

subtopic

# The Influence of the Scottish Enlightenment

## JAMES WILSON *and* NATURAL RIGHTS CONSTITUTIONALISM:

### THE INFLUENCE *of the* SCOTTISH ENLIGHTENMENT<sup>[1]</sup>

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There is now widespread recognition of the pivotal contributions James Wilson made to the constitutional jurisprudence of the United States. A native Scot, Wilson was a signer of both the [Declaration of Independence](#) and the [Constitution of the United States](#). His part in shaping the latter was acknowledged by [James Madison](#) himself. Controversy continues, however, over the question of the grounding of Wilson's own jurisprudence, which is articulated in a number of publications and decisions of the first [Supreme Court](#) on which he served. An examination of Wilson's reasoning in [Chisholm v. Georgia](#), coupled with his law lectures and speeches in the Pennsylvania Ratifying Convention, establishes important distinctions between his conception of natural rights and that of other natural law thinkers, especially [Grotius and Pufendorf](#). Moreover, rather than as a refinement or derivation of precepts from venerable English sources, specifically Magna Carta, the U.S. Constitution is understood by Wilson as the means by which a people defend themselves against the very implications drawn from such sources. His principal conceptual resource is the thought of Thomas Reid, a leading philosopher of the Scottish Enlightenment. Reid's "Common Sense" philosophy proved to be especially well suited to a new world suspicious of theories aloof to lived life.

In the twelfth of his [Lectures on Law](#), the lecture on "Natural Rights," Wilson quotes a passage from [Cicero's Pro Milone](#), wherein Cicero asserts the existence of a "law which is not written, but inborn." It is not learned by training, but is rather "snatched" or "imbibed" "from nature herself," a law "in which we are made."<sup>[2]</sup> Wilson cites this to illuminate his own analysis of natural rights.<sup>[3]</sup> The question he raises is whether rights as such are derivative of civil law or have a standing independent of civil society. The authorities behind the former proposition are many and include both [Edmund Burke](#) and [William Blackstone](#).<sup>[4]</sup> An implication to be drawn from those authorities' understanding is that rights are legal constructs, grounded in certain social and historical facts. "If this view be a just view of things," Wilson points out, it would follow that "under civil government," all of the "natural rights" of individuals "flow from a human establishment, and can be traced to no higher source."<sup>[5]</sup>

On such a view, the rights of the newly established citizens of the United States are granted by the Constitution and would have no reality outside that framework. Equally worrisome must be the status of that very Constitution, which, after all, came into being (on this account) by no more than a rebellious group rejecting pre-existing and authoritative civil arrangements. On such a view the several Acts of Parliament, leading up to the American Revolution were, quite literally, *legitimate*.

Wilson's understanding of natural rights is entirely different, based as it is on what I would be inclined to call a Christianized version of Cicero's presuppositions. Thus does Wilson speak of "the all-gracious Author of our existence," who "implanted in our breasts, for purposes the most beneficent and wise" any number of principles and dispositions. The rights in question, he says, "result from the natural state of man; from that situation, in which he would find himself, if no civil government was instituted."<sup>[6]</sup> Wilson elsewhere declares that all lawful government is "founded on the law of nature: it must control every political maxim: it must regulate the legislature itself," his source here being Blackstone's famous contention that "[t]he law of nature is superior in obligation to any other."<sup>[7]</sup>

Is this not just [Locke](#), reduced and reheated?<sup>[8]</sup> Alas, no. In Lecture VI of his *Lectures on Law*, Wilson criticizes the Lockean school of psychology on the basis of the work of Thomas Reid. Referring to

Locke's theory of ideas, Wilson notes the extent to which English legal treatises are themselves perilously obeisant to the Lockean psychology, which he calls "unsupported, absurd, and unphilosophical." He calls this theory "the sole foundation . . . for the philosophy of the law of evidence." Quoting an earlier statement of his own, he continues, "Despotism, by an artful use of 'superiority' in politicks; and skepticism by an artful use of 'ideas' in metaphysicks, have endeavored . . . to destroy all true liberty and sound philosophy."<sup>[9]</sup>

Whatever might be said of Wilson's theory of natural rights, it would be a most eccentric reading of his works to believe that the theory is grounded in some unexamined Lockean political philosophy. Indeed, far too little attention has been paid to the relationship between Locke's psychology and his political science. Wilson quite understood the worrisome fundamental compatibility between the two. To the extent that Locke sets the stage for Hume, he must be seen as allowing just that element of contextualism and relativism that must be inimical to the theory of rights defended by Wilson. To be sure, Locke's famous political treatises, even while granting to government the power to enforce the law, declare, ". . . that there remains still inherent in the people, a supreme power to remove and alter the legislature." But on this very point Wilson notes Blackstone's observation that, regarding Locke's somewhat eerie *supreme power*, "We cannot adopt it, nor argue from it, under any dispensation of government at present actually existing."<sup>[10]</sup> Locke's contention, Wilson concludes, is "merely theoretical."<sup>[11]</sup>

