republican liberty. In future times a great majority of the people will not only be without landed, but any other sort of property. These will either combine under the influence of their common situation; in which case the rights of property and the public liberty will not be secure in their hands; or which is more probable, they will become the tools of opulence and ambition, in which case there will be equal danger on another side.<sup>172</sup>

The "danger on another side" referred to by Madison was the example of bribery and illegal influence in English elections which he claimed was prevalent, not in rural counties, but in the cities and boroughs where the suffrage was not restricted to landholders.<sup>173</sup> His words on this occasion reveal how deep-set were his fear of and opposition to universal suffrage since his speech was in rebuttal to an

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<sup>172</sup> James MADISON, Speech in Constitutional Convention, August 7, 1787: Records of Federal Convention, II, p. 203-204. Emphasis mine.

<sup>173</sup> Ibid., p. 204.

eloquent plea on behalf of that privilege by Col. George Mason of Virginia.<sup>174</sup>

In retrospect, then, Madison's concept of democracy differed profoundly from that of Jefferson except for their agreement on the ideal subjects of democratic government, an agrarian "people". The evidence arouses curiosity as to the grounds on which Jefferson based his final evaluation that "the harmony of our political principles [...] have been sources [sic] of constant happiness to me through that long period [fifty years]."<sup>175</sup>

#### D. The Nature of Civil Law

The final question that will be asked in this attempt to probe the political philosophy of Jefferson, Madison, and Wilson will be addressed to their respective concepts of civil law.

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174 Mason had pleaded that "every man having evidence of attachment to and permanent interest with the Society ought to share in all its rights and privileges. Was this qualification restrained to freeholders?" (James MADISON, Speech in Constitutional Convention, August 7, 1787: Records of Federal Convention, II, p. 204.

175 Thomas JEFFERSON, Letter to James Madison, February 17, 1826: Writings (Ford), X, p. 377-378; cited by Adrienne KOCH, Jefferson and Madison, New York, Oxford University Press, 1950 (Galaxy Book, 1964), p. 281. Emphasis mine.

1. Wilson's Concept of Civil Law — A Contract Between Equals

Again, of the three, only Wilson presented an explicit philosophy of law. The point of departure and constant foil for his whole discussion was the theory of law which he traced through Blackstone, its contemporary proponent, to Pufendorff.<sup>176</sup> After accepting that part of Blackstone's definition which described law as a rule of action, Wilson began the discussion by questioning the phrase immediately following, "which is prescribed by some superior, and which the inferior is bound to obey":<sup>177</sup>

A superior! Let us make a solemn pause — Can there be no law without a superior? Is it essential to law that inferiority should be involved in the obligation to obey it? Are these distinctions at the root of all legislation?<sup>178</sup>

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176 Roscoe POUND in The Formative Era of American Law (Boston, Little, Brown and Company, 1938, p. 24) implies that Wilson's concept of law can be traced to Pufendorff, pointing out that Wilson quotes Pufendorff twenty-nine times. Pound omits the fact that Wilson quotes Pufendorff only to refute him. Wilson saw in Pufendorff's theory of law the exact contradiction of his own.

177 Sir William BLACKSTONE, Commentaries on the Laws of England, New York, Harper, 1856, I, p. 43; cited by Wilson, op. cit., Part I, Chap. II, "General Principles of Law and Obligation": Works (A), I, p. 59.

178 James WILSON, op. cit., Part I, Chap. II, "General Principles of Law and Obligation": Works (A), I, p. 59. Emphasis mine.

His challenge of Blackstone's definition was not motivated by mere academic curiosity but by fear of what he considered its consequences for contemporary democratic movements:

If I mistake not, this notion of superiority, which is introduced as an essential part in the definition of law [...] contains the germ of the divine right [...] of princes, arbitrarily to rule; and of the corresponding obligation [...] of the people, implicitly to obey.<sup>179</sup>

If the doctrines [of superiority], insinuated in the definition of law, can be supported on the principles of reason and science; the defense of other principles, which I have thought to be those of liberty and just government, become — I am sorry to say it — a fruitless attempt.<sup>180</sup>

His emphatic rejection of the divine right of kings was expressed practically in a major premise implicit in all subsequent arguments, namely, that any political theory which led to an affirmation of that right was ipso facto erroneous.<sup>181</sup>

Another prerequisite essential to Wilson's opposition to Blackstone and Pufendorff was his recognition of the distinction between divine and human law and his concession that the relationship of superiority and inferiority was essential to divine law:

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179 James WILSON, op. cit., Part I, Chap. II, "General Principles of Law and Obligation": Works (A), I, p. 59.

180 Ibid., p. 61.

181 Ibid., passim, p. 59-82.

That our Creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles.<sup>182</sup>

Wilson made it abundantly clear that for him the only question under discussion was human law:

But there are laws also that are human; and does it follow, that, in these a character of superiority is inseparably attached to him, who makes them; and that a character of inferiority is, in the same manner, inseparably attached to him, for whom they are made.<sup>183</sup>

Wilson's initial conclusion was an emphatic denial that that relationship was essential to the concept of human law. Ignoring temporarily<sup>184</sup> and possibly for the sake of argument the possible confusion implicit in the identification of superiority, sovereignty, and right of legislation, he considered the question of the origin of sovereignty. The idea of sovereignty based on sheer power is rejected without argument except that "bare force, far from producing an obligation to obey, produces an obligation

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182 James WILSON, op. cit., Part I, Chap. III, "Of the Law of Nature": Works (A), I, p. 95.

183 Idem, op. cit., Part I, Chap. II, "Of the General Principles of Law and Obligation": Works (A), I, p. 59.

184 Later (op. cit., Part I, Chapter V, "Municipal Law": Works (A), I, p. 169-170) he distinguished between sovereignty which cannot be delegated and the legislative, executive, and judicial powers which can be delegated according to terms of the people.

to resist."<sup>185</sup> Sovereignty based on a superiority of nature has been historically a foundation for the divine right of kings and for that reason is unacceptable.<sup>186</sup> Since the natural superiority of power or excellence have been found wanting as sources of sovereignty, a third alternative is proposed, the creation of a superior by means of the social compact. As Pufendorff proposed it, that compact was a composite of three contracts, namely: 1) the agreement by the persons involved to associate together and make decisions by common consent; 2) the agreement that specified the form of the government; 3) the agreement between the person or persons on whom the sovereignty is to be conferred and the people who confer it and as a result become subjects or inferiors. Enlarging on a metaphor that in such a case the first agreement is only the scaffolding for the second that constructs the government, Wilson continued:

If this is so, it must have required but a small portion of courtly ingenuity to persuade Lewis the Fourteenth [sic], that, in a monarchy, government was nothing but a scaffolding for the king.<sup>187</sup>

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185 James WILSON, op. cit., Part I, Chap. II, "Of the General Principles of Law and Obligation": Works (A), I, p. 63

186 Ibid., passim, p. 63-70.

187 Wilson considered Hugo Grotius an exponent of the divine right of kings and cites "a number of sentences and quotations, which Grotius collected together, in order to combat the sentiments of those, who hold that supreme power is, always and without exception, in the people" (Ibid.

Such a doctrine in which the people subject themselves as inferiors to a sovereign to whom they cede the power that is properly theirs can and has placed the ruler above the law, resulting in arbitrary and unlimited power for him and only passive obedience for the people.<sup>188</sup>

Indeed, Wilson denied the very possibility of a political society creating such a superior:

Can any person or power, appointed by human authority, be superior to those by whom he is appointed, and so form a necessary and essential part in the definition of a law?<sup>189</sup>

For an answer he turned first to Blackstone's argument in favor of the affirmative and pointed to what he considered its weak point:

By the Author of the Commentaries, this superior is announced in a very questionable shape [...] "When society is once formed, government results of course," — I use the words of the Commentary — "as necessary to preserve and keep that society in order. Unless some superior be constituted [...] they would still remain as in a state of nature [...]" But as all the members of the society are naturally equal, it may be asked" — what question may be asked? The most natural question, that occurs to me, is — how is this superior to be constituted? [...]

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p. 69-72). Wilson looked with suspicion on favorable relations of Grotius with Lewis [sic] the Fourteenth and Thirteenth to whom he dedicated "his very book of the Rights of War and Peace." (Ibid., p. 69-70, 72.)

188 James WILSON, op. cit., Part I, Chap. II, "Of the General Principles of Law and Obligation": Works (A), I, p. 59.

189 Ibid., p. 74.

This is the question to which I would expect to hear an answer. But how suddenly is the scene shifted! Instead of the awful insignia of superiority [...] the mild emblems of confidence make their appearance. The person announced was a dread superior: but the person introduced is a humble trustee. For, to proceed, "it may be asked, in whose hands are the reins of government to be intrusted?"<sup>190</sup>

Maintaining that the essential question of how a superior is constituted is never answered in the Commentaries, Wilson proposed and rejected several possible solutions. If a superior is necessary for human law, then any human law pretending to constitute a superior is invalid since it would have to be made without a superior.<sup>191</sup> Nor can a superior be created by a covenant or agreement since all parties to such an agreement would have to be equal and thus could not create a superiority which none of them possessed.<sup>192</sup> A third alternative, voluntary submission as inferiors, was rejected as contrary to human nature, as "legal suicide."<sup>193</sup> In final analysis, proponents of the

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190 James WILSON, op. cit., Part I, Chap. II, "Of the General Principles of Law and Obligation": Works (A), I, p. 74-75. Emphasis in original.

191 Ibid., p. 75.

192 Ibid., p. 76.

193 Ibid., p. 76-78. (footnote 2). Again Pufendorff is Wilson's bete noire. He is presented as founding sovereignty on a social covenant of voluntary subjection of citizens to the ruler selected by them. "This, then, is the nearest and immediate cause, from which sovereign authority, as a moral quality doth result. For if we

thesis that a superior is necessary for human law have recognized the weakness of their argument and have bolstered it by an appeal to the divine character of sovereignty:

Yet still [...] to procure to the supreme command an especial efficacy, and a sacred respect, there is need of another additional principle, besides the submission of the subjects. And therefore he who affirms sovereignty to result immediately from compact, doth not, in the least, detract from the sacred character of civil government, or maintain that princes bear rule, by human right only, and not by divine.<sup>194</sup>

For Wilson, his lengthy refutation of the arguments in favor of the necessity of a superior for law justified only one conclusion:

[...] as to human laws, the notion of a superior is a notion unnecessary, unfounded, and dangerous; a notion inconsistent with the genuine system of human authority.<sup>195</sup>

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suppose submission in one party, and, in another, the acceptance of that submission; there accrues to the latter, a right of imposing commands on the former; which is what we term sovereignty or rule." (De Jure Naturae et Gentium, Bk. VII, Chap. III, section 1, p. 654-655; cited by Wilson, ibid., p. 78.) It is this submission that Wilson terms "legal suicide."

194 Samuel von PUFENDORFF, De Jure Naturae et Gentium, Bk. VII, Chap. III, Section 1; cited by Wilson, ibid., p. 80. Emphasis in quotation by Wilson. In speaking of the divine right of kings Wilson voiced his opinion that this doctrine originated as a "barrier against the tyranny of priests [...]. It is not improbable, that [...] the divine right of kings was considered as the only principle, which could be opposed to the claims of the papal throne [...]." (Ibid., p. 86.)

195 Ibid., p. 88.

But if the notion of superior is eliminated from human law what constitutes the real source of its obligation?

Now that the will of a superior is discarded [...] in its place I introduce — the consent of those whose obedience the law requires. This I conceive to be the true origin of the obligation of human laws.<sup>196</sup>

Wilson's first argument in favor of his thesis is historical:

Among the earliest, among the freest, among the most improved nations of the world, we find a species of law prevailing, which carried, in its bosom, internal evidence of consent. History, therefore, bears a strong and a universal testimony in favor of this species of law.<sup>197</sup>

He finds historical justification for his conclusion in the ancient coronation oaths of the Kings of England, in the summons of Edward I to convoke a parliament, in the teaching of Lord Chancellor Fortescue, but especially in the Common Law of England.

In the countenance of that law, every lovely feature beams consent [...] This law is founded on long and general customs [...] On what can long and general custom be founded? Unquestionably, on nothing else, but free and voluntary consent [...] A law which has been established by long and general

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<sup>196</sup> James WILSON, *op. cit.*, Part I, Chap. II, "Of the General Principles of Law and Obligation": Works (A), p. 88. Emphasis mine.

