

Rethinking *People v. Croswell*: Alexander Hamilton and the Nature and Scope of “Common Law” in the Early Republic

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While serving in the New York Assembly in 1787, Alexander Hamilton identified a problematic clause in New York’s constitution. Remarking on an act for settling intestate estates, Hamilton asked, “The question is what is meant in the constitution, by this phrase ‘the common law’?”¹ He went on to describe an important distinction in his legal and constitutional thought:

These words have in a legal view two senses, one more *extensive*, the other more *strict*. In their most extensive sense, they comprehend the [British] constitution, of all those courts which were established by memorial custom, such as the court of chancery, the ecclesiastical court, &c. though these courts proceed according to a peculiar law. In their more strict sense, they are confined to the course of proceedings in the courts of Westminster in England, or in the supreme court of this state.²

After suggesting that the constitution’s reference to “common law” encompassed more than just the case reports generated by the central courts in

1. Remarks on an Act for settling Intestate Estates, Proving Wills, and Granting Administrations, made in the New York Assembly February 14, 1787, in Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, 27 vols. (hereafter PAH.) (New York: Columbia University Press, 1961–87), 4:69–70.

2. PAH, 4:69.

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Westminster, Hamilton determined that, “I view it as a delicate and difficult question; yet, I am inclined to think that the more *extensive sense* may be fairly adopted.” Although Hamilton referred here only to the intestacy bill, the distinction between a “strict” and an “extensive” common law would animate his constitutional and legal thought, many years later, during his famous defense of Federalist publisher Harry Crosswell.

In *People v. Crosswell*, a criminal libel prosecution initiated in 1803 and decided the following year, Hamilton argued Crosswell’s motion for a new trial based on this “extensive” interpretation of “common law” in the New York constitution.³ During post-trial arguments, the question at hand was decidedly a constitutional one: what exactly was the common law of criminal libel, as received by New York’s 1777 constitution? Despite the lawyers’ voluminous arguments directed at constitutional interpretation, with only a few exceptions, the constitutional question at the center of *Crosswell* has been ignored by historians.⁴

3. *People v. Crosswell*, 3 Johns. Cas. 337 (N.Y., 1804). Harry Crosswell published two libelous remarks about President Thomas Jefferson: that he was hostile to the United States Constitution and that he paid scandalmonger James Callender to attack former President John Adams (calling him a “hoary headed incendiary”) and to posthumously libel George Washington (as a “traitor, a robber, and a perjurer”). For these assertions, the Republican powers in New York brought Crosswell to court on criminal libel charges and he was indicted on January 10, 1803. For a complete narrative of the case’s background, including excerpts of Crosswell’s libelous article and the resulting indictment, as well as pretrial and trial arguments, motions, delays, and changes of venue, see Julius Goebel Jr., ed., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (hereafter LPAH.) (New York: Columbia University Press, 1964–81), 1:775–90. Hamilton was only involved in the arguments for retrial.

4. The exceptions are Julius Goebel Jr. and Daniel J. Hulsebosch who each describe *Crosswell*’s significance as a common-law “reception” problem. Goebel discusses common law reception at length in *Antecedents and Beginnings to 1801* (The Oliver Wendell Holmes Deviser: History of the Supreme Court of the United States, vol. 1 [New York: The MacMillan Company, 1971], 116–18). He identifies the crucial issue in *Crosswell*—that the court must declare the law in force—but he considers the prosecution and defense to be offering two sets of competing common-law rules. In this way, Goebel does not see past a “strict” interpretation of common law. Hulsebosch pays only passing attention to the case in footnotes. Citing Goebel’s chapter on the *Crosswell* case in the first volume of *LPAH*, Hulsebosch notes that “there were great debates over which rules represented the true common law. A good example is the prosecution of New York Federalist editor Harry Crosswell...” Hulsebosch, like Goebel, thinks only in terms of judicial “rules.” See *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: The University of North Carolina Press, 2005), 398, n. 60. Unlike Goebel and Hulsebosch, most scholars have missed the constitutional question at the heart of *Crosswell* because they have relied primarily on William Johnson’s case reports and its condensed summary of arguments. George Caines, representing the state in *Crosswell*, published a more complete account of the attorneys’ speeches in 1804. These published speeches reveal the constitutional uncertainty undergirding the attorneys’ arguments. When referring to Van Ness’, George Caines’, Spencer’s, and Harison’s

Croswell is most often considered in the context of an emerging free press doctrine: that is, historians are usually interested in the case for how it fits within a developing narrative of a free press.⁵ Although Hamilton can seem to be a hero of sorts in these accounts for arguing in favor of truth as a viable defense to libel prosecutions, some legal scholars take the opposite approach. Because Hamilton openly praised the Sedition Act in *Croswell*, and because he instigated criminal libel suits of his own, *Croswell* is viewed as a missed opportunity, or a stagnation of free press doctrine. Hamilton even has been cast as a historical villain for his failure to move legal practice farther along from politically motivated sedition prosecutions and the Blackstonian doctrine of “no prior restraint.”⁶

However, the lawyers arguing for and against Harry Croswell’s motion for retrial were not asking the court to change the law of criminal libel. Instead, they were concerned with establishing what the law of criminal

arguments, I cite this publication instead of the Johnson reports. See George Caines, *The Speeches of at Full Length of Mr. Van Ness, Mr. George Caines, The Attorney-General, Mr. Harrison, and General Hamilton, in the Great Cause of the People, against Harry Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States* (New York: G. & R. Waite, 1804). When I refer to Hamilton’s arguments I cite a reprinted excerpt of *Speeches at Full Length* that can be found in LPAH 1:808–33. Goebel’s printed excerpt of Hamilton’s address in *Speeches at Full Length* is lengthier than the version printed in the *Early American Imprints* collection of Waite’s *Speeches at Full Length*.

5. Leonard W. Levy cites *Croswell* in his chapter entitled “The Emergence of an American Libertarian Theory,” in *Emergence of a Free Press* (New York: Oxford University Press, 1985), 338–40. Also see Walter Berns’ argument in “Freedom of the Press and the Alien and Sedition Laws: A Reappraisal” that Alexander Hamilton and James Kent were “the men principally responsible for the development of a liberal law of free speech and press—for fashioning a remedy for the deprivation of the constitutional rights of freedom of speech and press” during the early republic (*Supreme Court Review* 1970 [1970]: 111). Like Berns, Michael Kent Curtis credits Federalists Alexander Hamilton and James Kent with invoking “a more liberal vision of the law of sedition than the common law” and even “a Federalist vision of free speech.” See *Free Speech, “The People’s Darling Privilege”: Struggles for Freedom of Expression in American History* (Durham: Duke University Press, 2000), 112–15. And although Robert W. T. Martin recognizes the competing ideas and ambiguities in seventeenth- and eighteenth-century free press doctrine, he also credits Hamilton’s defense of Harry Croswell as part of “the emergence of a recognizably modern concept of democratic press liberty.” See *The Free and Open Press: The Founding of American Democratic Press Liberty, 1640–1800* (New York: New York University Press, 2001), 155, 160.

6. James Morton Smith has been critical of Hamilton in particular, but also of the general “suppression” of the press in this period. See, in general, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956). Smith portrays Hamilton as a leading suppressor of the press in “Alexander Hamilton, the Alien Law, and Seditious Libels,” particularly for Hamilton’s failure to come out strongly against the Sedition Act and for his complicity in the 1799 trial of David Frothingham (*The Review of Politics* 16 [1954]: 305–33).

libel was in the first place. Hamilton and his colleagues asked the court to declare, but not to change, the law of criminal libel as received by the 1777 constitution.⁷

Declaring the law proved to be a tricky endeavor, as seemingly basic questions uncovered uncertain and complicated answers. For example, what authorities provided definitive evidence of the common law? Only the courts at Westminster? What about “ancient” English statutes, or Parliament, or even Congress? At its core, the constitutional issue raised by *People v. Croswell* corresponded to Hamilton’s previous distinction between a strict and an extensive understanding of “common law” in Section 35 of New York’s constitution. Hamilton led the defense’s argument for an extensive interpretation of common law: the defense argued that the “common law,” as received by the New York constitution, encompassed much more than just the decisions of the justices in Westminster.

Adding complexity to this “reception” problem was a “repugnancy” problem: Section 35 voided any elements of the common law that were repugnant to the constitution. As the prosecution and defense argued that their version of the common law was the true account of the law (and that their opponents’ version was incorrect or even repugnant to the constitution), the lawyers fused political concerns with the constitutional question. The counselors brought up a particularly timely topic—the universal desire to mitigate “the spirit of faction” in republican government—in support of their strict or extensive interpretations of the “common law” clause.