Consider now the overarching conclusion that Wilson would prevail upon his auditors to adopt. Recall the context. A bitter, costly, personally wrenching war has been fought against a regime to which the colonists had long been faithful. Now, even as the newfound institutions are still in the process of identifying their proper function, Wilson sets out to make clear that the principles on which the entire enterprise was launched were neither local nor situational nor even historical. Rather, they are universal, and thus the creation of the United States exemplifies what the motto conveys: *Novus ordo saeculorum*. This new order of the ages grows out of what Wilson offers as a psychology more faithful to the facts of human nature than that invented by a small group of British empiricists wed to a theory. The rights in question are not the gift of enlightened government, nor an offshoot of Magna Carta nor some sort of compact or social contract. The rights were there all along, and no government can claim validity or authenticity or the fidelity of the governed unless it is based on just this recognition.<sup>[12]</sup>

In this same Lecture VI, Wilson so closely traces Thomas Reid's *Inquiry into the Human Mind on the Principles of Common Sense* that whole sections are paraphrases drawn from it. He cites this same work in his landmark opinion in *Chisholm v. Georgia* (see below).<sup>[13]</sup> What he is at pains to establish in both places are the limits of any purely rational analysis in an attempt to understand life as actually lived. We make scores of decisions every day, and commit ourselves to innumerable actions that leave little time for logic chopping or close rational scrutiny. Take Reid's analogy of the lowly caterpillar who crawls across a thousand leaves until it finds the one that's right for its diet. The point is that nature fits out us and all creatures so that we might be able to engage the challenges of life with at least a modicum of success. The caterpillar that pauses to examine all the options rationally will starve before sundown. Thus does Wilson claim triumphantly,

When I say that the existence of the thinking principle, called the mind, has not been and cannot be proved; I am far from saying that it is not true that such a thinking principle exists. I know—I feel—it to be true; but I know it not from proof: I know it from what is great greatly superior to proof: I see it by the shining light of intuition".<sup>[14]</sup>

Perhaps this is all sufficient to establish that Wilson's theory of rights is not Lockean. One could go further to challenge the widely accepted notion that Locke's treatises on civil government in any fundamental way informed the framers of the Constitution.<sup>[15]</sup> That latter point need not be stressed, however. Locke, of course, was a figure of respect, his *Treatises* widely read by a well read community. Wilson, however, speaks for the Founders at large when grounding the American cause less in philosophical conjectures than in the immediate evidence arising from the most basic and natural of the human inclinations. Wilson was a Reidian, probably the only one by indubitable self-proclamation. If the

other Founders were not Reidians in this sense, they were also not theoreticians or metaphysicians. If there was a foundational philosophy that enjoyed very broad support, it was Scottish commonsense philosophy, and where Reid was not its specific textual source, as he surely was for Wilson, it was John Witherspoon who was its summoning expositor on the scene.

Wilson's Reidian understanding of rights was especially evident in his opinion given in the case of *Chisholm v. State of Georgia*, 2 U.S. 419 (1793), the first major jurisdictional issue to be settled by the first U.S. Supreme Court, to which Wilson was appointed by George Washington.

The main points were these: In 1777, Georgia's Executive Council approved the purchase of supplies from a South Carolina businessman but failed to make promised payments. The businessman having died, his executor took the case to court in an attempt to collect for the estate. Georgia thereupon answered the action by maintaining that a sovereign state was not subject to the authority of Federal courts. It claimed further that it could not be made a party-defendant in the Supreme Court of the United States at the suit of a private citizen who was not even resident in Georgia.

The Court found for the plaintiff. Opinions were set down by other justices, though Wilson's came to be regarded as authoritative. Wilson understood that questions regarding foundational principles lay at the heart of the case. To engage these principles, Wilson turns to Thomas Reid, "an original and profound writer." He follows Reid's critique of the reigning metaphysicians who habitually employ terms not grounded in the observations needed to supply them with clear meaning. Wilson finds two such terms at work in Georgia's response: The one is "State," which is presumed without more to have authority; the other is "Sovereign," which implies unopposable authority. However, notes Wilson, "To the Constitution of the United States the term SOVEREIGN, is totally unknown."<sup>[16]</sup> How Georgia's claim is to be understood depends, then, on giving meaning to the terms that convey its putative immunity.

