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Time as Consent

Common Law Thought after the American Revolution

The Loneliness of Consent

Over the past several decades, scholars have been made aware of many of the intellectual sources of the American revolutionary struggle, the period of constitution making, and its aftermath. These include republican thought, Lockean natural rights, Scottish ideas about the shift from the feudal to the commercial, common law thought, and Protestant millennial thought. These various intellectual sources were often mixed in ways that are difficult to separate out. The writings of Bolingbroke, Kames, Blackstone, and others were fully part of this complex universe of ideas.[1]

It is important to emphasize, however, that none of the British writers discussed in the preceding chapter had mapped out the truly innovative political structure that emerged out of the 1787 Philadelphia convention. While eighteenth-century British legal thinkers had imagined government to be constrained by the logic of history, and had sought to subject law to criticism in the name of the logic of history, few had imagined a government in which all three of the traditional orders of government would be subjected to the electoral principle. Accustomed to monarchy and aristocracy, to a world in which birth determined status, eighteenth-century Europeans deemed the constraint of history just one among many.

[1] Bernard Bailyn, *The Ideological Origins of the American Revolution* (enlarged ed.) (Cambridge, Mass.: Belknap Press, 1992); Henry F. May, *The Enlightenment in America* (New York: Oxford University Press, 1976); Gordon Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969); Ernest L. Tuveson, *Redeemer Nation: The Idea of America's Millennial Role* (Chicago: University of Chicago Press, 1968).

It is not surprising, then, that the establishment of a politicolegal structure in America that brought to an end centuries of monarchy and aristocracy resulted in a new and exhilarating sense of the lifting of constraints and of the possibility of remaking the world. At least for a segment of the American population, birth had ceased to be the formal basis of power and privilege. Lifelong subjecthood, traditionally attributed to those born within the protection of the king, was replaced by citizenship, theoretically grounded in volition. Men began to think of themselves as makers of their own political identities, and hence of their own laws, as they had not before.[2] Did this mean, however, that the late-eighteenth-century American politicolegal subject was *entirely* liberated from the fetters of the European past? In what senses did the politicolegal subject remain constrained? In what historical languages would a new sense of liberation and constraint be expressed? What would be the consequences for law in general and for the English common law in particular?

In keeping with this sense of the lifting of constraints, during the revolutionary years and their aftermath, regardless of political and intellectual stripe, Americans understood themselves to be living through a momentous historical shift away from "artificial," "mysterious," dazzling, invisible, nontransparent, nonrational European forms of the exercise of power (which could be, depending on the thinker, the privileges associated with birth, monarchy, feudalism, Roman Catholicism, or religious establishment) and toward "natural," unpretentious, visible, transparent, rational American forms (which could be, depending on the thinker, power grounded in consent, democratic self-government, Protestantism, and freedom of worship). This widespread sense of a historic shift from a world of obscurantism and "mystery" to a world in which clear, logical, and defensible principles could be laid bare was fully part of the demystifying rationalist impulse of the Euro-American Enlightenment and, as such, was not exclusive to Americans of the revolutionary generation. But in the new United States, this Enlightenment vocabulary was specifically joined to arguments about the legitimacy of democratic government and law.

An important and widely embraced implication of understanding the movement of history as a shift away from European "mystery" toward

[2] See James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978); Holly Brewer, *By Birth or Consent: Children, Law and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005).

American transparency was that law had to be rendered plain, visible, and rational, capable of being viewed and understood and imbibed by the citizens of the new polity. This explains in part the concerted efforts, so prominent in the postrevolutionary decades, to publicize and rationalize law through *writing*, whether in the form of written constitutions, the promulgation of digests and revisions, the standardization and reporting of judicial decisions, or the generation of legal treatises. In March 1791, Federalist U.S. Supreme Court Justice James Wilson, who had been appointed to revise and digest the laws of the Commonwealth of Pennsylvania, put it thus: "[S]implicity and plainness and precision should mark the texture of a law. It claims the *obedience* – it should be level to the *understanding* of all."[3] Wilson subscribed fully to the philosophy of history that saw the shift between England and America as a historic shift from "mystery" to transparency. For too long, he observed, law "has suffered extremely from the thick veil of mystery spread over it in the dark and scholastic ages"; it must now enjoy "the advantages of light, which have resulted from the resurrection of letters."[4] The Federalist politician and lawyer James Kent began his 1794 lecture at Columbia College by striking a similar note: "The human mind, which had been so long degraded by the fetters of the feudal and papal tyranny, has begun to free herself from bondage; and has roused into uncommon energy and boldness." The breaking of the fetters of the European past made it imperative that the structure of American law and government be rendered visible to all:

> [T]he people of this country are under singular obligations, from the nature of their government, to place the study of the law at least on a level with the pursuits of classical learning. The art of maintaining social order, and promoting social prosperity, is not with us a mystery fit only for those who may be distinguished by the adventitious advantages of birth or fortune. The science of civil government has been here stripped of its delusive refinements, and restored to the plain principles of reason.[5]

However, while there was widespread agreement that history was a move away from European "mystery" toward American transparency, and that law had therefore to be rendered plain and accessible to all, such agreement did not by any means imply a universal conviction that politics

[3] *The Works of James Wilson* (James DeWitt Andrews, ed.) (2 vols.) (Chicago: Callaghan and Company, 1896), Vol. 1, p. xxi (emphasis in original).

[4] Ibid., p. xxii.

[5] James Kent, "An Introductory Lecture to a Course of Law Lectures: Delivered November 17, 1794," *Columbia Law Review* 3 (1903): 330–343, at 331.

and law should therefore also be the self-conscious product of an entire population radically ungoverned by the past. James Kent, who claimed in 1794 that American government was not "a mystery fit only for those who may be distinguished by the adventitious advantages of birth or fortune," was a lifelong opponent of universal white male suffrage. During New York's 1821 constitutional convention, Kent would express firm opposition to suffrage expansion on the grounds that it would result in an erosion of private property rights. Neither was there universal agreement that government and law should be unmoored from the prerevolutionary past. Daniel Hulsebosch has written about the deep continuities between prerevolutionary and postrevolutionary governmental structures. Thinkers who opposed the "mystery" associated with prerevolutionary political forms also insisted upon continuity with them. During the 1821 convention at which he opposed universal white male suffrage, for example, Kent also tried, unsuccessfully, to hold off the abolition of New York's Council of Revision, a colonial era official body composed of unelected judges and legislators that could effectively veto legislation.[6]

However, if a commitment to demystifying law as part of a faith that history was a moving away from European "mystery" toward American transparency did not always or necessarily translate into a commitment to what we might take to be a self-conscious, inclusive, present-focused democracy, within certain radical democratic circles that same commitment to demystifying law came to be joined to the controversial figure of the subject of contemporaneous consent. This subject of contemporaneous consent did not, of course, encompass groups such as women, blacks, and Native Americans. Nevertheless, it carried with it the possibility of a thoroughgoing challenge to government and law of precisely the kind that a legal thinker such as James Kent would fear and abhor.

[6] On Kent as an American conservative, see John Theodore Horton, *James Kent: A Study in Conservatism, 1763–1847* (New York: Da Capo Press, 1969). In arguing against the expansion of suffrage, Kent would declare, "Society is an association for the protection of property as well as of life, and the individual who contributes only one cent to the common stock, ought not to have the same power and influence in directing the property concerns of the partnership, as he who contributes his thousands." Nathaniel H. Carter and William L. Stone, *Reports of the Proceedings and Debates of the Convention of 1821 Assembled for the Purpose of Amending the Constitution of the State of New York; Containing All the Official Documents Relating to the Subject, and Other Valuable Matter* (Albany: E. & E. Hosford, 1821), p. 221. On the 1821 New York convention, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005), Chap. 8.

At the same time, as we shall see, it was itself also limited in various ways that betray continuities with prerevolutionary thought. It is to an exploration of the contours of this subject of contemporaneous consent, accordingly, that I turn.[7]

"Consent" was, of course, one of the master concepts of eighteenth-century politics. The American Revolution had been fought, in an important sense, in its name. But consent also had a venerable history going back long before the Revolution. By the late eighteenth century, it carried different meanings, of which two are significant for our purposes.

In the imaginations of English common lawyers, as we have seen, consent had long been freely attributed to the common law. No express evidence of consent had been considered necessary. As stated in the preceding chapter, Blackstone had claimed that "our common law depends upon custom: which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people."[8] The consent attributed to the common law was imagined to encompass multiple generations, stretching back into the past and out into the future. Not surprisingly, a multigenerational consent to government and law was imbued with the special nonhistorical common law temporality of "immemoriality." In 1783, Richard Wooddeson, one of Blackstone's successors as Vinerian Professor of Law at Oxford, articulated the intimate, mutually constitutive links among custom, consent, and "immemoriality" as follows:

> [G]overnment ought to be, and is generally *considered* as founded on consent.... For what gives any legislature a right to act, where no express consent can be shewn? what, but immemorial usage? and what is the intrinsic force of immemorial usage, in establishing this fundamental or any other law, but that it is evidence of common acquiescence and consent?[9]

But the notion of contemporaneous consent, as it was articulated by radical democratic thinkers in the late eighteenth century and joined to

[7] There were, of course, various species of radical democratic thought in this period that cannot be subsumed within the discussion I offer. See, e.g., Michael Merrill and Sean Wilentz, eds., *The Key of Liberty: The Life and Democratic Writings of William Manning, "A Laborer," 1747–1814* (Cambridge, Mass.: Harvard University Press, 1993). For a discussion of Manning's *Key of Liberty* (1798), see the Prologue to Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993).

[8] Blackstone, *Commentaries*, Vol. 1, pp. 73–74.

[9] Richard Wooddeson, *Elements of Jurisprudence: Treated of in the Preliminary Part of a Course of Lectures on the Laws of England* (Dublin: H. Fitzpatrick, 1792), p. 35.

the widely shared commitment to demystifying government and law, was something entirely different. It stood precisely for the possibility of severing ties between generations, forcibly drawing past, present, and future apart. As such, it was sharply at odds with common law understandings of multigenerational attributed consent.

In the hands of radical democratic thinkers, the subject of contemporaneous consent was intended to apply to collectivities rather than to individuals. More important for our purposes, it was internally unstable. In its conceptualization, the subject of contemporaneous consent was simultaneously liberated and constrained. It oscillated freely between (1) the liberating idea that the subject of consent could subject everything to the test of contemporaneous consent, break completely with the past, and remake the present and future repeatedly and at will and (2) the constraining idea that the subject of consent would create a world in which politics and law would end up reflecting an already imagined "nature" or "society," such that the subject of consent would restore man, as it were, to himself. Although both possibilities carried radical consequences when set afloat in the world of late-eighteenth-century political and legal debate, the former authorized an open-ended democratic reimagination of the world, while the latter – often derived, as we shall see, from Scottish ideas – operated as a constraint on democratic reimagination.

Thomas Paine's exhortation to revolution, *Common Sense* (1776), perhaps the best known of the pamphlets of the American Revolution, is an exemplary text in this regard. In urging Americans to rise up against Great Britain, Paine emphasized the urgency of "the present time." As he put it, "The present time ... is that peculiar time which never happens to a nation but once, *viz.* the time of forming itself into a government. Most nations have let slip the opportunity ... of making laws for themselves."[10] Paine's acute sense of the urgency and uniqueness that the present represented for the nation was more than a statement about revolutionary tactics. For many of his readers, it would have been understood to be an argument about America's brief but enormously significant regression to the state of nature of eighteenth-century social contract theory. From this state, Paine argued, an unencumbered man could, on the basis of consent, self-consciously re-create himself.

For Paine, to qualify as one's own, hence to qualify as properly consented to and legitimate, visible and transparent laws would have to

[10] Thomas Paine, *Common Sense*, in *Basic Writings of Thomas Paine* (New York: Willey Book Company, 1942), p. 52.

emerge only in and from that peculiar slice of time known as the present. True consent to such laws could come only from a subject who could offer its consent in and for the present. For Paine, in other words, the subject capable of giving consent to law is *lonely*, imprisoned within its own present, utterly cut off from both past and future. This is the implication and meaning of Paine's celebrated attacks on hereditary right. For Paine, hereditary right is illegitimate – in his words, "unwise, unjust, unnatural" – because future generations have not consented to its transmission into their own times:

> [A]s no man at first could possess more public honors than were bestowed upon him, so the givers of those honors could have no power to give away the right of posterity, and though they might say "We choose you for *our* head," they could not, without manifest injustice to their children, say "that your children and your children's children shall *reign* over *ours* for *ever*" [emphasis in original].[11]

In this excerpt, Paine is denouncing hereditary monarchy. However, his argument could potentially be extended to all law. All law had to be the product of the contemporaneous consent of a lonely, temporally truncated subject capable of consenting only in and for its own present. The radical implication was that no law derived from the past was legitimate as such. The present was thus always potentially something like the state of nature, a time from which one could launch a beginning, unencumbered by the weight of the past. As Paine exulted, "We have it in our power to begin the world over again.... The birthday of a new world is at hand."[12]

Even as Paine drew a picture of a subject capable of dramatically recreating the world in the present, however, he sought to pin that subject down, to constrain it. The unencumbered man of the state of nature had never really been unencumbered. Drawing upon Scottish thinkers, Paine drew a sharp distinction between society, described as a function of "our wants," and government, described as a function of "our wickedness." The former was natural; the latter was not. Paine operated with a strong sense of the changeability of government, but with a far weaker sense of the changeability of society. Through a self-conscious transformation of government, he argued, the "genuine mind of man" could be restored to "its native home, society."[13] But what would the laws of society be? If society were naturalized as the "native home" of "the genuine mind of man," could its laws truly be the product of self-conscious design, of a

[11] Ibid., p. 15

[12] Ibid., p. 65.