<sup>197</sup> Ibid., p. 89.

custom, must have received its origin and introduction from free and voluntary consent [...].<sup>198</sup>

But the conclusion that the only origin of human law is consent presupposes the more basic question — can a person bind himself? Pufendorff had insisted on the maxim that a person cannot bind himself to an obligation and concluded that the only source of obligation must be the command of a superior.<sup>199</sup> Wilson, however, reverses the maxim:

We are now come to the important question [...] which must, in my opinion, decide the fate of all human laws [...] [I]f a man cannot bind himself, no human authority can bind him [...] if he cannot bind himself, there is an end of all human authority, and of all human laws.<sup>200</sup>

But a man can bind himself and frequently does so by contract or agreement:

A man can bind himself. But is his bond a law? Yes, it is a law binding upon himself [...] But shall a private contract be viewed in the venerable light of law? Why not, if it has all its essential properties?<sup>201</sup>

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198 James WILSON, op. cit., Part I, Chap. V, "Municipal Law": Works (A), I, p. 183-185. Emphasis mine.

199 Samuel von PUFENDORFF, op. cit., Bk. I, Chap. VI, Sec. 7, p. 63; cited by Wilson, ibid., p. 190.

200 James WILSON, op. cit., Part I, Chap. V, "Municipal Law": Works (A), I, p. 193. Emphasis mine.

201 Ibid., p. 196.

Human law, then, is essentially a rule of action binding upon the citizens by virtue of their voluntary consent in the form of an agreement or contract between themselves.

Wilson recognized that the strongest objection to his concept of law was the distinction, which he attributed to Pufendorff, between law, counsel, and compact or agreement. He presented that objection in a quote from Pufendorff:

[...] law is the injunction of him, who has a power over those, to whom he prescribes; but counsel comes from him, who has no such power [...] Neither are those ancients accurate enough in their expressions, who frequently apply to laws the name of common agreements [...] For a compact is a promise, but a law is a command.<sup>202</sup>

Wilson countered the objection indirectly by claiming "that these distinctions [...] would overturn the beautiful temple of liberty from its very foundations."<sup>203</sup> He then presented and developed his own theory that "the sole legitimate principle of obedience to human laws is human consent."<sup>204</sup> Hence, although Wilson himself never answered the objection directly an answer is implicit in his theory.

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202 Samuel von PUFENDORFF, op. cit., Bk. I, Chap. VI, Sec. 2, p. 59; cited by Wilson, op. cit., Part I, Chap. V, "Municipal Law": Works (A), I, p. 178. Emphasis mine.

203 James WILSON, op. cit., Part I, Chap. V, "Municipal Law": Works (A), I, p. 179.

204 Ibid., p. 179.

Law in general would be a "rule of action"<sup>205</sup> which is obligatory as opposed to counsel which would be a rule of action suggested but not obligatory. Law could then be divided into divine law, a rule of action obligatory as the command of God, our legitimate superior; and human law, a rule of action obligatory as a contract to which we have consented.<sup>206</sup> Thus the objection is met and answered by Wilson's theory which is capable of retaining the distinction between law and counsel on the basis of obligation while still avoiding the necessity of including a superior as an essential characteristic of all law.

Wilson also subdivided divine law into: 1) law eternal — the universal providence of God which cannot be known by man; 2) law celestial — the law made for "angels and the spirits of the just made perfect"; 3) laws of nature — the law ordering the "irrational and inanimate parts of nature"; 4) the law made for man in his present state which as promulgated by reason and the moral sense is called natural law while as promulgated by the Scriptures is called revealed law.<sup>207</sup> The content of these two laws,

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205 Wilson accepted this part of Blackstone's definition of law. Cf. Lectures on Law, Part I, Chap. II, "General Principles of Law and Obligation": Works (A), I, p. 54-55. Emphasis mine.

206 This definition of human law is a logical deduction from his whole analysis of such law.

207 Ibid., p. 92-92.

Wilson considered to be identical, with the only distinction between them coming from their mode of promulgation.<sup>208</sup>

The precepts of this law, whether natural or revealed, as addressed to men were called the laws of nature; as addressed to political societies, the law of nations.<sup>209</sup>

Consequent upon these distinctions Wilson admitted a relationship between the law of (human) nature and human law:

Nature, or, to speak more properly, the Author of nature, has done much for us; but it is his gracious appointment and will, that we should also do much for ourselves. What we do, indeed, must be founded on what he has done; and the deficiencies of our laws must be supplied by the perfections of his. Human law must rest its authority, ultimately, upon the authority of that law, which is divine.<sup>210</sup>

The first effect of this dependence of human on natural law is the introduction of the notion of a superior as the remote source of obligation in human law:

Of that [law of nature] law, the following are maxims — that no injury should be done — that a lawful engagement, voluntarily made, should be faithfully fulfilled. We now see the deep and the solid foundations of human law.<sup>211</sup>

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208 James WILSON, op. cit., Part I, Chap. II, "Of the General Principles of Law and Obligation"; Works (A), I, p. 92. Also cf. supra, Chap. III, p.

209 Ibid., p. 92.

210 Ibid., p. 93. Emphasis mine.

211 Ibid., p. 93. Emphasis mine.

This maxim is, indeed, a part of the law of a superior.<sup>212</sup> Another effect is at least suggested by Wilson, i.e., that human law is not the only source of obligation in civil society:

[...] in consequence of the divine authority, numerous are the claims that we are reciprocally entitled to make, numerous are the duties, that we are reciprocally obliged to perform.<sup>213</sup>

Although he never explicitly treats of whether or not these claims and duties flowing from the natural law are actually incorporated into or recognized by human law, Wilson could have conceived civil law as composed of laws expressing the divine commands of natural law binding us with divine authority as opposed to the laws expressing the agreements by the consent of the citizens and binding only under the obligation of fulfilling one's promises. The distinction reflects the familiar distinction of laws binding in conscience as expressions of natural law as opposed to so-called "penal" laws which express an official legislative choice between certain alternatives, all morally justifiable.<sup>214</sup> The latter would be what Wilson would describe

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212 James WILSON, op. cit., Part I, Chap. V, "Municipal Law": Works (A), I, p. 197. Emphasis mine.

213 Ibid., p. 190. Emphasis mine.

214 The content of such laws is matter to which the natural law is indifferent, e.g. driving on right or left side of road, protective tariffs. The whole problem of the

as social compacts binding under the natural obligation of fulfilling our promises.

A logical corollary of Wilson's philosophy of law would be that no society could enact legislation that contradicted natural law. Such a principle is implicit in his whole analysis of natural law<sup>215</sup> and in his concept of the relation between divine and human law:

What we do, indeed, must be founded on what he has done.<sup>216</sup>

[...] religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other. The divine law, as discovered by reason and the moral sense, forms an essential part of both.<sup>217</sup>

A final characteristic essential to Wilson's concept of human law is his conviction that common law is the true source and paradigm of all human law.

In the countenance of that law, every lovely feature beams consent [...] This law is founded on long and general custom [which] carries with it intrinsic evidence of consent. Can a law be made in a manner more eligible?<sup>218</sup>

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existence of "penal laws", i.e. laws imposing the disjunctive obligation of either obeying the law or paying the penalty if caught is controverted. Such a problem, however is not in the scope of this thesis.

215 Cf. supra, this chapter, p. 156.

216 James WILSON, op. cit., Part I, Chap. II, "General Principles of Law and Obligation": Works (A), I, p. 93.

217 Ibid., p. 94. Emphasis mine.

218 Ibid., Part I, Chap. V, "Municipal Law": Works (A), I, p. 183-184. Emphasis mine.

As to the nature of the common law:

We have mentioned the common law, as a law which is unwritten [...] It has its monuments in writing [...] accurate and authentic. But though, in many cases, its evidence rests, yet in all cases, its authority rests not, on those written monuments. Its authority rests on reception, approbation, custom long and established [...] Its foundations [...] contain the common dictates of nature [...] <sup>219</sup>

Wilson believed that English common law had been translated to America and prevailed here. He did not make the distinction, as Jefferson will, between federal law in which common law did not hold and state or local law in which it did. <sup>220</sup>

In summary, Wilson's concept of human law was a logical consequence of his social contract theory of civil society. If civil society is merely the creature of a compact between equally sovereign and independent individuals no superior should or, according to Wilson, can be created by that compact. Human law then cannot be a command of a superior and the only alternative as a source of obligation would be the contract to which each individual binds himself when he enters civil society. His consent to all laws enacted by the society is implicit in his consent to abide

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<sup>219</sup> James WILSON, op. cit., Part I, Chap. XII, "Of the Common Law": Works (A), I, p. 453-458. Emphasis mine.

<sup>220</sup> Ibid., p. 462-468.

by the decisions of that society when reached in the manner agreed upon. Human law is then the implementation of the original social compact. For Wilson the example par excellence of law by consent the English Common Law as originating in the customs of the people. This law, with necessary adaptations, was for him the necessary foundation of American law.

## 2. Jeffersonian Law — The Will of the Living Majority

For Jefferson, as for Wilson, a basic premise in his philosophy of civil or human law was the enduring sovereignty of the people. The social compact between equals by which civil society was initiated created no superior to whom that sovereignty should or can be transferred:

The whole body of the nation is the sovereign legislative, judiciary, and executive power for itself. The inconvenience of meeting to exercise these powers in person, and their inaptitude to exercise them, induce them to appoint special organs to declare their legislative will, to judge, and to execute it [...] it is their will which creates or annihilates the organ which is to declare and announce it.<sup>221</sup>

The definition, then, of civil law is simple: "The law being law because it is the will of the nation [...]."<sup>222</sup>

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221 Thomas JEFFERSON, Letter to Edmund Randolph, August 18, 1799: M.E., X, p. 125. Emphasis mine.

222 Ibid. Emphasis mine.

"It is the will of the nation that makes law obligatory."<sup>223</sup>

It was on the grounds of this concept of law that he was forced to differ with Edmund Randolph who evidently considered laws to be acts of the legislature which ceased to oblige as soon as that legislature ceased to exist.

I do not think this is the true bottom on which laws and the administering of them rests [...] The law being law because it is the will of the nation, is not changed by their changing the organ through which they choose to announce their future will [...] When, by the Declaration of Independence, they chose to abolish their former organs declaring their will, the acts of will already formally and constitutionally declared, remained untouched [...] and on establishing new organs [...] the old acts of national will continued in force until the nation should, by its new organs, declare its will changed.<sup>224</sup>

Jefferson's simple definition of civil law as the will of the nation becomes more meaningful when fused to his convictions on the will of the majority and the political sovereignty of the generation presently existing.<sup>225</sup> In that context the will of the nation is in reality the will of the majority of the generation politically alive at the present time. Since, in Jefferson's theory of civil government, all laws expire every nineteen years unless explicitly

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223 Thomas JEFFERSON, Letter to Edmund Randolph, August 18, 1799: M.E., X, p. 125. Emphasis mine.

224 Ibid. Emphasis mine.

225 Cf. this chapter, p. 165.

renewed by the existing majority,<sup>226</sup> no civil law can claim validity on the baais of tradition or custom; no citizen can appeal to immemorial custom or ancestral rights, nor for that matter to constitutions or bills of rights for these too are subject to the principle of periodic expiration. Such a concept of law can only be described as positivistic — law is the contemporary will of the majority. Whether or not Jefferson ever attempted to implement his theory that "the earth belongs to the living" is an academic question. It was certainly his theoretical conviction and as such must be considered an implicit premise of his philosophy of civil law.

That philosophy was reflected in his attitude toward the common law, an attitude that contrasted with Wilson's reverence for that law. For Jefferson, the common law of England was not automatically transferred to America with the coming of the English colonists. It became the law of a colony only if and when the members of the colony accepted it by democratic process.<sup>227</sup> Certainly it was not automatically the federal law of the United States:

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226 Cf. this chapter, p. 165.

227 Thomas JEFFERSON, Letter to Edmund Randolph, August 18, 1799: M.E., X, p. 126.

Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force and cognizable as an existing law in their courts, is to me the most formidable.<sup>228</sup>

When the United States was formed after the Revolution, the new nation faced the task of instituting its national laws and could not simply adopt in toto a whole system of laws, since the association of people and states into a nation was only for special purpose, carefully delineated. The will of the people organized into a nation was expressed carefully in the national constitution. A national government was created as the organ for declaring that will within the limits of those cases to which a national will could apply. In all other cases, the will of the people of a state was normative.<sup>229</sup> A political society so structured was a complete novelty to political theory and thus foreign to common law.<sup>230</sup>

As mentioned, Jefferson's political philosophy founded on the enduring sovereignty of the people effective

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228 Thomas JEFFERSON, Letter to Edmund Randolph, August 18, 1799: M.E., X, p. 124. Emphasis mine.