Wilson begins with the observation that "States and Governments were made for man."<sup>[17]</sup> One may consider the State abstractly as an artificial person but, insists Wilson, "we should never forget, that, in truth and nature, those, who think and speak, and act, are men." "If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired." Accordingly, the State, just as "the men who compose it, ought . . . to do justice and fulfill engagements," such as contracts. Should a State break a contract, it, just like an individual, "is amenable to a Court of Justice."<sup>[18]</sup>

What Wilson establishes here is that the dignity accorded to the state is parasitic on the dignity enjoyed by persons. To whatever extent actions by the state constitute a diminution of the dignity of the individual, to that same extent the standing of the state is itself diminished. On this understanding, Wilson continues, how is "sovereignty" to be understood? There are forms of government under which persons are reduced to the status of subjects owing obedience to the "sovereign." The newly established government of the United States has nothing in common with these. Sovereignty of the sort Georgia would claim for itself is a concept not to be found in the Constitution of the United States. Wilson categorizes sovereignty thus conceived as nothing less than a "plan of systematic despotism." Its foundational principle "is, that all human law must be prescribed by a superior," whereas "genuine jurisprudence . . . must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man." Sovereignty is in the man—in the person. It exercises itself through the institutions and instruments of justice. One result of this exercise is the formation of states, which states are therefore subject to the will of its constituent persons.<sup>[19]</sup>

This is not the occasion to adjudicate the issue of states' rights. The topic here pertains to the general concept of rights. That Wilson read Thomas Reid assiduously there is no doubt, for where he does not quote Reid directly he paraphrases closely. This alone establishes the distance between Wilson's conception of rights, and that advanced by John Locke. Reid's critique of Locke centers on that very "ideal" theory that is the linchpin of Lockean psychology. Equally clear is Wilson's rejection of Hume's approach to the same issues. Justice and rights for Hume, as with political institutions, and the rule of law itself, arise from practical considerations covered by the principle of utility. Reid accepts none of this, and draws attention to both conceptual and observational grounds on which to reject such views:

Some knowledge of duty and of moral obligation is necessary to all men. Without it they could not be moral and accountable creatures, nor capable of being members of civil society. It may therefore be presumed, that nature has put this knowledge within the reach of all men. Reasoning and demonstration are weapons which the greatest part of mankind never was able to wield. The knowledge that is necessary to all, must be attainable by all. . . . It may, therefore, be expected from the analogy of nature, that such a knowledge of morals as is necessary to all men, should be had by means more suited to the abilities of all men than demonstrative reasoning is.<sup>[20]</sup>

Rights are the outward expression of an inner truth available to all who are fit for life under law. It is the inner truth, part of the very constitution of human nature, that makes government possible. Thus, government is not the source but the product of that exercise of power and judgment available to a being capable of self-government. In words that Wilson surely would applaud, Reid put it this way:

If we had no confidence in our fellow men that they will act such a part in such circumstances, it would be impossible to live in society with them: for that which makes men capable of living in society, and uniting in a political body under government, is, that their actions will always be regulated in a great measure by the common principles of human nature.<sup>[21]</sup>

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[1] A version of this essay was delivered at the *4th International Reid Symposium*, Center for the Study of Scottish Philosophy, Princeton Theological Seminary, Princeton, N.J., September 7, 2007.

[2] James Wilson, *The Works of James Wilson*, ed. Robert Green McCloskey, 2 vols. (Cambridge, Mass.: Harvard University Press, 1967), 2:609.

[3] *Ibid.*, 2:588ff.

[4] In his *Reflections on the French Revolution*, Burke contended that “one cannot enjoy the rights of an uncivil and of a civil state together.” As Wilson would have him understood, Burke argues that those rights that arise uniquely within civil society are unintelligible in a purely natural state. On Burke’s understanding, so construed, rights do not run concurrently in civil society and in a state of nature. To become part of the former is to lose whatever might have been possessed in the latter. Blackstone, in his authoritative *Commentaries*, is more explicit. He acknowledges that there are, indeed, natural rights but declares that “their establishment, excellent as it is, is still human.” The rights are man-made, and, at least for the English, are derived from Magna Carta. On this view, rights take on the character of civil privileges, proffered or denied by way of a legislative authority. (William Blackstone, *Commentaries on the Laws of England* [1765–69; a facsimile of the first edition, Chicago: University of Chicago Press, 1979], 1:127ff.)

[5] Wilson, *Works*, ed. McCloskey, 2:589.