[13] Thomas Paine, *Rights of Man*, in *Basic Writings of Thomas Paine*, p. 52.

kind of creative and imaginative radical remaking that proceeded from subjecting the world to the test of contemporaneous consent?

In *Common Sense*, Paine did not explore such questions sufficiently. In *Rights of Man* (1791), written fifteen years after *Common Sense*, we discern more clearly Paine's debt to Scottish thinkers such as Kames, who had plotted the movement of history as a shift from a warlike feudal to a peaceable commercial. Paine tells us that, in society, laws would be those "which common usage ordains" and as such would have "a greater influence than the laws of government." Such laws would include laws of trade and commerce grounded in "mutual and reciprocal interest."[14] The spread of commerce would "extirpate the system of war" associated with the feudal-monarchic past and advance "universal civilization."[15]

In Paine's rendering, then, we observe the internal instability of the subject of consent – capable of remaking the world entirely, on the one hand, but restricted to making it so that it matched a given conception of naturalized society, on the other. The idea of contemporaneous consent as a test of the legitimacy of government and law, potentially radical though it is, ends up dissolved into a philosophy of history already imagined by prerevolutionary (and distinctly nonradical) European thinkers.

A similar argument about contemporaneous consent, replete with the same tension between freeing up the subject of consent completely and reigning it in through some conception of society or nature, would be made by a more mainstream figure such as Thomas Jefferson. In a celebrated 1789 letter to James Madison, Jefferson opined:

> The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water.... I set out on this ground which I suppose to be self-evident, "*that the earth belongs in usufruct to the living*;" that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society [emphasis in original].[16]

Jefferson followed up the above-mentioned statement with the exposition of a complicated scheme based on life expectancies and death rates that would determine precisely how long human laws were to remain in force. This would ensure that, "by the law of nature [i.e., the natural life cycle], one generation is to another as one independant [*sic*] nation

[14] Ibid., pp. 150, 153.

[15] Ibid., p. 210.

[16] Letter to James Madison, September 6, 1789, in Thomas Jefferson, *Writings* (M. D. Peterson, ed.) (New York: Library of America, 1984), p. 959.

to another."[17] One concrete instantiation of this idea was the reversal in Virginia of the English rule of construction according to which, if a statute repealing another was itself repealed, the earlier statute was revived. In Virginia, the law provided that "whensoever one law, which shall have repealed another, shall itself be repealed, the former law shall not be revived without express words to that effect." Virginia's St. George Tucker described the English rule as "certainly inconvenient; since old acts, long since forgotten, might be revived upon the community; affecting their persons and property upon a legal fiction without notice that such was the case."[18] The present generation's consent to its own laws was to be secured. But as the past, present, and future were rendered foreign countries vis-à-vis one another, the subject of contemporaneous consent was rendered lonely, confined to the present, restricted to consenting only for itself, utterly freed from the past and future.

Jefferson repeatedly expressed similar ideas. In an 1801 letter to Joseph Priestley, he condemned "[t]hose who live by mystery and *charlatanerie*," a marker of the old, past-centered power, and eulogized the "newness" of America:

> We can no longer say that there is nothing new under the sun. For this whole chapter in the history of man is new. The great extent of our Republic is new. Its sparse habitation is new. The mighty wave of public opinion which has rolled over it is new.[19]

In 1824, he would repeat this view with breathtaking clarity:

> [Our revolution] presented us an album on which we were free to write what we pleased. We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts.[20]

As the reference to appealing to the "laws of nature" and finding them *already* "engraved on our hearts" suggests, however, Jefferson's sense that each generation was free from its predecessor was moored in an understanding of human reality that acted as a check upon radical democratic reimagining. Like Paine's, Jefferson's freeing up of the present from the

[17] Ibid., p. 962.

[18] Act of 1789, c. 9; St. George Tucker, ed., *Blackstone's Commentaries*, Vol. 1, pp. 89–91, n. 19.

[19] Letter to Joseph Priestley, March 21, 1801, in Jefferson, *Writings*, pp. 1085, 1086.

[20] Letter to Major John Cartwright, June 5, 1824, in Jefferson, *Writings*, p. 1491.

claims of the past, the heart of the notion of contemporaneous consent, ended up drawing heavily upon Scottish teachings. Jefferson led the attack on feudally derived landholding forms such as the entail in the Virginia of the late 1770s. Kames had made the case against the entail decades earlier. As such, Jefferson's emphasis on contemporaneous consent as sanctioning a doing away with "mystery and *charlatanerie*" and on being "free to write what we pleased," which could have stood for something quite radical, ended up affirming what mainstream European legal thinkers had been arguing for a while.

Although Paine and Jefferson (but especially the latter) might not have been all that radical in practice, by the early 1790s what I have called the lonely subject of contemporaneous consent appeared to many to be concretely – and terrifyingly – instantiated in the events in France. As the French Revolution entered its radical phase, many in England and America began to think of it as a concerted and self-conscious effort to render the present almost literally a blank canvas, to uproot the past in its entirety so as to inaugurate a brand new order. The French revolutionaries sought to reset the clock and begin time itself anew, proposing a calendar that replaced the Christian year 1792 with the republican *L'an 1*. Hundreds of churches, palaces, and convents were destroyed in France and then all over Europe. Many lost their lives in the process. Although there was no comparable level of physical destruction or bloodshed in the United States, as American domestic politics began to splinter around attitudes toward the French Revolution, calls for a complete break with the past such as those of Paine and Jefferson began to seem more and more worrying. As a result, a range of battles came to be fought around the meanings and implications of the lonely subject of contemporaneous consent who was represented as the fulcrum of the shift from "mystery" to transparency.

One of these battles concerned the presence in America of the English common law. From the perspective of those who believed that government and law should be subjected to the test of contemporaneous consent and that consent should be expressed in writing, the problems with the common law were evident. What was more "mysterious," more a marker of outmoded European forms of power, than a body of unwritten, customary law that rested its legitimacy on the nonhistorical temporalities of "immemoriality" and "insensibility"? What was less the product of contemporaneous consent than a body of law that derived its authority from a repetition of precedent and a boast to bind past, present, and future together effortlessly? Who was more opposed to the will of the

people than the common law judge who derided legislation as lacking in the collective wisdom of multiple generations? In the preface to his Connecticut reports (1789–1793), Jesse Root echoed the sentiments of many when he described the temporality of "immemoriality" as a feature of arbitrary governments: "That so long as any one living can remember when they [i.e., customs] began to exist they can have no force or validity whatever, however universally they may be assented to and adopted in practice; but as soon as this is forgotten and no one remembers their beginning, then and not till then they become a law; this may be necessary in arbitrary governments."[21] Legislatures could accomplish openly through written law, many argued, what the fiction of "immemoriality" had once wrought.

The constitutions of most of the new polities, federal and state, were written.[22] This was fully part of a commitment toward moving away from European "mystery" and toward American transparency that was shared by legal thinkers of widely varying political persuasions, from the Federalist James Wilson to the Republican Thomas Jefferson. But were such writings sharp breaks with the past (instantiations of contemporaneous consent and self-sufficient principles) or extensions of the past (transcriptions of unwritten customs and accumulated experience)? The debates of the 1790s over the nature of the written U.S. Constitution and its relationship to the unwritten British one reveal little consensus. Debates over the ontology of the American constitutions led directly to one of the most explosive legal questions of the period, that surrounding the meaning of written legal texts. Could writing – and hence the contemporaneous consent that gave rise to writing – ensure the transparency, legibility, and fixity of its own meaning? Or should written laws be given meaning through unwritten common law? And what was one to make of the vast body of common law that lay outside of the newly demarcated realm of constitutional law? Could everything be subjected to the test of contemporaneous consent, could everything be lifted up and examined, judged in terms of its relevance to the present? All American states,

[21] Jesse Root, "Introduction," in *Report of Cases Adjudged in the Superior Court and Supreme Court of Errors: From July, A.D. 1789 to June, AD 1793* (Hartford, Conn.: Hudson and Goodwin, 1798–1802), p. xii.

[22] For a comprehensive discussion, see Benjamin P. Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (2 vols.) (Washington, D.C.: Government Printing Office, 1877). Connecticut and Rhode Island were the only original states that did not create new constitutions in the eighteenth century.

whether by statute or otherwise, and with various caveats, "received" the English common law.[23] But this did not end debates about how to establish a relationship to the English legal legacy. Critics called for a legislative reform of the common law or its replacement with a code that would tether it firmly to contemporaneous consent expressed by legislatures.

What is interesting for our purposes is not just how debates over the status of the common law in the postrevolutionary United States were structured around the contours of the subject of contemporaneous consent as the fulcrum of the historical shift from European "mystery" to American transparency, but how the defenders and proponents of the common law deployed the new historical sensibilities to their advantage. Even as the common law's defenders agreed that the law should be subjected to historical critique and demystified, they would argue that the common law embodied the logic of history itself. Some would argue that, where consent was the fulcrum of history, the common law was the most consensual of all possible laws. In doing so, they would blend older common law languages of multigenerational and attributed consent with newer radical democratic languages of contemporaneous consent. In the manner of Kames and Blackstone, other legal thinkers would argue that the common law, entirely by itself, had engineered the historical move from feudal to commercial, and hence from European "mystery" to American transparency. In so doing, they exploited the instability inherent in the idea of the subject of contemporaneous consent, as it oscillated between the possibility of radical democratic reimagining and being hemmed in by Scottish ideas about the logic of history. In constraining the subject of contemporaneous consent, Paine had argued that the ideal society of the future would be governed by "common usage," such that the world of war would be replaced by the world of peaceable commerce. Was the common law *already* that law?

Constitutional Ontologies: Common Law, Writing, and Consent

Eighteenth-century Americans had actively claimed England's "ancient constitution" despite lingering questions about its applicability to the colonies. In the 1720s, New York's attorney general, Joseph Murray,

[23] For an excellent discussion of the reception of the English common law after the American Revolution, see F. W. Hall, "The Common Law: An Account of Its Reception in the United States," *Vanderbilt Law Review* 4 (1951): 791–825.

had argued that New Yorkers' right to form an assembly derived "from the *common Custom and Laws of England*, claimed as an *Englishman's Birth Right*, and as having been such by *Immemorial custom in England*."[24] As the political controversy with Great Britain heated up in the 1760s, Americans once again invoked England's customary constitution. The right of self-taxation, New Yorkers argued, "whether inherent in the People, or sprung from any other Cause, has received the royal Sanction, is the Basis of our Colony State, [and has] become venerable by long Usage."[25] Parliament's assertions of authority over the colonies were dubbed innovations and resisted as a "new and awful Idea of the Constitution."[26] John Philip Reid has shown at great length the extent to which common law ideas were part of the revolutionary struggle.

But in the aftermath of the Revolution, there were also influential arguments that Americans should not blindly obey custom. As Bernard Bailyn has argued in the context of the debates over the ratification of the U.S. Constitution, it was Federalists who argued for a break with, and Anti-Federalists who argued for keeping faith with, tradition, the tradition being that of republicanism.[27] Anti-Federalists had objected to various aspects of the proposed constitutional text – the "Necessary and Proper" Clause, the Supremacy Clause, the reference to Congress's power "to raise and support armies," and the absence of a bill of rights – as an attempt to inject the new American political order with precisely those attributes of "mysterious," overweening power that the Revolution had been fought to check. In response, Federalists argued against facile, unthinking continuity with the republican tradition. The past should not be followed for its own sake. One had to be alive to differences in context and assert the right to make one's present. In other words, Federalists were making an argument about the legitimacy of contemporaneous consent. As James Madison put it in one of the early *Federalist* papers:

> Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world ... shut your ears against this unhallowed language. Shut your hearts against the poison which it conveys.... Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule

[24] Hulsebosch, *Constituting Empire*, pp. 63–64 (emphasis in the original).
[25] Ibid., p. 93.
[26] Ibid.
[27] Bailyn, *Ideological Origins of the American Revolution*.

the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?

... Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no Government established of which an exact model did not present itself, the People of the United States might, at this moment, have been numbered among the melancholy victims of misguided councils, must at best have been labouring under the weight of some other of those forms which have crushed the liberties of the rest of mankind.[28]

Nevertheless, as a result of vigorous debate over the constitutional text, various aspects of England's "ancient constitution" – rights to jury trials in criminal cases, prohibitions on warrantless searches and seizures, bars on double jeopardy – were incorporated and transformed into written fundamental rights in the Bill of Rights. However, the incorporation of aspects of England's "ancient constitution" into America's written constitutions hardly ended discussions of the relationship between the two. By the 1790s, however, the nature of the debate between Federalists and Anti-Federalists had shifted. The former now argued for continuity with the British past; the latter for a break with it.

The discussion must begin with the late eighteenth century's most impassioned defense of British customary constitutionalism under the pressures of revolution, Edmund Burke's *Reflections on the Revolution in France* (1790). To be sure, Burke was responding to the challenges of the French, rather than the American, Revolution (he had been a defender of Americans' rights during their constitutional struggles with Great Britain). But the subsequent American debate over Burke's text reveals a great deal about how Americans in the early 1790s divided on the question of their relationship to their constitutional past.[29]

Burke's great fear was that radicals in France and England bandied about ahistorical principles without any regard for the specific contexts within which such principles had necessarily to be instantiated and which in turn provided the only basis for judging their worth. As he put it, "Circumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing colour, and

[28] James Madison, Federalist 14, in *The Federalist* (New York: C. Scribner, 1863), pp. 88–89.

[29] Edmund Burke, *Reflections on the Revolution in France*, in *Two Classics of the French Revolution* (New York: Anchor Books, 1989). On Burke's common law sensibilities, see J. G. A. Pocock, "Burke and the Ancient Constitution: A Problem in the History of Ideas," in *Politics, Language & Time: Essays on Political Thought and History* (New York: Atheneum, 1971).

discriminating effect.... Is it because liberty in the abstract may be classed amongst the blessings of mankind, that I am seriously to felicitate a madman, who has escaped from ... his cell, on his restoration to the enjoyment of light and liberty?"[30] For Burke, circumstances gave meaning to principles, mitigating the abstraction of principles by enmeshing them in a temporal, complex, specific world of multiple overlapping claims and interests, a world in many ways close to the common law world Blackstone had described in such detail. Burke's preference for circumstance over principle is a preference for a gradual building up and solidification of government and law over time.

This building up of law over time is described explicitly in terms of the nonhistorical temporality of "insensibility" articulated by common law thinkers such as Hale. Burke argues that the English constitutional order both changes and does not change, is always identical to and different from itself. As such, England's common law order resists the historicist differentiation between old and new, "mysterious" and transparent, ancien régime and new order, that late-eighteenth-century revolutionary thought set such store by. "The spirit of our constitution," Burke claims, is "a sort of immortality through all transmigrations."[31] Indeed, where American legal thinkers of all persuasions repudiated "mystery" as a feature of European power, the proto-romantic Burke embraces "mystery," describing it positively precisely because it allows a breaking down of distinctions between past, present, and future. In its "mystery," Burke argues, the English constitutional order matches "the order of the world" and nature itself. Where thinkers like Paine and Jefferson opposed "mystery" to nature, the Burke sees nature as itself "mysterious":

> Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts; wherein, by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of unchangeable constancy, moves on through the varied tenour of perpetual decay, fall, renovation, and progression. Thus, by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete.... In this choice of inheritance we have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties.[32]

[30] Burke, *Reflections*, p. 19.
[31] Ibid., p. 34.
[32] Ibid., pp. 45–46.

Given Burke's equation in this excerpt of "our frame of polity" to "a relation in blood," it is not surprising that his preferred metaphor for England's common law constitution is, in the spirit of Coke, "inheritance." Like Coke, Burke describes the English constitutional order as an inheritance in order to embrace and claim the presence of the past.[33] He repeatedly secures the meaning of this idea of inheritance through recourse to the common law property concept of the entail, precisely the legal device through which ancestors controlled the disposition of property down the bloodline (and the landholding form that Kames, Jefferson, and others had attacked so vigorously as an artifact of feudalism). Thus, Burke states, the English "claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom."[34] The English state, for Burke, is "locked fast as in a sort of *family settlement*, grasped as in a kind of mortmain forever."[35]

The representation of government and law as a precious "entailed inheritance" – something derived from the past that is only held temporarily before it is transmitted intact to the future – involves a conception of human political agency implicit in common law modes of thought but completely different from what I have described as the lonely subject of contemporaneous consent associated with radical democratic thought. For Burke, those of the present generation are always only "temporary possessors and life-renters" of the world, a mere conduit between past and future.[36] For Burke, radical democrats in France and England – and, he might have added, America – were driven by nothing other than "a present sense of convenience" or "the bent of a present inclination."[37] This present-oriented "spirit of innovation" was self-regarding and limited: "A spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look backward to their ancestors."[38] All great questions, for Burke, necessarily implicated past, present, and future. To have them decided only by the living only for the living – the Jeffersonian idea – excluded important parties from the negotiating table. "Where the great interests of mankind are concerned through a long succession of generations," Burke declares,

[33] Ibid., p. 43.
[34] Ibid., p. 45 (emphasis in original).
[35] Ibid. (emphasis added).
[36] Ibid., p. 108.
[37] Ibid., p. 37.
[38] Ibid., p. 45.

"that succession ought to be admitted into some share in the councils which are so deeply to affect them. If justice requires this, the work itself requires the aid of more minds than one age can furnish."[39] The preceding sentence reveals Burke's debt to Coke. Coke had opposed the encroachments of England's monarch by arguing that a single individual could not possibly possess the undifferentiated collective wisdom of multiple generations embodied in an "immemorial" common law. Burke deploys the same idea against the present-minded revolutionary generation.

The *Reflections* did not pass without immediate response. Intimately involved in revolutionary activities in France, in February 1791 Paine published *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*. Intended to be a defense of the French Revolution, *Rights of Man* was also written with a keen eye on the American political scene. Paine dedicated the tract to George Washington, expressing the wish that Washington might "enjoy the happiness of seeing the new world regenerate the old."[40]

A large part of Paine's critique of Burke's notion of the English customary constitutional order's "mysterious" incorporation of past, present, and future was a restatement of the presentist, consent-based arguments of *Common Sense*. Burke had lauded the constitutional settlement of 1688 and argued for its binding power. Paine was at pains to attack arguments for continuity with 1688:

> Every age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it.... The parliament or the people of 1688, or of any other period, had no more right to dispose of the people of the present day, or to bind or control them *in any shape whatever*, than the parliament or the people of the present day have to dispose of, bind or control those who are to live an hundred or a thousand years hence [emphasis in original].[41]

However, Paine's most pointed criticisms were directed at Burke's understanding of the term "constitution." In the *Reflections*, Burke had maintained that pre-1789 France had possessed a constitution just as England currently possessed one. By "constitution," Burke had meant exactly what many other eighteenth-century common lawyers might have meant: a common law or customary structure of government that had emerged over time as a result of specific negotiations among the various

[39] Ibid., p. 185.
[40] Paine, *Rights of Man*, unpaginated dedication.
[41] Ibid., p. 4.

branches of government, a series of declaratory acts, and a repetition of past practices that knitted past, present, and future together. By contrast, Paine argued that a constitution that was the proper product of contemporaneous consent had to consist of "principles" – separated out, delineated, visible, and written – rather than of a diffuse Burkean mass of past circumstances. On such a definition, the celebrated "ancient constitution" simply did not exist:

> A constitution is not a thing in name only, but in fact. *It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none.... It is the body of elements, to which you can refer, and quote article by article, and contains the principles on which the government shall be established.*
>
> Can then Mr. Burke produce the English constitution? If he cannot, we may fairly conclude, that though it has been so much talked about, no such thing as a constitution exists, or ever did exist, and consequently the people have yet a constitution to form [emphasis added].[42]

What followed was a long criticism of unprincipled English parliamentary procedure that, in showing that Parliament was bound by nothing, demonstrated the absence of any English constitution.[43] But Paine had faith that things would change in Great Britain. The French and American Revolutions were bound to have an impact, for "when once the veil [another reference to the "mystery" of European power] begins to rend, it admits not of repair."[44] Indeed, Paine concluded triumphantly, "I do not believe that monarchy and aristocracy will continue seven years longer in any of the enlightened countries of Europe."[45]

Paine's *Rights of Man* was published in the United States by an enterprising publisher who, apparently without authorization, appended as a foreword an excerpt from Jefferson's approving note regarding the book. Jefferson had written, "I am extremely pleased to find ... that something is at length to be publicly said against the political heresies which have sprung up among us. I have no doubt that our citizens will rally a second time to the standard of Common Sense."[46] There was little doubt that Jefferson had John Adams's writings in mind. The letters of "Publicola,"

[42] Ibid., pp. 41–42.

[43] For example, Paine states, "The act by which the English parliament empowered itself to sit for seven years, shows there is no constitution in England. It might, by the same self authority, have sat any greater number of years or for life." Ibid., p. 43.

[44] Ibid., p. 97.

[45] Ibid., p. 141.

[46] Quoted in Lance Banning, *The Jeffersonian Persuasion* (Ithaca, N.Y.: Cornell University Press, 1978), p. 155.

published in the *Columbian Centinel* in June and July 1791, were a response to Paine's *Rights of Man*. Initially, John Adams was thought to be the author, but suspicion eventually – and correctly – centered on his son, John Quincy Adams.[47]

Adams sought to meet head on Paine's argument that the English had to give themselves a constitution because they did not already possess one. If Paine's definition of a constitution as one existing "in a visible form" and that one could quote "article by article" were adopted, Adams asserted, one would be hard pressed to find "in all history, a government that will come within this definition ... previous to the year 1776." But this was clearly absurd. How could one account for the long opposition tradition of eighteenth-century England that had culminated in the American Revolution? The claims made on the basis of "the principles of the English Constitution" by "the most illustrious Whig writers in England" and "the glorious Congress of 1774" rendered Paine's definition utterly illegitimate. Adams went on to make the point more clearly:

> [The British constitution] is composed of a venerable *system* of unwritten or customary laws, handed down from time immemorial, and sanctioned by the accumulated experience of the ages; and of a body of statutes enacted by an authority lawfully competent to that purpose.... I hope they [the English] will never abolish a system so excellent, merely because it cannot be produced in a visible form.... [H]owever frequently [the British constitution] may have been violated by tyrants, monarchical, aristocratical, or democratical, the people have always found it expedient to restore the original foundation, while from time to time they have been successful in improving and ornamenting the building [emphasis in original].[48]

Adams's reference to Britain's common law constitution as an improved and ornamented building resting upon an "original foundation" hearkens to Blackstone's celebrated metaphor of the common law as a constantly refurbished feudal castle. Endorsing the idea of an "immemorial" British constitution, Adams follows up with a notion of attributed and multigenerational consent: "The right of a people to legislate for succeeding generations derives all its authority from the consent of that posterity who are bound by their laws; and therefore the expressions of perpetuity used by the Parliament of 1688, contain no

[47] I draw this information from *The Writings of John Quincy Adams*, Vol. 1: *1779–1796* (Worthington Chauncey Ford, ed.) (New York: MacMillan, 1913), p. 65, n. 1.

[48] Ibid., pp. 74–75.

absurdity; and expressions of a similar nature may be found in all the Constitutions of the United States."[49]

Notwithstanding Adams's vindication of British common law constitutionalism and his rejection of the starkest forms of contemporaneous consent as a test of the legitimacy of law, prominent American legal writers continued to emphasize the creation of written constitutions in America as an important historical break vis-à-vis British practice. But there were divisions on how this break was to be related to its British background.

For some, following Paine, the writing of the U.S. Constitution was a sort of emergence from an unencumbered state of nature in a self-conscious, concrete, visible act of contemporaneous consent that stood by itself. In 1795, Connecticut's Zephaniah Swift wrote, "At the dissolution of our connexion with Great Britain, tho we could not be literally said, to be in a state of nature, yet the states which had been directly dependent on the British crown, were so in a political point of view."[50] The U.S. Constitution, Swift maintained, was "the most illustrious example of a government founded on the voluntary contract of the people, that the page of history has ever recorded."[51] In his famous 1803 "republican" edition of Blackstone's *Commentaries*, Virginia's St. George Tucker spelled out the position more systematically. Blackstone's views about the impossibility of finding "original contracts" had made sense, perhaps, in a world in which "tradition [had supplied] the place of written evidence; where every new construction [had been] in fact a new edict; and where the fountain of power [had been] immemorially transferred from the people, to the usurpers of their natural rights."[52] But this had all changed.