229 Ibid., p. 126.

230 The novelty of the American political experiment was that the people of the United States could be acted upon by the national government directly instead of merely indirectly by means of local governments as in a traditional federation. (Cf. Federalist Papers, Nos. 15 and 16.)

ly eliminated from his concept of civil or human law any notion of a legislator superior to the people.<sup>231</sup> However, unlike Wilson, he proposed no clear alternative as the source of obligation in civil law. Wilson's theory of human law as a contract would certainly harmonize with Jefferson's concept of civil law as the will of the nation except for the Jeffersonian proviso that such a contract would naturally expire every nineteen years. But Jefferson's emphasis on law as the expression of the contemporary political majority and his dedication and subserviency to the wisdom and power of that will can be interpreted in terms of Rousseau which would make the will of the majority the political superior of the people as subjects or citizens. The differences between the legal philosophies of Jefferson and Wilson are suggested, without any names mentioned, in a comment of James DeWitt Andrews:

The question of who and to what extent the common law became a part of our law was of great importance at this time, for two reasons, viz: There was a class of men who held that the rights of American citizens were not based upon the common law, but upon the "natural rights of man", [...] or that the Americans stood as expatriated men. These men were impregnated with the ideas of the French Revolutionists, which were utterly at war with the principles of our Constitution, the most baneful of which view was afterward embodied in the Kentucky and Virginia Resolutions. — The other school held that the common law, so

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231 Cf. supra, this chapter, p. 154-161.

far as applicable to their situation, was brought by the colonists to America, and that the abdication of the king, as mentioned in the Declaration of Independence, and the consequent change of government, did not abrogate these laws.<sup>232</sup>

Andrews' insight was astute. While referring explicitly to the contrast between the legal philosophies of Jefferson and Wilson, it also implies other differences between them. Where Jefferson's only concern is man's rights, Wilson places the emphasis on obligation as the source and limitation of those rights. In political philosophy Jefferson finds French liberal democracy quite congenial to his own thought and develops his own "general will" in his concept of the absolute power of the present political majority. Wilson, on the other hand, remains ever conscious that man's rights are limited by his divinely imposed obligations and cannot permit the sovereignty of the people to throw off those limitations. These more general differences are summed up by another authority on Wilson:

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232 James D. ANDREWS, Works of James Wilson, I, p. 464-465. Emphasis mine. That Andrews is speaking of Jefferson is clear from his reference to the Kentucky and Virginia Resolutions of which Jefferson was, if not the actual author, the prime inspiration. (Cf. KELLY-HARBISON, op. cit., p. 207-213.) These Resolutions were essentially an attempt to make the States the final arbiter of the Constitution by asserting their right to "interpose" in the case of a "deliberate, palpable, and dangerous exercise of other powers not granted by the said contract", the Constitution (p. 208).

[...] one strain emerging from the Revolution is [...] the line of so-called Jeffersonian democracy [...] This strain is rationalistic, Deistic, democratic, non-conformist, romantic. It exalts the will of the people over everything, is anti-hierarchical, anti-historical in a deep sense, basically formless, utopian, evolutionary, messianic, progressive.

The other strain is legal, historical, hierarchical, classical, Anglican, aristocratic [...] finding its expression in the espousal of law and the advocacy of the supreme law to which the state itself is subservient [...].<sup>233</sup>

The relative importance of these two strains remains to be evaluated.<sup>234</sup>

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<sup>233</sup> Page SMITH, James Wilson, Founding Father, 1742-1798, Chapel Hill, University of North Carolina Press, 1956, p. 319. Emphasis mine. The parts of this quotation omitted and its entire context form an argument concluding to an evaluation of Wilson as "a key figure because he represents the reception into America of a tradition, essentially medieval and Scholastic [...]" (p. 319). The omission at this point is justified because it presumes as answered the very point that is at issue in this dissertation. Smith's conclusion concerning Wilson's Scholasticism has been challenged by my analysis of Wilson's epistemology, moral philosophy, political philosophy, and general attitude toward ontological metaphysics.

<sup>234</sup> This evaluation will form part of the conclusion, p. 250-254.

## CHAPTER V

### CONCLUSION

#### I. TRADITIONAL<sup>1</sup> VERSUS MODERN NATURAL LAW

Because of the tenacity with which the terminology of natural law has held its place in moral and political philosophy, the concept of natural law may seem, historically, as constant as its terminology.<sup>2</sup> In reality the generic vocabulary of natural law includes two widely divergent concepts, the traditional and the modern.<sup>3</sup> An essential premise for any conclusions concerning the relation of the Constitutional Fathers to natural law is the recognition and analysis of this disjunction. The two theories are each a composite of epistemological premises and a moral and political philosophy logically sequential to them. Only by comparing the two concepts of natural law from all three aspects do their differences become apparent.

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1 "Traditional" is used to signify Thomist or Scholastic natural law. Its characteristics will be brought out in what follows.

2 Alessandro P. d'ENTREVES, Natural Law, an Historical Survey, p. 9.

3 Otto von GIERKE, Natural Law and the Theory of Society, Boston, Beacon Press, 1957, p. 46; also, Alessandro P. d'ENTREVES, op. cit., p. 9-10; Leo STRAUSS, Natural Right and History, p. 165-166, 221; Heinrich ROMMEN, The Natural Law, St. Louis, Herder, 1949, p. 41, 75.

## A. Epistemology

Traditional natural law is founded on a realistic theory of intellection that recognizes the capacity of the human intelligence to know the essences or natures of extramental realities. That capacity is an essential prerequisite of an ontological metaphysics, the science on which the acceptance and interpretation of that law is dependent.<sup>4</sup> In contrast, the predominant theme of the rationale of modern natural law is an anti-metaphysical nominalism resulting from the methodology and epistemology of sensible empiricism. With all valid knowledge of nature reduced to the sensibly empirical, ontological metaphysics is rejected and the foundations of traditional natural law destroyed. The philosophies of Hobbes, Locke, and Hume are examples of this empiricism and from them modern natural law emerged.<sup>5</sup>

Historically and logically, sensible empiricism is identified with a theory of knowledge developed from a dialectic between sensible experience and mathematics. If sensible experience were the only knowledge of which man is capable, no human knowledge could be universal or necessary

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4 Heinrich ROMMEN, op. cit., p. 173: "Natural law in the strict sense is therefore possible only on the basis of a true knowledge of the essence of things, for therein lies its ontological support."

5 Ibid., p. 82, 90, 93.

since the sensible is always particular and contingent. But the existence of mathematics testifies to man's capacity for universal, necessary, and consequently non-sensible or "intellectual" knowledge. However, the universality and necessity of mathematical knowledge is achieved only by prescinding from particularity and contingency of sensible reality. Hence, if sensible reality is the only reality, mathematics is non-existential. Accordingly, a dichotomy is established between universal, necessary, non-sensible or "intellectual", but non-existential knowledge exemplified by mathematics as opposed to particular, contingent, and existential knowledge proper to sensible experience.

Nominalism found the dichotomy congenial to its fundamental premise which denied existential value to any universal concept, general term, or definition. They are creations of the mind or "ideas" and any reasoning based on them is, therefore, merely reasoning about the "relations of ideas." Such reasoning — demonstrative reasoning — is universal, necessary, "intellectual", and non-existential. Hence, it can be equated to "mathematical" reasoning, the explicitation of consequences implicit in definitions. Opposed to it is moral reasoning — deductions or inferences from matters of fact known only by sensible experience. Since sensible reality is particular and contingent, moral reasoning founded on it can at best be probable, never

universal or necessary. It is, however, always existential.

Traditional epistemology, on the other hand, credited the human intellect with the power of abstracting essences from the sensible experiential by means of simple apprehension and with the ability to grasp existence within sensible experience by means of judgment. Accordingly, traditional epistemology could attribute to its definitions universality and necessity because of its knowledge of essences. But it could also preserve the existential value of those definitions because the essences defined had been abstracted from sensible experience and that abstraction had been accompanied by an existential judgment.

Reasoning based on such definitions is, therefore, universal, necessary, and existential. If, then, universal and necessary reasoning is identified as demonstrative, demonstrative reasoning must be subdivided into existential and non-existential; the latter will be exemplified by mathematics while the former is realized to some extent in philosophy and experimental science.<sup>6</sup> Moral or probable reasoning would still be recognized as the highest level of

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<sup>6</sup> The phrase, "to some extent", is meant to indicate the thorny problem of the possibility of demonstrative knowledge in either philosophy or experimental science. The use of "philosophy" as opposed to "experimental science" is a recognition of the problem of distinguishing the two disciplines and the right of each to the title of science in a more general sense.

knowledge possible in cases where the essence of an object cannot be known.

Certain consequences are proper to each of these theories of knowledge and help identify them as traditional or modern. In traditional epistemology, simple apprehension — abstraction of essences — will not be confused with imagination — the reproduction or creation of mental images. Nor will there be any difficulty in classifying the existential judgment; it will be recognized as an intellectual act. Modern epistemology, on the other hand, because it denies the capacity of the intellect to abstract essences can find no place for simple apprehension except to confuse it with imagination, conception, perception, etc. Similarly, because that epistemology denies the intellect any capacity to grasp existence, it cannot define an existential judgment as an intellectual act. On the contrary, to be true to sensible empiricism such a judgment would have to be classified as a sensible act. Finally, because modern epistemology can discover no other function for it, the intellect will be limited to arbitrary generalizations or definitions and deductive reasoning.

#### B. Moral Philosophy

The problem fundamental to any theory of morality claiming to be realistic is the transition from empirical

facts to moral judgments, the problem of discovering in what "is" the foundation of the moral "ought". Traditional natural law responds with a metaphysical argument that accounts for both the moral obligation that is law and the knowability of it that makes the law natural. Obligation is founded on the theonomy of being discoverable in nature. God, in creating, has a definite plan for creation and is not indifferent to its fulfillment.<sup>7</sup> Subhuman creatures are physically compelled to fulfill that plan but man's obligation to cooperate is moral, dependent on his free choice.

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7 "Cum enim omne agens agat propter finem, tantum se extendit ordinatio effectuum in finem, quantum se extendit causalitas primi agentis [...] Causalitas autem Dei, qui est primum agens, se extendit usque ad omnia entia [...] Unde necesse est omnia quae habent quocumque modo esse, ordinata esse a Deo in finem. [...] Et cum cognitio ejus comparetur ad res sicut cognitio artis ad artificiatam [...] necesse est quod omnia supponantur suo ordini, sicut omnia artificiatam subduntur ordini artis." (Summa Theologica, I, q. 22, a. 2, Roma, Marietti, Vol. I, p. 126.)

"Manifestum est autem, supposito quod mundus divina providentia regatur [...] quod tota communitas universi gubernatur ratione divina. Et ideo ipsa ratio gubernationis rerum in Deo sicut in principe universitatis existens, legis habet rationem." (Ibid., IaIIae, q. 22, a. 1, Vol. II, p. 413.)

"[...] manifestum est quod omnia participant aliquantulum legem aeternam, in quantum scilicet ex impressione ejus habent inclinationes in proprios actus et fines. Inter cetera autem rationalis creatura excellentiori quodam modo divinae providentiae subjacet, in quantum et ipsa fit providentiae particeps, sibi ipsi et aliis providens. Unde et in ipsa participatur ratio aeterna, per quam habet naturalem inclinationem ad debitum actum et finem. Et talis participatio legis aeternae in rationali creaturae lex naturalis dicitur." (Ibid., IaIIae, q. 91, a. 2, Vol. II, p. 414.)

The divine plan is expressed in the natures of His creatures and therefore supposes the natural capacity of the man's intellect to know these natures or essences, including his own. The ethics of traditional natural law is simply a recognition of the reason for all things and of man's obligation to abide by that reason as understood in a prior metaphysics.<sup>8</sup>

With metaphysical knowledge rejected, sensible empiricists found difficulty in keeping natural law both religious and natural. It could be considered entirely Biblical, completely dependent on Revelation, in which case it ceased to be natural from the aspect of knowledge.<sup>9</sup> Or

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8 "The full realization of its nature [...] is the end or goal of a thing [...] The teleological conception grounded in the metaphysics of being, is therefore the basis of the essential unity of being and oughtness." (H. ROMMEN, op. cit., p. 170-171.)

"With regard to the problem of bridging the chasm between is and ought, between "fact" and "value" [...] [t]he ontological welds together being and oughtness, and maintains that the very notion of natural law stands and falls on that identification." (A.P. d'ENTREVES, "The Case for Natural Law Re-examined" in Natural Law Forum, Notre Dame, U. of Notre Dame Press, Vol. 1 (1956), p. 34.)

