COMMON LAW & LIBERAL THEORY

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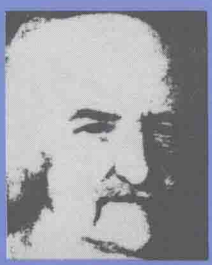
JAMES R. STONER, JR.



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For my parents, Lois and James Stoner

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A custom is said to be good at common law when it is thought to exist "from time immemorial," that is, for so long that "the memory of man runneth not to the contrary." Though modern historians have often enough improved on custom's memory, one who has been at work on a project for a decade or more finds human meaning in the phrase "time immemorial," or at least accumulates more debts than he is able to recollect. At the risk of omission, let me attempt acknowledgment.

Professor Harvey C. Mansfield, Jr., of Harvard University supervised the dissertation from which this book developed with infinite patience, sound suggestion, and gentle encouragement, then helped me secure the leisure that made possible its revision. As another of his students has written, Professor Mansfield teaches with the virtue of example as well as with his words, and though the world knows well, or should, his words, to have had the benefit of the example has been a special fortune. In its early stages, my research was saved from certain traps by the guidance of Professor Judith Shklar. When circumstances made it impossible for her to serve as second examiner on the dissertation, Shannon Stimson generously accepted the task and gave it a thorough and probing reading, with almost unimaginable dispatch. Nor can I neglect to thank Professors James Q. Wilson, Harry Hirsch, and R. Shep Melnick, for their exposition of contemporary quandaries in the doctrine and practice of American courts, and Professor Michael Walzer, whose interpretation of Hobbes became more cogent to me each time I reread the texts.

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One's greatest debts are most personal and must remain by and large unwritten. Still, I would say that without the great faith and trust of my bride, Jill Landry, I cannot imagine having seen this book through to completion. And the dedication expresses a debt for benefits about which my memory truly "runneth not to the contrary."

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INTRODUCTION

It is a maxim of common sense that a definitive biography cannot be written until its subject has breathed his last. Character might show early promise, and great deeds manifest themselves, but we hesitate to grasp the full significance of a life until we can judge it as a whole. Even then, we doubt the adequacy of our perspective, at least if we remember that the reach of a person's influence often spans generations, that genius can go almost unrecognized in a lifetime, and that great genius often does. Historiographers, of course, will add that we can never be sure of the completeness of the data available, and they may even lead us to wonder whether reputation is as insecure after one's demise as it is during one's lifetime, at least so long as those who judge have their own purposes and the standards for judgment stay open to debate.

Perhaps something similar in the life of a regime or constitution helps explain the variety of interpretations given to the American Founding, for the principles enunciated in the Declaration of Independence still frame our political discourse, and the institutions established by the Constitution of 1787 still govern our political life. Even apparent innovations in principle and institution—not to mention amendments to the Constitution itself—are often ambiguous in their import for the whole: Do they repeal an original understanding, or work out the logic of a founding idea, or settle a choice left open at the outset for later resolution? When we write about the Founding, in other words, we cannot avoid passing judgment on its legacy as we know it today, and what we say will be only as definitive as our confidence in the latter judgment and our presumption that all the possibilities of the regime have been disclosed.

If these last reflections have merit, then we cripple ourselves in trying to understand contemporary American politics or political institutions without reference to the Founding. I do not mean to claim that the Founders' understanding of the regime they established was clairvoyant, nor do I assert that we must bend our minds to theirs. Rather, since some continuity of principles and institutions is a fair supposition, and since it is well known that those principles were not lightly declared nor those institutions formed without conscious design, it is as foolhardy of the contemporary student to dismiss

the Founders' insight and intentions as it would be to assume that these alone explain our politics today or teach us all we need to know of how to act.

