

# ISI Lecture Program

## Lecture Archive

*On October 18, 2001 ISI co-sponsored the following lecture by Dr. James R. Stoner, Jr. with the Pi Sigma Alpha chapter at the United States Air Force Academy in Colorado Springs, Colorado. Dr. Stoner is Associate Professor of Political Science at Louisiana State University.*

### **"A Harmonious and Consistent Whole": The Framing of the Constitution and the Common Law"**

James R. Stoner, Jr.  
Louisiana State University

It's an honor to lecture today at the Air Force Academy. The other week, in teaching Thucydides to my own students at LSU, it struck me that what the navy was to ancient Athens its most innovative force, what Athenians mastered and what allowed them to project their power, what their confidence of themselves as a world power depended on what the navy was to Athens, so the Air Force is in large part to us today. We Americans now take it for granted that the first step in any serious engagement is that we control the skies, and this is enormously important for American power and American pride.

In time of war, all questions, even those that seem merely historical or cultural, take on a certain urgency. Answers are needed, but there is little time to pursue the questions, and even the experts scramble to make sure that the questions they have been asking all these years are the ones that matter.

For example, in the war against Islamic terrorism, are we fighting in defense of modern life against the past? Or are the enemies we face indeed the modern counterpart of the totalitarians we faced in the last century, those who brought modernity to its perverse if logical conclusions, and against whom we marshaled the best of old traditions, together with our modern means? We hear the former often taken for granted in the media, and it was anticipated in Samuel Huntington's celebrated "Clash of Civilizations" thesis. We heard the latter from the President in his magnificent address to Congress the other week.

I am not competent to speak about the enemy, at least not yet, but I do want to speak about ourselves. What is the way of life we are defending, and how is it to be understood? More particularly, what can we learn about this question by looking at our Constitution and the government it established? I want to approach this by asking about the influences of political thought on the American founding, and to ask this in what might seem to be a strange way: Are we ancients or moderns? And if ancients in any respect, how?

### **ANCIENT AND MODERN POLITICAL PHILOSOPHY**

The distinction between the ancient and the modern or between the classical and the modern has been central to much political analysis (or political theory analysis) in the last half century, reviving a debate in the eighteenth and early nineteenth centuries, known to us best through Gulliver's Travels, about which was superior. In part this reflects the endemic tension in political life between the new and the old, between the young and the old, between the ambitious and the established. But the reference I am making is more specifically to two distinct schools of political philosophy. On the one hand is the ancient or classical, best exemplified in the political philosophy of Plato and Aristotle, and of subsequent thinkers, like Thomas Aquinas or Thomas More, who aligned themselves with the one or the other. On the other hand are the

modern political theorists in the line of Machiavelli, Hobbes, Locke, Rousseau, Hegel, Mill, and the like; there are many variations among them, for the modern seems to spawn competition to be more modern yet. To see how these two schools of thought differ from one another, let me begin by noting what they have in common.

First, both start from the premises of philosophy: that the world, or at any rate the political world, is intelligible to human reason, which can understand human nature and its place in the whole and which is self-conscious about the limited character of human knowledge. Philosophy is the love of wisdom rather than wisdom itself, to be sure, but these thinkers are confident that there is a certain wisdom about political things that can be grasped even if we are ultimately ignorant about first things. Philosophy here is to be distinguished from such other claims to know as tradition, religious law, or poetic insight.

Second, both ancient and modern political philosophers show a devotion to the common good, and in this way, it might be said that they are all republican. They hold that the common good can be arrived at through deliberation, in some sort of public assembly, or at least that a writer can appeal to some such forum, if only in the imagination. Political philosophers might make their peace with monarchy, but theirs is always a mixed monarchy or a monarchy with a republican origin or end. Deliberation in a republican setting is a sort of counterpart to dialectic or dialogue in philosophy, though of course the two are distinct in their end: whether to act or just to know.

A third point of confluence between ancients and moderns is their recognition of the partisan character of political life, at least in a republican government. This is the classic political paradox, that claims to the *common* good are in fact typically *partial*, that is, they privilege the good of one's own faction, of those like oneself. The fundamental partisan distinction is between the many and the few, but there is a certain fluidity here, as there are different groups of "few," and maybe even a different character in the many from one place to another.