Both the prosecution and the defense insisted that the common law, as their side defined it, provided the ultimate bulwark to individual liberty in a republic.⁸ The attorneys enhanced this argument by associating their version of common-law libel doctrine with certain legal rights—for

7. There can be a fine line between “declaring” the law and “changing” the law. In *Croswell*, however, the court’s duty to declare the law resulted from the opposing premises adopted by each side. The defense assumed that the law of criminal libel was never settled in New York State; therefore, no matter what outcome the judges selected, the court would not be “legislating,” or actively changing what they acknowledged to be existing law; instead, the court would be determining criminal libel law’s official, doctrinal starting point on the New York record. In this way, a new legal outcome could be generated within the boundaries of a “proper” judicial adjudication. The prosecution adopted the opposite premise: the law had been already in force in New York, and to deviate from King’s Bench and colonial precedent (Peter Zenger’s case) would be to inappropriately alter the law by judicial judgment. Therefore, neither side asked the *Croswell* court to change the existing law.

8. Attorney General Ambrose Spencer, for example, referred to the common law’s distinction between law and fact—which were usually considered the separate provinces of judge and jury—as “the bulwark of legal security” in *Speeches at Full Length*, 49.

example, a right to protect one's reputation or a right to equal treatment under the law—which in turn, they claimed, helped thwart partisanship. They positioned their opponents' version of common law, on the other hand, as undercutting common-law rights, enabling partisanship, and producing legal outcomes that were repugnant to republican government and to the New York constitution.

This article examines *Croswell* for its unacknowledged significance: as a moment of constitutional uncertainty and as a debate over the meaning of common law in the early republic. New York's pre-eminent lawyers used arguments about the nature and scope of the "common law" received by New York's 1777 constitution as a way to answer a pressing question facing the state: what was the law of seditious libel in the American Republic? The arguments made by Hamilton, along with his colleagues on both sides of the aisle, indicate that the attorneys strategically adopted a "strict" versus an "extensive" idea of the common law, just as Hamilton had articulated years before. The common law, then, could be considered as merely the legal output from the English "common-law" courts; however, New York lawyers and judges were also willing to consider the broadest possible scope of "common law"—understood as synonymous with the entire English constitution—as pertinent precedent that still informed New York's jurisprudence. The legal strategies used to argue *People v. Croswell* on both sides demonstrate the ways in which republican jurists conceptualized and instrumentally applied an extraordinarily expansive view of the nature and scope of common law in order to determine the law in force in the American Republic.⁹

9. This exploration of *People v. Croswell* and the continued reception of common law into the early republic period builds upon generations of scholarship that has been mostly, although not exclusively, focused on the reception of common law into the American colonies. I have posited that New York's leading lawyers and judges accepted the broadest possible conception of "common law" as received under New York's reception clause, and that Americans continued to rely on the entire English constitution as a vast body of legal rules and precedents to inform, but not to control, the substance of their republican law. For the scholarship on common-law reception, see William B. Stoebuck, "Reception of English Common Law in the American Colonies," *William and Mary Law Review* 10 (1968): 393–426; Paul Samuel Reinsch, "The English Common Law in the Early American Colonies," in *Select Essays in Anglo-American Legal History*, 3 vols. (Boston: Little, Brown, and Company, 1907–9), 1:367–415; Julius Goebel Jr., "King's Law and Local Custom in Seventeenth Century New England," *Columbia Law Review* 31 (1931): 416–48; and "The Common Law and the Constitution," in *Chief Justice John Marshall: A Reappraisal*, ed. W. Melville Jones (Ithaca: Cornell University Press, 1956), 101–23; and Elizabeth Gaspar Brown, *British Statutes in American Law, 1776–1836* (Ann Arbor: University of Michigan Law School, 1964).

The jurisprudential circumstances surrounding *People v. Croswell* provided the defense with an ideal opportunity to invoke Hamilton's "extensive" common law. First, although the prosecution cited Lord Mansfield as stating what they claimed to be a clear, unassailable statement of the law of seditious libel, in reality, the law in England was muddled, and the defense leveraged this imprecision and confusion by advancing a broad and historical approach to English precedent.¹⁰ Next, the defense's adoption of the broadest possible conception of common law and their historical methodology—that is, their strategy of sifting through the entire history of English constitutionalism in order to make their argument—had particular resonance under New York law. The state's 1777 constitution had modeled New York's highest court after the House of Lords, one of England's oldest and most distinctive institutions. By creating the Court for the Trial of Impeachments and the Correction of Errors, the state constitution retained a Parliament-like body: a combined upper legislative house and highest judicial court that predisposed its members—which included the justices of the New York Supreme Court who presided over the *Croswell* case—to be responsive to past and current parliamentary precedent as part of or relevant to the law of seditious libel upheld by New York law.

Finally, as the case involved the meaning of free press in the American Republic, the outcome of the *Croswell* case impacted certain rights enjoyed by the citizens of New York state.¹¹ Throughout his career as a lawyer, statesman, and constitutional theorist, Alexander Hamilton frequently addressed the problem of how to protect customary rights in the American Republic. In order to defend a common-law right that had been infringed upon by an overzealous legislature, an overreaching executive official, or even a partisan court, Hamilton relied on his "extensive" conception of the common law as his strategy to address the violation. *People v. Croswell*, then, marked the final instance of Hamilton employing his broad understanding of America's inherited, common-law tradition in order to defend a contested or imperiled right. Therefore, for Alexander Hamilton, contested rights claims generated opportunities for him to invoke the "extensive" common law. Calling upon such a broad corpus of law provided Hamilton, along with the other jurists involved with the *Croswell* case, with strategic flexibility and a vast body of legal precedents

10. See Part I, as well as Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, c. 1770–1820," *Oxford Journal of Legal Studies* 10 (1990): 307–52.

11. These included the right to publish controversial political materials, the right to a proper jury trial, the right to protect one's reputation, and the right to equal treatment under the law.

from which to draw in order to make arguments about the substance of law in the American Republic.¹²

This article explores the constitutional significance of *People v. Croswell* at the same time that it seeks to recover the extraordinarily broad scope of the common law adopted into American jurisprudence. Part I highlights the constitutional uncertainty that defined the *Croswell* case. I examine the prosecution and defense's separate accounts of criminal libel law and how their arguments evidenced two distinct interpretations of what "common law" could mean under Section 35 of the constitution. When referring to these differing interpretations as "strict" versus "extensive," I borrow

12. Hamilton's concern for the protection of common-law rights has been hinted at by biographer John C. Miller, but otherwise, his rights consciousness is largely unacknowledged by scholars. (*Alexander Hamilton: Portrait in Paradox* [New York: Harper & Brown, 1959] 101–5.) Scholars and biographers tend to focus on other aspects of Hamilton's political and constitutional thought, such as his desire to empower the central government to be a strong fiscal-military state, his arguments in favor of an energetic executive, and his insistence that the federal judiciary be coequal to and independent from the other departments of government. For examples of these various portraits of Hamilton, see Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2003); Harvey Flaumenhaft, *The Effective Republic: Administration and Constitution in the Thought of Alexander Hamilton* (Durham: Duke University Press, 1992); and Clinton Rossiter, *Alexander Hamilton and the Constitution* (New York: Harcourt, Brace & World, Inc., 1964). However, Hamilton's well-known distrust of the masses, his tendency to suspect the common man as unfit to govern himself, and his arguments against a civil jury clause and a bill of rights in the United States Constitution have not helped his historical reputation as a rights-conscious Framers. On Hamilton's suspicions of "the people's" ability to govern themselves, see Robert W. T. Martin's insightful article reconciling Hamilton's distrust of democracy with his conception of republican citizenship and a free press, "Reforming Republicanism: Alexander Hamilton's Theory of Republican Citizenship and Press Freedom," *Journal of the Early Republic* 25 (2005): 21–46. On Hamilton's skepticism of juries, particularly civil juries, see Hamilton's *Federalist* No. 83 and Akil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 89–92. Amar labels Hamilton as "hardly a jury worshipper," but he correctly notes that Hamilton did not argue against common-law rights protection, he merely disagreed with the need for a separate declaration or bill of rights (114). In *Croswell*, all of the attorneys argued, in some fashion, that rights emerged from the interstices of legal process and principles. Julius Goebel Jr. noted that "the substance of individual constitutional rights was imbedded in the common law, and of this the colonials were well aware." It makes sense, then, that Hamilton, a common lawyer of the revolutionary generation, would be concerned that a written declaration of rights had the potential to limit those many customary rights that naturally emerged from common-law process. (See Hamilton's arguments in *Federalist* No. 84 against a written bill of rights. Also, see Goebel, "The Common Law and the Constitution," 103.) Finally, in light of Hamilton's reliance on his "extensive" conception of the common law as his go-to legal strategy to defend rights claims, I disagree with Daniel Hulsebosch's comment—albeit made in passing—that Hamilton found the common law "inadequate" for the protection of liberties (Hulsebosch, *Constituting Empire*, 288).

Hamilton's 1787 distinction as a helpful analytical label; in their *Croswell* arguments, neither Hamilton nor his colleagues used the terms "strict" or "extensive" to describe their conceptions of the common law. Also, while discussing the nature of New York's common law of criminal libel, the attorneys raised concerns about political partisanship and the common law's usefulness in the protection of certain rights. By noting these concerns, both the prosecution and defense underscored the strategic link between contested rights claims and the protection of those rights provided by reference to English common law.