I undertook the present study with a hope to shed light on the contemporary practice of judicial review—the power of courts to declare void and refuse to enforce acts of the legislature or the executive that they determine violate the Constitution—through an inquiry into its place at the Founding. In this book, though I conclude with an account of the anticipation of judicial review voiced at the Philadelphia Convention and with an examination of the case made on its behalf in *The Federalist Papers,* I devote the bulk of my attention to authors who wrote in the century or two before the American Constitution was devised, most of whom never saw the New World. For this too is true of the Founding: It is not only a mirror in which to see ourselves but also a window that opens on vistas of thought and learning that came before and made it possible. Judicial review as we know it is a peculiarly American institution in many ways; indeed, it has sometimes been thought the distinctive contribution of American constitutionalism as a whole. But like our constitutionalism, the elements from which it is formed are not indigenous, even if colonial experience and Revolutionary deliberation provided its kiln.

For at least the past century, the practice of judicial review has been a matter of continuous controversy.[1] Particular rulings of the Supreme Court have often been the source of complaint, but sometimes dispute has widened to call into question the legitimacy of the function itself, or at least the whole way of thinking that judges bring to its exercise. Most obviously, the right of an appointed judiciary holding office for life to void acts passed by popularly elected bodies has seemed anomalous in a system of government now called democratic, and the arguments from bench or book seeking to reconcile judicial review and democracy—or purporting to show actual harmony in result—have thus far rather deflected than defeated the doubt.[2] Nor has the matter been solved by mere reference to the statements of its first defenders, for these seem paradoxical to the modern mind, linking the power of judicial review to the fact of a written constitution, though the power itself must be inferred from, as it is not declared in, the Constitution's text.[3] The pragmatic spirit of modern America has generally been willing enough to live with judicial review, provided courts exercise the power with moderation, and various parties rarely hesitate to invoke it when they can to their advantage. But pragmatic use is not the same as principled defense, and the latter might be expected of a practice that claims to follow the logic of justice and rights, rather than, like administration or legislation, aiming to prosecute a public interest or fashion common good. Besides, our fabled pragmatism, or at least our practical sense, should not at the outset be supposed an independent virtue, uninstructed by our ways at law.

Much academic debate in recent years has been among various competing

theories of judicial review, each purporting to offer a method for resolving constitutional disputes. Attempts a decade ago to classify theories as interpretive or noninterpretive have been superseded by advanced theories of interpretation; and theories based upon postulated personal or moral rights have been joined by theories centered on property rights and economics, supplemented by theories based upon inference from constitutional structure.[4] During the presidency of Ronald Reagan and especially through the confirmation hearings of Judge Robert Bork, public attention was directed to the jurisprudence of original intention, a doctrine that constitutional texts ought to be interpreted according to the intentions of their framers. Observers have increasingly recognized, however, that this doctrine serves rather to encourage an attitude of judicial restraint than to provide an alternative theory for judicial decision, in part because determining original intent in any particular case is notoriously difficult, in part because the doctrine has little practical to say concerning settled precedents established on different assumptions.[5] In the polity at large, or at least in the press and among many political scientists and law professors, it is simply taken for granted that judges inevitably bring their political orientation to the exercise of judicial review, though an occasional "anomalous" opinion gives pause. Judge David Souter's surprising success in winning almost unanimous confirmation to the Supreme Court may indicate a latent aspiration toward constitutional consensus in the polity, though his hearings offered no elaborated account of what an "objective" constitutional jurisprudence would entail;[6] the bitter inquisition of Judge Clarence Thomas suggests that partisan passions in constitutional matters still seethe.

One point of emerging consensus is that the character of judicial review has changed significantly since the early years of the republic. Generally scholars now divide constitutional legal history into three eras: the antebellum years, the age of the laissez-faire Court, and the modern era, dating from the "Constitutional Revolution" of 1937. Alexander Bickel, perhaps the most influential commentator on the Court in a generation, wrote a book in the aftermath of the Warren era arguing that the modern Court had, while initially devoted to undoing the discredited activism of its predecessor, unwittingly repeated it, though in different form.[7] Bickel had little to say about the Marshall or Taney Court; but his account was refined by Rogers Smith, who argues that changes in constitutional doctrine parallel developments in American liberalism, and by Christopher Wolfe, who contrasts Chief Justice Marshall's constitutional jurisprudence with what he calls "modern judicial review," in both its laissez-faire and libertarian-egalitarian forms. Wolfe's thesis has recently been seconded by Robert Clinton's work on *Marbury v. Madison,* which argues that judicial review as we often conceive it—as the power of courts to sit as final judges of the constitutionality of legislation—is almost

entirely a development of the past one hundred years, the original power of courts to void legislative acts having been strictly limited to "cases of a judiciary nature."[8]