9 Prof. Leo STRAUSS sees an example of this in the predicament of John Locke. Drawing his arguments from Locke's Essay concerning Human Understanding, The Reasonableness of Christianity, and two Treatises of Civil Government, Strauss argues that Locke first theorized on a theological concept of natural law which was law only because it was known to have been given by God and sanctioned by the rewards and punishments of an after life. But this was not the law of nature presented in his second Treatise of Civil Government: "[...] to understand why he wrote his

it could be kept naturally knowable, dependent on sensible experience alone and inferences from it, in which case it ceased to be religious for religious obligations are not within the scope of sensible knowledge. Nor could it be truly natural law since sensible experience can discover neither physical nor moral necessity in nature. What actually evolved was a natural law that rejected both metaphysics and Revelation, and began empirically with the rights of the individual instead of his obligations. Herein lies a salient distinction between the two versions of natural law. The traditional concept founds man's rights on natural law, i.e., on the obligations incumbent upon him as a creature with a divinely-willed destiny that is part of the order of the universe and which obligations he has a right to fulfill. Modern natural law founds his obligations on his rights; his obligation is to respect the rights of others. The source of his rights is simply his existence as an individual. Therefore, while in traditional natural law the emphasis is on man's obligation, modern natural law definitely shifted

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Two Treatises on Civil Government, and not a 'Politique tirée des propres paroles de l'Écriture Sainte' it [...] suffices to assume that he had some misgivings as to whether what he was inclined to regard as solid demonstrations was likely to appear in the same light to all his readers. For if he had any misgivings of this kind, he was forced to make his political teaching [...] as independent of Scripture as it possibly could be." (Op. cit., p. 209.)

that emphasis to man's rights. That change of emphasis made the individual the origin and center of the moral order and in doing so, hastened the divorce of morality from theology. God is necessary only as Creator and man's rights are his by virtue of existence alone without any consideration of obligations.

This revolution of the moral order had its impact on the political order also. If the emphasis on the rights of the individual was dynamic enough to wrest the moral order from God, it had, by the same token, the potential to wrest the political life of the people from any kind of authority. Historically the doctrine of natural rights became more revolutionary in the seventeenth and eighteenth centuries than it ever had been previously.<sup>10</sup>

A morality was then developed on the basis of the right of the individual to happiness. Sensible empirical knowledge could grasp the relationship between human actions and empirically observable results in the temporal order. On this foundation, hypothetical imperatives could be developed — pragmatic "oughts" in the sense that to attain certain results determinate means "ought" to be taken. Such imperatives are not moral but only practical relations

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<sup>10</sup> Leo STRAUSS, op. cit., p. 182.

between means and end. To the fundamental problem of which ends ought to be realized, a criterion, congenial to sensible empiricism, was found in relation of actions to the temporal and concrete well-being of society or "human happiness". Such a generalization is deceptive since, with human nature as such declared unknowable, human happiness can only mean the collective happiness of individuals. Hence an essential mark of the new morality was its recognition of the right of the individual to pursue his own version of temporal happiness. The individualism was mitigated by the democratic tendency to majority rule which often left the interpretation of happiness, and consequently of morality, to a qualitative majority. To the question of how an individual was to know what was conducive to the happiness of society, the answer was an appeal to a feeling or sympathy for the happiness of others. Such feeling was a function of a moral sense possessed by all right-minded men.<sup>11</sup>

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<sup>11</sup> "Moral sense" is that special faculty possessed by all men by which they have a special intuition of the moral characteristics of actions. That doctrine was essential to a school of moralists that arose in England in the eighteenth century as a reaction against Hobbes' interpretation of the nature of man as essentially egoistic and against all authoritarian ethics. The two foremost exponents were Anthony Ashley, 1671-1713 and Frances Hutcheson, 1694-1746. Their doctrine is a logical development of Locke's theory that all ideas must begin in sensible experience. Since external sensation obviously cannot grasp

The morality of modern natural law is essentially secular, humanistic, and conventional. Some attempted to make it religious by considering man's dedication to his own temporal well-being as divinely willed and the moral sense as divinely inspired.<sup>12</sup>

### C. Political Philosophy

Modern natural law is identified with the political theory that makes the social contract the instrument of man's emergence from a primitive state of nature and the foundation of civil society.<sup>13</sup>

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moral entities, moral knowledge must begin in an internal sense whose proper object is precisely moral characteristics. Against Hobbes, they made morality essentially altruistic; Hutcheson, especially, tended ultimately to utilitarianism, "the greatest happiness of the greatest number." For a thorough discussion of the "moral sense" theory, consult F. COPLESTON, History of Philosophy, V, Chap. X, p. 171-201.

12 "Moral sense" theorists were for the most part also Deists who identified the natural with the divine, considering human nature and the human faculties a kind of presence of God in man just as the whole order of nature was the presence of God in the world.

13 "But the theory of the social contract [...] is an entirely modern product. It is the distinctive mark of the political theory of individualism. It is closely associated with the modern theory of natural law." (A.P. d'ENTREVES, Natural Law, an Historical Survey, p. 55-56.) Also, H. ROMMEN, op. cit., p. 76; O. GIERKE, op. cit., p. 97.)

While in agreement in founding their political thinking on a state of nature, modern political theorists differed in their concepts of that state. The Hobbesian state of nature, in which every man had a right to everything and violence is normal, was not widely accepted. Instead theorists preferred Locke's description of that state as "a state all men are naturally in [...] of perfect freedom to order their actions [...] as they think fit, within the bounds of the law of nature."<sup>14</sup> But that description contained the elements of a profound problem. How could the assumption of the "perfect freedom" or sovereignty of the individual be preserved in a condition governed by law? Law to become factual demands the functions of judging and enforcing. In a state where all men are equally sovereign, where could such power exist? Appeal to divine authority and sanctions in an after-life was unacceptable.<sup>15</sup> In lieu of any other alternative, Locke's theory that in the state of nature "[...] the execution of the law of nature is put into every man's hand"<sup>16</sup> was popularly accepted.

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14 John LOCKE, Second Treatise of Civil Government, Chap. II, 4, Gateway ed., Chicago, H. Regnery Co., 1962, p. 4.

15 Cf. above, note 8.

16 John LOCKE, op. cit., Chap. II, 7, p. 6.

Locke's solution offers a first contrast to the political philosophy of traditional natural law. Never postulating an individualistic state of nature but considering man's natural state as societal, the traditional theory presumed as essential to society a public authority whose function it is to judge and enforce the law.

[...] it is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, and therefore it belongs to him alone who has charge of the community [...] Now the care of the community is entrusted to persons of rank having public authority. Therefore it is lawful for them only to put evildoers to death, not for private individuals.<sup>17</sup>

From the postulate of a natural law governing the state of nature there also arises the question of whether that state is not in reality social instead of individualistic. Modern natural law, whose whole theory of society depends on the individualism of the state of nature, answered by distinguishing between social and societal. The natural law demands social amenities between individuals,

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<sup>17</sup> Thomas AQUINAS, Summa Theologica, IIaIIae, q. 64, a. 3: "[...] occidere malefactorem licitum est in quantum ordinatur ad salutem totius communitatis. Et ideo ad illum solum pertinet cui committitur cura communitatis conservandae [...] Cura autem communis boni commissa est principibus habentibus publicam auctoritatem. Et ideo eis solum licet malefactores occidere, non autem privatis personis." (Vol. III, p. 335.)

but those relations are too formless and insecure to be societal.<sup>18</sup>

In modern natural law man creates civil society by means of the social contract. Since prior to that contract each individual is sovereign, the only obligations incumbent on him are those he imposes on himself by contract. Hence all obligations in civil society are reduced to contractual relations between individuals.<sup>19</sup> Traditional natural law also recognizes that the formation of any particular society demands human consent or a kind of contract. That contract,

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18 "The advocates of the principle of 'sociability' held that the Law of Nature commanded sociable behaviour, and they, therefore, believed that the state of nature, if it were not yet a state of society, was at any rate a state of sociability. They represented this state as a state of common intercourse [...] so formless, and so insecure, that the conception of a *societas* was entirely inapplicable to it." (O. GIERKE, op. cit., p. 100-101.)

"For 'tis not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter in one community and make one body politic; other promises and compacts men may make one with another and yet still be in the state of nature." (John LOCKE, op. cit., Chap. II, 14, p. 12-13.)

19 "If civil society in general was merely the result of a contractual act, whereby individual rights were pooled in order that individual objects might henceforth be socially pursued, such a society must, in the last analysis, resolve itself into an aggregate of mere legal connections between individuals [...] In this way we find a general theory of society developed [...] in which the conception of the moral person is only applied to the external relations of a society, while its internal life [...] is reduced entirely to a matter of mutual obligations between so many individuals." (O. GIERKE, op. cit., p. 114.)

however, is considered a status contract in which the essential elements are not left to the will of those contracting but are predetermined by nature of the object of the contract, as, for example, in the marriage contract. The contracting parties agree only to enter the contract and have no choice as to its essential factors. Hence in the formation of civil society, certain of its elements are necessarily independent of human wills.<sup>20</sup>

The differences between the two political philosophies become more obvious in their attitudes toward civil government or political authority. In the older version of natural law political authority necessarily results with the beginning of civil society and is essential to it. From the premise that individuals cannot transfer what they do not possess, traditional natural law concludes that political authority cannot come from the citizens because it is superior to them. It must naturally reside in the community and those to whom its care is committed. The community therefore is prior to the individual in those things which

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20 "The social contract is, therefore, a status contract [...] The basic elements are beyond the human will. They are preestablished in human nature and follow objectively from the purpose of the new order. The state is of the objective moral order, that is, an order by itself independent of the will of man." (H. ROMMEN, The State in Catholic Thought, St. Louis, Herder, 1945, p. 236, 240.)

concern the common good and its political superiority is exercised by the officials during their term in office.<sup>21</sup>

From the same premise modern natural law draws an opposite conclusion. Since political authority is delegated to the community by the individuals, it cannot be superior

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21 "[...] supposita voluntate hominum conveniendi in una politica communitate, non est in potestate eorum impedire hanc jurisdictionem: ergo signum est proxime non provenire ex eorum voluntatibus quasi ex propria causa efficiendi." (He also gives example of matrimony.)

"Declaratur secundo, quia haec potestas habet plures actus qui videntur excedere humanam facultatem, prout est in singulis hominibus: ergo signum est ut non esse ab aliis, sed a Deo. Primum est punitio malefactorum, etiam usque ad mortem.

[...] assero hanc potestatem [public authority] non resultare in humana natura, donec homines in unam communitatem perfectam congregentur et politice uniantur. Probatur, quia haec potestas non est in singulis hominibus divisim sumptis, nec in collectione vel multitudine eorum quasi confuse et sine ordine et unione membrorum in unum corpus; ergo prius est tale corpus politicum constitui quam sit in hominibus talis potestas [...] Semel autem constituto illo corpore, statim ex vi rationis naturalis est in illo haec potestas: ergo recte intelligitur esse per modum proprietatis resultantis ex tali corpore mystico jam constituto in tali esse, et non aliter."

Suarez reasons that, just as the parents only beget the child and do not give him the free will and other faculties with which he is endowed by God, so the citizens only beget the political society and not its essential powers.

"[...] ita haec potestas datur communitati hominum ab auctore naturae, non tamen sine interventu voluntatum et consensuum hominum, ex quibus talis communitas perfecta congregata est [...] voluntas hominum solum est necessaria ut unam communitatem perfectam componant; ut autem illa communitas habeat praedictam potestatem, non est necessaria voluntas hominum, sed ex natura rei consequitur et ex providentia auctore naturae." (F. SUAREZ, Tractatus de Legibus, L. III, "De Lege Positiva Humana", c. III, n. 2, 3, 6, Opera Omnia, Paris, Vives, Vol. V, p. 182-183.) Emphasis mine.

to them but is only the sum of their individual powers and rights that they have ceded to the society.<sup>22</sup> The individuals are always prior by nature to the community; here again the individualism of modern natural law is apparent. The origin of civil authority is rooted in the rights of the sovereign individual in the state of nature, especially his right to judge and enforce the law of nature. Political authority is created as a necessary evil, a remedy for the serious inconveniences arising from that personal right to judge and execute.<sup>23</sup> It is created by the contract of each with all the others or the whole to cede some of their rights to the community in order to create a pool of power which can guarantee better protection for the rights retained by all. Essentially the community is given the power to protect the life and property of all by being

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22 "For nobody can transfer to another more power than he has in himself." (John LOCKE, op. cit., Chap. XI, 135, p. 111.)