[6] *Ibid.*, 2:592.

[7] William Blackstone, “Of the Rights of Persons,” in *Commentaries*, 1:41. Wilson cites this passage in his widely distributed essay of 1774 challenging the authority of Parliament when extended to the Colonies. Therein he grants authority to Parliament only insofar as it serves the very mission that would render it worthy of respect. The dispositive principle is that all lawful government is established “. . . to ensure and increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the *first* law of every government,” and this law in turn is founded on “the law of nature.” (“Considerations on the Nature and Extent of the Legislative Authority of the British Parliament” [1774] in Wilson, *Works*, ed. McCloskey, 2:723).

[8] There is a lengthy chapter in historical scholarship devoted to the American Founding concerning Jefferson’s sources for the *Declaration of Independence*, and particularly the phrase, “the pursuit of

happiness.” In his *Commonplace Book* Jefferson quotes entire passages from Wilson’s *Considerations*, though not the passage that establishes human “happiness” as the object of all lawful government. The classic study here is Carl Becker’s *The Declaration of Independence* (New York: Harcourt Brace, 1922). An old but still informing discussion of approaches to the question is Herbert Lawrence Ganter, “Jefferson’s ‘Pursuit of Happiness’ and Some Forgotten Men,” *William and Mary College Quarterly Historical Magazine*, 2nd ser., 16, no. 3 (1936): 422–34. Jefferson, for his own part, insisted that, in incorporating the “pursuit of happiness” phrase he never consulted works by Locke or any other putative source. He told Madison that all he needed was readily available in Aristotle, Cicero, Locke, Sidney—an entire school of political thought.

[9] Wilson, *Works*, ed. McCloskey, 1:221–22.

[10] Blackstone, *Commentaries*, 1:161.

[11] Wilson, *Works*, ed. McCloskey, 1:169.

[12] A summary of his understanding was trenchantly expressed by him in a speech before the Pennsylvania State Legislature on October 6, 1787 as ratification was considered. Noting that many were concerned that the Constitution included no Bill of Rights, Wilson reminds the assembly that “everything which is not given is reserved” by the People, whose possession of rights owes nothing to the nation they have set out to form. He states the matter this way: “...to those who think the omission of a bill of rights a defect in the proposed constitution; for it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges of which we are not divested, either by the intention or the act that has brought the body into existence.” (James Wilson, “James Wilson’s State House Yard Speech, October 6, 1787,” in *Collected Works of James Wilson*, eds. Kermit L. Hall and Mark David Hall [Indianapolis, Ind.: Liberty Fund, 2007], 1:172)

[13] *Chisholm v. Georgia* [2 Dall. (2 US) 419 (1793)].

[14] Wilson, *Works*, ed. McCloskey, 1:224.

[15] I might only mention here an 1825 letter from Madison to Jefferson as the two discussed required readings in the newly formed Law School at the University of Virginia. They intended their students to read those thinkers who taught “the true doctrines of liberty” that “should be inculcated on those who are to sustain and may administer” “our Political System.” Jefferson had listed both Locke and Algernon Sydney. Although Madison had found those two “admirably calculated to impress on young minds the right of nations to establish their own governments, and to inspire a love of free ones” he nevertheless thought that they “afford no aid in guarding our Republican charters against constructive violations.” Madison correctly finds in Locke the right of nations to establish their own governments, but this is different from the rights of persons over and against the claims of nations. (James Morton Smith, *The Republic of Letters: The Correspondence Between Jefferson and Madison 1776–1826*, 3 vols. [New York: Norton, 1995], 3:1924.)

[16] *Chisholm v. Georgia*.

[17] *Ibid.*

[18] *Ibid.*

[19] In Wilson’s words, the issue in *Chisholm* turns on the question of whether the people of the United States, including those living in Georgia, could “. . . bind those States, and Georgia among the others, by the Legislative, Executive, and Judicial power. . . . If those States were the work of those people; those people . . . could vest jurisdiction or judicial power over those States and over the State of Georgia in particular.” Wilson’s opinion continues for many pages and marks an early and important contribution to the constitutional jurisprudence of the United States. Indeed, his opinion proved to be so worrisome as

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to inspire the framing and the ratification of the 11th Amendment, the wording of which leaves no doubt about the cause that gave rise to it: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." ([Chisholm v. Georgia](#))

[20] Thomas Reid, *Essays on the Intellectual Powers of Man*, ed. Derek Brookes (1785; repr. University Park: Penn State University Press, 2002), 554. The passage is taken from Lecture VII, "[On Reasoning](#)."

[21] Ibid, 488.

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