In the pages that follow, I hope to show that judicial review and the constitutionalism of which it forms a part can be illuminated by an awareness of the sources of the Founders' understanding in two different, indeed sometimes directly opposing schools of legal and political thought: on the one hand, the tradition of the English common law; on the other, early liberal political philosophy. I begin by examining the legal thought of Sir Edward Coke, the seventeenth-century English judge and parliamentarian whose opinion in *Doctor Bonham's Case* (1610) was once seen as a precedent for the modern practice. Coke still receives attention from legal historians, but his work is not well known today among political scientists interested in constitutionalism, despite the fact that to the generation of Americans who made the Revolution and wrote the Constitution he was an authority, not a curiosity. I turn next to the political philosophy of Thomas Hobbes, the source of many of the principles, if not conclusions, of modern liberalism, who in the *Leviathan* and other works explicitly disputes Coke's doctrines. As Coke and Hobbes display in sharpest relief the distance between the ways of thinking about law and judging characteristic of the common law mind and liberal political theory, I accord them the most extensive treatment—though it must be noted at the outset that Hobbes is much better known, not to mention respected, by political theorists today than he would have been to Americans at the time of the Founding. But Hobbes indeed was known, openly corrected, and quietly adopted by authors who developed the versions of liberalism that more directly influenced the Founders, and I devote chapters to the thought of three: John Locke, Montesquieu, and William Blackstone, the last of whom gradually replaced Coke as the authority on common law. I close with a few essays on law, liberties, and judging at the Founding, which do not pretend to be definitive but rather illustrate the relation between liberalism and common law.

My argument, then, is preliminary to any account of American constitutional history, not to mention any doctrine of contemporary adjudication, though I think it should prove useful in establishing the larger context of the origin of judicial power in the United States and in explaining the course of its subsequent alteration. As an account of the sources of American constitutionalism, it perforce joins a number of scholarly debates. What Thomas Pangle has called the "old orthodoxy" of constitutional development, based upon a faith in historical progress and telling a story of the evolution of modern liberalism out of the constitution of medieval England, has largely given way to different schools of thought that stress the novelty of liberal politics, though they differ as to its source and its opposition.[9] Since the

publication of Bernard Bailyn's *Ideological Origins of the American Revolution* and Gordon Wood's *Creation of the American Republic,* historians have often framed debates over the Founding in terms of a dispute between civic republicanism, which they trace back through the radical Whigs in Britain, and an emergent liberalism, indebted to the Enlightenment and to the pressures of modern commercial life; the typical drift of their analysis has been to attribute the Revolution principally to the first and the Constitution to the second.[10] This framework has been accepted by some political theorists; others, finding the roots of modern liberalism in the thought of such seventeenth-century philosophers as Hobbes and Locke or even in the works of Niccolo Machiavelli, draw the critical line between classical and modern republicanism, counting liberalism within the latter and thus attributing even more exclusively to modern influence the inventive spirit of the Founding as a whole.[11]

This quick summary does not presume to do justice to the subtlety and complexity of the positions involved (some of which I will treat in more detail later), but it does indicate a certain consensus and allows me to locate my own study for the reader reluctant to travel without a map. The consensus is that the American regime has come to take its bearings from modern liberalism and that the source of this orientation can be discovered in the Founding, even though it is usually acknowledged that elements of earlier forms of thought and practice—most notably, those associated with Christianity—persist and play an ancillary role in American political life.[12] My intention here is not to gainsay the hegemony of modern liberalism over American politics today nor to deny the importance of liberal thought in informing the American Founding, but to propose that, for the understanding at least of the judicial branch and its capacity to expound the Constitution as originally conceived, the recovery of forms of thought besides modern liberalism is not ancillary but decisive. I mean to suggest, in other words, that the division of function behind the separation of powers permits or perhaps requires very different ways of thinking about politics and government. Harvey Mansfield has ingeniously shown that the American presidency owes a special debt to the development of the concept of executive power in modern political theory, but his argument does not preclude that the judicial branch taps a different root, particularly as he finds in the American "taming" of the modern executive an Aristotelian echo, if not a voice.[13] And while the modern exercise of judicial review may have allowed liberal influences to eclipse other moments, the crisis of modern liberalism—to which, in one way or another, all the alternatives to the "old orthodoxy" respond—recommends the wisdom of restoring a sense of the alternatives available within the regime.