"A simple logical extension of this argument, however, discloses the untenability of the individualist theory of consent [...] All social-contract theories overlook the fact that the individuals cannot transfer something which they do not possess, namely the public rights which is political authority." (J. MESSNER, Social Ethics, St. Louis, Herder, 1949, p. 511.)

23 "I easily grant that civil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great where men may be judges in their own case [...]." (John LOCKE, op. cit., Chap. II, 13, p. 11.)

given the right to judge and punish violations against them.<sup>24</sup> This power may be in turn entrusted to individuals but the sovereignty is perpetually retained by the community. However, since decisions are made and community power exercised by the majority, as is essential to the social contract,<sup>25</sup> it is the majority that proves to be the real sovereign. Any subsequent attempt to limit the power of the majority must be judged by the majority; hence the majority can be limited only by itself, a power that creates a problem fundamental to democracy.

Since civil or political authority is exercised by means of laws, a philosophy of law is necessarily a part of political theory. Traditional natural law, recognizing the political authority as superior to the people in things pertaining to the common good, finds no difficulty in applying to civil law the fundamental concept of law as the command of a superior charged with the care of the common good.<sup>26</sup>

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24 "[...] there only, is political society where every one of the members hath quitted his natural power, resigned it up into the hands of the community [...] and thus all private judgment being excluded, the community comes to be umpire." (John LOCKE, op. cit., Chap. VII, 87, p. 68-69.)

25 "For when any number of men have, by the consent of every individual, made a community one body, with a power to act as one body, which is only by the will and determination of the majority." (Ibid., Chap. VIII, 96, p. 78.)

26 Cf. above, note 20. Also O. GIERKE, op. cit., p. 19; J. MESSNER, op. cit., p. 513, 528.

For modern natural law two concepts of law are possible. First, it can pragmatically recognize the sovereignty of the people, that is, the majority and define civil law as the will of the people or majority. Or, secondly, it can persist in the theory that in a social contract society no superior can be created. In this case, civil law becomes a contract between the individuals consenting to the social compact and is obligatory only on the grounds that contracts must be fulfilled.<sup>27</sup>

A final characteristic of the political theory of modern natural law is its concern over a problem inherent in social contract theory, namely, the problem of binding future generations to the original social contract. Since that compact bound only those consenting and their dependents at the time, it and all the acts based on it can be repudiated by those newly arrived at political maturity who are now obligated only to political decisions approved by them.<sup>28</sup>

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27 Cf. above, note 13.

28 "At first, thinkers had been content with the idea that later generations were bound by the contracts of their predecessors; but the fiction of fresh contracts soon came to be regarded as necessary in order to explain the social obligation of each new age [...] Here the theory of contract had touched an extreme where, by denying to the will of yesterday any authority over the will of today, it condemned itself to suicide." (O. GIERKE, op. cit., p. 110.)

The problem has the potential for continuing periodic revolutions, especially if the principle of tacit consent is rejected.<sup>29</sup>

## II. THE CONSTITUTIONAL FATHERS AND NATURAL LAW

With the disjunction between traditional and modern natural law established, some conclusions as to identification of the Constitutional Fathers with one or the other version can now be drawn.

### A. Thomas Jefferson

#### 1. Epistemology

The methodology and epistemology of Jefferson reveal in him the strong anti-metaphysical bias of modern natural law. In methodology he was a logical positivist in a strict sense, restricting all valid knowledge of nature to the recording of experimentally verified relations between sensibly observable phenomena. He carefully cultivated a personal agnosticism with regards to any hypotheses that went beyond that data.

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<sup>29</sup> "Thus, in principle, the will of the people stands above the constitution created by it, the actual will of the people over its essential will, revolution above legitimacy." (J. MESSNER, op. cit., p. 680.)

In epistemology Jefferson was explicit only on the question of external sensation and on this he was a convinced realist. The rationale of this realism was that of the French Ideologue, DeStutt, who postulated feeling as the foundation of our convictions concerning the existence of extra-mental reality. In the absence of any personal observations on the subject, Jefferson's theory of intellection was developed only indirectly from his admitted preceptors, Dugald Stewart and DeStutt. With them, he must be ranked as a Nominalist, denying to the intellect any natural capacity for an existential knowledge of essences and reducing its function to that of deductive reasoning.

Accordingly, Jefferson's epistemology, as an anti-metaphysical nominalism resulting from sensible empiricism, is in keeping with the epistemology underlying modern natural law.

## 2. Moral Philosophy

Jefferson's moral philosophy was logically sequential to his epistemology and is congenial in every detail with the morality of modern natural law. First, it is definitely secularistic. He rejected the Old Testament entirely as anti-humanitarian and accepted the teachings of Jesus Christ not as obligatory but as humanitarian counsels worthy of imitation. His recognition of the moral sense of

atheists and his advice to his nephew that a denial of the existence of God made no difference to morality imply a divorce between religion and morality. A man possessed of a moral sense needs no enticement of heavenly rewards as an incentive to virtue. Secondly, his ethics is humanistic since its ultimate criterion is utility to man, human happiness. In view of his demonstrated secularism, that happiness can be interpreted validly only in terms of temporal well-being. A note of altruism must be added to this and, indeed, of social altruism, for the morality of an act was judged by its contribution to the well-being of society. Since that would be interpreted in various ways by different societies, the morality of an act is relative to those interpretations. Consequently, his ethics is relativistic as well.

Consistent with the morality of modern natural law the emphasis in Jefferson's moral theory was on rights, with obligation interpreted only as the duty of respecting the rights of others. He did not discuss the source of rights but simply accepted them as God given by the fact of creation. The fundamental moral obligation, the duty of respecting the rights of others, is considered divinely imposed, obligatory even in the state of nature. This does not change the secularism of his morality. This and other periodic appeals to the Creator have no real significance in

his ethical reasoning. This is to attribute to Jefferson, not hypocrisy, but deism which recognizes God as the creator of a perfect world whose destiny and control he has relinquished entirely to human reason.

For moral knowledge Jefferson relied completely on an emotional moral sense — a position in harmony with his acceptance of DeStutt's emphasis on "feeling" as the only foundation of existential knowledge. Again a potential individualism is offset by his qualification that, although no man owed a duty he did not feel, the final arbiter of morality was not the feeling of the individual but the general feeling of the "wise and honest part of mankind". His morality is conventional, quite in accord with his respect for majority opinion.

Jefferson's moral theory is, accordingly, an exemplar of the deistic morality of eighteenth century Europe and of modern natural law.

### 3. Political Philosophy

The first link between the political philosophies of Thomas Jefferson and modern natural law is the similarity between his social contract theory and that of John Locke. Jefferson, in sympathy with Thomas Paine, accepts the first premise of modern political philosophy, the state of nature as the necessary prerequisite of the social contract. He

envisions it as a human condition in which every man is sovereign and possessed of the natural rights of thinking and acting for his own well-being, subject only to the natural law of respecting the same right in others. In a case of violation of natural law, the person offended is judge and executioner in his own case. It is this recognition of the force of natural law in the state of nature and the right of the individual to judge and enforce it that makes the Jeffersonian state of nature, like Locke's, social but not societal, the distinction necessary to preserve the individualism essential to social contract theory.

Not only his state of nature but also Jefferson's concept of the social contract was Lockean since it centered on that right of judging and enforcing the law of nature. The inability of the individual to defend and exercise that right is the source of the serious inconveniences for which civil society is the only remedy. Society is created by a social contract in which the individual cedes, especially, his right as judge and executioner plus all other rights he is incompetent to defend and exercise. Accordingly, civil power is the sum of those rights ceded to it in the social contract. It can never claim more power and for that reason is always the creation and instrument of the people. Thus far, Jefferson's political theory is moderately democratic.

But the strongest link between Jefferson and modern natural law is his complete and enduring dedication to the rule of the popular majority, a radical democracy expressed in his dictum that "the earth belongs to the living." The translation of that principle into political reality limited the validity of all political acts, including the Constitution, to a period of nineteen years. They are then revalidated only if approved explicitly by the majority of that generation newly arrived at political maturity who are now bound only by their own consent. That Jefferson was aware of and accepted the revolutionary tone of his theory is evident from his emphasis on the distinction between his principle and the right of repeal. Jefferson's theory emphasizes the power of the people by forcing society and government to seek their approval. The right to repeal, on the contrary, can actually frustrate the popular will by presuming its consent to the existing political status unless opposed by an organized protesting majority which must force its will on society and government, a much more difficult political process.<sup>30</sup>

The application of Jefferson's theory to law emphasizes the positivism inherent in his definition of law as

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<sup>30</sup> The difficulty of the process is reflected in the number of proposed amendments that failed. Cf. *infra*, p. 251-252.

the "will of the nation." Logically that "will" now becomes the will of the present political majority, unrestricted by tradition or precedent and open to the possibility of complete repudiation every nineteen years.

There is, therefore, in Jefferson's political theory a tendency to a radical democracy that takes him beyond Locke in the direction of Rousseau and French liberalism. Jefferson's submission to the will of the majority is as complete as Rousseau's dedication to the general will. Their confidence in the essential righteousness of an informed popular will is fundamental to both. If Rousseau makes his general will an absolute sovereign, Jefferson's will of the present majority is its equal, for nowhere does he qualify its power. Where Rousseau demands popular approbation of the social compact and the existing political order at every assembly, Jefferson demands that the validity of the Constitution and all statutes be expressly renewed periodically by explicit approval and not merely by the tacit consent of failure to repeal. If Rousseau denies the power of any law to bind civil society without its consent, Jefferson's definition of law as the will of the nation — the will of the present political majority — implies the same conclusion. Jefferson's political philosophy takes its start from the social contract theory of John Locke but

terminates in a dedication to popular democracy more congenial to Jean Jacques Rousseau.

In the light of his nominalism in epistemology, his secular humanism in moral philosophy, the radical populism of his political theory, and his positivism in law, Jefferson is definitely in harmony with modern natural law. Any attempt to link him to the earlier version of that law would be a contradiction of his whole philosophy. If traditional natural law is the philosophical rationale of America's political foundations, Jefferson could have made no substantial contribution to them.

#### B. James Madison

The relationship of James Madison to natural law must be evaluated almost exclusively on the basis of his political philosophy because of his failure to treat of epistemological and moral questions in his writings. In moral philosophy, only two conclusions are important. First, moral knowledge is emotional; he subscribes to the moral sense theory. Secondly, his morality is not conventional; what is morally right does not necessarily coincide with the interests of the majority. The first conclusion intimates a congeniality with modern natural law while the second introduces a significant difference of opinion between Madison and Jefferson on the whole question of the

value of majority opinion.

Madison's political philosophy is founded on the state of nature, of which no description is offered, and the social contract, the premises characteristic of modern natural law. Civil society is established by the social contract and its power is the sum of the powers ceded to it by those consenting to the contract.

His discussion of majority rule in reference to the social contract introduces a dominant theme of his political theory, his suspicion of and opposition to the power of the majority. For him, majority rule is not a necessary consequence of the social contract. On the contrary, political decisions naturally require a unanimous consent and majority rule is not operative until society establishes it by unanimous decision. He reluctantly agreed that in practice it had been established in American civil society that the majority did have the right of decision.

Just as his political theory centered on the power of the popular majority, his political art was dedicated to controlling it. This control demanded that property interests have a strong voice in government, namely, in a bicameral legislature of which one house would represent the interests of property owners and wealth; in the right of the Executive, necessarily a man of some means, to a qualified veto over all legislation; in a Supreme Court

appointed by the Executive and hence not subject to the control of popular legislatures or the people; in the restriction of the suffrage to free landholders. His masterly refutation of Jefferson's theory that "the earth belongs to the living" mercilessly exposed its consequences and argued for permanence in government, tradition in law, and sacredness of obligations inherited from the past. Madison's conservatism divorced him from Jefferson's tendency to revolution, but the rationale of that conservatism is neither moral nor theological enough to link Madison to traditional natural law. From the evidence of his own arguments, his motivation was strongly economic. Thus, although his political genius enabled him to so influence the Constitution that it frustrated the popular liberalism of Jeffersonian democracy for some time, his victory cannot be interpreted as evidence of the influence of traditional natural law.

In brief, there is some evidence, namely, his acceptance of the state of nature and the social contract theory, to link Madison to modern natural law, but no evidence of any affinity to the traditional version. Therefore, if traditional natural law is the foundation of American political institutions, Madison, like Jefferson, could have contributed little of theoretical importance to them.

## C. James Wilson

Wilson's relation to natural law is ambivalent. Some of his thinking is certainly congenial to traditional natural law, but there is also present in his philosophy a strong current of thought characteristic of John Locke and David Hume which links him to the natural law of the eighteenth century. Precisely because of this conflict, he personifies the tone of American thought during the setting of our political foundations.