I divide my discussion of Hamilton's *Croswell* arguments between Parts I and II. The first Part considers Hamilton's thoughts on why the *Croswell* court should look to a multitude of English sources to find evidence of the true common law of criminal libel. He argued that certain American institutions—particularly in New York—took their cues from this "extensive" common law of England. Because the Court for the Trial of Impeachments and the Correction of Errors loomed large in New York's legal culture, Hamilton suggested that the New York Supreme Court could even look to Congress as it would to Parliament to find evidence of the true substance of seditious libel law. Part II traces other instances throughout Hamilton's career in which he employed the "extensive" conception of common law as a legal strategy. Whether he spoke for a persecuted client or as an advocate for the American public, Hamilton asserted a broad, expansive view of the nature and scope of "common law," and adopted it into republican law, in order to defend customary, common-law rights that were contested or threatened.

Declaring the Common Law

Harry Croswell's defense counsel placed its motion for a new trial on two grounds, both of which disputed the common-law doctrine declared by trial judge Chief Justice Morgan Lewis.¹³ First, the defense attorneys insisted that the jury had been misdirected by Lewis. The chief justice had stated that the common law of criminal libel restricted the jury to consider only the fact of publication and whether the publication's innuendos meant what the prosecution said they meant (that they referred to President Thomas Jefferson). The defense's second ground for retrial was that the common law allowed evidence of truth to be proffered, and, therefore, the original trial should have been put off until the next circuit so that

13. Lewis presided over the trial, which proceeded at the Circuit Court convened at Claverack, New York on July 7, 1803.

the defense could round up those witnesses who would testify to the truth of the publication. At trial, Lewis had instructed the jury not to consider either the truth or falsity of the publication, or Croswell's intent.¹⁴

After reassembling their respective legal teams for oral argument, the prosecution and the defense met in the Supreme Court at Albany on February 13–15, 1804.¹⁵ Chief Justice Lewis presided, along with Justices James Kent, Brockholst Livingston, and Smith Thompson, to resolve the question: what was the law of criminal libel in New York? William W. Van Ness opened for the defense, and he was followed by both of the state's attorneys, George Caines and Attorney General Ambrose Spencer. Arguments concluded with Richard Harison and Alexander Hamilton for Croswell.

Caines and Spencer agreed with Chief Justice's Lewis' understanding of common-law doctrine, which comported with the law declared in Peter Zenger's case (New York, 1735) and most recently with Lord Mansfield in *Rex v. Shipley*, more commonly known as the *Dean of St. Asaph's Case* (King's Bench, 1784). In the *Dean of St. Asaph's Case*, Mansfield made clear that the law of criminal libel differed from other types of criminal prosecutions; that is, the jury did not decide on the general issue—whether the defendant was guilty or innocent of criminal libel—but rather it deliberated only on the narrow factual question of whether or not the accused published the libelous piece. Mansfield cited a string of King's Bench cases—including, among others, *Rex v. Tutchin* (1704), *Rex v. Franklin* (1731), *Rex v. Owen* (1752), and *Rex v. Nutt* (1755)—to support this position.¹⁶ According to England's former chief justice, if the jury determined guilt based on the publisher's intent, this would permit the jury to determine law, rather than fact, which would invite a dangerous instability into English law.¹⁷ The *Croswell* prosecution echoed this warning against inviting “chaos” into the law, should the defense's version of common-law libel be adopted by the court.¹⁸ Mansfield's account of criminal libel law conformed to Chief Justice's Lewis' jury instructions at trial.

14. LPAH, 1:789–90.

15. Both the prosecution and the defense retained different combinations of legal counsel at each stage of the *Croswell* proceedings. Only Ambrose Spencer and William Van Ness appeared consistently. For details, see LPAH, 1: 779–93.

16. James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004) 228–29. Note that each *Croswell* attorney also addressed one or more of these King Bench cases throughout their speeches.

17. *Ibid.*, 229. Mansfield suggests that jurymen, who were subject to bias and prejudice, would disrupt the staid course of the law if they could rule on law—in this case, on the intent of publication.

18. George Caines asked, “Was the law to receive its construction from Jury exposition, what a chaos would our books of reports present? It is only by giving to the Court

Lord Mansfield's statement of the law of criminal libel constituted the core of the prosecution's position in *Croswell*: the common law adopted in New York reflected only what the judges in Westminster said it was. And with few exceptions—notably the *Seven Bishop's Case* (1688)—the King's Bench had ruled that juries did not decide on both law and fact in criminal libel actions. Also, for actions of criminal libel, truth was never a viable defense.¹⁹

However, the English law of seditious libel had been changing over the course of the late eighteenth century, a development obscured by Mansfield's declaration of the law of seditious libel in the *Dean of St. Asaph's Case*. Beginning after 1770, prosecutions for politically motivated, criminal libels emphasized the seditious effects of the publication in question (that is, the potentially deleterious effect of the words on society) rather than the text's unlawful nature. The lawyers involved in late eighteenth-century English libel trials began to frame their arguments around the question of whether the effect of the publication was seditious (an increasingly contextual, and, therefore, factual, matter for the jury to decide) rather than the question of whether the words were libelous (a point of law for the judge to determine).²⁰ Consequently, Mansfield's assertion that the jury could decide only the narrow question of publication proved unworkable, and, therefore, before Parliament passed Fox's Libel Act to allow the jury to decide on the general issue, the English law of seditious libel had already begun blurring together the questions of libel and sedition (law and fact) such that both matters had to be left to the jury.²¹

exclusively, the right to determine on points of law, that the stream of Justice is made to flow in one regular and even channel." *Speeches at Full Length*, 28.

19. Although this has been generally true for criminal libel actions, the larger story of English prosecutions against seditious publications suggests a more complex story behind English libel law. According to Philip Hamburger, the doctrine of criminal libel described by Mansfield only developed around 1700, and prior to the mid-1690s, criminal libel actions were not regularly used as a means to restrain the press. The English Crown used other legal actions and statutes to prosecute libel, some of which—such as *Scandalum Magnatum*—allowed truth as a defense to the publication of libelous news. Hamburger's findings lend historical support to the *Croswell* defense's argument that King's Bench libel doctrine could be considered as a relatively new legal position, and not evidence of the true common law. (Note, however, that whereas the *Seven Bishops Case* allowed truth as a defense, because of the political nature of the decision, Hamburger considers the case to be an exception from the developing doctrine of criminal libel law, which did not allow truth as a defense.) ("The Development of the Law of Seditious Libel and the Control of the Press," *Stanford Law Review* 37 [1985]: 663, 668–69, 699.)

20. Lobban, "From Seditious Libel to Unlawful Assembly," 307–22.

21. This outline of late eighteenth-century developments in English seditious libel law comes directly from Lobban's "From Seditious Libel to Unlawful Assembly," 307–22, 349–52. Fox's Libel Act, or *The Libel Act* (1792) 32 Geo. III, c. 60, declared that juries

This muddled, transitory state of English criminal libel law could work to Croswell's advantage, however. If Mansfield's pronouncement of criminal libel law did not even match the true state of the law in England, how could it be an authority for the law in New York? The defense's "extensive" conception of the common law allowed them to mine other sources of English law in order to present a more advantageous (and more accurate) description of the English law of seditious libel to the New York Supreme Court.

Because the *Croswell* court was familiar with Mansfield's ruling on criminal libel law, the prosecution moved on to deflecting critiques of its "strict" version of common law and to elaborating the benefits of King's Bench doctrine. For example, both sides suggested that the infamous Star Chamber Court, a prerogative court abolished in 1641, originated the doctrine of libel law embraced by eighteenth-century King's Bench justices, but to the defense, libel law coming from the Star Chamber was tainted. Van Ness called the Star Chamber "despotic," and Hamilton described it as "one of the most oppressive institutions that ever existed," whose "horrid judgments cannot be read without freezing the blood in one's veins."²² In response to and in anticipation of these sentiments, Caines reassured the *Croswell* court that the Star Chamber's reputation was tarnished only by the fact that it did not use juries in its oftentimes "ex parte" operations. Those legal principles handed down from the Star Chamber court were not only good law, but represented law that was in accordance with the true common law of criminal libel.²³ Furthermore, the prosecution added, the ancient statutes, and supposedly "common-law" proceedings presented by the defense, did not even hint at true common-law doctrine.²⁴

The prosecution attempted to demonstrate to the court how their strict conception of common law comported with (and, therefore, was not repugnant to) New York's constitution. To meet this end, the prosecution connected the particularities of the "course of settled law" to republican purposes.²⁵

should determine the general issue of guilt or innocence for criminal libel actions, but it did not mention truth as a defense. However, even if Parliament did not declare truth to be a viable defense to criminal libel prosecutions, under the Libel Act the jury had more discretion to consider truth and intent of publication as part of its general verdict. As Lord Mansfield's experience made clear, English juries resisted the narrow question of the fact of publication and would have welcomed the opportunity to decide under the general issue. (Oldham, *English Common Law in the Age of Mansfield*, 218–19.)