> [T]he American revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers. *The world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of individuals disposed to unite in the same social bonds, thus exhibiting a political phenomenon unknown to former ages* [emphasis added].

Indeed, relying on James Mackintosh's *Vindiciae Gallicae: Defense of the French Revolution* (1791) and reversing Burke's preference for circumstance over principle, Tucker argued that "all the governments that

[49] Ibid., p. 72.
[50] Swift, *A System of Laws of the State of Connecticut*, Vol. 1, p. 12.
[51] Ibid.
[52] St. George Tucker ed., *Blackstone's Commentaries*, Vol. 1, App., p. 4.

now exist in the world, except the United States of America, have been fortuitously formed. They are the produce of chance, not the work of art.... These fortuitous governments cannot be supposed to derive their existence from the free consent of the people."[53] Nothing was clearer: writing was the required evidence that law was the product of contemporaneous consent. Only writing, rather than customary or circumstantial checks and balances between branches of government, truly guaranteed the freedom of the people.[54] This was because only writing could fix what precisely had been consented to. In England, Tucker argued, the liberty of the press was grounded merely "on its not being prohibited." Such liberty could be overridden at any time. In the United States, by contrast, the liberty of the press was protected "by a visible solid foundation" in the constitutional text.[55]

Not all American lawyers shared Tucker's views of the U.S. Constitution as an "original written compact" breaking with the English tradition. Like Blackstone, American common lawyers frequently condemned state of nature and natural rights arguments by pointing out that civil and social rights – that is, rights recognized at common law – were original to man. For example, in his *Dissertations: Being the Preliminary Part of a Course of Law Lectures* (1795), a self-published text based on lectures given at Columbia College, James Kent dismissed state of nature theories precisely because they suggested that "civil society ... was a matter of expediency, rather than the course of our original destination."[56] "Expediency," in the hands of common lawyers, was a pejorative descriptor of the reckless disregard for past and future that the subject of contemporaneous consent displayed (Burke called this a "present sense of convenience"). Kent expressed concern over "the universal passion for novelty" sweeping Europe that "threatens to overturn everything which bears the stamp of time and experience."[57] Kent subscribed instead to the views of Vermont's Nathaniel Chipman, who had argued in his *Sketches of the Principles of Government* (1793) that man was fitted and intended by the great author of his being for society and government.[58] "Our civil

[53] Ibid., p. 15.
[54] Ibid., p. 14.
[55] Ibid., p. 298.
[56] James Kent, *Dissertations: Being the Preliminary Part of a Course of Law Lectures* (New York: George Forman, 1795) (1991), p. 6.
[57] Kent, "Introductory Lecture," p. 343.
[58] Nathaniel Chipman, *Sketches of the Principles of Government* (Rutland, Vt.: From the Press of J. Lyon, 1793), pp. 33–40.

and social rights," Kent maintained, "are our true natural rights."[59] When one looked for the state of nature, from which (for St. George Tucker) the American people had emerged, one found law – and, indeed, the common law – already there.

This view allowed Kent to argue that the common law had undergirded the American Revolution: "[N]o higher evidence need or can be produced of the prevailing knowledge of our rights, and the energy of the freedom of the Common Law, than the spirit which pervaded and roused every part of this Continent on the eve of the late Revolution."[60] Furthermore, Kent argued that Americans, with their written fundamental law, were in no way superior to those who had only an unwritten law. *Contra* Tucker, written law was not the way of the future. Hume had convinced him, Kent observed, "that the present civilized monarchies of Europe [i.e., Great Britain] are governments of laws and not of men, and that under them property is secure, industry encouraged, and the arts flourish."[61] Indeed, the Commons had been able "constantly to meliorate the blessings, and increase the importance of their political condition."[62] Nevertheless, for Kent, there remained "important ... abridgments of freedom" in England, namely religious establishment, hereditary orders, inadequate representation, and the unchecked power of a monarchy that exercised power through the agencies of the nobility, the church, the national debt, and the army.[63] America's "noble experiment" had been to introduce "the principle of representation and responsibility into every part of [the government]."[64]

Kent offers us one instance of how common lawyers in the postrevolutionary decades mingled the language of the common law with the more radical democratic language of America's "noble experiment," insisting upon the self-conscious break that American constitutionalism embodied *and* upon its roots in the common law. A more dramatic version of how American common law thinkers blended newer historical languages with older common law ones is afforded in the writings of U.S. Supreme Court Justice James Wilson. Wilson has been described as having exercised more influence on the structure of the U.S. Constitution than anyone other than James Madison and as having been the principal architect

[59] Kent, *Dissertations*, p. 7.
[60] Kent, "Introductory Lecture," p. 333.
[61] Kent, *Dissertations*, p. 9.
[62] Ibid., p. 14
[63] Ibid., pp. 16–17.
[64] Ibid., p. 17.

of the Pennsylvania Constitution of 1790. Wilson was one of only six men to have signed both the Declaration of Independence and the U.S. Constitution.[65]

Wilson's reflections on the relationship between the written U.S. and Pennsylvania Constitutions and the common law were advanced in a series of lectures delivered at the College of Philadelphia between 1790 and 1792.[66] In the *Lectures*, Wilson promised to investigate "the different parts of the constitution and government of the United States, [which] will lay the foundation of a very interesting parallel between them and the pride of Europe – the British constitution." Wilson's *Lectures* would be self-consciously historical. Particularly in "free countries," Wilson insisted, "[l]aw should be studied and taught as a historical science."[67]

Like Paine, Jefferson, and Tucker, Wilson celebrated America as something unprecedented, something entirely new. In other words, he fully appropriated the radical democratic vocabularies that rested upon a sense of a sharp break with the past. As Wilson put it, "In no other part of the world, and in no former period, even in this part of it, have youth ever beheld so glorious and sublime a prospect before them."[68] This rather Jeffersonian celebration of America's "glorious and sublime," endlessly open future went along with an embrace of the idea of contemporaneous – rather than multigenerational – consent. Wilson articulated it clearly: "All human laws should be founded on the consent of those who obey them."[69] This was not a common lawyerly notion of "immemorial" multigenerational consent attributed to law. Instead, what Wilson called the "revolution principle" supported the view that Americans, in the name of consent, could shrug off precedent "whenever they please":

> This revolution principle – that, the sovereign power residing in the people, they may change their constitution and government whenever they please – is not a principle of discord, rancor, or war: it is a principle of melioration, contentment, and peace.[70]

[65] See Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798* (Columbia: University of Missouri Press, 1997), p. 1. For a more recent treatment of Wilson, see John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, Mass.: Harvard University Press, 2007), Chap. 1.

[66] The inaugural lecture appears to have been something of an event. It was attended by the president and vice president of the United States, both houses of Congress, and the president and both houses of the legislature of Pennsylvania.

[67] *The Works of James Wilson*, Vol. 1, p. 3.

[68] Ibid., p. 37.

[69] Ibid., p. 179.

[70] Ibid., p. 18.

Accordingly, like Paine, Wilson argued, *contra* Blackstone and Burke, that Americans were precisely not bound by the constitutional precedent of 1688. Wilson thus comes very close to the radical democratic position.

But such a view cannot be sustained without qualification. For Wilson, America's written constitutions represent an open future, a radical break with the past in the name of the "revolution principle," but simultaneously a return to a distant past. In the manner of an "insensibly" changing common law that collapses identity and difference, America's constitutions are both very new and very old. Wilson secures the blurring of past and future through the familiar Whig narrative of Saxon simplicity and Norman encroachment upon that simplicity. English law was beset with "new and oppressive refinements" that had been "gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but the more free and intelligible, maxims of distributive justice among the Saxons."[71] America stood precisely for a shedding of Norman encroachments and a recovery of Saxon originals. As Wilson told his audience, "You will be pleased to hear, that, with regard to ... many ... subjects, we have renewed, in our governments, the principles and the practice of the ancient Saxons."[72] Wilson thus saw the written American constitutions of his day as bearing a marked resemblance to the unwritten Saxon one:

> The original frame of the British constitution, different, indeed, in many important points, from what it now is, and bearing to some of the constitutions which have lately been formed, and established, in America, a degree of resemblance, which will strike and surprise those who compare them together – this venerable frame may be considered as of Saxon architecture.[73]

Wilson saw striking parallels between written American constitutional structures and Saxon customs in the following specific contexts: the resting of the entire government on the elective principle; provisions respecting the adjournment of houses of legislature; the freedom of members of Congress from arrest during their attendance of sessions; the legislative right to make war; the election of the chief executive; the structure of the judiciary; rights to jury trials; the election of sheriffs (under the Pennsylvania Constitution of 1790); and the right to bear arms.[74]

[71] Ibid., pp. xxii–xxiii.
[72] Ibid., Vol. 2, p. 278.
[73] Ibid., Vol. 1, p. 448.
[74] Ibid., Vol. 2, pp. 18, 36, 57–58, 63, 79 *et seq.*, 238, 404. James Kent would also see the structure of the postrevolutionary government as being traceable back to Germany. As he

This invocation of the Saxon constitution was not a mere rhetorical nod in the direction of Anti-Federalists chafing under the Federalist administration. For one, drawing analogies between the U.S. and Saxon constitution was a way of arguing for continuity with the past at a time – the time of Burke's *Reflections* – when arguments about continuity had become highly politicized and were openly serving counter-revolutionary ends. More important, the ways in which Wilson used the argument about continuity could not have pleased states' rights Anti-Federalists. In his concurring opinion in *Chisholm v. Georgia* (1793), Wilson agreed with the rest of the U.S. Supreme Court that Article III of the U.S. Constitution authorized the citizen of a state to sue another state in federal court (the decision was subsequently overruled by the passage of the Eleventh Amendment). Wilson saw this provision of the U.S. Constitution as an improvement over the current English constitution and a return to the Saxon:

> In England, according to Sir William Blackstone, no suit can be brought against the King, even in civil matters. So, in that Kingdom, is the law, at this time, received. But it was not always so. Under the Saxon Government, a very different doctrine was held to be orthodox. Under that Government, as we are informed by the Mirror of Justice, a book said, by Sir Edward Coke, to have been written, in part, at least, before the conquest; under that Government it was ordained, and that the King's Court should be open to all Plaintiffs, by which, without delay, they should have remedial writs, as well against the King or against the Queen, as against any other of the people. The law continued to be the same for some centuries after the conquest.[75]

Thus we see, in at least one influential rendering of the relationship between the American constitutions and the Saxon one (advanced by no less than a sitting U.S. Supreme Court justice), that written fundamental law and unwritten common law, even as they could be distinguished in the name of a historical break grounded in ideas of contemporaneous consent, nevertheless remained intimately linked versions of one another. While America's written fundamental law, founded on the "revolution principle," repudiated the past and gestured toward a new and open future, the "revolution principle" ultimately returned America to England's "immemorial" past. This way of plotting the relationship between America's constitutions and the

put it, "It is from the antient Germans that our present ideas of a mixed and representative government are supposed to be derived." Kent, *Dissertations*, p. 12.

[75] *Chisholm v. Georgia*, 2 U.S. 419 (1793), 460.

British constitution underscores how common lawyers combined historical and nonhistorical temporalities. History represented a break with common law continuities, on the one hand, even as it ended up returning to those continuities, on the other.

Written Law and its Unwritten Supplement in the New Polities

Even as they debated the ontology of the American constitutions, American legal thinkers in the late eighteenth and early nineteenth centuries struggled over a related question: how to give meaning to written law in polities considered to be organized on the principle of contemporaneous consent. Notwithstanding the professed faith of republican legal thinkers like St. George Tucker that written texts would ensure their own meaning – and hence secure the boundaries of the contemporaneous consent that had given rise to them – it soon became clear that written texts were capable of engendering as much uncertainty as unwritten ones. If writing was taken to be the only way to ensure that official power did not exceed limits, the problem of supplementing written law with unwritten law was a grave one indeed. It threatened the integrity of contemporaneous consent and muddled the imagined shift from European "mystery" to American transparency.