## 1. Epistemology

The first evidence of Wilson's affinity to eighteenth century thought is his agreement with Hume in the substitution of the "study of the human mind" or epistemology for metaphysics as "first philosophy", the necessary prerequisite for all other science. Wilson's methodology also rejects traditional metaphysics by limiting valid knowledge of nature to the results of sensible observation and experiment.

Wilson's epistemology begins with a defense of sensible realism against what he considers Locke's idealism and Hume's scepticism. It terminates, however, in an uncritical acceptance of a nominalistic theory of reasoning common to both Locke and Hume. The rationale of Wilson's

theory of sensation is important for its recognition of the intentionality of sensation and its sensitivity to the role of judgment in existential knowledge, two notes characteristic of traditional epistemology. His failure to develop these insights along the same lines is actually evidence of his habituation to the sensible empiricism of his age.

All the characteristics of sensible empiricism and nominalism are present in Wilson's analyses of judgment and reasoning. He finds difficulty in classifying existential judgments and first moves toward traditional epistemology by defining them as acts accompanying sensation. His sensible empiricism, however, makes it impossible for him to attribute an existential judgment to the intellect. Another factor contributing to his difficulty is his reduction of non-sensible knowledge to deductive reasoning and "simple apprehension" which he confuses with imagination. Since these operations of the mind have no existential value, a non-deductive existential judgment must be opposed to both reasoning and simple apprehension and therefore to non-sensible knowledge. It must, therefore, be a sensible operation. His analysis of judgment terminates finally in a vague description of existential judgments as acts of an original power or internal sense, possibly "common sense".

Wilson's theory of reasoning is another witness to his affinity to modern epistemology. He accepts without

question Hume's distinction of reasoning into demonstrative and moral which are described as non-existential and existential respectively. His thinking reflects the dialectic that produced that distinction when he concludes that demonstrative reasoning is possible only in mathematics and that the science of morality is analogous to mathematics because it is founded on necessary or intuitive truths. He does not recognize even the possibility of demonstrative existential reasoning. Wilson, therefore, is committed to a distinction of reasoning so congenial to nominalism and anti-metaphysical positivism that it survives to the present under the names of analytic and synthetic reasoning, a distinction essential to logical positivism — the modern antagonist of the philosophical rationale of traditional natural law.

## 2. Moral Philosophy

It can be granted at once that the conclusions of Wilson's moral philosophy and the arguments immediately supporting them are congenial to traditional natural law. The religious tone of his ethics is also obvious in his recognition of God's will as source of all moral obligation, a will that is expressed clearly in the teleology of His creation. Sacred Scripture, both Old and New Testaments, contain commands as well as counsels. Wilson recognizes

also the importance of the role of religion in both morality and law.

His criterion of morality is human nature itself which is the reflection of God's will for man. On that nature, its faculties and its inclinations, is founded the natural law which is as universal and immutable as its foundation. So certain is this criterion that, once man was created, even God Himself was bound by it. Wilson's criterion of morality is identical with that of traditional natural law.

He is also consistent with that law in his concept of rights as the means of fulfilling obligations and therefore as founded on obligations. Wilson, in fact, reduces his moral theory to practice by classifying rights according to the obligations incumbent on the individual because of personal necessities and his relations to others. In Wilson's moral philosophy, as in the ethics of traditional natural law, the emphasis is on obligations as prior to rights.

This consistency with traditional natural law underlines the crucial problem of Wilson's moral philosophy — its consistency with the rest of his philosophy, especially with his epistemology and theory of moral knowledge. In general, his moral theory agrees with traditional natural law because Wilson's reasoning is metaphysical, not in his

own sense of metaphysics as the "study of the human mind" but in the traditional ontological sense that his whole philosophy rejects.

The basic premises of Wilson's moral philosophy state, first, that the primary purpose of man was to fulfill God's will, the source of all moral obligation. Secondly, that God's will is clearly expressed in the order of nature in general, in the natures, constitutions, and mutual relations of men and things which make up the law of nature. Thirdly, God's will for men is promulgated in the natural law which is founded on the nature, faculties, and interests of man; a law which is as universal and immutable as human nature itself. These premises are expressed in what are clearly universal terms.

The conclusions of Wilson's moral philosophy are proposed as universal and necessary. The natural law is binding on all men and, once man is created, binding even on God who is under the glorious necessity of not contradicting Himself. Given human nature as it is, the natural law simply cannot be otherwise. These conclusions are intended to be practical, binding on each individual and operative in his relations to others in general and in his particular relations as husband, father, son, citizen, etc. In brief, Wilson has developed a demonstrative science of morality and claims for it existential value.

But that is precisely what his epistemology renders impossible. His sensible empiricism rejects ontological metaphysics; his nominalism makes universals creations of the mind that prescind from reality; his distinction of reasoning defines any argument ending in universal and necessary conclusions as demonstrative reasoning and denies it any existential value. Therefore if Wilson's moral conclusions and immediate arguments are accepted for their own intrinsic value, they constitute a contradiction of his epistemology and general philosophical orientation. But if they are taken in the context of his own thought, they form a "mathematics" of morality — a demonstrative science without existential value. Wilson is caught in the perennial impasse resulting from the rejection of metaphysics which the Humean distinction between demonstrative and moral reasoning reflects.

Even within his total moral philosophy, the intellectuality of his conclusions and their immediate rationale are contradicted by his theory of moral knowledge. Wilson, following Hume, founded his existential morality on passion instead of reason. The morality of an act is decided by its conformity to the ultimate ends of human actions. These ends are known by sentiments and affections; the intellect or reason is explicitly denied any role in the matter. The fundamental and ultimate source of practical or existential

moral judgments is an emotional moral sense. Despite his ethical theorizing from the premise of a natural law founded in the nature of man, in view of his reliance on the emotional moral sense as the ultimate judge of morality, Wilson's final answer to the question of why this particular action is morally right or wrong would have to be, "because I feel it is."

However, his moral philosophy can be made somewhat consistent on the basis of the solution offered to the problem of the roles of reason and moral sense in regards to ethical judgments.<sup>31</sup> In that solution it was concluded that Wilson uses "moral sense" in two ways: first, as the power which discovers the first necessary truths of morality, the starting points of a demonstrative science of morality; secondly, as the power that judges the morality of an actual moral act by inferring that morality from the "matter of fact" of a feeling of approval or disapproval. The moral sense related to demonstrative reasoning, the "speculative moral sense", was described as non-sensible or "intellectual" while the moral sense related to matters of fact, the "practical moral sense", was considered emotional. A further analysis of judgments of necessary truths in the light of modern logical positivism reveals them as merely

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31 Cf. supra, p. 102-105.

the recognition of the agreement or disagreement of definitions.<sup>32</sup>

In this context Wilson's speculative moral theory founded on the necessary truths or definitions like the "order of nature", the "relations of men and things", "the natural law founded in human nature" becomes a demonstrative science of morality. The "speculative moral sense" or reason discovers the first necessary truths by recognizing the agreement or disagreement of those definitions. The science of morality is then developed by reasoning concerning the relations of these definitions or ideas. His speculative moral theory or moral philosophy then is simply an example of demonstrative reasoning and lacks existential value.

Wilson's practical morality, on the other hand, would be founded on the judgments of the "practical moral sense" which are in reality inferences based on feeling. By further deductions from these basic inferences, i.e. by moral or probable reasoning, a body of moral knowledge with existential value could be developed but its conclusions could never attain universality or certainty.

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<sup>32</sup> For a discussion of the nature and functions of definitions in analytical reasoning, cf. A.J. AYER, Language, Truth and Logic, Chap. IV, p. 71-87.

In the terms of this solution, Wilson's moral conclusions and their immediate rationale lose their existential value and can no longer be considered in harmony with traditional natural law. No claim is here made that such was Wilson's understanding of his reasoning about natural law in moral philosophy. The description of his moral theory as a "mathematics" of morality is suggested as the logical development of his epistemology and theory of moral knowledge. Wilson himself seems unaware of the contradiction between his natural law morality and the rest of his philosophy. He fails to realize that his philosophy does not support his traditional moral conclusions. It is precisely for this reason that Wilson's moral reasoning typifies so well the mental attitude of Revolutionary and Constitutional America. Like him, the average American was clinging to traditional and inherited ideals which were contradicted by the contemporary intellectual climate. They were living in an age of transition which provided the catalyst that reduced what had been a philosophy of natural law to an ideology of it.

### 3. Political Philosophy

Wilson, more explicitly than either Jefferson or Madison, is a social-contract theorist. In discussing the state of nature, he distinguishes between natural and civil

society and argues that the former is the natural state of man. But his arguments, based on the social powers of the intellect, language, and the privations inevitable in solitude, conclude only to a state of nature that is social, not societal. The social relations exist between individuals equally sovereign and independent of each other. His natural society is merely a collection of individuals living in mutual respect and cooperation, bound only by natural and divine law. Although he ignores the question of the judge and guardian of natural law, logically he could only conclude, as Locke did, that in a state where all men are sovereign each man is judge and guardian in his own case. In Wilson's state of nature no social organization exists, no common judge or authority, and therefore it is not societal but social; it is the state of nature typical of modern natural law.

For him, it is the consent of the sovereign individuals to the social compact that creates the "whole", the community, with which each of the individuals contracts for the preservation, security, improvement, and happiness of all. The individual must be prior by nature to the community as the creator is to his creation. Again he is consistent with modern natural law and opposed to the traditional which denies absolute sovereignty to the individual even in the natural order. In those matters pertaining to the

society he is by nature subject to the public authority essential to the societal state natural to him.

In traditional natural law the consent of the individuals gives particular form to a civil society essentially predetermined by the nature of man, a society of which public authority is an essential element. Wilson's version of the social contract creates a civil society without public authority since all citizens remain as sovereign, equal, and free as in the natural "society" and are bound only by natural and divine laws.

This concept of "civil society previous to civil government" contains discrepancies, if not contradictions. The society, once formed, possesses all the former rights of the citizens and "all other powers and rights resulting from a social union." Besides the creation of the community, the only other simultaneous and natural result of the social compact is the rule of decision by the majority which is natural because it is the only reasonable method of group decision. All community affairs and, logically, the decision as to what affairs are communal are then subject to majority decision. It would seem, therefore, that all rights of the citizen are now subject to majority rule. But Wilson did not see it this way. Men remain as sovereign in civil society previous to civil government as they were in the state of nature. Wilson's answer to the objection

that majority power negates the natural liberty of the citizen is not pertinent. Since all men, he argues, remain as free in civil society previous to civil government as they were before, no man can claim political superiority over another. The question is not whether any man, but whether the majority is politically superior to the citizens.

Another answer wide of the point was a reminder that consent to majority rule was voluntary as if what is voluntarily consented to cannot be superior in authority.

The simple answer that the majority is the natural political superior of the civil society and that its political power is one of those "other powers" resulting from the social union would have made Wilson's contract a status contract and aligned him to the tradition of natural law. But for him, such an answer is impossible because of his modern individualism. If the political power of the majority involves superiority, his social contract cannot create it since a contract between equals cannot produce something superior to them.

Civil government, in Wilson's political theory, is not an essential element of civil society. It is necessary only as a remedy for the lack of virtue in the citizens. To it the society delegates the legislative, executive, and judicial power. His concept of the origin of civil government could also have been made congenial to traditional

natural law if he had made government the instrument of the natural political superiority of the community or majority. In the traditional concept since the community is politically superior to the individual in things pertaining to the common good, the majority can be politically superior as the agent of the community, and government superior as the instrument of the majority. The appointment of the men to exercise political superiority is always the right of the people and they are protected against abuse of power by their rights to recall those men. But the citizens cannot eliminate political superiority which is God-given in the very essence of society and man.

Wilson, however, was the victim of a phobia against the divine right of kings and any notion of a God-given political superiority was repulsive to him. His opposition to the idea of any man being politically superior to others blinded him to the possibility of the society possessing that superiority. All political entities must be created by the social contract between equals and if that contract could not create a superior, a political power superior to them simply did not and could not exist. His reasoning on government is also colored by his opposition to political theories that called for a third step in the social contract, the transfer of the sovereignty of the people to the ruler as to their superior. Hence he emphasized the retention of

sovereignty by the people as the vital principle of the American Constitution. His motives may explain why he developed his theory of society and government but they do not affect what he developed. Wilson's social contract creates no political authority in the sense of a political superior capable of commanding the people and to whom obedience is due. His civil society and its government is a collective unity of sovereign individuals and the aggregate of their contractual obligations to each other, a creation typical of eighteenth century natural law.