My aim is first to bring to life the way of thinking about politics, law, and liberty characteristic of the common law mind, and then to show how

liberalism could be interpreted to seem assimilable to common law, not destructive of it. It would be misleading to describe the first task as providing a theory of the common law, however, for it is characteristic of the common law mind to collect and gather, rather than to theorize—or at least to resist any theory that would too quickly reduce the multiplicity of phenomena to strict distinctions and abstract causes. This habit of common lawyers and their friends maddens the modern liberal intellect, but the latter has a lesson to learn about itself from taking patience—indeed, a lesson about its own strength. For the strength of liberalism is not in its ability to provide an account of the whole—here it notoriously fumbles—but in its keen analytical insight into specific matters put before its probe. In one way or another this was known to those whom we now call the early liberals and forgotten by most of their successors in the nineteenth and twentieth centuries—the first actually to call themselves "liberals" and their doctrine "liberalism," we should recall.[14]

To any reader familiar with the common law it is obvious by now that I do not mean to use the term in its technical sense, and to any student of the federal judiciary in the United States its use in any sense relevant to federal courts might seem anachronistic; so a few words of explanation are in order at the start.[15] Since the famous lectures of Oliver Wendell Holmes, Jr., scholars and lawyers have tended to think of common law as judge-made law, but this definition has become so familiar as to lose the ring of paradox it had for ears still attuned to the distinction between judging cases and making law.[16] Nor ought the term be limited to the ancient and unwritten law of England. One never can and never should forget the source of American common law, nor should one ignore that its spirit pays homage to the wisdom embedded in tradition. At the same time, one must remember that it is characteristic of common law to survive the abandonment of particular customs and that by the time of Independence common law had grown sufficiently at home in the American colonies to withstand the shock of severance from the mother-root. In defining common law, it is better to begin by noting that, in the time of Coke as in our own, common law is said to exist wherever precedents have the force of law, although traditionally precedents are seen to indicate common law, not create it. Precedents as well as statutes have the force of law, not to encourage stubbornness or thwart improvement, but simply because justice demands that similar cases be similarly disposed of. Common law typically proceeds by the forms implied in the ancient phrase "due process," many of which are still familiar today, most especially trial by jury. In contrast to systems of Civil Law, based upon a code and employing a professional magistracy, common law courts not only draw their law from precedent but draw their judges from the practicing bar, as they draw their juries from the community at large. Without doubt the common law has changed over time,

but as J. W. Gough has noted in a slightly different context, it is characteristic of common law to be oblivious to changes in itself and then even to erase the evidence of transformation.[17]

Common law differs from statutory law—and what I call the common law way of thinking differs from legal positivism—not merely in its source or its ground, but more essentially in its perspective. It is law seen from the point of view of a judge faced with a controversy, or a jury seeking to arrive at a verdict, not from the point of view of a sovereign monarch faced with an unmanageable people, or a sovereign people faced with civil war. To judge and jury, law need not begin with a statute, which in turn began with a sovereign authority, which began in consent; popular consent, after all, is given for a reason, and in a democracy it is given by the same sovereign that a jury represents. In court, statutes are law when statutes are there, but new cases come up which statutes do not cover, and, of course, what statutes themselves mean for a case requires interpretation. From the standpoint of the legislator, case law fills gaps between statutes, for new gaps open as circumstances change; but from the standpoint of the judge, statutes themselves fill gaps and revise precedents, though they are neither as comprehensive nor as precise as their authors might imagine.