In its early years, the U.S. Supreme Court hinted at an intimate relationship between the U.S. Constitution and underlying custom when it came to establishing the meaning of the constitutional text. In its 1798 decision in *Calder v. Bull*, the Court limited the scope of the *Ex Post Facto* Clause of the U.S. Constitution to the criminal context in reliance upon the writings of "[t]he celebrated and judicious Sir William Blackstone," his successor Wooddeson, the *Federalist*, and various state constitutions. Domestic custom came to play a specific role in the case. The result was to permit the state of Connecticut – the unwritten constitution of which was described as "composed of its charter, acts of assembly, and usages, and customs" – to pass a legislative resolution permitting appeals in an already adjudicated will dispute in respect of which appeals had previously been legally unavailable. Justice Paterson's concurring opinion would have specifically allowed Connecticut to override the earlier adjudication of the dispute on the ground that Connecticut's legislature possessed "customary judicial capacity," making a legislative overruling of an adjudicated dispute more like the act of an appellate court than like a true *ex post facto* law, thus entirely removing the dispute from possible coverage by the

Constitution's *Ex Post Facto* Clause. Custom – whether resting upon a reading of Blackstone or an acknowledgment of Connecticut's own practices – thus informed the Supreme Court's interpretation of the U.S. Constitution.[76]

But it was by no means clear to all that the federal government should be able to import the common law into its understanding of its own enumerated powers. In the late 1790s, the conflict between Federalists and Anti-Federalists intensified around questions of foreign policy, the suspicion of foreign radicals, and the prosecution of domestic seditious libel. The conflict over Federalist legislation in these areas and over federal common law crimes in general resolved into two related questions: whether Congress possessed common law jurisdiction under the U.S. Constitution and Bill of Rights and whether Article III of the U.S. Constitution conferred common law jurisdiction upon the federal courts. While much of the debate took place in terms of the internal meanings and interrelationships of the clauses of the constitutional text, the question of the relationship between the written text and its unwritten common law background was present in the minds of all parties. At issue, in other words, was whether written principles as products of contemporaneous consent could stand alone or not.

In the spring of 1798, Massachusetts Federalist Congressman Harrison Gray Otis, arguing on behalf of the administration's sedition bill in the House, argued that the common law informed both the U.S. Constitution and state statutes. As he put it, "The people of the individual States brought with them as a birthright into this country the common law of England, upon which all of them have founded their statute law. If it were not for this common law, many crimes which are committed in the United States would go unpunished. No State has enacted statutes for the punishment of all crimes which may be committed."[77] This foundational, interstitial presence of the common law at the level of the states, Otis argued, necessarily extended to the U.S. Constitution. The common law was the background from which the meaning of the constitutional text had to be derived. "When the people of the United States convened for the purpose of framing a federal compact, they were all habituated to this common law, to its usages, its maxims, its definitions." It was natural to conclude then that, in framing the Constitution, "they kept in view the model of the common law, and that a safe recourse may be had to it in

[76] *Calder v. Bull*, 3 U.S. 386 (1798), 391, 392–393, 395.
[77] *Annals of Congress*, House of Representatives, 5C, 2S, 2146.

all cases that would otherwise be doubtful." The very language of the constitutional text had no meaning unless one referred back to the common law:

> Again, what is intended by "cases at law and equity arising under the Constitution,' as distinguished from 'cases arising under the laws of the United States" [the language of Article III]? What other law can be contemplated but common law; what sort of equity but that legal discretion that has been exercised in England from time immemorial, and is to be learnt from the books and reports of that country? [W]hat is to be done with other terms, with trial, jury, impeachment, &c., for an explanation of all which the common law alone can furnish a standard?[78]

The U.S. Constitution, so proudly hailed by many as an original written compact emerging in an act of self-conscious reflection, was thus undergirded, Otis suggested, by an "immemorial" common law.

This argument extended as well to the Bill of Rights. Opponents of the sedition bill had made much of the express language of the First Amendment ("Congress shall make no law abridging the freedom of speech and of the press"). But this language, Otis argued, was merely "a mode of expression which we had borrowed from the only country in which it had been tolerated [i.e., Great Britain]." Its construction, therefore, "should be consonant not only to the laws of that country, but to the laws and judicial decisions of many of the States composing the Union." This freedom consisted of the right to write, publish, and speak one's opinion subject to being answerable for "false, malicious and seditious expression, whether spoken or written." In support of this interpretation of the language of the First Amendment, Otis cited not only Blackstone's *Commentaries*, but also – recognizing that invocations of English authority would make him an easy target of criticism – the laws of various states that had "adopted the definitions of the English law."[79]

Pennsylvania Republican Albert Gallatin responded to Otis's arguments on behalf of the sedition bill by focusing on the self-sufficiency and integrity of the constitutional text. It was necessary to remind the House, he argued, of agreed-upon "Constitutional principles." The language of these principles was "strict and precise; it gave not a vague power, arbitrarily, to create offences against Government." The Constitution had specified the authority of Congress to legislate against certain crimes and no others; it had similarly specified the jurisdiction of the federal courts.

[78] Ibid., 5C, 2S, 2147.
[79] Ibid., 5C, 2S, 2148.

This carefully laid down language excluded common law crimes and federal common law jurisdiction. Furthermore, it was clear. No "immemorial" common law background or supplement was necessary in order to understand the constitutional text. Gallatin contended that Otis was wrong to conclude that the use of technical terms in the constitutional text such as "writ of habeas corpus" implied that federal courts had common law jurisdiction. There was a difference between "the principles of the common law, and the jurisdiction of cases arising under it." Principles of the common law applied only where jurisdiction had been expressly conferred upon federal courts. This did not mean that federal courts had common law jurisdiction generally.[80]

A frequent Republican argument against the common law as an "immemorial" supplement to the constitutional text was that the common law had no temporal priority whatsoever vis-à-vis the U.S. Constitution. It was thus not an antecedent background at all. In the contemporary United States, St. George Tucker argued in his 1803 edition of Blackstone's *Commentaries*, the common law owed its validity not to any inheritance from ancestors, but entirely and exclusively to postrevolutionary acts of reception in the different states.[81] As such, the common law, like the U.S. Constitution, was the product of contemporaneous consent. This argument also made it possible to claim that there was no common law *tout court*. Different jurisdictions had adopted the common law differently. These variations in the common law meant that "we must ... abandon all hope of satisfaction from *any general theory*, and resort to [the colonies'] several charters, provincial establishments, legislative codes, and civil histories, for information."[82] Common law crimes were acceptable in Virginia, Tucker argued, only because the common law had

[80] Ibid., 5C, 2S, 2156–2159. Republican arguments about the limits of federal power took place, of course, within a larger context in which federal extension of power was seen as an encroachment upon the power of the states. The celebrated 1799 declaration of the Virginia General Assembly protested the idea that the common law of England should be part of federal law on precisely such grounds. Given the labor involved in drawing the now-agreed-upon line between federal and state powers, the Virginia General Assembly objected, it was distressing that elements within the federal government were seeking to enlarge federal power by incorporating "in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law." Thomas Jefferson and James Madison, *The Virginia Report of 1799–1800, Touching the Alien and Sedition Laws; Together with the Virginia Resolutions of December 21, 1798* (Union, N.J.: Lawbook Exchange, 2004), p. 217.

[81] St. George Tucker, ed., *Blackstone's Commentaries*, Vol. 1, p. 80.

[82] Ibid., App., p. 393.

been explicitly adopted there. This was not the case at the federal level because the common law had not been adopted at that level.

This relocation of the origins of the common law to the present, its transformation from something "immemorial" into a product of contemporaneous consent, made it possible for Tucker to argue that giving meaning to the U.S. Constitution in terms of the common law would represent an overriding of popular consent:

> [A]s every nation is bound to preserve itself, or, in other words, it's independence; so no interpretation whereby it's destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case where it has not, in the *most express terms*, given it's consent to such an interpretation [emphasis in original].

The very constitution and acts of legislature, Tucker declared, would be nullities "if the common law of England be paramount thereto."[83] This would have even specific consequences for the states. Among other things, the Virginian wrote, admitting federal common law jurisdiction would override the constitutional and legal recognition of slavery in the states because the English common law did not admit it.[84]

Even as the battle over federal common law jurisdiction raged, however, the U.S. Supreme Court under the chief justiceship of John Marshall actively converted common law background into federal constitutional principle. The case of *Fletcher v. Peck* (1810), the first of the Court's major Contract Clause cases, provides an example.[85] The dispute in *Fletcher* involved a statute passed by the Georgia legislature in 1795 that conveyed large tracts of land to four land companies. A year later, allegations that the companies had bribed legislators surfaced and a newly constituted legislature passed another statute rescinding the conveyances. *Fletcher v. Peck* was set up as a test case in which subsequent purchasers of the lands brought suit to determine the validity of their titles.

At issue was the applicability of the Contract Clause of the U.S. Constitution that prevented states from passing laws "impairing the Obligation of Contracts."[86] But it was not at all obvious that the Contract Clause should govern. Attempting to trace the rather sketchy background of the Contract Clause, G. Edward White has concluded that, "first, it

[83] Ibid., p. 423.
[84] Ibid., p. 425.
[85] 6 Cranch. 87 (1810).
[86] U.S. Const., Art I, Sec. 10.

was designed as one of several restrictions on the power of states to give relief to debtors in periods when the supply of specie was reduced; and, second, that its scope was limited to private contracts."[87] It was not clear, in other words, that the Contracts Clause was ever intended to apply to legislative grants to groups of individuals or whether public contracts (those between the state and individuals) were to be treated as identical, for purposes of constitutional law, to private contracts (those between individuals). For Marshall, however, the governing analogy was contracts between private parties, that is, contracts governed by the common law. As he put it, "Their [referring to conveyees of the original grantees] case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud."[88] It remained to show that a "grant" was a "contract." Blackstone provided the necessary authority:

> A contract is a compact between two or more parties, and is either executory [to be performed] or executed [performed].... *A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant.* The contract between Georgia and the purchasers was executed by the grant.... A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party, is, therefore, always estopped by his own grant [emphasis added].[89]

The general language of the Contract Clause, Marshall continued, was applicable to "contracts of every description," private *and* public. Georgia could not, in other words, rescind the sales of the lands with respect to subsequent purchasers of those lands. Such was the teaching of "those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts."[90] What had once been a set of rules at common law and equity applicable to contracts between private parties had now defined the scope and meaning of the Contract Clause. The common law was thus absorbed into the written text.

[87] G. Edward White, *The Marshall Court and Cultural Change, 1815–1835* (Oxford: Oxford University Press, 1988), p. 601.
[88] 6 Cranch. 87, p. 135.
[89] 6 Cranch. 87, pp. 136–137.
[90] 6 Cranch. 87, p. 134.

This does not mean, however, that the federal courts were able to expand their jurisdiction unchecked in every area. In part, this had to do with the shift in political tide. After the "revolution of 1800," the Sedition Act expired on its own terms. Thereafter, the Federalist position on federal common law crimes began to crumble. In *United States v. Worrall* (1798), Justice Chase, ironically the most vigorous enforcer of the Sedition Act, had declared, "In my opinion, the United States as a Federal government, have no common law; and consequently no indictment can be maintained in their Courts, for offences merely at common law."[91] This position was confirmed in *United States v. Hudson and Goodwin* (1812), when the U.S. Supreme Court declared that it had been "long settled in public opinion" that a person could not be convicted of a federal crime without a statute.[92] In 1813, U.S. Supreme Court Justice William Johnson, on circuit, essentially adopted St. George Tucker's view of the history of the common law in the United States in a case raising the question of whether a person could be punished in admiralty for murder on the high seas. Even though exclusive federal jurisdiction over admiralty cases was guaranteed under the U.S. Constitution, Justice Johnson held that there could be no punishment in the absence of statute in part because there was no single common law from which meaning could be derived. The common law existed only insofar as it had been adopted in the different states.[93]

Even as the Sedition Act expired on its own terms and the federal courts began to capitulate on the question of federal common law crimes, however, during the first decade of the nineteenth century, questions relating to the meaning of written legal texts – and hence to the boundaries of contemporaneous consent – persisted.[94] In states such as Pennsylvania, the fallout of the Sedition Act controversy resulted in attacks on the Federalist-dominated judiciary and then on the common law itself. The demands of Pennsylvania radicals make sense when understood precisely as a repudiation of the common law as a "mysterious" system derived from the past that was seen as occluding contemporaneous consent and

[91] 28 F. Cas. 774 (1798), p. 779.

[92] 7 Cranch 32 (1812). This view prevailed even though several members of the Supreme Court were disposed to reconsider the case four years later. At that time, however, the United States attorney general refused to argue that the *Hudson* case should be overturned, and as a result, the Supreme Court did not reconsider its decision. *United States v. Coolidge*, 1 Wheat. 415 (1816).

[93] *Trial of William Butler for Piracy* (1813?), quoted in Horwitz, *Transformation of American Law, 1780–1860*, p. 15, nn. 39, 48.

