

Thomas Jefferson and Alexander Hamilton

A Defining Political Debate

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This book is dedicated to my family, without whom I would not have been able to complete this book, nor had a reason to.

Also to Ross Lence who taught me, “Hence, it certainly follows that he who studies wisdom—that is, the philosopher—will be happy when he begins to enjoy God.” (*City of God*, Book VIII.8)

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INTRODUCTION

The American common law is a peculiar topic of study. The common law itself does not carry any inherently odd characteristics, but the study of the American common law is odd given the transformation the common law has undergone in America. Modern scholarship has pointed out that the definition of common law that we currently labor under is far different from how it was understood in 18th century America, not to mention 13th century England.¹ Efforts have been made to show how this transformation has taken place. Most studies rest on the idea that Enlightenment principles infiltrated common law thinking and this distorted view of the common law is what permeated the post-Constitution interpretation of the common law and jurisprudence.² More historical accounts have chosen to focus on political events, such as the Judiciary Act of 1789 or the Alien and Sedition Acts.³ Both streams of inquiry lead to the conclusion that the common law as it was understood in America after Constitutional Ratification was far different

¹ Horwitz, Morton J. (1977) *The Transformation of American Law: 1780-1860*. Cambridge, MA: Harvard University Press.

² Carrese, Paul O. (2003) *The Cloaking of Power*. Chicago, IL: The University of Chicago Press

Stoner, James R. (2003) *Common-Law Liberty: Rethinking American Constitutionalism*. Lawrence, KS: University Press of Kansas.

Stoner, James R. (1992) *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*. Lawrence, KS: The University Press of Kansas.

³ Warren, Charles (1923) “New Light on the History of the Federal Judiciary Act of 1789.” *Harvard Law Review*. Vol. 37:1.

Palmer, Robert C. (1986) “The Federal Common Law of Crime.” *Law and History Review*. Vol. 4:2.

than the understanding of the common law just a few years before.

While both streams of inquiry provide relevant insights, both, according to this book, overlook the impact of the actors. The confluence of political philosophy and events occurs at the debate between the Federalists and the Republicans, at the heart of which were two men, Alexander Hamilton and Thomas Jefferson. This book is designed to show how the political philosophy of both men, their political objectives, and the political events which surrounded them came together to affect their perception of the common law and the federal judiciary; and in turn shaped the action they took either in support of, or in opposition to, federal common law jurisdiction. This conflict is important because it defines the direction the common law was to take in America both in practice and in thought. The parameters in which the federal jurisprudence was debated were set by the conflict between Hamilton and Jefferson. This book has no intention of undercutting the earlier efforts to trace the course of American common law, but merely serves as a complement in order to paint a fuller picture of how thoughts, events, and actors shape policy.

This study seeks to reclaim an understanding of a lost tradition. Even if America is unable to reclaim this tradition perhaps scholars will come to recognize the importance of this tradition as a legitimizing force and consensus building mechanism at the time of the American founding. This becomes important when one expands his vision beyond American shores and focuses on newly democratizing nations and begins to ask what institutions and social forces must be in place in order for democracy to develop. While this question is not new, it can certainly be reframed. In understanding our own founding, we can hypothesize, and then study, how institutions can be arranged to integrate and maintain local customs and traditions in order to foster the growth of a stable government which protects liberty.

One of the primary advantages of the common law system is that it is flexible and decentralized which allows it to be a system of law which is separate from the central government, thus providing a barrier between the people and the central authority. Perhaps it is true that “As societies become increasingly complex and interdependent, there arises a need for the greater and greater extension of law.”⁴ But law does not have to be, nor does this quote intimate that it must be, determined by an inflexible and centralized system of governance. It is not law that is the problem; it is how it is created and administered that can be problematic. Doomsday predictions are not apart of this project, nor should they be inferred, as there are still avenues which may be utilized to promote a system which will allow for the community to reassert itself as the rightful determiner of justice, and under which the rule of law will prevail. Exploring these avenues is a step in a positive direction. It would help restore a sense of community and responsibility that is essential to a republic’s health.