Now common law and constitutional law are obviously not identical. Common law is unwritten law, while the most evident characteristic of American constitutionalism is its insistence on written constitutions. Moreover, common law and constitution are strictly speaking opposites in the hierarchy of kinds of law: Statutes override common law, while constitutions can override statutes. But to limit common law to its technical sense, as these objections would have it, obscures the deeper relations between common law and constitution. The Constitution of 1787 was formed in the midst of a common law tradition—not the least element of which was a habit of declaring fundamental law in written documents, such as Magna Charta, the Petition of Right, and the English Bill of Rights—and it established a judicial power that was expected, in certain fundamentals, to follow the familiar form of judging. Whatever the disposition of the delegates at Philadelphia on this matter, the adoption in the federal Bill of Rights of numerous protections and practices from common law (including, in the Seventh Amendment, mention of common law itself) made that intention clear. There were of course many particulars to be worked out once a federal judiciary was established, arising partly from the continued existence of competent common law judiciaries in the several states, partly from the conjunction of law and equity in a single set of courts; debates about the existence of a general federal common law in the strict or technical sense continued well into the present century.[18] Any thorough account of the development of the judicial power in the United States of course must treat these matters, but for my purposes here

what is noteworthy is that, taking the wider definition, one sees the color of common law in their very settlement; in other words, they are settled by thinking through what Alexander Hamilton called "the nature and reason of the thing," in the context of particular cases where the questions were put to judgment.[19] For cases that arise within their jurisdiction, federal judges have authority to interpret all the various sorts of relevant law, and in such interpretation similar forms of reasoning are involved, since the particular cases and controversies, not the technically different forms of law, provide the beginning point of judicial analysis.[20] Specifically, since precedent operates in constitutional decisions, even if it operates in a limited way, the forms of constitutional adjudication itself entail a sort of common law. In short, if the marks of a common law judiciary include attention to the rule of precedent, trial by jury, a bench drawn from the bar, and the like, the federal judiciary qualifies, or at least deserves the presumption of probable cause, which is all that the author of an introduction needs to claim.

I have suggested that the spirit of common law includes a way of thinking about political liberty, not simply settling cases in court, and this suggestion might seem particularly inapt when one encounters the origin of common law in English monarchy. How can any sort of political liberty consistent with the republican principle of the sovereignty of the people, which the Constitution announces in its first words and which popular elections seem to reinforce, be attached to inherited law that preserves a certain independence from popular will? The modern liberal, of course, appeals to private rights privileged against infringement by the public power, though often enough when pressed to define those rights the liberal has recourse to a principle so expansive that little remains for political decision outside the juridical realm. In any event, this response is foreclosed to one who would plead for attention to the common law, for the distinction between public and private, or at least between public and private law, derives from the Civil Law, which the traditional common lawyer believed a foreign system of thought. That we often take the distinction between public and private for granted today is some indication how far we have moved from a common law background; but before we give its importation a hero's welcome, we might pause to consider whether that distinction has not more often sacrificed the rights of individuals to the state, or hidden oppression from common view, than it has preserved personal integrity against state power or lawless force.

In a sense it is the burden of this entire study to give a satisfactory answer to the question of the relation of popular sovereignty to political liberty anchored in common law. At the outset let me simply appeal to an observation of Alexis de Tocqueville, who wrote in 1835 at the height of Jacksonian democracy: "Up till now no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim ap-

parently invented in an age of freedom in order to legitimize every future tyrant."[21] At the close of this brutal century we are no longer innocent of tyrannical slogans, but I take it as axiomatic in a constitutional regime that this claim remains impious to the public mind, and I take it as a point of departure for the political scientist to wonder why in the United States this still holds. I do not think the answer is judicial supremacy: This is not what the Constitution meant to establish, and it is not in fact what we have. There is something sovereign about judging in the United States, but it can be understood only by paying attention to the influence of common law in American political culture or constitutionalism, and to the impetus and form it gives to judgment, not only by a detached observer, but by citizens of the regime.