[94] After the "revolution" of 1800, the Sedition Act expired on its own terms.

a call for a "simple" system created in the present seen as actualizing it. The radicals demanded, *inter alia*, the creation of a written code of laws free of Latin phrases and technical terms, which they believed would be more consistent with "the plain and simple nature of a Republican form of government"; the simplification of court procedure and the establishment of a system of arbitration to reduce the "sophistication and pretensions" of the legal establishment; and a judiciary more responsive to the wishes of the people.[95]

During the election of 1805, the radicals pressed their case against the common law. They enlisted in their cause none other than Paine, recently returned to America, who now distinguished between what he called "lawyers' law" and "legislative law." The former was "a mass of opinions and decisions, many of them contradictory to each other, which courts and lawyers have instituted themselves, and is chiefly made up of law reports of cases taken from English law books"; the latter was "the law of the land, enacted by our own legislators, chosen by the people for that purpose."[96] The pamphlet *Sampson Against the Philistines* (1805) made much the same point, denouncing lawyers for having turned "simple justice" into a "professional mystery, which has contributed to the oppression and plunder, rather than the happiness and security of the people."[97] In 1808, Pennsylvania Supreme Court Justice Hugh Henry Brackenridge, who had himself not escaped the ire of the radicals when they had attempted to impeach sitting Supreme Court justices, also called for the replacement of the common law by a code.[98] The faith was that written texts produced, to borrow Paine's phrase, "by our own legislators" would secure contemporaneous consent on the strength of language's intrinsic clarity.

Moderate Pennsylvania Republicans responded to radicals' efforts to do away with the common law by insisting, as Federalists had insisted in the Sedition Act debates, that the common law was interstitial and foundational. "Legislative law" – that putatively transparent product of contemporaneous consent that Paine had opposed to common law – was grievously incomplete, a claim with considerable plausibility in the early nineteenth century. It could never deal with "the varying exigencies of

[95] See Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (Oxford: Oxford University Press, 1971), p. 161.

[96] *The Complete Writings of Thomas Paine* (2 vols.) (Philip S. Foner, ed.) (Binghamton, N.Y.: Citadel Press, 1945), Vol. 2, p. 1004; quoted in Ellis, *Jeffersonian Crisis*, p. 176.

[97] *Sampson against the Philistines*; quoted in Ellis, *Jeffersonian Crisis*, p. 177.

[98] Hugh Henry Brackenridge, *Considerations on the Jurisprudence of the State of Pennsylvania* (Philadelphia, 1808), p. 8.

social life" or "the complicated interests of an enterprising nation." The Society of Constitutional Republicans put forth a lengthy address that was chiefly the work of the moderate Republican Alexander Dallas and that reads like a chiding of radicals:

> It is the common law, generally speaking, not an act of Assembly, that assures the title and the possession of your farms and your houses, and protects your persons, your liberty, your reputation from violence; that defines and punishes offences; that regulates the trial by jury; and (in a word, comprehending all its attributes) that gives efficacy to the fundamental principles of the constitution. If such are the nature and the uses of the common law, is it politic, or would it be practicable, to abandon it? Simply because it originated in Europe cannot afford a better reason to abandon it than to renounce the English and the German languages, or to abolish the institutions of property and marriage, of education and religion, since they, too, were derived from the more ancient civilized nations of the world.[99]

Federalist legal thinkers in Pennsylvania – who were, of course, allied with moderate Republicans on the question of the common law – went even further, attacking the core idea that decontextualized written language could ensure the stability, fixity, and integrity of its own meaning. In other words, they argued that it was always going to be impossible to determine exactly what had been consented to. In 1809, in a pamphlet addressing the proposed abolition of the common law, Joseph Hopkinson sought to reverse the valences of written principles and unwritten supplements, certainty and uncertainty, that were prevalent in radical Republican discourses. One recognizes in Hopkinson's arguments the stamp of common lawyerly derision of legislative efforts going back to Coke and traceable through Kames and Blackstone. Statutes could be "the arbitrary dictates of a single man, or any body of men, who promulge only their own individual sense of right and justice." Furthermore, "the very men who make the law do not all mean the same thing by it." Words themselves could not be trusted: "By turning to a dictionary it will be seen that scarcely a word in our language has a single, fixed, determinate meaning; and, of course,

[99] *Life and Writings of Alexander James Dallas* (George M. Dallas, ed.) (Philadelphia, 1871), p. 222. In 1801, Massachusetts Attorney General James Sullivan made a similar point. He acknowledged that "[t]here have been strong prejudices against what is called the Common Law, from an idea, that it is a system imposed upon us, by a power now foreign to our national existence." James Sullivan, *The History of Land Titles in Massachusetts* (Boston: I. Thomas & E. T. Andrews, 1801), p. 13. But such nativism was misplaced. "We should treat a people with contempt," Sullivan continued," who should be barbarous enough to reject an alphabet, or scale of music, because it had been in use in other countries" (p. 15).

that you will change the sense of a sentence, as you shall adopt one or the other of the various interpretations of the words used in it.... That language is by no means a certain and unquestionable method of conveying and fixing ideas, is proved in every branch of human knowledge."[100] Hopkinson offered example upon example of disputes over the meaning of poetic language, religious texts, contracts, statutes, and constitutions to show that writing in itself meant little when it came to fixing meaning. A code replacing the common law would therefore ensure nothing.

Certainty of meaning emerged, Hopkinson argued, not from written words standing alone, but from interpretations extending over long periods of time, by dint of repetition. It was only the method of the common law, in final analysis, that could confer stability of meaning and hence secure the boundaries of consent, which would necessarily then be multigenerational. The constructions of the common law, Hopkinson argued, "ha[d] been fixed by time, wisdom and experience."[101] Hopkinson related an anecdote about Coke to make the point that the common law was more certain than statutes:

> A statesman told lord Coke, that he meant to consult him on a point of law: If it be common law, said Coke, I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed if I answered you immediately.

In fact, statutes were unsettled "until a course of judicial decision, which in fact is common law, gives them certainty and character."[102] Thus, the diffuse nonhistorical temporality of common law "immemoriality" was required to give body and meaning to the contemporaneous consent instantiated in statutes. In 1802, Federalist Congressman James A. Bayard would make much the same argument, this time in the context of the need to limit judicial discretion: "[S]tripped of the common law, there would be neither Constitution nor Government.... And were we to go into our courts of justice with the mere statutes of the United States, not a step could be taken.... If the common law does not exist in most cases, there is no law but the will of the judge."[103]

[100] Joseph Hopkinson, *Considerations on the Abolition of the Common Law in the United States* (Philadelphia: William P. Farrand, 1809), pp. 23, 31, 25–26.

[101] Ibid., p. 27.

[102] Ibid., p 28.

[103] *Annals of Congress*, 7th Cong., 1st Sess., House, pp. 613–614; quoted in Linda K. Kerber, *Federalists in Dissent: Imagery and Ideology in Jeffersonian America* (Ithaca, N.Y.: Cornell University Press, 1970), p. 154.

Notwithstanding the debates in Pennsylvania over the status of the common law, indictments for common law crimes continued at the state level. The common law was thus a supplement to governments considered to be founded upon written documents grounded in contemporaneous consent. Common law prosecutions of labor combinations began in the first decade of the nineteenth century.[104] In 1806, the presiding judge in the Philadelphia boot and shoemakers' case, Recorder Moses Levy, fended off challenges to the common law as a legitimate basis for prosecuting labor combinations in a republican polity of written laws by praising the common law for its "critical precision" and "consistency." Invoking the temporality of "immemoriality" without naming it, Levy argued that the common law was the result of the "wisdom of ages" and, as such, superior to the "temporary emanations" of legislatures.[105] Counsel for laborers repeatedly argued that common law crimes thwarted the principles of contemporaneous consent on which republican constitutions had been erected, surreptitiously importing a bit of the "mysterious" past in to govern the present. The Irish émigré lawyer William Sampson, in the New York prosecution of journeymen cordwainers, argued:

> In vain [has our constitution] consigned to oblivion so many remnants of antiquated folly [the reference is to English statutes], if ever and again some unsubstantial spectre of the common law were to rise from the grave in all its grotesque and uncouth deformity, to trouble our councils and perplex our judgments. Then should we have, for endless ages, the strange phantoms of *Picts* and *Scots*, of *Danes* and *Saxons*, of *Jutes* and *Angles*, of *Monks* and *Druids*, hovering over us like ... ghosts.[106]

But, like Sampson's arguments in the New York prosecution, such arguments could be unavailing.

[104] Labor combinations were the subject of indictment and prosecution in at least six American states – Pennsylvania, Maryland, New York, Louisiana, Massachusetts, and Virginia – through the first half of the nineteenth century. Legal and labor historians have written a great deal about these highly politicized "conspiracy cases." The authoritative account in this regard is Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), esp. Chap. 5.

[105] Thomas Lloyd, *The Trial of the Boot and Shoemakers of Philadelphia, on an Indictment for a Combination to Raise their Wages* (Philadelphia: B. Graves, 1806), p. 146.

[106] William Sampson, *Trial of the Journeymen Cordwainers of the City of New-York; for a Conspiracy to Raise their Wages; with the Arguments of Counsel at Full Length, on a Motion to Quash the Indictment, the Verdict of the Jury, and the Sentence of the Court* (New York: I. Riley, 1810), p. 31.

Perhaps the most intellectually rigorous attack on the concept of common law crimes at the state level was John Milton Goodenow's *Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of English Common Law on the Subject of Crimes and Punishments* (1819).[107] The personal politics of the book had to do with a dispute of long standing between Goodenow and Judge Benjamin Tappan, which eventually ended in a slander suit.[108] But the immediate intellectual impetus was Tappan's 1817 decision in *Ohio v. Lafferty*, which held that English common law crimes could be crimes in Ohio in the absence of specific Ohio legislation.[109]

Whatever one might say of eternal laws, all human laws, Goodenow argued, were necessarily "mere matters of social policy" and, as such, were products of their own time.[110] Fitting law and reason to "the texture of the time in which they are made" took place for Goodenow in terms of a historical progression thematized as a movement toward ever less "mysterious" power.[111] The idea of common law crimes was flatly inconsistent with – that is, anachronistic in terms of – the idea of demystified and transparent American power. It was only in monarchical or aristocratic governments that the principles of the criminal law were the "secrets of the empire."[112] Goodenow specifically extended the attack beyond common law crimes to custom in general. In Goodenow's rendering, in America, where all power was expressed in a public and written form, custom – associated as it was with antiquity, unknown "immemorial" origins, and imperceptible "insensible" change – could not be a source of law. It is worth setting forth his reasoning at some length:

[W]here a government, like the English government, is founded in custom and usage, and advances in course of time to a regular mode of legislation; but is

[107] John Milton Goodenow, *Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of English Common Law on the Subject of Crimes and Punishments* (Steubenville, Ohio: James Wilson, 1819) (1821) (Buffalo: William S. Hein & Co., 1975).

[108] Goodenow v. Tappan, 1 *Ohio Reports* 60 (1823). John Milton Goodenow sued Judge Benjamin Tappan for slander for stating that Goodenow was, among other things, an escaped convict and of bad moral character. A jury found in favor of Goodenow and awarded him $600 in damages. On appeal, Tappan argued that the statements were not actionable because they did not directly impugn Goodenow's professional character. The Ohio Supreme Court, in a split decision, refused to grant Tappan a full new trial.

[109] Ohio v. Lafferty, *Tappan* 81 (1817).

[110] Goodenow, *Historical Sketches*, p. 6.

[111] Ibid., pp. 12–13.

[112] Ibid., p. 22.

still guided by its ancient customs, usages and traditions; its *statutory laws* have an uncertain and oscillating standard in the *customary law.... But in a government like ours, whose foundation is in written and positive law; untrammeled by custom or tradition; every legislative act, every expression of the people's will, by their agents, has a standard at hand, that never changes; by which the integrity and genuineness of the act may be tested. In such a government, what is not written and published, IS NOT LAW* [first two emphases in original; third emphasis added].[113]

As it turned out, according to Goodenow, it was not just the case that custom could not be a source of law in America. There *was* no custom in America to begin with. America was empty, as it were, of custom. As Goodenow put it, "We have no native common law, no municipal customs, such as is properly so called in England."[114]

An Agent of History? The Common Law and Historical Change

Even as American legal thinkers debated the ontology of their written constitutions and whether the common law could constitute a supplement to written law, they were confronted with the allied question of constructing a relationship to the vast legacy of what had now become a newly deconstitutionalized body of English common law, public and private. All American legal thinkers, regardless of political stripe, agreed with Pennsylvania Supreme Court Judge Hugh Henry Brackenridge that, "[w]ith regard to the common law ... so much of it only, could have been carried by the emigrants to this state, as was applicable to their situation and therefore so much of it only in force."[115] Blackstone himself had earlier made a similar point about the inapplicability of much of the common law to the North American colonies, arguing that "[t]he artificial refinements and distinctions incident to the property of a great and commercial people" were neither necessary nor convenient for "the infant colony."[116] But that did not solve the question of the kind of relationship one established vis-à-vis the common law past.