Finally, political philosophy of either stripe includes an analysis of necessity and choice, for it begins with the view that politics is not determined solely by gods or fate or intractable causation, but neither is the political world like clay that can be formed into any shape at all by the potter. Causation in human affairs is not absolute, but there is much that is intractable about politics: partisanship itself, war, relative scarcity, mortality.

What then distinguishes the ancients from the moderns? Again, let me suggest four things.

First, the ancient and modern political philosophers posit different ends of a good political order. For the ancients, the end of politics is virtue, or the cultivation of virtue; for the moderns the end of politics is liberty or freedom. Now, the ancients, too, celebrated liberty, for there is no true virtue without it, as coerced actions cannot be called virtuous. Likewise, the moderns often praise virtue as needed for the establishment of liberty or its preservation. There are thus plenty of political maxims that ancients and moderns can share. Still, for the ancients liberty was the condition for virtue, while for moderns the relation is reversed. Another way of seeing this distinction is to note the relative importance in their worlds of war and commerce.

Second, ancients and moderns differ in their terms of political analysis. For the former, the central concept of political science is the *politeia*, the regime or form of government or constitution. Moderns, by contrast, are always concerned with power and its structures. Again, this difference might seem to be only a matter of

emphasis: Moderns are also interested in the question of the form of government, while the ancients were certainly aware of the necessities of power. But for the ancients, the fundamental question of politics concerned the form of government: What is the best regime, absolutely and in the circumstances at hand? For the moderns, the political question concerns the extent of and limits on political power: How much government do we want?

A third contrast concerns the structure of society. For the ancients, the principal social issue was the division of the classes and the ordering of their relative roles in governance. The fundamental unit of society is the family, or rather the household, which consists of the family and its servants or slaves. (The ancients accepted slavery as necessary for the provision of life's needs, to provide the heads of households the leisure for politics and other noble pursuits.) The moderns posit a classless or at least a fluid society with a dynamic and growing political economy. This allows the abandonment of slavery or even requires its suppression. The fundamental unit of society is the individual. Consequently, the ancients tend to prefer aristocracy, or where there are too few good men, a mixed regime; modernity moves toward considering democracy, not so much to be the best regime, as to be the only legitimate one.

Fourthly, for the ancients, the best political arrangement was a polis, a city where citizens can know each other as friends, or friends of friends, and so can know each other's virtues (and vices); this city would be knit together by common piety and shared traditions. Moderns invent the state, a sort of polis within a society, distinct from society, not to mention from church or churches, and states can cover substantially more territory, indeed can aspire to be universal. The basis of the modern state is science, whose first principles are openly proclaimed. Modern political science is not hidden or esoteric, but enlightened.

## **AMERICA IN THIS LIGHT**

On these terms, is American government more classical or more modern? This might seem a preposterous question to ask. All the things I just described as modern are clearly American: liberty, concern with the extent of government, a dynamic economy and society focused on the individual, and a state or government over a large territory. Surely the claim to be something new, to promise a 'new order of the ages,' is characteristically American. We live in the 'New World,' and we name our political movements 'New Freedom,' 'New Deal,' 'New Frontier,' 'New Federalism,' and so forth. Moreover, anyone who has read *The Federalist Papers* can see the influence of modern political thought upon the authors' defense of the Constitution. The discussion of faction, for example, notes that modern legislation 'involves the spirit of party and faction in the necessary and ordinary operations of Government.' The discussion of executive energy as "a leading character in the definition of good government" likewise betrays the vigorous sense of the powers of organization and command that characterizes the advocates of the modern state.

Contemporary political scientists and historians tend to analyze the question of classical or modern influence on American government in four ways. First are those who unabashedly consider American government to be modern, even the pride of modernity. This was the standard interpretation of the Progressives, who wrote the twentieth century textbooks on American government and are still in that way very influential on our self-understanding. In fact, they tended to distrust the original Constitution as including some traditional elements that cut against its modernizing thrust, so they applaud all that makes it more democratic, from the Civil War Amendments, which their successors interpret today as an engine for further social change, to the Progressive Amendments that extended the vote to women, made Senators popularly elected, and enhanced

the federal government's power to tax.