This book will unfold in five chapters. The first chapter is designed to regain the original understanding of common law and compare it to the current understanding in order to show just how far we have come from the original definition. Uncovering this original understanding is crucial for understanding what is at stake in transforming the definition and how important the conflict between Hamilton and Jefferson was in defining federal jurisprudence. Chapter 2 will lay out the jurisprudential thought of Hamilton and Jefferson. Each man’s idea about federal common law jurisdiction is defined by his perception of judges and this perception is informed by principles of the Enlightenment philosophy and other political factors. Chapter 3 will evaluate each man’s position on the common law, how he

⁴ Lence, Ross M. (1995) “Is Civic Order Possible in the Modern City?” in *This Will Hurt: The Restoration of Virtue and Civic Order*. Edited by Digby Anderson. The Social Affairs Unit, A National Review Book.

developed this view of the common law, and how his view of the common law directed his actions. Chapter 4 makes the argument that the course of action pursued by Jefferson, with respect to the common law, was actually more damaging to state's rights than an alternative path. Chapter 4 ends by assessing the damage the common law incurred as a result of the Hamilton/Jefferson conflict and shows that the result of this conflict was a federal judiciary more in tune with Hamilton's political objectives than Jefferson's. Chapter 5 continues with the theme begun at the end of Chapter 4 by providing an empirical test of what affect abandoning the common law has on political actors.

CHAPTER 1

DEFINING THE COMMON LAW

The common law originated in the decisions of English judges during the Middle Ages. Eventually the common spread throughout the world through English colonization. Common law is often contrasted with equity which is distinctive rights and remedies administered through a different process. In both England and the United States the common law is vanishing partially because of the merger between common law and equity. But, as this paper makes clear, it is not the merger of equity and common law that caused the decline but the definition of common law and the role of the judiciary that led to both the decline of the common law and the merger of common law and equity.

Although most settlers in the English colonies arrived in America in order to escape England, they brought with them the common law as it was the system they knew best. As the colonies began to take shape and England extended its control over the colonies many colonial assemblies began to formally integrate the common law and its procedures into their system of law, relying on both the common law procedure and English precedent. Even after American Independence common law rules continued to stay in effect. In fact, North Carolina's Act of 1778 declaring common law in force is still on the books in that state. The continuation of the common law, even after the war of independence, is reasonable given that the common law was seen as a bulwark against executive power, a sentiment held closely to the hearts of early Americans. Many common law protections such as the prohibition of *ex post facto* laws, the guarantee of *writ of habeas corpus*, the right against self-incrimination

and cruel and unusual punishment; are all common law terms and practices that were included in the Constitution.

But while the common law saw rapid growth in America as a result of improved reporting and geographic expansion, America began making refinements that would threaten its continued practice as adopted from England. *Marbury v. Madison* (1803) established judicial review in America, a decision which was not a departure from the thought of the founding fathers, but was a departure from the common law tradition. While some do not see judicial review as a radical break from the common law tradition citing Lord Coke's reasoning in the *Bonham Case*, judicial review failed to establish itself in England. Judicial review allows judges to call into question legislation, a practice which was not given under common law as judges were to be constrained by the law, both legislative and judicial, and not make law if the legislature had already spoken in that area.

Marbury v. Madison was just the first in a string of events that would eventually lead to the dismantling of the common law in America. But, before I can trace the path of its dismantling at the hands of Jefferson and Hamilton, a description of the common law must be given. Defining the common law becomes somewhat problematic as the current definition of the common law is simply judge made law. The definition of common law is not so simple however. The common law requires an intimate familiarity with procedure and cases. The only way one can come to understand the common law is to spend a considerable amount of time with common law cases. Given the enormity of this task I have boiled down the common law to a few fundamental points in order to give a working definition and to explain what has been lost as a result of its deterioration.