Republican legal thinkers argued, as did St. George Tucker, that Blackstone's *Commentaries*, indispensable as they were, were a guide

[113] Ibid., p. 40–41.
[114] Ibid., p. 49.
[115] Hugh Henry Brackenridge, *Law Miscellanies: Containing an Introduction to the Study of Law* (Philadelphia: P. Byrne, 1814), p. 37.
[116] Blackstone, *Commentaries*, Vol. 1, pp. 102, 103; cited in Brackenridge, *Law Miscellanies*, p. 47.

only to what the "*law had been.*"[117] "The principles of our government," Tucker maintained flatly, are inconsistent with the "principles contained in the *Commentaries.*"[118] The former were the product of self-conscious contemporaneous consent; the latter were not. The English common law was the product of unreflective "immemorial usage"; American law was the "principled" result of the "deliberate voice of the legislature."[119] The most comprehensive changes between the common law of England and the new legal regime in Virginia, Tucker argued, were attributable to "the suggestions of political experiment."[120]

Tucker's attempt to organize the historical difference between English and Virginian law in terms of a republican language of consent, principles, and experiments translated into a willingness to dub – one might even call it a delight in dubbing – multiple aspects of the English common law obsolete. To be sure, various rights, privileges, prerogatives, courts, writs, and remedies mentioned by Blackstone were simply not to be found, and had likely never existed, in Virginia.[121] Neither, for that matter, did many of them exist in eighteenth-century Britain. But where Blackstone could often speak of the pastness of the past as simply that, a falling away or a coming into view, for Tucker it was important to account for the pastness of the past in terms of principle, to kill the past definitively, to pronounce its demise. To take the example of writs of attaint, where Blackstone simply highlights their gradual fading from use, Tucker offers a terser footnote: "The writ of attaint

[117] St. George Tucker, ed., *Blackstone's Commentaries*, Vol. 1, Preface, p. v (emphasis in original).

[118] Ibid., pp. iv–v.

[119] Ibid., Vol. 3, App., p. 19.

[120] Ibid., Vol. 1, Preface, p. x.

[121] To offer just a few examples, where Blackstone had mentioned different kinds of rights of commons, Tucker writes that commons of estover were the only type of rights of common known in Virginia. Ibid., Vol. 3, p. 35, n 4. A variety of English common law remedies also did not exist in Virginia, as was the case with a variety of English courts. Ibid., Vol. 4, p. 15. Tucker lists various remedies, such as seizing heriots for distress; ibid., p. 7 (referring to the absence of court-leets and courts baron in Virginia); p. 33 (referring to the absence of courts of *piepoudre* in Virginia); p. 67 (referring to the courts of the king's high commission); p. 68 (the court of chivalry). The proprietors of the Northern-Neck in Virginia had been authorized to set up courts-baron, i.e., manorial courts, by their charters within the limits of their proprietary. However, Tucker remarked that "none of them availed themselves of their authority." Ibid., p. 34, n 2. They had also been authorized to set up a court-leet. Tucker was not sure whether such courts had ever been established but presumed that "the franchise ... was annihilated at the revolution." Ibid., Vol. 5, p. 274, n. 11.

seems *perfectly obsolete* in Virginia."[122] Some English courts that were unimportant even in the England of Blackstone's day such as courts of chivalry that Blackstone nevertheless chooses to detail – perhaps in order to edify his gentlemen readers – were dismissed curtly by Tucker as a "remnant of feudal pomp" that had never existed in Virginia.[123] One gets the sense that Tucker is trying to render the legal landscape of Virginia a blank slate, what Jefferson had described as "an album on which we were free to write what we pleased."

However, at the same time, in keeping with the way in which Paine's and Jefferson's emphasis on an open-ended contemporaneous consent ends up leading the political subject back to a given, constraining conception of nature or society, Tucker suggests that contemporaneous consent results in a recognition of the "naturalness" of various legal principles that are themselves the product of the common law. As discussed in the preceding chapter, Blackstone's acute sense of the specificity and detail of England's legal past had led him to see rights as civil rather than as natural. By contrast, Tucker's adherence to principle allowed him to insist upon those very same rights' naturalness. In his comment on Blackstone's famous observation that the right to transmit property at death was merely custom that had gradually (and, for Blackstone, falsely) acquired the cast of the natural, Tucker registers vehement disagreement. "The notion of property is universal," Tucker insists, "and ... suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements." Children's claims to their parents' property did not originate "solely in political establishments"; "*Haeredas successoresque sui cuique liberi* [Every man's children are his heirs and successors] seems not to have been confined to the woods of Germany, but to be one of the first laws in the code of nature."[124] What Blackstone had seen as a common law right had now become a natural one. Of course, what counted as natural remained a subject of disagreement. Where Tucker saw entails as unnatural, Massachusetts Attorney General James Sullivan attributed to the "self-love, incident to the human race," the fact that the people of Massachusetts had preserved the entail.[125]

Thus we see how republican thinkers such as Tucker plotted a relationship to the common law past. In polities where law was supposed

[122] Ibid., Vol. 4, pp. 404–405, n. 1 (emphasis added).
[123] Ibid., p. 105, n. 10.
[124] Ibid., Vol. 3, pp. 10–11n.
[125] Sullivan, *History of Land Titles in Massachusetts*, p. 75.

to be the product of contemporaneous consent, much of the common law was simply obsolete, inconsistent with America's political "experiment." Where parts of the common law remained relevant, they were re-presented as natural, prepolitical. However, other American legal thinkers – often Federalist – advanced very different representations of the common law past and of the place of the common law in the new polities of America.

In the writings of American common law thinkers, we can discern ways of joining the consent-centered historical sensibilities of the day to older common law temporalities. Newer notions of contemporaneous consent mingle promiscuously with older notions of multigenerational and attributed consent. In thus mingling different temporalities, common law thinkers were able to argue that the common law was the most consensual and experimental of laws, which made it especially fitted to the new, consensual, experimental polities of America. It is also crucial to emphasize the possibilities presented by the internal instability of the subject of contemporaneous consent in the writings of Paine, Jefferson, and Tucker: contemporaneous consent as oscillating between the possibility of radical reimagining, one the one hand, and a return to nature plotted as a shift from the feudal to the commercial, on the other. If contemporaneous consent was nothing other than a return to an already imagined nature, if consent-centered democracy was constrained by nature (or history plotted as a shift from "mystery" to transparency that was really nothing other than an uncovering of nature), the common law could be represented as itself embodying a certain conception of nature and as realizing the logic of history. Tucker himself had suggested that the right to transmit property at death, long recognized by common lawyers, was a natural right. If the common law could do the work of developing natural rights and of accomplishing the shift from feudal to commercial, could it not thereby win a place for itself in the new polities constrained by a metaphysics of history as an uncovering of nature?

Perhaps the most theoretically sustained of the arguments mingling different ideas of consent were contained in U.S. Supreme Court Justice James Wilson's reflections on the common law. In the manner of Scottish thinkers and of Paine, Wilson imagined society to be the natural ground out of which consent could be offered. Society predated civil government and constituted every human subject capable of giving consent. Wilson wrote, "Society is the powerful magnet, which, by its unceasing though silent operation, attracts and influences our dispositions, our desires, our

passions, and our enjoyments."[126] This constitutive power of society, insofar as it acted on all its members, underscored the naturalness of democratic consent and made the definitive case for the concentration of power in the people. At the same time, however, it set limits on popular consent.[127]

But if a truly legitimate law could emerge only from the consent of members of a society, what form was that law to take? For Wilson, even as he insists on consent as the only legitimate ground of law, it is the common law – rather than St. George Tucker's "deliberate voice of the legislature" – that constitutes the best evidence of consent and the best instantiation of the social. Wilson argues that insofar as the common law is evidence of consent "practically given," emerging from the silent operations of a naturalized society, it is even more legitimate than laws authorized by express written contemporaneous consent.

> [T]he mode for the promulgation of human laws by custom seems the most significant, and the most effectual. It involves in it internal evidence, of the strongest kind, that the law has been introduced by common *consent*; and that this consent rests upon the most solid basis – experience as well as opinion. This mode of promulgation points to the strongest characteristic of liberty, as well as of law. For a consent thus practically given, must have been given in the freest and most unbiased manner.... If it were asked – and it would be no improper question –who of all the makers and teachers of law have formed and drawn after them the most, the best, and the most willing disciples; it might not be untruly answered – custom.[128]

At first blush, this might seem like nothing other than a traditional common lawyerly argument about the common law's being the most

[126] *The Works of James Wilson*, Vol. 1, p. 253.

[127] There was a broader, and more attractive, universalism associated with Wilson's focus on "society." The naturalness of the "social" – combined with the idea that the ideal social arrangement implied harmony between individual and collective interests – led Wilson to celebrate Lord Mansfield's incorporation of the *lex mercatoria* into English law. As he puts it: "One branch of that law, which since the extension of commerce, and the frequent and liberal intercourse between different nations, has become of peculiar importance, is called the law of merchants. This system of law has been admitted to decide controversies concerning bills of exchange, policies of insurance, and other mercantile transactions, both where citizens of different states, and where citizens of the same state only, have been interested in the event. This system has, of late years, been greatly elucidated, and reduced to rational and solid principles, by a series of adjudications, for which the commercial world is much indebted to a celebrated judge [Lord Mansfield], long famed for his comprehensive talents and luminous learning in general jurisprudence." Ibid., p. 335. This universalism led Wilson to argue that the law of nations should be the rule of decision in the federal courts, a decision anticipating Justice Story's decision in *Swift v. Tyson* decades later. Ibid., pp. 341–342.

[128] Ibid., pp. p. 57–58.

consensual of all laws. However, Wilson mingles newer and older languages. It is noteworthy that, for Wilson, the consent embodied by the common law reflects "experience *as well as* opinion." Earlier generations of English common law thinkers had focused only on custom's ability to embody experience, the accumulated wisdom of past ages. In Wilson's postrevolutionary republican America, the common law also embodies "opinion," an important basis of the new type of government. But Wilson goes further still in his appropriation of the languages of the lonely subject of contemporaneous consent. Where thinkers like St. George Tucker were wont to refer to American polities in the language of "experiment," Wilson argues that the common law is also the product of "experiment":

> The prospect of convenience invites to the first experiment: a first experiment, successful, encourages to make a second. The successful experiments of one man or one body of men induce another man or another body of men to venture upon similar trials. The instances are multiplied and extended, till, at length, the custom becomes universal and established. Can a law be made in a manner more eligible?[129]

However, even as he appropriates these new republican languages of "opinion" and "experiment," *contra* Paine and Jefferson, Wilson insists that the consent embodied in the common law is precisely *not* limited to the human subject's own present or lifetime. Even though the common law is a law of "opinion," "experiment," and "voluntary adoption" – all markers of prevailing notions of contemporaneous consent – the common law for Wilson remains "immemorial," inherited, derived from ancestors: "[O]ur predecessors and ancestors have collected, arranged, and formed a system of experimental law.... This system has stood the test of numerous ages: to every age it has disclosed new beauties and new truths."[130] Indeed, in the manner of a long line of common lawyers from Sir John Davies on, Wilson will argue that the common law affords the best proof of consent precisely because of its ambiguous, nonspecifiable temporality. Because we can never know the "when" of a custom's

[129] Ibid., pp. 183–184. Hugh Henry Brackenridge would go so far as to argue that custom was the equivalent of a legislative act. "When we talk of custom we must remount to some convention; or gathering of the people to originate the rule. Even supposing but two persons in a community, there must be such assent, and so of more; so that I can see nothing in a distinction to be taken between the origin of an unwritten custom and a written law. They are both equally the act of a legislature." Brackenridge, *Law Miscellanies*, p. 84.

[130] *The Works of James Wilson*, Vol. 1, p. 184.

emergence, it becomes possible to dispense with concrete proof of consent and to attribute consent to all actually existing customs:

> Now custom is, *of itself*, intrinsick evidence of consent. How was a custom introduced? By voluntary adoption. How did it become general? By the instances of voluntary adoption being increased. How did it become lasting? By voluntary and satisfactory experience, which ratified and confirmed what voluntary adoption had introduced. In the introduction, in the extension, in the continuance of customary law, we find the operations of consent universally predominant [emphasis added].[131]

We thus see in Wilson's writings how late-eighteenth-century American common lawyers could bring the consent-centered historical sensibilities of their time to bear upon the law and, mingling newer and older notions of consent, argue that that the common law embodied those very same consent-centered historical sensibilities. If, for a thinker like Paine, history was a move from a nonconsensual political to a consensual social, Wilson would argue that the common law was already the best reflection of that consensual social.