The effects of his concept of the social contract are most obvious in Wilson's philosophy of law. His rejection of a political superior in civil society forces him to reject also the concept of civil law as a command of a superior. The relation of superior and subject holds true only for natural and divine law. Civil law can only be a contract between each citizen and all the others. It is obligatory not by virtue of obedience but fidelity to promises. Again he is at odds with traditional natural law.

Justice to Wilson demands the recognition that his philosophy of law was not as radically democratic as Jefferson's. While the latter never explicitly or implicitly limits the will of the nation which is law, Wilson does so explicitly by recognizing that the will of the nation is

subject to natural and divine law. The people can exercise their sovereignty only within those limits.

Finally Wilson's affinity for modern natural law is evident in his concern about the problem of binding future generations to the social contracts. He discusses it in terms of particular societies but his basic premise that the only obligation that binds man to live in civil society is his consent to the social contract justifies the extension of the problem to the larger question of the obligation to live in any society at all. His answer is unimportant since it is his concern with the question that is suggested as evidence of the modern tone of his political theory.

In final analysis, the temptation to make Wilson a representative of traditional natural law is enticing if his moral conclusions and their immediate rationale alone are considered. But if traditional natural law doctrine demands a synthesis of moral conclusions, an epistemology and theory of moral knowledge capable of supporting them, and a political philosophy logically consequential to them, the philosophical synthesis of James Wilson simply does not qualify.

## III. GENERAL CONCLUSIONS

The conclusions on the relation of the individual Constitutional Fathers to traditional natural law reveal them, not as representative of it, but rather as opposed to it in varying degrees. Jefferson's epistemology, moral philosophy, and political theory place him in definite opposition to it and just as definitely in sympathy with eighteenth century natural law. James Madison, the "Father of the Constitution", is revealed as interested in the immediate political task of forging thirteen states into one national community and of assuring the protection of minority rights, especially economic, against the probable tyranny of a popular majority. He is so absorbed in practical political problems of democratic government that he neglects for the most part any discussion of its philosophical foundation. Accordingly, he has no value as a source for evaluating the influence of traditional natural law in the political foundations of the United States. James Wilson stands alone among the three as a possible link to traditional natural law. However, while his moral philosophy, and to a lesser degree, his political philosophy contains some conclusions and reasoning congenial to that law, his epistemology, theory of moral knowledge, and most of his political philosophy are in opposition to it and essentially

more congenial to modern natural law. The view of his moral conclusions as a heritage of ideals without the rationale to support it suggests him as the ideal representative of the mind of Constitutional America.

Thus a problem emerges. To the extent that Thomas Jefferson, James Madison, and James Wilson are considered Founding Fathers and influential in determining the philosophical tone of the original political institutions of the United States, to that extent does the influence of traditional natural law in those institutions decrease. On the other hand, the more the influence of that law is presented as dominant, the less right do these men have to be honored as Founding Fathers. Insofar as James Wilson stands alone as having some sympathy for the traditional, he and others of his kind must take the places of Madison and Jefferson.

The thesis that traditional natural law is the essential inspiration of the political philosophy of the United States demands therefore that it be dominated by the influence of James Wilson alone of the three Constitutional Fathers. Subsequent history does not support that thesis. It testifies instead that neither Wilson's natural law ideology nor Madison's politically artistic attempt to frustrate the popular majority could stem the tide of radical democracy implicit in Jefferson's concept of the power of the popular majority.

Jefferson's absence in France during the Constitutional Convention prevented him from any personal influence in the structuring of the Constitution. His influence, however, as Secretary of State, his definitive controversy with Alexander Hamilton, and especially his leadership as President came early enough in the political life of the Constitution to mould it to his philosophy of radical democracy. It was Jeffersonianism that emerged victorious from the Republican-Federalist controversy of 1800 and gained momentum during Jefferson's presidency.

By the time of Monroe's presidency, the Jeffersonian-Republican-Democratic party had been so successful in making its general anti-aristocratic bias the touchstone acceptability for anyone ambitious of elective office, that it had for practical purpose become the only political party in the country [...]. The process which can be followed in the development of Jefferson's own thought was at work in American society at large. The early emphasis on individual and minority rights weakened and devotion to popular sovereignty increased. The business of the elected representatives of the people was to carry out the people's wishes. Not representation but delegation was the basis of the system.<sup>33</sup>

Claiming the heritage of Jefferson, there was a constant and increasing emphasis on popular control of government in the evolution of American political policy.

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33 KELLY-HARBISON, The American Constitution, p. 317. Also, Max BELOFF, Thomas Jefferson and American Democracy, New York, Crowell-Collier, 1962, p. 200-201. Emphasis mine.

Between 1815 and 1850 state constitutions were re-written in favor of the popular will. The new Western states took the lead in extending the suffrage and eligibility for office to all male whites. The new constitutions provided for the popular election of nearly all public officials, even of the judiciary. This popular demand for control of the government finally made itself felt on the national level and elected Andrew Jackson to the presidency in 1828.

Carrying Jefferson's philosophy to its logical conclusions, the Jacksonians [...] demanded the right of all men to participate in government on an equal basis.

Jackson maintained that the right of the popular majority to govern was "the first principle of our system." Most Democrats insisted upon the people's right to "instruct" their legislators on important matters, and upon the right of the various state legislatures to "instruct" their senators and to "request" their congressmen on national issues.<sup>34</sup>

The widespread acceptance of Jefferson's affirmation of the right of each generation to amend the Constitution resulted in a deluge of over four hundred proposed amendments between 1804 and 1860.<sup>35</sup> The failure of any of these to pass demonstrates the effectiveness of the constitutional measures to prevent the tyranny of the majority and of the

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34 KELLY-HARBISON, op. cit., p. 329. Emphasis mine.

35 Ibid., p. 325-326.

difficulty of amending the Constitution.<sup>36</sup> However, this simply meant that other means would have to be found.

Consequently the champions of democracy turned to construction and extra-constitutional methods to advance their cause [...] Very effective as instruments for democratizing the federal constitutional system were the new political parties that emerged after 1824 from the ruins of the old Jeffersonian party organization.<sup>37</sup>

The trend of American politics was moving toward the "coach-driver" theory<sup>38</sup> which:

[...] exercised great influence upon the French Revolution, upon French democracy throughout its history, and upon all democratic movements inspired by French examples [...] From the time of Andrew Jackson on, the coach-driver theory has been an ideological factor of some importance in American history.<sup>39</sup>

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36 This effectiveness cannot be attributed to any influence of traditional natural law. It is simply the result especially of the political genius of James Madison and his dedication to controlling the power of the popular majority.

37 KELLY-HARBISON, op. cit., p. 327.

38 Yves SIMON, Philosophy of Democratic Government, Chicago, Chicago U. Press (Phoenix Book), 1951, p. 146-154. Basically the "coach-driver" theory of government considers the governing personnel as merely instruments of the popular majority. A modern taxi-cab driver does not decide where to take his passengers; rather, they set their destination and leave it to him to get them there. So, in this theory of government, the representatives merely execute the will of the people. Simon comments on this theory: "It did not play a decisive part in the early ages of American democracy; the concept of natural law was then too strong to allow the voluntarism of such a theory to unfold its consequences and reveal its principles." (P. 149) I do not agree that it was the influence of natural law that controlled this tendency but rather other influences. Cf. infra, p. 254ff. I think Simon would agree that the Constitution is certainly open to the "coach-driver" interpretation of government.

39 Ibid., p. 149.

That trend congenial to Jeffersonian principles has continued to the present day. The hypothesis that Jeffersonian liberalism prevailed as the dominant philosophy of the Constitution makes recent legal and political developments in the United States logical consequences of the Constitution rather than contradictions. Their consistency with Jefferson's thought can be construed as corroborating evidence of a philosophical continuity between American political origins and their modern implementation. A most significant development is the influence of sociological jurisprudence. This theory of law stresses its social purpose and conceives law as an instrument for satisfying human needs and desires expressed in the received ideals of time and place. This concept of law has been a most influential standard for the decisions of the Supreme Court of the United States since the time of Justice Oliver Wendell Holmes. To condemn it as un-American because it contradicts traditional natural law — "the traditional American philosophy of law" — is simply to beg the question.<sup>40</sup> If it is un-American, so is Thomas Jefferson, for sociological jurisprudence expressed admirably both his political philosophy of popular democracy and his concept of law as the will of the nation.

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<sup>40</sup> F. LEBUFFE, J.V. HAYES, The American Philosophy of Law, 5th ed., New York, Jesuit Educational Association, 1953, p. 41, 73.

The recent decision of the United States Supreme Court demanding that both Houses of Congress be elected on the basis of population alone is certainly a repudiation of Madison's effort to protect economic interests by giving them a voice in government. It interprets the Constitution in terms of liberal democracy to an extent, perhaps, of which even Jefferson would not approve.

To sum up, there is evidence indicating that Jefferson's influence on the Constitution was eventually far stronger than either Madison's or Wilson's. Although he had no direct voice in framing the Constitution, his success in shaping it, in its infancy, to the image of his liberal democracy argues that the Constitution was open to such an interpretation. To declare that traditional natural law is the official philosophy of American political foundations is to contradict the evidence.

An important objection to the thesis of Jeffersonian influence is the obvious difference between the American and French Revolutions. The contrast between the moderation of the American Revolution and the excesses of its French counterpart indicates, it is argued, a difference in philosophical motivation. The force of the objection is blunted since the absence of violence in America can be easily explained by factors other than philosophical.

Several factors cooperated in inhibiting the explosive potential of Jeffersonian liberalism. First was the fortuitous circumstances of the American Revolution, so succinctly stated by de Tocqueville:

The great advantage of the Americans is that they have arrived at a state of democracy without having to endure a democratic revolution, and that they were born equal instead of becoming so.<sup>41</sup>

American democracy was not born in the hostile environment of European monarchy but in the congenial atmosphere of the "salutary neglect" of English colonial policy. From its very beginning life in America had been democratic. Having nothing to overthrow, the American Revolution did not arouse the fury of a people long under the bondage of tyrants; Americans had no need to turn to the excesses of the French Revolution before, during, or after their own fight for independence. On the contrary, instead of considering themselves revolutionists, they thought of themselves as traditionalists defending the rights of Englishmen.

The clue to these results lies in the following fact: the Americans, though models to all the world of the middle class way of life, lacked the passionate middle class consciousness which saturated the liberal thought of Europe.

There was nothing mysterious about this lack. It takes the contemptuous challenge of an aristocratic feudalism to elicit such a consciousness [...]

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<sup>41</sup> Alexis de TOCQUEVILLE, Democracy in America, Vintage ed., New York, Random House, 1945, Vol. II, p. 108.

Frustration produces the social passion, ease does not [...]. Thus it happened that the fundamental aspects of Europe's bourgeois code of political thought [...] were not so much rejected as they were ignored [...] because the need for their passionate affirmation did not exist.<sup>42</sup>

A second moderating influence that took effect after the Revolution was the pragmatic conservatism of the agrarian majority. The rationale of that conservatism was the recognition by vested interests of the danger that rule by a truly popular majority threatened their economic status. Since the political conditions of America protected agrarian interests there was no reason for a radical revolution.

A third important factor in restraining the power of the popular majority was undoubtedly religion. De Tocqueville recognized the power of religion in early America but also offered a valuable insight into the intellectual quality of that religion and its effect on political thought.

In the United States Christian sects are infinitely diversified and perpetually modified; but Christianity itself is an established and irresistible fact, which no one undertakes to attack or defend. The Americans, having admitted the principal doctrines of the Christian religion without inquiry, are obliged to accept in like manner a great number of moral truths originating in it and connected with it. Hence the activity of individual analysis is restrained within narrow limits,

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<sup>42</sup> Louis HARTZ, "American Political Thought and the American Revolution", in American Political Science Review, Vol. 46, No. 2 (June 1952), p. 331-333.

and many of the most important human opinions are removed from its influence.<sup>43</sup>

He goes on to describe some political consequences of this unreasoned Christianity:

If the minds of the Americans were free from all hindrances, they would shortly become the most daring of innovators [...] But the revolutionists of America are obliged to profess an ostensible respect for Christian morality and equity, which does not permit them to violate wantonly the laws that oppose their designs; nor would they find it easy to surmount the scruples of their partisans even if they were able to get over their own. Hitherto no one in the United States had dared to advance the maxim that everything is permissible for the interests of society [...] Thus, while the law permits the Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash and unjust.<sup>44</sup>

After the acceptance of the Constitution, a fourth factor came into play, the governmental structure of checks and balances. The efficiency of that structure in controlling the popular will has already been indicated.