22. Van Ness, *Speeches at Full Length*, 9; Hamilton, LPAH, 1: 820.

23. Caines, *Speeches at Full Length*, 33.

24. *Ibid.*, 35, 48.

25. *Ibid.*, 41.

Caines anticipated possible criticism of the “strict” approach by pointing out that King’s Bench doctrine was not just a set of rules. Behind those formalistic rules rested an important substantive concern: criminal libel law had developed to protect the public against breaches of the peace.²⁶ Moreover, if incendiary speech went unpunished, this would facilitate not only breaches of the peace, but political partisanship. With this in mind, Caines refuted the defense’s contention that true, but libelous, publications were necessary for republican elections:

In a republic, it is not a spirit of liberty which we have to keep alive,—it is a spirit of faction that we have to repress: and this right [the purported “power of libeling” for a better informed electorate], thus contended for, without benefiting the first, begets the second; the only enemy of our real liberty. It creates the calumniator; that civil incendiary, who uses as firebrands, scandal, slander, and invective...with these he kindles the flame of party spirit.²⁷

In seeking to avoid the “inevitable consequences of a factious spirit,” Caines reminded the court that Lord Mansfield had already provided New Yorkers with the appropriate solution. And, therefore, “to prevent these deleterious results,” Caines proclaimed, “the strong corrective of common law principles...is the only remedy.”²⁸ By this he meant King’s Bench principles of common law.²⁹

26. *Ibid.*, 22. Some scholars seem to doubt Caines’ assertion that the law developed to protect against breaches of the peace. Hamburger, in particular, notes how criminal libel doctrine became as a way for the King to prosecute seditious subjects when other legal remedies—licensing laws, treason, *Scandalum Magnatum*, various Tudor felony statutes, heresy—fell into obsolescence for varied reasons. Although the Crown used criminal libel law, in part, to keep the peace, political motivations seemed to be the more dominant reason for the development of criminal libel law in the late seventeenth century. (Hamburger, “Development of the Law of Seditious Libel,” 664–65, 692, 697–714.) In New York, the *Croswell* case divided along political lines, strongly suggesting that political motivations lurked behind *Croswell*’s indictment for criminal libel. Still, it is understandable that in the American Republic, where political partisanship was considered a poison to the republican experiment, politically charged, seditious speech might incite party passions and lead to a breach of a community’s peace. Political motivations and the breaking of the peace were intertwined in America, as they were in England.

27. Caines, *Speeches at Full Length*, 42.

28. Caines, referring to the *Dean of St. Asaph’s Case*, in *Speeches at Full Length*, 43.

29. As counsel for the defense in *Rex v. Shipley* (or, the *Dean of St. Asaph’s Case*), Thomas Erskine would have turned Caines’ argument back around on the *Croswell* prosecution. To Erskine, precisely because seditious publications could incite discord, determining the seditious nature of the words necessarily relied on the context of the publication, and, therefore, was a fact (and not a question of law) for the jury to decide. (Context was difficult to capture on the written record, and yet, according to common-law rules, the judge could only base his decision on the law from the information and evidence captured on the record.) Therefore, when placed in the changing context of the late eighteenth-century law of

By introducing political partisanship as a substantive concern of criminal libel law, Caines opened up an opportunity to discuss certain rights protected by their “strict” version of common law in connection with the evils of political faction. He first suggested that criminal libel law provided for the legal protection of a person’s reputation, and later in his speech, he openly declared that the common law protected the “rights of reputation,” which were “as sacred as those of property.”³⁰ As a corollary to this point, Caines skeptically questioned whether a right to vote in republican elections also conferred the right to abuse other Americans, be they magistrates or private citizens seeking elected office.³¹ Through this comment, Caines attacked the defense’s contention that true, but libelous, information about a candidate or public officer was crucial and relevant to preserving republican elections.³²

Finally, Caines asserted that to allow truthful libels to be protected under New York law was to invite a double standard into the law, which would be repugnant to the constitution. To this end, Caines presumed a right to equal treatment under the law: if the court declared that truth was a viable defense in criminal libel law, then a double standard would be set for magistrates and private citizens. The law would protect the private citizen from any sort of published libels (under an action of private libel), but the magistrate would not receive the same treatment under the law, for true libels aimed at him would be afforded no legal protection.³³ Moreover,

sedition libel, Caines’ point about protecting against breaches of the peace would serve to aid Crosswell’s argument that under New York law, the jury should decide the general issue. (See Lobban, “From Seditious Libel to Unlawful Assembly,” 316–17.)

30. Caines, *Speeches at Full Length*, 20, 38, 44. Considering the “right of reputation” as a form of property right to be enforced by a libel prosecution was common in England (Lobban, “From Seditious Libel to Unlawful Assembly,” 311). It also makes sense in the context of prevailing Anglo-American cultural norms—namely, the honor culture of the late eighteenth century (See, generally, Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* [New Haven: Yale University Press, 2001]).

31. Caines, *Speeches at Full Length*, 40.

32. Van Ness, *Speeches at Full Length*, 10.

33. Caines claimed that to ease the severity of King’s Bench criminal libel law would be to allow a form of unfair, extralegal proceedings: “A man may be a worshiper of God or of fire; he may be a Hindoo, a Manichean, or a Copt: he may believe in all the Gods of antient mythology, or the materialism of Spinoza, and neither by *our* Constitution, nor that of the United States, will one, or all of these circumstances affect his eligibility to any of the various offices in our system. Yet, if he fail in what any *printer* shall please to think a moral obligation; if he avail himself of any limitation, or other act against the opinion any fellow, who has credit or friends to procure ink, types, and a press; he is, to the endangering that peace, the Constitution is so desirous to preserve, to be arraigned before a tribunal unknown to the law of the land. A self-erected jurisdiction, where the accuser, judge, jury and executioner, may be united in one malignant wretch.” He then went on to underscore the inherent

the damage wrought by unpunished libels of a public official's reputation would affect not only his peace of mind and his character, but also his property and the peace of mind of his family.³⁴

Attorney General Spencer reinforced Caines' arguments about these rights protected by the King's Bench account of criminal libel law. Spencer reminded the court that because the law of New York state was concerned with the protection of an individual's rights and liberties, it followed that no judge could allow one person to infringe on the rights, property, and happiness of another, when acting in accordance with his prescribed judicial duty.³⁵ But for the most part, Spencer left all talk of rights protected at law to Caines, and focused instead on chipping away at the defense's interpretation of a broadly-conceived common law.

When Van Ness, Harison, and Hamilton outlined the defense's arguments in favor of a new trial, they built their case on a conception of the common law as being more than just the judicial output of the central courts at Westminster. The common law, as received by the New York constitution, included King's Bench and Common Pleas' judgments and their rules of procedure and substance, but the reception went much further than that. As Hamilton noted in 1787, the common law was the sum total of all the courts in the English realm, and in *Croswell*, Harison looked to "the whole of English law" for guidance on question of criminal libel.³⁶ This "extensive" notion of common law encompassed the entire English constitution, and meant that the substantive law, rules, and processes of equity, ecclesiastical, and admiralty courts—to name only a few of many English jurisdictions—combined with those narrowly defined, and more commonly known "common-law" courts (held at Westminster, in county quarter sessions, and on assize) to form a broadly conceived common law shared by Englishmen. Sometimes process and doctrine from these other types of courts conflicted with the output of the King's Bench or Common Pleas, but this circumstance only made it necessary for the New York bench to sift through the sources of common law to declare the particular law in force under New York's constitution.

unfairness of the defense's suggested legal double standard: "But on what principle of Justice is there to be one law for the reputation of the private man, and another, or none for that of the magistrate? Why is not the name of the latter as much entitled to protection as that of the former?" *Speeches at Full Length*, 39–41.

34. Caines does not specify how, in fact, unpunished libels would affect a person's property, real or chattel, unless he was referring to the public man's reputation as property. *Ibid.*, 44.