A second group of states' rights conservatives, especially in the circle around the late Mel Bradford, likewise suppose that there is much that is modern in the federal Constitution, but for that reason there is much about it that they distrust, especially as it was interpreted by the Union forces in and after the Civil War. There is much to be learned from their critique of the dominant Progressive reading, though to my mind they sell short the complex character of the Founding, even as they celebrate traditional complexity. In particular, I think they tend to understate the undoubted modern or liberal influences in the Constitution, especially as regards the federal business of protection and commerce, and the moral disapproval of slavery from the start.

A third group stress the modern influences, like the first, but make a sophisticated argument that the differences between ancients and moderns has been exaggerated. Put most baldly, they argue that John Locke is simply what Aristotle would have been had he seen his theory (mis)appropriated by Christian scholastics. On this reading, modern political theory involves a reassertion of something like classical virtue, including the virtue of prudence in statesmanship, but now hides virtue under the name of liberty, since classical virtue had been softened by religious adoption. There is some truth, I think, in this claim, but it too greatly understates the genuine novelty of the modern project, especially in regards to political economy, and it too easily assimilates the virtues of the businessman to those of the statesman. And they have little or nothing to say about the family as a traditional institution in the modern world, in fact readily adopting the modern critique.

Historians who posit a classical republican influence on the Founding constitute a fourth group, though they are rarely sophisticated in their analysis of the political theory at issue and thus pass over the distinction between Aristotle's *Politics* and Machiavelli's *Discourses*. One has only to look at the architecture and iconography of Washington, D.C., to know there is some truth to this, but whether they mean anything beyond what the third group mean is not clear, for the third group admit that the symbols and even some of the substance of ancient republicanism were borrowed by the modern republic's progenitors.

## **THE COMMON LAW ELEMENTS OF AMERICAN CONSTITUTIONALISM**

My suggestion is that we have to understand a further element as well, the common law dimension of American constitutionalism, and that the result is a complex, mixed regime. What do I mean?

Common law was the unwritten law of England, existing there 'from time immemorial.' It is customary law, but formalized in the records of courts, in precedents. It is not exactly natural law, for it does not claim authority over men in all times and places, nor does it restrict its rules to a high level of generality, but it was held to contain nothing contrary to natural law and made natural law maxims its own. Common law process was adversarial and its judges were drawn from the bar; and the judges sat together with a jury, charged with finding fact, made up of 'twelve good men and true.' Though essentially unwritten, common law developed a tradition of declaring its leading principles in written documents such as Magna Charta or the Petition of Right. In all of this, English common law can be contrasted with civil law, descended from the law of Rome. The latter was codified rather than unwritten, and included among its maxims that the will of the prince (or government) had the force of law. The civil law method of trial is inquisitorial rather than adversarial, its judges usually form a separate order from its attorneys, and its courts are more apt to sit as a panel of judges than as judge and jury.

The American colonists carried along the common law when they came to America (and quite literally carried many of its books), and the colonies and, upon Independence, all the states declared the common law still in force, so far at least as was consistent with their circumstances and not overridden by their statutes. And they put many principles of common law in writing in their constitutions and bills of rights. Let me note five respects in which the common law appears in the federal Constitution and the story of its framing.

First, common law appears in the definition of 'judicial power,' established for the federal government in Article III. This is apparent from the summary of common law I just gave, for many of its elements are readily recognizable in our law today. Some are explicit in the Constitution, such as the requirement of trial by jury; some are implicit, like the rule of precedent (though this was explicitly mentioned by Publius in *Federalist* no. 78). Common law appears also in a number of specifics: Due process is a common law term, developed in the interpretation of Magna Charta and seen to encompass many of the other protections in the federal Bill of Rights.