All eighteenth-century American common law thinkers shared Paine's, Jefferson's, and Tucker's sense that the feudal had to be left behind. But many did not agree with Tucker that the common law was therefore to be transformed by the legislature into a field for the operation of principles. Although not all late-eighteenth-century American common law thinkers offered carefully reasoned theoretical elaborations of the relationship between common law, consent, and history in the manner of Wilson, certain common law thinkers, in the vein of Kames or Blackstone, wrote as if the common law in America had already accomplished, all by itself, the crucial movement of history from the feudal to the commercial.

Nobody expressed a sense of the common law's role as an agent of history more clearly than Connecticut's Zephaniah Swift. Because Connecticut had no formal common law reception statute, Swift asserted, "The common law of England is obligatory in this state by immemorial usage, and consent, so far as it corresponds with our circumstances and situation."[132] Connecticut courts, furthermore, were the shapers of the boundaries of that "immemorial usage and consent."[133]

According to Swift, the English common law was a law of constant improvement:

[131] Ibid., pp. 88–89.
[132] Swift, *A System of the Laws of the State of Connecticut*, Vol. 1, p. 1.
[133] Ibid., p. 1

> [The common law] establishes one permanent uniform, universal directory, for the conduct of the whole community, and opens the door for a constant progressive improvement in the laws, in proportion to the civilization of their manners, and the encrease of their wealth. [W]hile the legislature were passing acts for general regulations, the courts were polishing, improving, and perfecting a system of conduct, for the minuter subordinate transactions of life, which by the collective wisdom and experience of successive ages, have advanced to the highest pitch of clearness, certainty, and precision.[134]

Swift's representation of the activity of common law courts – that of advancing "the collective wisdom and experience of successive ages" to "the highest pitch of clearness, certainty, and precision" – is of course an endorsement of the "insensible" common law method, one through which improvements are made only by building slowly upon the achievements of the past. These improvements took the form, Swift argues, of nudging society along gradually from the feudal to the commercial. He traces the origin of actions of trespass on the case in England as follows. Initially, all actions grounded in torts had been trespass, replevin, detinue, and deceit. At this stage, there had been little personal property. "[T]he people, being in an agricultural state of society, paid their chief attention to lands." However, "[w]hen [the people] arrived to the commercial state, and the principles of jurisprudence were better understood, as well as personal property largely encreased, it was apparent that new remedies must be devised." Swift then proceeded to trace the slow emergence of trespass on the case.[135] In general, English jurisprudence was praised for the following:

> They have from time to time, devised remedies as the exigencies of mankind required, in a gradual progress from the simplest stages of society, to the complicated interests of commerce, luxury, and the highest refinement of manners. The system of jurisprudence has become so perfect, that it can hardly be expected a case should arise that does not come within the description of specific remedies, well known and established. Yet the same principle ... may still be called into exercise whenever there shall be an occasion.[136]

To be sure, Swift still deemed it important to mark the differences between English rules and American ones. These were all to the advantages of Connecticut, and specifically to the credit of its common lawyers. Connecticut courts had introduced "a vast many improvements ... without any legislative act."[137] For example, Swift stated that there was "much

[134] Ibid., pp. 40–41.
[135] Ibid., Vol. 2, pp. 20.
[136] Ibid., p. 22.
[137] Ibid., Vol. 1, p. 44.

abstruse learning" in England relating to rights of entry on lands that was irrelevant in Connecticut;[138] Connecticut courts had "exploded" the distinction between written and unwritten contracts;[139] the Connecticut writ and process was superior to the "very lengthy and circuitous mode of process" in England[140]; another aspect of Connecticut's process, superior to the English requirement that all writs be returned to the central courts at Westminster Hall, was described as "the offspring of gradual improvement, and cautious innovation";[141] Connecticut courts had replaced all the myriad actions for the recovery of lands in England with just one, the action of disseisin, which was "striking evidence of the propensity of our progenitors, to improve upon and simplify the laws of their native country." In one stroke, they had replaced "an artificial system of law" with a structure "wonderful for its simplicity and beauty."[142]

Like Wilson, then, common law thinkers such as Swift reveal themselves to be acutely aware of the movement of history. However, even as they understand that law has to be subjected to critique in the name of history, they argue that the common law is the best way of effecting the movement of history. If history was a move from a nonconsensual European "mystery" to a consensual American transparency, from the feudal to the commercial, nobody was better equipped to engineer this move than the common law courts. In making such arguments, of course, late-eighteenth- and early-nineteenth-century common lawyers were doing no more than their British counterparts had argued decades earlier.

Conclusion: The Blank Canvas of the Common Law

As stated throughout this chapter, for republican legal thinkers, the nonhistorical common law temporalities of "immemoriality" and "insensibility" were hallmarks of "mysterious" European power. More important, many agreed with St. George Tucker's argument that, under the technical English legal concept of "immemoriality," there could be neither custom nor prescription in America.[143] Only the legislature, presumably, could create law. This was consistent with Tucker's view that the English

[138] Ibid., Vol. 2, p. 3.
[139] Ibid., p. 6.
[140] Ibid., p. 193.
[141] Ibid., p. 194.
[142] Ibid., p. 68.
[143] St. George Tucker ed., *Blackstone's Commentaries*, Vol. 3, p. 36, n. 7.

common law existed in various American jurisdictions only by virtue of legislative acts of reception.

But it might be interesting to ask how common law thinkers themselves imagined the possibilities of the common law's future in America. We have already seen that American common law thinkers imagined the common law to be a method of effecting the movement of history even as they subjected the English common law to history. At the same time, they were able to argue that the common law was, as the most consensual of all laws, perfectly consistent with America's experimental, consent-based polities. But did this emphasis on the consensual nature of the common law mean that American common law thinkers were receptive to the proliferation of local customs in America?

Occasionally, American legal thinkers, even those opposed to common law sensibilities, recognized that peculiar and local customs had developed in America over time. St. George Tucker remarked that "local circumstances have necessarily introduced a variety of new regulations, which by imperceptible and gradual changes, have lost all resemblance to the British original."[144] Massachusetts's James Sullivan could maintain, "We have also some customs established by general practice, peculiar to ourselves, and which were never known in England: these are law with us by our own consent."[145]

For the most part, however, there was little enthusiastic recognition of local customs, the recognition of which had been such a significant part of Blackstone's legal science. This was, paradoxically, especially true of Federalist and pro–common law thinkers. Even as they actively embraced the common law and wielded the temporalities of "immemoriality" and "insensibility" to their advantage, American common law thinkers appear to have wanted to concentrate the power to declare the customs of the community in the hands of the common law judge, to produce an internally homogeneous legal landscape. Connecticut's Zephaniah Swift, among the era's most enthusiastic proponents of the common law, insisted that "in [Connecticut] we have no local customs, but the citizens are all governed by the same general rule."[146]

Perhaps the sense of America's legal landscape as uniform, internally homogeneous, was nothing other than a version of the clean slate that consent-oriented, present-focused, Jeffersonians and Paine-ites imagined

[144] Ibid., Vol. 1, Preface, p. x.
[145] Sullivan, *History of Land Titles in Massachusetts*, p. 18.
[146] Swift, *A System of the Laws of the State of Connecticut*, Vol. 1, p. 47.

America to be. This suggestion has some plausibility when one looks at judges' self-representation in this period. Here, I examine the writings of James Kent.

Throughout his career as politician, lawyer, and judge, Kent saw himself as a staunch Federalist. As he put it, "I entered with ardor into the Federal politics against France in 1793, and my hostility to the French democracy and to French power beat with strong pulsation down to the Battle of Waterloo."[147] In his activity as a judge sitting on New York's Council of Revision, Kent often incurred the hostility of Democrats for his attack on antiproperty legislation that he frequently dubbed "Jacobinical."[148] Until his death, he fought (often unsuccessfully) to defend the integrity of the judiciary from legislative attack, whether this involved the preservation of the Council on Revision (abolished in 1821), the salaries and tenures of judges, or the maintenance of the distinction between law and equity.

As a Federalist and a common lawyer, Kent despised Jefferson. In 1802, at the height of the Republican attack on the federal judiciary, he wrote in his journal, "The pernicious effects of the violent Jacobinical administration in this [New York] and the United States begin to be sensibly and strongly felt. The best men are no longer in office and government becomes degraded and feeble and threatens to pervert the administration of justice and introduce violence and oppression."[149] The threat was, precisely, the Jeffersonian idea that government and law should be a matter of contemporaneous consent. In 1837, in a letter to Kent, Theodore Dwight offered up a plan for a work he had projected "on the principles and character of Thomas Jefferson." Among the eighteen objections to Jefferson Dwight listed, from "Destitute of veracity" to "Was not a Christian," one was telling: "That one generation of men or of societies cannot make laws or constitutions to bind their successors."[150] Kent's own annotations to Henry St. George Tucker's "Life of Jefferson" revealed similar objections. Kent noted Tucker's "temperate and able discussion of Mr. Jefferson, and [Jefferson's] project that no law, or constitution, or contract [be] binding after nineteen years."[151]

Like other legal thinkers of his generation, Kent was intensely interested in the relationship between law and historical change. Following Montesquieu, Kent argued that "[t]he regulations of the lawgiver should

[147] *Memoirs and Letters of James Kent*, p. 82.
[148] Horton, *James Kent*, p. 239.
[149] Ibid., p. 127.
[150] *Memoirs and Letters of James Kent*, p. 220.
[151] Ibid., p. 222.

always have a steady relation to the state of society, its industry, wealth, trade, morals, genius, extent and connection with other nations."[152] This translated into an intense interest in the shift from the feudal to the commercial. In 1795, commenting on Dugald Stewart's "View of Society," Kent remarked that the book had been "of great use to me in my researches into the genius of feudal policy."[153] On the basis of his reading of Adam Smith, Kent maintained that it was important for laws not to "perplex the industry" of citizens, so that there could be "free circulation of labor and the produce of labor."[154] "[P]roperty," he argued, "should have a free circulation, and free employment, without any of the fetters of entailments and perpetuities."[155]

This interest in getting rid of the feudal and preparing the ground for the commercial made Kent highly open to reforming the common law. Only the very latest common law learning counted. In 1795, in a discussion of the law of nations that could also have been a discussion of common law, Kent argued that, because the law of nations had kept pace with "the cultivation of morals, and the refinements of commerce," only "the modern precedents and writers are deserving of superior attention."[156] Kent was also open to remaking the common law by borrowing from French law writers. He even exploited the pro-French leanings of Republicans to do so. As he explained it:

> Between that time [1798] and 1804, I rode my share of circuits.... I read in that time Valin and Emerigon [authorities on the law of insurance], and completely abridged the latter, and made copious digests of all the English law reports and treatises as they came out. I made much use of the *Corpus Juris*, and as the judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. I could generally put my brethren to rout and carry my point by my mysterious wand of French and civil law. The judges were Republicans and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities and thereby enrich our commercial law.[157]

But if this openness to importing the teachings of French jurisprudence were not enough, Kent sometimes sounds, in his attitude toward law, *precisely* like the despised Jeffersonian lonely subject of contemporaneous

[152] Kent, *Dissertations*, p. 18.
[153] *Memoirs and Letters of James Kent*, p. 239.
[154] Kent, *Dissertations*, p. 19.
[155] Ibid., p. 20.
[156] Ibid., p. 58.
[157] *Memoirs and Letters of James Kent*, p. 117.

consent who jettisons the past, renders the world a blank canvas, and begins afresh. Thus, when Kent was appointed New York's chancellor in 1814, he expressed himself as follows:

> I took the court as if it had been a new institution, and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English chancery powers and jurisdiction as I thought applicable under our Constitution. This gave me grand scope, and I was checked only by the revision of the Senate, or Court of Errors.[158]

This language is striking. Kent treats the court as a "new institution ... never before known in the United States." He acknowledges no guide and arrogates to himself "grand scope" to shape it.

In embracing a sense of freedom from the past, pro–common law American judges such as Kent were acting precisely like the subjects of contemporaneous consent that they so feared and despised. For the judiciary's many democratically inclined critics in early-nineteenth-century America, such judicial attitudes were the basis of the argument that the scope of judicial powers had to be limited, that the judiciary had to be rendered subject to the checks of a democracy based on express consent. For our purposes, however, it shows how the engine of history – here the Jeffersonian lonely subject of consent – could be both embraced and rejected. In Kent's understanding of his own vocation as a common lawyer who claims "grand scope" in shaping the law, we find a reinscription of the way the common law was both subjected to history and gave rise to it.

[158] Ibid., p. 158.