35. Spencer, *Speeches at Full Length*, 53.

36. Harison, *Speeches at Full Length*, 55.

Parliament, the highest court of the realm, figured prominently in the defense's "extensive" conception of the common law, because its output regularly constituted the truly *common*, shared law of England.³⁷ Parliamentary output blurred any formal distinction between legislation and judicial determinations. Historically and theoretically, its statutes were decisions of a court, either decreed retrospectively for particular petitioners, or aimed prospectively for all subjects of the realm. In their broad conception of common law, the defense considered Parliament's statutes to be authoritative, declaratory evidence of the common law and relevant for New York's bench to consider.³⁸

Particularly relevant was Fox's Libel Act of 1792, the Parliamentary statute declaring that in cases of criminal libel, the jury could decide on the general issue, and it should not be confined only to determining the fact of publication.³⁹ The defense championed Fox's Act as a judicial determination handed down by the highest court of the realm to declare and clarify the actual substance of common law. Hamilton argued that the Act did not alter the existing law espoused by Lord Mansfield, but it instead restored the true, time-out-of-mind law of criminal libel. Late seventeenth- and eighteenth-century King's Bench doctrine had muddled the law, and with Fox's Act, Parliament declared that the common law as embodied in ancient statutes—and in line with the legal spirit of *Scandalum*

37. It may seem surprising that members of a generation who protested parliamentary legislation during the Anglo-American imperial crisis would be willing to confer on Parliament, the institution that passed the "tyrannical" Declaratory Act of 1766, the status of highest court. However, even the revolutionary generation understood Parliament to be the highest court of the English realm, if not the highest court of her colonies (Americans maintained that the highest legislature and court in each colony was the combined authority of the King presiding in his colonial legislatures). Therefore, Croswell's defense counsel and the New York bench would have thought nothing of admitting that Parliament had the power to declare what the common law was in England, even if the American revolutionaries would not have granted Parliament the power over the customary rights and common law that her colonies claimed. For the best treatment of the legal and constitutional disputes between the American colonies, Parliament, and the King, see John Phillip Reid, *Constitutional History of the American Revolution*, Abridged Edition (Madison: The University of Wisconsin Press, 1995).

38. Matthew Hale described Parliament as "the high and supreme court of this kingdom." Hale elaborated on the dual nature of Parliament's adjudicatory and law making powers: "Touching the power of parliament, either it respects things done or things to be done. In respect of things already done. This is the judicative power of parliament, which is the supreme judicature...in respect of things to be done, wherein it acts under a double notion, viz. either by way of council or by way of law...As touching the legislative power...this power of law making is exercised: (1) in imposing charges as subsidies &c. (2) in enacting new laws, (3) in declaring laws..." (Sir Matthew Hale, *The Prerogatives of the King*, ed. D.E.C. Yale [London: The Selden Society, 1976], 135, 140–41).

39. *The Libel Act (1792)* 32 Geo. III, c. 60.

Magnatum, which allowed truth as a defense—reflected the real substance of criminal libel law. The Act was not a modification to the law, but a *declaration* of the law—the true legal doctrine of criminal libel—as it had always been. (And, as discussed, Fox’s Act formally pronounced the already-occurring transition in late eighteenth-century English libel law as well). Crucially, given that the New York constitution only adopted common law dating from before April 19, 1775, the defense argued that Fox’s Libel Act simply provided evidence of the true criminal libel doctrine *already in place* in 1775, but had been confused by the King’s Bench version of the law.⁴⁰

During this portion of his arguments, Hamilton also raised a technical question of law for the court to consider: what constituted a valid precedent? He suggested a rubric for determining a true legal precedent: first, nothing but a uniform course of judicial conduct on a legal matter formed a precedent, and if this uniform course was not in place, then the substance of the now-questionable precedent must be considered in relation to “principles of general law.” If the questionable precedent did not conform to these principles, then the court was free to disregard the judicial conduct that had been heretofore erroneously considered to be binding precedent, and to assume instead that the law had never been settled.⁴¹

According to Hamilton, this was the exact circumstance of Harry Crosswell’s case: ancient statutes pointed to truth as a defense, and the general principles of criminal common law allowed juries to determine not only the general issue, but intent as well.⁴² Criminal intent, as Hamilton elaborated earlier in his speech, was an inseparable mixture of law and fact: the one legitimate and indisputable exception to the English judge’s duty to decide only on law, and the jury’s duty to decide only on fact.⁴³ The King’s Bench judges had developed a criminal libel doctrine that denied truth as a defense and limited the law to a narrow question of the fact of publication, thus denying the jury its power to determine the general issue and the publisher’s intent. This meant that the law of England and the law of New York consisted of only “a mere floating of litigated questions” on criminal libel.⁴⁴

40. LPAH, 1:826.

41. *Ibid.*

42. Van Ness cited four statutes, passed between 1275 and 1554, which suggested that the law of England only punished false or malicious publications. *Speeches at Full Length*, 7.

43. LPAH, 1: 814–15. Van Ness also raises this point, rhetorically asking why it was that, in English criminal law, only criminal libel law set a different standard for juries to find only the fact of publication and not the publisher’s intent—especially when intent constituted the crucial element of *criminal acts*. Van Ness, *Speeches at Full Length*, 10, 11.

44. LPAH, 1: 826.

England, however, had already taken care of this problem. With Fox's Libel Act, the "highest branch of the judicature of that country" confirmed and—for Hamilton's argument—settled the common law of criminal libel in England. Hamilton continued, "It is in evidence that what we [the defense] contend for was and had been the law, and never was otherwise settled"—until Fox's Act.⁴⁵ Now, Hamilton and his colleagues looked to the Supreme Court sitting at Albany to resolve New York's problem of unsettled law.

Hamilton argued last, but Attorney General Spencer anticipated these claims and pre-emptively attempted to mitigate their effects on the prosecution's case. Spencer underscored that English judges and their American counterparts shared a solemn judicial duty to separate the question of law from fact, because under the English constitution, the jury "ought not to decide the question of law."⁴⁶ The defense's motions for retrial, therefore, stood in contrast to both English and American judges' judicial duty. Furthermore, Spencer resisted the defense's claims that any law originating outside of the courts at Westminster—and especially not the ancient laws cited by Van Ness—constituted the common law of England.⁴⁷ He also warned the *Croswell* court that it should deny what amounted to the defense's prodding to change the prosecution's version of the existing law of England—that of Zenger's case and Mansfield's ruling in the *Dean of St. Asaph's Case*—because it fell only to the New York legislature, and not to the courts, to make new law or to modify this existing law. Spencer lectured the court, "let us not, in a Court of Justice, attempt, by altering the law, to usurp the power of the legislature."⁴⁸ Again, he

45. *Ibid.*, 1: 827. Hamilton looked to Fox's Libel Act as a declaration, or confirmation, of the law of seditious libel, but a declaration that had the imprimatur of the highest court in the realm. Fox's Libel Act did not "come up" to Parliament on appeal—and, therefore, in this sense, the Act was not perfectly analogous to a judicial decision handed down on a specific case. However, New York's constitution borrowed the House of Lord's example, and vested simultaneous legislative and judicial powers in the Senate (the senators and the lieutenant-governor acting as president of the Senate, along with the chancellor and judges of the Supreme Court constituted the highest court of New York, the Court for the Trial of Impeachments and the Correction of Errors). Therefore, Hamilton did not have to label Fox's Libel Act as *either* a legislative or judicial declaration of the law because inherently in the Act, as a statute of Parliament, it was both. The English constitution had developed such that parliamentary output was simultaneously legislative and judicial in nature, and because the New York constitution recreated a similar mixture of legislative and judicial powers in its upper house, the New York bench would have understood the complexity behind Hamilton's statement that the "highest branch of the judicature" of England had determined the true doctrine of criminal libel law.

46. Spencer, *Speeches at Full Length*, 50.

47. *Ibid.*, 48; Caines had previously made a similar point (*Speeches at Full Length*, 35).

48. Spencer, *Speeches at Full Length*, 47. Fox's Libel Act did not declare "truth" to be a defense to criminal libel actions; therefore, argued Spencer, even if the prosecution granted

argued that the English judge served as an example for the American judge. American courts inherited the maxim *jus dicere non jus dare* which, when further bound by uniquely American notions of separated departmental powers, did not give the court any authority to “usurp” legislative power and change the law of libel. The legislature altered the law, but it did not declare the law; only the courts did.

In addition, the attorney general denied the defense’s contention that Parliament provided contrary evidence to the King’s Bench version of criminal libel law. He argued that Parliament’s libel act was not evidence of New York’s common law, because Fox’s Act *innovated* on Mansfield’s version of criminal libel law, rather than *declaring* the law as it existed in 1775.⁴⁹

The defense’s argument ultimately revolved around the idea that because various elements of the English constitution, including centuries-old statutes, “principles of general law,” Parliament, and King’s Bench determinations *together* formed the broadly defined, common law of England, all of it gave evidence as to the common law adopted under New York’s constitution. However, the defense did not stop there in its application of an extensive notion of common law to New York State. The defense also suggested that American institutions—namely, Congress and the New York legislature—operated similarly to Parliament and shared a Parliament-like authority to give evidence as to what constituted common law. In republican legislatures, as in Parliament, a fine line separated the power to make the law and the capacity to declare the law.⁵⁰

that the 1792 Libel Act was declaratory of common law, the court could not apply the Act to Crosswell’s second ground for retrial.