Second, the common law way of thinking appears in the distribution of power between the federal government and the states. On the one side, federal powers are granted by enumeration rather than by definition, and this is typical of common law documents, such as the English Bill of Rights. The basic principle is thus left unwritten, which allows for flexibility in interpretation, but the enumeration is specific, guaranteeing a core that cannot be defined away. On the other side, sovereignty in the states is residual, and it includes not only the police power but the continued authority of common law, for common law strictly speaking was a matter of state law, where property was recorded and protected, marriages and families formed, crimes tried and punished, and the like.

A third appearance of common law thinking is in the Supremacy Clause of the Constitution, in Article VI. This, it might be noted, was not James Madison's idea: He would have adjusted federal and state relations by giving Congress a veto on state laws. The Supremacy Clause is introduced in the Philadelphia Convention not in the Virginia but in the New Jersey Plan, supported by the smaller states. It insures that conflicts between the federal and state governments will not be structured into the system as government-to-government showdowns, but will be adjusted when possible in the ordinary courts of law as issues arise in law among individuals or among governments suing as individuals. Though this does not of itself mandate judicial review by courts of legislation passed at their own level of government under their own constitution, it does suggest judicial review of state laws under the federal constitution, in both state and federal courts.

Fourth, common law thinking appears in the Bill of Rights. I already mentioned the Due Process Clause, but it is worth adding mention of the process of the Bill of Rights' formation. Many resisted adoption of the Constitution because of its lack of a genuine bill of rights on the traditional model, and the great compromise which led to the Bill of Rights (states agreed to ratify the Constitution without a bill of rights, while the Federalists promised to introduce one as amendments) added the good old law to the new form of government. Moreover, and most importantly, the common law heritage appears in the way civil rights and liberties were conceived: not on the whole as absolute spheres of privacy, but as room for exercise of free will; not negating right and wrong, but leaving right to be done in the first place by individuals acting on their own initiative.

Finally, in the Amendment Clause in Article V one finds an American innovation that adopts a common law perspective. Common law, though traditional, was always flexible. It could change as circumstances change (there is no other way for law to stay the same, is there?), through the workings of judicial reason, through

the testimony of juries, or through statutory remedies. On the whole, common law favored tradition; the rule of precedent insures this, and customary law is traditional by definition. But even so traditional a common lawyer as Sir Edward Coke, the seventeenth century judge and parliamentarian whose works helped tutor the Founders in common law, could end one of his books with the adage, 'Blessed be the amending hand.'

To recognize the influence of common law at the Founding is to recognize the force of authoritative tradition. In the wake of Enlightenment, tradition often gets a bad name today, but unjustly: It means the handing on of good things, rendering gratitude forward, I like to say, gratitude for a worthy inheritance which cannot be adequately repaid except by passing it along. The goods that tradition passes along are often not articulated, though in principle one can describe why they are good; that is a task for political philosophy. Still, a good does not cease to be a good just because it is traditional, and a tradition need not cease to be authoritative just because it lacks a modern philosophical defense.

### **THE COMMON LAW HERITAGE AND THE CONSTITUTION TODAY**

Why does all of this matter? Today, our Constitution is often defined, by liberals and conservatives alike, as a modern document and is thought to have launched a modern enterprise. To deny this dimension of our constitutionalism would be foolish, but to claim that it tells the whole story would be equally so. This means that when theories are drawn by interpretation from the Constitution that would invoke its authority to suppress other aspects of our constitutional tradition, the effort is partisan and ought to be resisted as such: The Constitution does not mandate that we enter a brave new libertarian and egalitarian world, nor that we pretend to live in 1789 or 1868. When Publius writes in *Federalist* no. 82 that "Tis time only that can mature and perfect so compound a system, can liquidate [interpret] the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE," he is referring in part to the openness of America to new influences, but also to our ability to preserve our traditions and to give a traditional cast even to the Constitution's innovative goods.

This you at the Academy ought of all people to understand instinctively. You are being trained to fight modern wars with modern equipment, and you are the most modern of the branches of the armed services. But you know that the choice of when to fight and whom to fight is informed by a political science that can know more about necessity and justice than Machiavelli and his modern crew can teach. And the decision of when and why to risk, nay, even to sacrifice one's life for one's country, draws on resources of knowledge and faith that the moderns can barely imagine.