Developing a working definition of the common law is quite difficult given that there is no theory or set of maxims that are expressed by the original common law thinkers. The very nature of common law almost wants to defy precise definition since one of its key characteristics is

adaptability. However, there are some easily identifiable characteristics that aid in the definition. Common law exists wherever precedents are used to identify law. This is quite different from the Oliver Wendell Holmes, Jr. formulation.⁵ Holmes considers common law to be judge made law, therefore precedents create common law. The more traditional approach says that precedents reveal common law. Precedents are used as a guide to indicate to judges what the previous path has been, as justice demands that similar cases be treated in similar ways. Judges in the common law tradition do not make law; they discover it through a systematic search and application of precedent. The Holmesian formulation is a bit like saying Moses created the Decalogue.

The common law also requires the use of juries. Juries must be drawn from the general community. A jury randomly selected from the community is the best representation of the community's sense of right and wrong. The jury must be allowed to find fact and apply the law. This formulation is consistent with what James Stoner says is part of the essence of common law. "Common law emphasizes assent rather than domination, the community rather than the state, moral authority rather than physical power."⁶

The common law is not rigid; it is adaptable, just as the community that it is derived from has changing needs and considerations. Thus, codification is contrary to common law. While revision of statutes is possible, it violates what is at the essence of common law. Furthermore, common law decisions reflect the sentiment of the community; common law must be made locally in order to

⁵ Holmes, Oliver Wendell Jr. (1991) *The Common Law*. Boston, MA: Dover Publications.

See Stoner (2003 and 1992) for a critique of the Holmesian formulation, *supra* note 2.

⁶ Stoner (2003), p. 8. *supra* note 2.

reflect this sentiment as the national stage is too far removed from the people to be truly responsive. Judges must be able, with the aid of the jury, to hand down decisions which best serve the interests of the community. While not all laws are defined under this system, traditionally those laws left undefined by the legislature are left for the courts and the community to define through tradition, practice and history. The common law is not positive law. It relies on the belief that a moral sense of right and wrong is possessed by each individual in a community. This conceptualization of law is quite different from the statutory outlook, a point expressed by Morton Horwitz who says, “common law rules were discovered, statutes were made.”⁷

Another component of the common law is the separation of courts of law and equity. Common law requires a strict procedure of pleading that must be adhered to in order to preserve the integrity of the process. One of the procedures is declaring whether the complainant is seeking retribution under the law or in equity, this must be stated at the beginning of the trial. The idea behind this type of pleading is to limit the judge’s ability to make decisions which conflict with the law. If courts of law and equity were merged, and during pleading one did not have to state where they sought retribution, then the judge would be able to hand down a decision outside of the law in all cases he so choose to by claiming equity jurisdiction. Under the common law procedure if someone sought a remedy in equity and there was a proper remedy under the law then they were denied the equity remedy. If someone sought a remedy under the law and there was none to be had, then the judge could not grant a remedy at equity as the two courts—those of law and equity—were separate. Anyone who has read Brutus’ argument against Publius is quite familiar with the risks inherent within a system which combines courts of law and equity.

⁷ Horwitz (1977), p. 7. supra note 1.

The Federalist position on common law, which ironically is quite consistent with the definition applied by the Republicans, is best seen in the thought of James Wilson; an important figure in the creation of the Constitution and ardent supporter of its ratification in Pennsylvania. While serving as professor of jurisprudence at the College of Philadelphia he gave a lecture entitled “Of the Common Law.” In his lecture he made explicitly clear his position on the subject. Wilson agreed that common law was necessary because of man’s fallibility. Because man was fallible he could not be trusted as judge in his own case. For Wilson, men could not be trusted as judges in their own cases because there was a conflict in the different means men chose for arriving at justice. Furthermore, it was unlikely that the end product of what justice looked like could be agreed upon.

To select and ascertain those means is often a matter of very considerable difficulty. Doubts may arise; opposite interests may occur; and the preference must be given to one side from a small over-balance, and from very nice views. This is particularly the case in questions with regard to justice.⁸

This position is a departure from the English and medieval doctrine of common law.⁹ Common law was traditionally grounded in natural law. In the natural law formulation, man had an intuitive sense of right and wrong—which legitimizes the use of juries. The common law, for Wilson, took the place of this intuitive sense that he found lacking in men. For Wilson, man was not able to make a

⁸ McCloskey, Robert Green (1967) *The Works of James Wilson*. Cambridge, MA: Harvard University Press. p. 137.