If the contrast between the French and American Revolutions is to be converted into a demonstration of the influence of traditional natural law, only the influence of religion is useful as a premise. But a summary evaluation of the important religious influences of the times does not favor the case of traditional natural law, but rather argues

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43 Alexis de TOCQUEVILLE, op. cit., II, p. 7.

44 Ibid., I, p. 316. Emphasis mine.

against it in favor of Jefferson's influence.

Shortly before the Revolution American intellectual life quickened to the influence of the English Enlightenment. The epistemology and political philosophy of Locke and the physical science of Newton captured the intellectuals of America as they had European minds. With this intellectual invasion came the altruistic humanism of Moral Sense ethics and the religion of reason, Deism. The power of these forces over the non-religious intellect was evident in the thought of Franklin, Jefferson, Paine — all leaders of the Revolution.

The dominant religions of America came to grips with the foe but the retreat of Anglicanism to England in the face of the coming Revolution left Calvinism alone in the field. Its position had already been weakened by an internal struggle between strict Biblical Calvinism and a liberal Calvinistic theology that appealed more to reason while still clinging to the Bible. When challenged by Deism, the liberal Calvinists to a great extent capitulated to it and became Unitarian by sacrificing the divinity, the redeeming influence, and the authority of Christ. Accordingly, the religious milieu of the Revolution was divided between Deism and an unreasoned Christianity which set its defenses more deeply in the Bible. A reasoned Christianity or a genuinely theonomous philosophy were conspicuous by their absence.

The field of reasoned religion was left to Deism.<sup>45</sup>

Such were the influences that wrote the Declaration of Independence.

It has been increasingly recognized by historians of American culture and thought that behind the political philosophy of the American Revolution, as it found its expression [...] in the Declaration, there lay a view of God that was not Christian but Deist [...] The reference to God in the Declaration of Independence, and the apparent submission to his will, should not blind us to the tragic misuse of biblical ideas to convey Deistic principles for the realization of a society which would be essentially humanistic and anti-supernatural in character.<sup>46</sup>

Accordingly, if the traditional natural law is to be read into the Declaration, it must be found in either Deism or Biblical Christianity. But the philosophical foundations of American Deism were the sensible empiricism and nominalism of Locke, his social-contract political theory, and the secularized morality of Moral Sense ethics; a combination inconsistent with traditional natural law. If that law is linked to Biblical Christianity, it must sacrifice its right to be called "natural". It could have been influential

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45 "By 1730 [...] the dominant influence in this intellectual and philosophical transition from the Puritanism of the seventeenth century to the increasingly secularized colonial outlook of the eighteenth century was the arrival of Deism in the United States." (C. Gregg SINGER, A Theological Interpretation of American History, Philadelphia, Presbyterian and Reformed Publishing Co., 1964, p.

46 Ibid., p. 36, 41.

through the medium of James Wilson, but the difficulties of that theory have already been made clear. Thus, to interpret the Declaration of Independence apodictically in terms of traditional natural law is to contradict the evidence.

In some ways the Constitution seems a more effective premise for the traditional natural law theory. In the decade between the Declaration of Independence and the Constitutional Congress of 1787 a conservative reaction set in against both Deism and popular democracy. The Congress of 1787 was most likely more Christian and less democratic. Of the men who formulated and signed the Declaration only six were present including Franklin, whose position was mostly honorary, and Wilson, who played a leading role. From the Records of the Convention it appears that the defence of popular democracy was left to him and George Mason. The Christianity, however, was again Biblical and the political conservatism more economic than anything else. The most influential champion of traditional natural law would again be James Wilson.<sup>47</sup>

But political and religious conservatism did not control the destiny of the Constitution long enough to stamp it permanently with their image. On Jefferson's return

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<sup>47</sup> The Records of the Federal Convention yield no evidence of Wilson making use of an argument from traditional natural law.

from France, with his deistic liberalism confirmed and augmented by French thought, the forces of liberal democracy formed ranks behind him. The Constitution was still young with its character not yet definitely determined. The impact of Jeffersonian liberalism on its early years has already been assessed. It is the influence of religion on Constitutional development that is here being discussed. Deism was on the decline and the reaction to it had strengthened Biblical Christianity and regained for it much of the prestige it had lost. Unitarianism, however, was still strong enough to be a constant challenge to it. But in these early years of the nineteenth century a new religious philosophy was rising in America as a reaction to Deism. Just as Jefferson had been fortunate in Revolutionary times to find in Deism a religious ally for his political theories, so Jeffersonians of this era found a more powerful religious ally in Transcendentalism.

Transcendentalism was, as stated, a religious philosophy, born of a reaction to the Enlightenment and Deism. Discontented with limitations imposed on human knowledge by the sensible empiricism of Locke and the scientific method of Newton, Transcendentalists emphasized a new mode of knowledge as proper to man — intuitionism — which can be understood only when synthesized with the pantheism resulting from a reaction to the Deistic divorce of

nature from God. That pantheism was Hegelian and considered each human mind or person an incarnation of the universal mind of God. Accordingly, each man had an intuition of God completely independent of sense experience and the judgments of each man are the judgments of God expressed in him.

Transcendentalism is, therefore, completely humanistic; a religion of man dedicated to the glorification of the individual. In opposition to Calvinism, it considers man completely good; human aspirations for a better world and the quest of the individual for freedom are the aspirations and quest of God Himself present in each man. Such a concept of man is easily translated into the doctrine of the sovereignty of man and the right of the popular majority.

The affinity of this religious philosophy to Jeffersonian liberalism is obvious.

It can be said that the Transcendentalists simply carried the basic assumptions of the Jeffersonian philosophy to their logical democratic conclusions [...] Its glorification and deification of man, the common man, was a more logical expression of the secular democratic philosophy than were the more restrained statements of a former era.<sup>48</sup>

The appeal of Transcendentalism was too intellectual to convert the masses to its tenets. Yet it reached the masses

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<sup>48</sup> C. Cregg SINGER, *op. cit.*, p. 68. Prof. Singer adds that "[...] in Transcendentalism there was an inner pressure for radical reform [...] which was much greater than that found in Jefferson." The addition does not contradict nor diminish the validity of the quotation.

effectively by its dedication to human progress, a dedication expressed practically in its participation and leadership in political and social reform. Like Jefferson, Transcendentalism believed strongly in perpetual revolution to guarantee a hearing for the voice of the popular majority. "With the advent of Transcendentalism, reform was here to stay as a permanent feature of American political life."<sup>49</sup>

Just as Deism prepared the religious intellectuals for Jefferson's ideas, so Transcendentalism cultivated the same soil for Jacksonian democracy, the progeny of Jeffersonian liberalism. Again, an attack by a religious philosophy drove Christianity back to the Bible, leaving the field of reason to secular humanism. De Tocqueville, writing of conditions in the Jacksonian era, describes them accurately.<sup>50</sup> In the light of the impact of Transcendentalism, his evaluation of Christianity at that time as a faith accepted "without inquiry" must be recognized as valid and lends credence to his conclusion that the moral truths accepted by Christianity were equally unreasoned.

Accordingly, since Transcendentalism is even less congenial than Deism to traditional natural law, that law could have been influential in the development of

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49 C. Gregg SINGER, op. cit., p. 77.

50 Cf. supra, this chapter, p. 256-257.

Constitutional thought only through the medium of unreasoned Christianity. Again, as in the case of the Declaration of Independence, the intellectual milieu is devoid of any trace of a Christian or theonomous philosophy representative of traditional natural law. If such law accepts unreasoned Christianity as its foundation, the propositions of traditional natural law, precisely as natural, have no foundation in natural reason. Without such a foundation, they can only be considered an ideology. They now refer "not so much to any real state of affairs as to the aspirations" of the United States, aspirations so favorable to immediate necessities that they created in Americans of the Revolutionary and Constitutional times an eager "will to believe" which blinded them to the discrepancies between the philosophy demanded by the propositions and the philosophy actually prevalent in the society. The propositions were expressed "in the language of everlasting truth", the equivocal terminology of natural law, but in reality they state only the "timely aspirations" of the popular majority of Americans. With no immediate hope of restoring the philosophy of traditional natural law which is truly capable of supporting the inspiring propositions of the Declaration of Independence and the Constitution, those propositions are in

danger of becoming "deadly cliches".<sup>51</sup>

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<sup>51</sup> The context of the conclusion about traditional natural law as an ideology is the passage from Yves SIMON, The Tradition of Natural Law: A Philosopher's Reflections, p. 16-17.

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## SUMMARY

A considerable literature, both pro and con, has been written concerning the influence of traditional natural law in the political foundations of the United States. The question is a difficult one because the basic charters of American political life — the Declaration of Independence and the Constitution — are open to a variety of interpretations as the expression of different political philosophies. One approach to the task of rediscovering the actual rationale of those documents is to accept the premise that they reflect the reasoning of the Founding Fathers who wrote them. Accordingly some insight into that rationale can be gained from an evaluation of the relative importance of the various Founding Fathers and an analysis of their personal philosophies. This dissertation hopes to make a contribution based on this approach.

The paramount importance of three Founding Fathers, namely Thomas Jefferson, James Wilson, and James Madison, is first established. Through an analysis of their writings a definite conclusion is reached concerning the influence of traditional natural law on them. This conclusion is then offered as a partial but precise answer to the more general problem of the influence of that law in the political foundations of America. If that law was influential in their

political philosophies it would have found its way into the political charters of the United States. If, on the contrary, it played no part in their thinking then they are eliminated as sources of its influence on American politics and the scope of the discussion is fruitfully narrowed to a quest for other possible sources.

Because of the lack of speculative thought in his writings James Madison proved of little value to the discussion. This negative conclusion, however, has positive value to the extent that it eliminates him as a source of traditional natural law influence, an elimination that could not have been justified without a thorough investigation of his thought.

Thomas Jefferson and James Wilson alienated themselves from traditional natural law initially by their rejection of ontological metaphysics. Their substitution of the "study of the human mind" in place of such metaphysics identifies them with modern philosophy in the tradition of David Hume. Their epistemology confirmed that identification by its emphasis on sensible empiricism and its nominalistic theory of universals and any reasoning involving them. Their attitude toward ontological metaphysics and their epistemology place them in definite opposition to the philosophy of traditional natural law.

Jefferson's moral philosophy, founded on the judgments of an emotional moral sense, proposed as its ultimate criterion of morality the contribution that a human act made to the temporal well-being of society as determined by its qualitative majority. His moral philosophy is, accordingly, a relativistic secular humanism typical of modern natural law. It is fully consistent with his epistemology and metaphysics.

Wilson's moral philosophy is, on the other hand, a contradiction of the rest of his philosophy. Its principles and immediate rationale are entirely consistent with traditional natural law in their recognition of a universal and immutable natural moral law based on human nature, its faculties and inclinations. Such a moral theory demands a foundation in ontological metaphysics and in an epistemology that recognizes the capacity of the human intellect for an existential knowledge of essences. But Wilson's rejection of such metaphysics, his sensible empiricism, and his acceptance of a morality based on emotional instead of reasonable judgments are precisely a contradiction of that foundation. That part of his moral theory congenial to traditional natural law stands in marked contrast to the rest of his philosophy. It is this contrast that makes him an exemplar of the confusion in American Revolutionary and Constitutional thought.

In their political philosophy all three Founding Fathers are in opposition to traditional natural law because of their acceptance of the social contract theory characteristic of modern natural law and its sovereignty of the individual and the popular majority. Their differences on the practice of majority rule are reflected in their varying concepts of civil law and ultimately resolve into a tension between the liberal democracy of Jefferson and the more conservative democracy of Wilson and Madison.

A final evaluation of their relationship to traditional natural law finds Jefferson in total opposition to it and Madison as uninfluenced by it. Wilson alone has any affinity to it, an affinity that is partial and contradicted by his general philosophy. If the discussion of the influence of that law on American politics is confined to the thought of these three Founding Fathers, that discussion is reduced to the question of the relative importance of Jefferson and Wilson in American political foundations. To that question there is only one answer — Jefferson was far more influential. The corollary to that conclusion is a proportionate weakening of the thesis affirming the dominant influence of traditional natural law in the pioneer political thought of the United States. That thesis must now find its evidence in other sources. It cannot appeal to the philosophical milieu of Revolutionary and Constitutional America

since any philosophy congenial to traditional natural law was conspicuous by its absence from that milieu. The remaining possible source would seem to be an emotional Biblical Christianity, the Christianity described by de Tocqueville as unreasoned. A doctrine of natural law originating in and defended by such Christianity would be simply "a great number of moral truths ... admitted ... without inquiry" i.e. an ideology of natural law instead of a philosophy of it.