49. Spencer, *Speeches at Full Length*, 49.

50. Evolving and uniquely American ideas of separating judicial from legislative power hinged on the common-law notion that judges only “declared” the law rather than “making” the law. Even in England, however, this distinction, although important, was somewhat of a legal fiction; it served the purpose of reminding judges to be conservative, rather than innovative, and to apply existing principles to new cases at hand as much as possible. American judges inherited the same notion, but endured the extra pressure brought on by the demands of American theories of separating governmental powers. American judges could be accused of inappropriately “usurping” legislative power (and, depending upon when and where the “usurpation” occurred, could be punished by the legislature) if they were perceived as innovating on the law. It is significant to note, then, that Alexander Hamilton’s strategy allowed American judges to declare alternative legal doctrines without improperly becoming “innovators” or “legislators.” Hamilton offered a way for American judges to reconcile their judicial duty to “declare” new legal outcomes through his conception of an extensive common law. (For a discussion of America’s eighteenth-century, common-law legal culture, see Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), 33–46. Also, to understand how Americans inherited and adapted the common-law concept of “judicial duty” from

The defense never argued that American judges could make law, and in this way, the defense and prosecution agreed that the English conception of judicial duty applied to American judges. But the defense looked to Congress to give evidence of the law (the New York legislature had not yet “declared” the law on criminal libel, but they would do so after the *Croswell* court divided and failed to grant the new trial). Referring to Congress’s Sedition Act of 1798—which declared truth to be a valid defense against federal sedition (criminal libel) prosecutions—William Van Ness declared:

The supreme legislature of the union has declared, that by law, truth is a justification...by a recurrence to the statute [the Sedition Act], it will be found, that *that* part of it which permits the truth to be given in evidence is *declaratory*, and the other parts remedial. Ought this Court to doubt after this solemn declaration of the nation on this point? And is it not bound to regard it as conclusive on this subject?...This is an authority pure and unadulterated; above all, it is American.⁵¹

Hamilton agreed. He affirmed, “I say, the highest legislative body in this country, ha[s] declared that the common law is, that the truth shall be

English jurisprudence, see, generally, Parts IV–VII in Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008). On the other hand, republican legislatures at both the state and federal levels routinely blurred the boundaries between legislative and judicial power during this period. The line between “making” law and “declaring” the law in many state legislatures, and under certain state constitutions, was so fine as to occasionally appear to be nonexistent. In New York, for example, the state constitution did not provide for the separation of the judiciary from the legislature and the executive, and, in fact, these powers blended in New York’s Council of Revision, as well as the Court for the Trial of Impeachments and the Correction of Errors (modeled, as mentioned, after the English House of Lords; see LPAH, 1:17–18, 178.) Connecticut retained its 1662 colonial charter (purged of monarchical elements), and under this constitutional arrangement, the legislature acted as the high court of the state. (The United States Supreme Court discussed the Connecticut legislature’s Parliament-like capacity at length in their 1798 *Calder v. Bull* decision.) New Hampshire’s legislature restored litigants to their law—effectively overturning court decisions—and it actively legislated state judges out of office when it disagreed with court decisions. (See John Phillip Reid, *Legislating the Courts: Judicial Dependence in Early National New Hampshire* (DeKalb: Northern Illinois University Press, 2009), 7–13.) The pre-Marshall Supreme Court acknowledged these blurry boundaries of state legislative and judicial powers in decisions such as *Chisholm v. Georgia* (1793, James Iredell’s opinion in particular), *Calder v. Bull* (1798), and *Cooper v. Telfair* (1800). Finally, even Congress (along with various state assemblies) regularly adjudicated claims made on state debts and contracts. (See Christine A. Desan, “Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in *Chisholm v. Georgia*,” in *The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development*, ed. Kenneth R. Bowling and Donald R. Kennon (Athens: Ohio University Press, 2002), 178–233.)

51. Van Ness, *Speeches at Full Length.*, 9.

given in evidence, and this I urge as a proof of what that common law is.”⁵² Congress, they implied, imitated Parliament’s capacity to declare the common law.

Through these arguments, the defense advanced an important claim about the nature of governmental power in the early republic. By implicitly analogizing a Congressional power to declare the law to that of Parliament, the defense suggested that whereas state legislatures were generally fashioned as separate and independent departments from the courts of law, the legislatures’ powers oftentimes included the capacity to make certain quasijudicial determinations, such as confirming what exactly comprised the law of the land. It is important to remember, however, that Hamilton and Van Ness intended these remarks to persuade judges who also sat on the highest court in New York State, the Court for the Trial of Impeachments and the Correction of Errors. Analogies between Congress and Parliament would have resonated particularly well with judges who were accustomed to participating in and being overseen by New York’s version of the House of Lords.⁵³ Hamilton was not, therefore, revising his views on the separation of legislative and judicial power, which he articulated most clearly in his *Federalist* essays; instead, he merely tailored his legal arguments to influence his audience. In 1804, just as in 1788, Hamilton remained a staunch advocate for an independent federal judiciary, and would not (and did not) make arguments analogizing Congress to Parliament in order to describe the nature of legislative and judicial power at the federal level. But in the context of New York, where the Court for Trial of Impeachments and the Correction of Errors held a primary place in the state’s legal and constitutional apparatus, Hamilton thought that New York’s bench would be willing to accept Congressional law as “proof” of the common law, and to adopt his broad conception of the British common-law tradition as part of New York’s jurisprudence.

The defense did not imply that either Congress or the New York assembly (the lower house) was actually a high judicial court of their respective

52. LPAH, 1: 830.

53. See LPAH 1:17–18, 78. In addition, see “Collision between the Supreme Court and the Court of Errors of the State of New York,” *American Law Magazine* 3 (1844): 317. In *Constituting Empire*, Daniel Hulsebosch discusses how the Court for the Trial of Impeachments and the Correction of Errors fit into New York’s late eighteenth-century constitutional fabric (see 180–82). Theodore F. T. Plucknett and Philip Hamburger describe how Parliament, as the highest court in the realm, presided as the dernier resort of the English legal system. See Plucknett, “The House of Lords as a Court of Law, 1784–1837,” *Law Quarterly Review* 52 (1936): 189, and Hamburger’s chapter, “No Appeal from Parliament,” in *Law and Judicial Duty*, 237–54.

federal and state realms; however, their “extensive” common-law argument does suggest how American institutions and constitutional law continued to be intimately tied to English constitutionalism. State and federal institutions imitated and relied on British institutions as models, and American jurists and statesmen looked to English law for guidance and precedent.⁵⁴ The defense’s “extensive” conception of the common law was premised on the notion that American courts could answer novel questions about republican law by scouring the corpus of English law. The arguments made in *People v. Croswell*, and especially those devised by Alexander Hamilton, demonstrate how the influence of the English constitution and its broadly conceived, truly *common* law was alive and well, and in operation in America’s republican jurisprudence.⁵⁵

Defending Rights with the “Extensive” Common Law

Although William Van Ness and Richard Harison occasionally voiced concern over the “spirit of faction,” Alexander Hamilton devoted considerably more time to the relationship between criminal libel law and political partisanship.⁵⁶ Like the prosecution, Hamilton tied political matters to valid legal concerns. He argued that the defense’s version of criminal libel protected certain legal rights that, in turn, worked to counter the evils of faction and rendered the defense’s version of common law in accordance with the New York constitution.

However, Hamilton’s arguments about common-law rights were more sweeping than those of his colleagues. To Hamilton, the whole of the

54. Take, for example, Congress relying on parliamentary precedent as a model to run the trial of Robert Randall and Charles Whitney (see the *Annals of Congress* from Monday, December 28, 1795 to Friday, January 8, 1796). Also, eighteenth-century American statesmen oftentimes consulted George Petyt’s *Lex parliamentaria: or, A Treatise of the law and custom of the Parliaments of England* (London: T. Goodwin, 1690).

55. At the end of its term, in May 1804, the court handed down a divided decision, 2–2, thus defeating the motion for Harry Croswell’s retrial. However, since the beginning of February 1804, the New York Assembly and Senate had been considering various bills to “declare” the law of criminal libel once and for all. Their legislative efforts became law on April 15, 1805, and provided that in libel actions, the jury had the right to consider both law and fact and the jury did not have to find the defendant guilty based solely on the fact of publication. The law also allowed the defendant to offer truth as a justification for his libelous publication (N.Y. Sess. Laws 1805, ch. 90). James Kent referred to the law as a “declaratory statute,” thus underscoring his assumption that the legislature had exercised its Parliament-like capacity to declare the common law in force in New York State. (Morris D. Forkosch, “Freedom of the Press: *Croswell’s Case*,” *Fordham Law Review* 33 [1965]: 445–48.)

56. Van Ness, *Speeches at Full Length*, 17.

common law of England provided substantive and procedural safeguards for an individual's rights and liberties, and in the midst of the fierce partisanship that developed on both the national and the New York political scenes, these common-law protections were needed, more than ever, to counter party spirit. Hamilton read the substance of English common law into the federal Constitution, and he believed that maintaining both the rigors of the English legal process and the proper roles of judge and jury provided the best protection for individual rights.

To Alexander Hamilton, then, English common law was the best solution to the problem of republican governance: common-law substantive principles, legal process, and juries formed the crucial barrier between a citizen and their government. The common law safeguarded an individual's rights and liberties from the executive, the legislature, and even the judiciary, although Hamilton oftentimes credited truly independent judges with protecting individual rights from the other two departments.⁵⁷ Ultimately, if the judiciary was not fully independent of the legislature or the executive, or if partisanship corrupted the judges, common-law juries, principles, and process would be the last line of defense to protect the individual.