⁹ Hogue, Arthur R. (1986) Reprint. *Origins of the Common Law*. Indianapolis, IN: Liberty Fund.

Hudson, John (1996) *The Formation of the English Common Law: Law and Society in England From the Norman Conquest to Magna Carta*. Edinburgh Gate, UK: Addison-Wesley Longman Limited.

decision regarding justice, but collectively, justice could be achieved, and this is where the common law came in.¹⁰ Common law was not only a collection of men drawn together to make decisions, according to Wilson, but a collection of practices and customs that had come to be followed and adopted by successive generations. But while there is little doubt that tradition and custom each play a central role in determining how the common law is defined, Wilson neglects the role of conscious reason. He neglects the role played by judges and lawyers who spend considerable time studying the law trying to come to a conclusion that stays consistent with both the needs of the community and with what has transpired in the past. Wilson abandons this deliberative process as well as natural law as principles necessary for common law. To put it another way, Wilson reconstructs common law theory to meet his own needs by abandoning the original understanding. He believed that there could be no natural law basis because the common law had to be changing and mutable. But Wilson overestimated the restrictiveness of natural law. Adaptability is not necessarily inconsistent with natural law as Wilson believed it was. Because circumstances change does not mean natural law changes, but instead natural law remains a force that can be consulted when confronted with new challenges. By removing the natural law foundations from common law, Wilson laid a foundation for an all out assault on common law by later generations. Wilson probably would not have approved of the assault on common law since he was, at least on the surface, a proponent of the common law.

I bring up Wilson at this point because of his profound influence at the time of the founding, and his understanding of the common law is a good reflection of the general understanding at this time. What is missing from the discussion of Wilson is an explanation of how this

¹⁰ McCloskey (1967) p. 356. *supra* note 9.

transformation in thought occurred. In Chapters 2 and 3 it will be shown that the jurisprudential thought of Hamilton and Jefferson informed their thought on the common law, and it was the principles of the Enlightenment that informed their jurisprudential thought. Chapter 4 will show that the resulting action was a function of thought and circumstance.

The work by Morton Horwitz, in what is now the well-known first chapter of his text entitled *The Transformation of American Law*, partially documents the transformation that takes place in common law understanding as a result of judge's changing the perceptions of their roles. While the causal arrow may not point explicitly in this direction, we can be sure that the changing role perception and the transformation of common law are correlated. "As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on the self-conscious consideration of social and economic policies."¹¹ One then, by the time Holmes hands down his definition of common law, can see the departure from what the traditional conception expressed by J. Otis who said the, "grand basis of the common law [is] the law of nature and its author."¹²

This book offers support for the Horwitz thesis to the degree that there is a correlation between jurisprudence and the common law. Each of the primary actors in this study, Jefferson and Hamilton, had his views of the common law shaped not by a study of the common law but by his view of the judiciary as a political agent. In Jefferson's case he saw a partisan judiciary dominated by the opposing party, and then sought to overturn Federalist dominance through court appointments that would then actively promote the Republican position. For Jefferson there was almost no

¹¹ Horwitz (1977) p. 2. supra note 1.

¹² Otis, J. (1965) *A Vindication of the British Colonies* in Bernard Bailyn (1965) *Pamphlets of the American Revolution*.

distinction between politics and the law. Hamilton on the other hand was swayed less by current events and more by political theory, a theory of the judiciary which was informed by the Enlightenment which then promoted an active judiciary. Both men, then, promoted an active judiciary so long as it promoted their political ends. In both cases, the idea of an active judiciary violated the traditional understanding of common law and thus shaped each man's view of the common law as he favored an active judiciary rather than a traditional view of the common law.