Although Hamilton eloquently described these ideas in his *Croswell* arguments, he had been relying on his "extensive" conception of the common law as the primary strategy used to defend his clients' rights claims since he began practicing law. As evidenced in the *Croswell* case, the "extensive" common law strategy worked well to safeguard contested or imperiled rights because it opened up the vast past and present history of English constitutionalism as a source for crafting persuasive legal arguments. Invoking the entirety of English law gave Hamilton flexibility to look past the law reports generated in Westminster, to interrogate pronouncements of the law made by individual justices, and to find novel, yet persuasive, arguments in favor of his client. The "extensive" common-law strategy also encouraged Hamilton to rely on common-law process, in

57. In *Federalist* No. 79, Hamilton makes his strongest statements about the importance of an independent judiciary. Hamilton praises the federal Constitution for allowing its judges to serve under good behavior and without fear of having their salaries reduced by Congress for any unpopular decisions made from the bench. Unlike in New York, the federal Constitution did not intermingle legislative and judicial personnel in a high court or in a council of revision. Under the 1777 state constitution, New York judges held their tenure under good behavior (although they could not serve past age 60), and in *Federalist* No. 79, Hamilton remarked that this age restriction was unpopular and that, in general, state constitutions should have done a better job protecting judges' salaries. Therefore, for all of these reasons, Hamilton most likely thought that New York state judges were not ideally independent; however, he still thought them independent enough to be more willing to safeguard individual rights than either a legislator or executive official.

addition to citing the history of English constitutionalism, in order to influence the substance of American law. For Hamilton, who throughout his career demonstrated a sincere concern for the vulnerability of individuals' rights, the common-law tradition afforded the best method of protecting rights under a republican government.

Contested rights claims, such as those of the embattled New York Loyalists, generated opportunities for Hamilton to scour the English common-law tradition, and to invoke a broad conception of common-law rights received under the New York State Constitution. When Hamilton entered New York City's legal scene in 1782, victorious Patriots were eagerly punishing Loyalist Americans and any remaining British subjects for their failure to support the revolutionary cause. Much to Hamilton's dismay, Loyalists' postwar mistreatment oftentimes occurred in court, facilitated by the Trespass Act.⁵⁸

New York's legislature passed the Trespass Act to ensure that Loyalists could not claim military permission for their wartime use of Patriots' property. The British occupied New York City for much of the war, and as a result, they granted certain Loyalists who remained within the city the use of abandoned property. Under the law of nations, this wartime circumstance could be successfully defended against postbellum suits alleging trespass, because the Law of Nations recognized military permission as a valid defense. New York's Trespass Act, however, legislated away this plea of military justification, and exposed Loyalists to litigation while simultaneously denying them a valid legal defense.⁵⁹

Alexander Hamilton represented dozens of Loyalist clients during the postwar 1780s, and although he did not always defeat the trespass actions initiated against his clients, he was oftentimes successful in mitigating the effects of Trespass Act litigation. His courtroom strategy, as evidenced in his defense of Joshua Waddington in *Rutgers v. Waddington* (New York Mayor's Court, 1784), was to cast doubt on the successfulness of a Trespass Act prosecution. Hamilton did this by arguing that the Law of Nations, and, therefore, the plea of military permission, was received into New York state law by Section 35's common-law reception clause, and as such, courts could apply constitutional law over statutory law if a conflict arose. Although Justice James Duane did not adopt all of

58. Passed March 17, 1783. *Laws of the State of New York* 6 Sess. 1783, c. 31.

59. The Trespass Act also authorized transitory prosecutions of trespass (prosecuted in courts beyond the vicinity where the offense occurred), which gave Patriot plaintiffs their pick of favorable local courts. Furthermore, it stipulated that not only the defendant, but his representatives, executors, and heirs, were subject to prosecution. Finally, the Act made the first court to hear a case also the final court of record, thus denying removal to a higher court or appellate review.

Hamilton's reasoning, the court in *Rutgers* equitably interpreted the Trespass Act to reach Hamilton's desired result. Because the court ruled that Waddington had military permission for the use of some of Elizabeth Rutgers' property, the decision's effect was to cast doubt on the successfulness of a Trespass Act prosecution.

Hamilton also pursued settlement strategies—such as removing litigation to higher courts for common-law (and eventually statutory) trespass actions—in order to leverage his success in *Rutgers* against potential plaintiffs' zeal for prosecution. Plaintiffs opted to settle their suits for much smaller amounts, rather than take the chance that a higher court would rule, as New York's Mayor's Court did, that under an equitable interpretation of the law, the Trespass Act allowed the plea of military permission.

These legal strategies demonstrate that even in the 1780s, Hamilton relied on a broad conception of common law (as encompassing the Law of Nations, as relying on mitigating principles of equity) and the availability of common-law process (writs of certiorari, for example) to protect his unpopular Tory clients. Hamilton's reliance on common-law principles and process to defend Loyalists even extended outside the courtroom. In two polemical essays, addressed to the citizens of New York, Hamilton argued that if New York's legislature could pass laws that denied common-law due process to some, then everyone—Patriot and Loyalist citizens alike—would find their rights and liberties compromised. Writing as "Phocion," Hamilton made the case that it was neither the legislature nor court magistrates who safeguarded rights and liberties, but instead, it was the due process afforded by common-law procedure that allowed liberty to remain intact.⁶⁰

Phocion cited familiar common-law processes to make his point. "Due process of law" meant presentment, indictment, trial by the accused's peers, and conviction in consequence. And not only did New York's borrowed common-law writ system provide this due process of law, but the thirteenth article of New York's constitution guaranteed it as well.⁶¹

60. In his biography of Hamilton, John C. Miller posited that Hamilton signed his essays with the great Athenian statesman's name because Phocion had offered Athens much "safe and wholesome counsel," which his fellow citizens did not follow. Miller suggests that Hamilton recognized that his advice to Patriot New Yorkers would be ignored in the short term, but it would prove well-founded over time (Miller, *Alexander Hamilton: Portrait in Paradox*, 103).

61. "A Letter from Phocion to the Considerate Citizens of New York" (New York, January 1–27, 1784). Hamilton wrote: "The 13th article of the constitution declares, 'that no member of this state shall be *disfranchised* or *defrauded of any of the rights or privileges* sacred to the subjects of this state by the constitution unless *by the law of the land or the judgment of his peers.*' If we enquire what is meant by the law of the land, the best

Furthermore, Phocion made clear the fundamental assumptions of due process: “that no man can forfeit or be justly deprived, without his consent, of any right, to which as a member of the community he is entitled, but for some crime incurring the forfeiture.”⁶² Also, no forfeiture of rights could occur without allowing the accused to offer a defense, made through the typical course of prosecution, and that unless convicted of a crime, his rights could not be denied.⁶³

Loyalists, Hamilton contended, were citizens too, and if the legislature could pass discriminatory laws against them for no justiciable offense committed, then all that could protect these former Tories was the promise of common-law due process.⁶⁴ The Trespass Act, however, tampered with the routine course of process, and if the people of New York tolerated this infringement of justice when it applied to Loyalist citizens, then even Patriot citizens would one day have their rights and liberties abridged as well.⁶⁵ Phocion’s immediate goal was to convince the people of New York to demand a change to or the rescission of the Trespass Act, but his larger point reminded New Yorkers that they *all* benefitted from those necessary, common-law safeguards that protected them from any injustice perpetrated by the institutions of republican government.⁶⁶

During the 1780s, Hamilton was not only concerned with protecting Loyalists’ rights. He also argued against the New York Assembly’s

commentators will tell us, that it means *due process of law, that is, by indictment or presentment of good and lawful men*, and trial and conviction in consequence.” (PAH, 3:485.)

62. *Ibid.*, 3:532.

63. *Ibid.*, 3:532–33.

64. The 1783 Treaty of Peace forbade any future prosecutions for anything done on account of the war. Hamilton asked, “Can we then do by act of legislature, what the treaty disables us from doing by due course of law?” (*Ibid.*, 3:488).

65. Hamilton wrote, “...the people, at large, are sure to be the losers in the event whenever they suffer a departure from the rules of general and equal justice, of from the true principles of universal liberty” (*Ibid.*, 3:486).