CHAPTER 2

THE JURISPRUDENTIAL THOUGHT OF HAMILTON AND JEFFERSON

Alexander Hamilton's position on the role of the federal courts must be generated by looking at those statements which expressly state his vision, as well as those that imply his vision. Certainly *Federalist* #78 provides the most popular account of his position, but it does not exhaust the topic.¹³ For instance, we can see the germ of what is to become #78 in *Rutgers v. Waddington* (1784)¹⁴ which is where Hamilton displays his understanding of judicial review and where "he...put his readers on notice that in ratifying the new federal constitution they were settling for a judicial control over legislation."¹⁵ To some extent Hamilton can be seen as a supporter for judicial supremacy based upon his position that natural law was superior to parliamentary law. "I will now venture to assert, that I have demonstrated, from the voice of nature, the spirit of the British constitution, and the charters of the colonies in general, the absolute non-existence of that parliamentary supremacy for which you contend."¹⁶ Hamilton could not understand a position of

¹³ All references to the Federalist Papers are from Carey, George W. and James McClellan. (2001) *The Federalist*. Indianapolis, IN: Liberty Fund, Inc. For the sake of convenience all references to *The Federalist Papers* will be given by the paper number followed by the page number where the citation is found in the Carey and McClellan edition.

¹⁴ Reprinted in Goebel (1964). *infra* note 14.

¹⁵ Goebel, Julius (1964) *The Law Practice of Alexander Hamilton*. Volume 1. New York, NY: Columbia University Press. p. 282.

¹⁶ Syrett, Harold C. Editor. (1961) *Papers of Alexander Hamilton*. New York, NY: Columbia University Press. Volume 1:122.

parliamentary supremacy given the superior position of natural law, but instead it was the courts that could apply the natural law, and decide what it was, when they interpreted the constitution on matters the constitution was silent on.¹⁷ “If the constitution were even silent on particular points those who are entrusted with its power, would be bound in exercising their discretion to consult and pursue its spirit, and to conform to the dictates of reason and equity.”¹⁸ And it was the lawyers and judges who are entrusted with the power to interpret the spirit of the constitution.¹⁹ However, these select statements in no way decide the matter of Hamilton’s thought, but are merely illustrations of the point that is to be made in the section which links Hamilton’s thought to the Enlightenment as seen in Montesquieu.

This chapter concludes with a discussion of Jefferson and his position relative to Hamilton. Like Hamilton, Jefferson’s thoughts on the judiciary must be pieced together into a coherent whole. Jefferson made some unequivocal statements, like the one in his letter to Edmund Pendleton that judges are “mere machines.”²⁰ But further investigation suggests that Jefferson may have been willing to give the courts more latitude than this quote suggests, particularly when those courts could advance his political goals. But, more than Hamilton, and even more than Wilson or Madison, Jefferson desired a restrained judiciary in order to prevent the centralizing tendencies associated with a strong federal judiciary. Chapter 3 will demonstrate how his opposition to a federal common law was fueled by his fear of a powerful federal judiciary. This chapter will illustrate Jefferson’s fears of a strong judiciary while rectifying what appear to be contradictions in his thought. What will be

¹⁷ However, Hamilton’s understanding of natural law is best understood as that law, established by men in civil society, which is supreme.

¹⁸ Volume 3: 548 in Syrett (1961) *supra* note 15.

¹⁹ Volume 1: 137 in Syrett (1961) *supra* note 15.

²⁰ Boyd, Julian. Editor. (1950) *Papers of Thomas Jefferson*. Princeton, NJ: Princeton University Press. Volume 1: 505.

displayed is a thought which is more concerned with restraining the federal government than the judiciary. Furthermore, Jefferson's fears display an incorporation of the Enlightenment principles as applied to the judiciary by Hamilton.

The Enlightenment and Hamilton

The Enlightenment was grounded in reason and the principle that all questions were answerable through the application of reason. The rational man was held in the highest esteem; all things must be investigated and understood through reason.

As stated above, the principles of the Enlightenment can be seen in the thought of Alexander Hamilton, particularly in his thinking about the judiciary. This section attempts to draw a more direct line between Charles de Secondat Baron de Montesquieu and Alexander Hamilton. I choose to focus on Montesquieu for a two reasons. One, their importance to American political thought has been understated, especially in light of the work by Donald Lutz.²¹ Second, Montesquieu gives one of the most detailed applications of the judiciary of any Enlightenment thinker.

This section will unfold in three parts. First I will give an account of Montesquieu's interpretation of history. It will be shown that Montesquieu's view of history led to his determination that human intervention was necessary to prevent the unpredictability that he associated with historical progression. Montesquieu's presentation of history reveals history's tendency to bring about moderation, a process which Montesquieu seeks to replicate through institutional design. Within the institutional design there is an instrument which serves as the moderating force. This instrument is not

²¹ Lutz, Donald S. (1984) "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought." *The American Political Science Review*. Vol. 78:1.

simply a separation of powers, but it is nested within that system. That instrument is the judiciary.

I will then move on to Alexander Hamilton. I will show that the thought of Hamilton is the result of taking Montesquieu's view of history to an extreme. Hamilton understands history for its lessons, but that which has occurred need not be replicated but replaced by a new system of government because the earlier systems have failed. Thus, it is through human innovation that the progression of human activity will occur, not history. Hamilton says that history ought to be controlled, if not abandoned, in favor of a more rational system. This requires an energetic and centralized system of governing that is guided by a moderating force. Hamilton gives man the authority to control the forces of history, whereas Montesquieu says we must respect history's influence when developing governments and laws as history shapes the character of the people. Hamilton, on the other hand, has much less respect for history's influence on human character and much more confidence in the power to impose law and government on the people. Montesquieu was after a judiciary that would ensure gradual reform, Hamilton was after a judiciary that was able to create positive law.

The Influence of Montesquieu:

Montesquieu's teaching is based on the lessons of history. His understanding of history is the basis for his political philosophy and the way he transmits that philosophy. In Montesquieu we see an effort to derive political standards from history. "It is in the thought of Montesquieu that the need to derive some moral and political standards from history, history understood as opposed to, or as the replacement for nature, comes into the foreground of the tradition of political philosophy."²² The lesson of history

²²Pangle, Thomas (1973) *Montesquieu's Philosophy of Liberalism: A Commentary on The Spirit of the Laws*. Chicago, IL: The University of

is moderation. History resolves itself by balancing extremes and achieving moderation, and it is the moderate resolutions that are desired by Montesquieu. This is the historical dialectic as Montesquieu understands it.²³ Montesquieu presents history to us in such a way that we see that history achieves moderation by destroying those nations that lie in the extremes. Athens and Marseilles were destroyed when they abandoned their moderate base. When Rome became an empire it too was destroyed as a result of abandoning its moderate principles of republicanism. This reading of history leads Montesquieu to conclude that the proper political order is the order which is moderate. Before a consideration of Montesquieu's political philosophy commences, we must understand his history, as it is the teaching of Montesquieu that demands this approach.

Montesquieu substitutes history for nature. It was the tradition of the liberal theorists before him, specifically Hobbes and Locke, to give an account of human nature as the basis of their political philosophy. Montesquieu does not follow their lead, but instead builds on another foundation, a foundation based on history and laws, since "Nature always acts, but it is overwhelmed by social customs."²⁴ For Montesquieu it is the laws and history which dictate human nature, not the other way around. In Book V.3 Montesquieu says:

The good sense and happiness of individuals largely consists in their having middling talents and fortunes. In a republic whose *laws have formed many middling people* is composed of sober people, it will be

Chicago Press. p. 9. The importance of the lessons of history to Montesquieu should be somewhat obvious as he uses historical examples to make his philosophic points, in place of abstract reasoning.

²³ According to Judith Shklar (1986), "Linear history was alien to Montesquieu." Shklar, Judith N. (1986) *Montesquieu*. New York, NY: Oxford University Press. p. 50.

²⁴ This comes from *Pensees*, but I found it initially in Judith Shklar (1986) p. 55.