66. Hamilton was quick to equate any tampering with due process with tyranny. By passing the Trespass Act, which altered and limited the normal course of common-law process, he accused the legislature of usurping the judiciary’s powers and of “subvert[ing] the constitution and erect[ing] a tyranny” (*Ibid.*, 3: 548). Hamilton did not let the judiciary off the hook either; in remarks made while he served in the assembly, Hamilton made it clear that he thought that the 13th article of the New York state constitution—which he described as guaranteeing due process of law—applied to the judicial actions. In this way, the courts would be acting unconstitutionally if they denied process as it comported with the law of the land—that is, the due process of law. See Hamilton speaking during deliberations on an “Act for Regulating Elections” in the New York Assembly on February 6, 1787. During that debate he remarked, “The words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature” (*Ibid.*, 4:35).

proposed requirement that naturally born Roman Catholics take an oath of abjuration that effectively would have barred them from holding office.⁶⁷ And when Hamilton considered the place of the federal judiciary under the United States Constitution, he showed concern for the rights and liberties of the American people as a whole. He emphasized, "It equally proves that though individual oppression may now and then proceed from the courts of justice, the *general liberty of the people* can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive."⁶⁸ Hamilton had high hopes for the federal judiciary's ability to safeguard individual liberty because, more so than many of the state governments, including New York, the Framers designed the institutions of the federal government to be distinct and separate entities. Hamilton's *Federalist* essays on the judiciary are, therefore, peppered with references to the security of individual rights and liberty.

To Hamilton, then, the combined principles and process of common law, as provided and adhered to by the courts of justice, provided the ultimate security to individual rights. When the American people brought a truly independent federal judiciary into existence, Hamilton felt comfortable emphasizing that the federal courts could provide the necessary security for individuals. But even if the independent judiciary provided a barrier to rights infringement, the common law practiced inside the courtroom afforded the critical safeguards.

In this way, Hamilton conceived of the judiciary and the common law as a two-pronged defense to prevent rights infringement. This view again appeared, years later, in his "Examination" essays and in his *Croswell* arguments. During the winter of 1802, Hamilton published eighteen essays, titled "The Examination" in the *New York Evening Post*, under the pseudonym "Lucius Crassus."⁶⁹ Hamilton intended these articles to be his public response to President Jefferson's First Annual Message to Congress (December 8, 1801), as well as an opportunity for Hamilton to address his larger concerns about the state of the nation.

67. Remarks on an Act of Regulating Elections, made in the New York assembly on January 24, 1787 (Ibid., 4: 22). Also, Miller, *Alexander Hamilton: Portrait in Paradox*, 104.

68. *Federalist* No. 78. Emphasis added.

69. Lucius Crassus was a lawyer and politician who supported efforts to reform the Roman courts. His contemporaries considered him to be one of the greatest orators before Cicero, and years after Crassus' death, Cicero featured him in *De oratore* (55 B.C.E.). Although Harold C. Syrett does not identify Crassus in *PAH*, a brief summary of Crassus' life can be found in the *Encyclopædia Britannica*, 15th ed., s. v. "Lucius Licinius Crassus.")

The most pressing of these concerns involved the state of the federal judiciary, which, according to Hamilton, had been compromised and rendered dependent by the repeal of the 1801 Judiciary Act.⁷⁰ With the successful repeal of the Act, Congress abolished sixteen federal circuit court judgeships, even though judges had already been selected to fill those positions. Hamilton found this to be an unconstitutional violation of Article III, which guaranteed federal judges their offices as long as they maintained “good behavior.” He argued that to divest the judges of these offices, once created, was to violate the judge’s vested right in the office, in addition to violating Article III’s good behavior clause.⁷¹ Furthermore, the repeal of the circuit court judgeships meant that the independence of the federal judiciary had been successfully nullified by the national legislature, and that the wisdom and benefits of separating governmental institutions had been abrogated.⁷²

In particular, Lucius Crassus lamented that a properly stable and independent judiciary was “the surest guardian of person and property” because “as it regards the security and preservation of civil liberty, it is by far the

70. The Judiciary Act of 1801 (or, “An Act to provide for the more convenient organization of the Courts of the United States,” *U.S. Stat.* 2:89–100) and “An Act for altering the times and places of holding certain Courts therein mentioned, and for other purposes” (*U.S. Stat.* 123–24) were repealed on March 8, 1802 (*U.S. Stat.* 2:132). After the repeal, Congress effectively restored the judicial system created under the Judiciary Act of 1789 (“An Act to establish the Judicial Courts of the United States,” *U.S. Stat.* 1: 73–93). The Judiciary Act of 1801 had reduced the number of Supreme Court justices (which would have gone into effect only after a sitting Supreme Court justice retired) and established sixteen circuit court judgeships. President Adams had already filled those new positions when the repeal became law. After the Republican Congress repealed the 1801 Judiciary Act and abolished the judgeships, Federalists, including Hamilton, lamented Congress’ actions as a threat to an independent federal judiciary. The judiciary could not be independent, they argued, if Congress could remove federal judges from their offices at will.

71. While making a case for a judge’s “vested right” in his office, Hamilton described his general approach to interpreting rights: “provisions which profess to confer rights on individuals, are always intitled [*sic*] to a liberal interpretation in support of the rights, and ought not, without necessity, to receive an interpretation subversive of them.” (“The Examination, No. XVII,” PAH, 25: 573.) Hamilton also discusses a judge’s vested right to his office in “The Examination, No. XII” (PAH, 25: 533). During this time, however, the notion of a judge’s property interest in his office existed in tension with a new administrative model of office-holding, where the office holder held his office at the discretion of the executive. See William E. Nelson, “Officeholding and Powerwielding: An Analysis of the Relationship between Structure and Style in American Administrative History,” *Law and Society Review* 10 (1976): 195, 200, 203.

72. Hamilton attempts to make this point in the “Examination” essays Nos. XII–XVII, but he gives a particularly dire forecast of the effects of the 1801 Judiciary Act’s repeal in No. XII, PAH, 25:535.

safest [department].”⁷³ Judicial independence erected “a precious shield to the rights of persons and property. Safety and liberty are therefore inseparably connected with the real and substantial independence of the courts and judges.”⁷⁴ As he had in his *Federalist* essays, Hamilton equated an independent judiciary with the security of individual rights.

Moreover, misguided legislation was not the only problem. The repealing act was no good, but it represented more than just a foolish Congress; the repeal reflected a truly worrisome “tide of faction” and “turbulent humors of party spirit” that had recently plagued the young republic.⁷⁵ Judges needed to be protected from partisanship, Lucius Crassus warned, and, judging by the tenor of the current political scene, it seemed that even monarchical Great Britain provided better protection for its judges than the United States did, especially if Congress could unconstitutionally remove judges from their offices.⁷⁶

In his turn as Lucius Crassus, Hamilton candidly displayed his anxiety that political partisanship had effectively undermined the constitutionally constructed, institutional relationship between Congress and the federal judiciary. Factionalism was spreading like a poison, and it not only destroyed the judiciary’s independence but, by implication, could threaten the rights and property of Americans. Through his “Examination” essays, Hamilton began to describe the detrimental relationship between “the spirit of faction” and individual rights, a theme that he would address soon after in *People v. Croswell*.

Croswell required Hamilton to refocus his apprehensions on New York’s political scene, where the New York constitution did not attempt to create a wholly independent judiciary. But with this return to New York politics, Hamilton revisited the spirit of his Phocion essays. A truly independent judiciary was not an option in New York, and therefore, more explicitly than before, Hamilton advocated for common-law principles and process as the ultimate safeguards to individual rights.

73. “The Examination, No. XIV,” *Ibid.*, 25: 551. A similar sentiment can also be found in “The Examination, No. XII,” *Ibid.*, 25: 529.

74. “The Examination, No. XIV,” *Ibid.*, 25: 551.

75. “The Examination, No. XIV,” *Ibid.*, 25: 549.

76. “The Examination, No. XVII,” *Ibid.*, 25:575. Hamilton would later echo this sentiment in *Croswell* (LPAH, 1: 811). He reasoned that the British monarch cannot attack English judges alone, but he must instead be united with the two houses of Parliament. And if Parliament attacked English judges, the monarch could more easily resist Parliament’s efforts. In America, on the other hand, executives were too weak to pose a serious threat to judges themselves or to stave off a legislative attack on American courts. And republican legislatures—like Congress—proved to be dangerous to the American judiciary if the courts were not adequately separated and made independent from legislatures.

Political partisanship had infected New York, just as it had the national political arena, as each of the *Croswell* counselors noted in their speeches. To Hamilton, this concern was particularly relevant because the motion for a new trial required the court to consider institutional questions regarding the respective roles of judge and jury. As Hamilton argued in relation to the federal judiciary, judges were important to the protection of rights. But in New York—and in light of recent events, even at the federal level—complete independence from the legislature could not be assured. Under these circumstances, then, Hamilton argued that it was safer to allow juries, as opposed to judges, more discretion to determine the publisher's intent or the truth of a publication involved in a criminal libel action.⁷⁷ In giving his reasons for this conclusion, he echoed Lucius Crassus: “the independence of our judges is not so well secured as in England.”⁷⁸

Hamilton reasoned that, as civil officers inevitably touched by state politics, the court would be more susceptible to “the View & Spirit of Government”—the prevailing winds of partisanship—than a jury, that “occasional & fluctuating body” to be chosen by lot.⁷⁹ In this era of factional paranoia, Hamilton trusted the jury more than he trusted the state judges to ensure the liberty of the press. The New York bench could not be fully independent of the legislature, and, therefore, they might be susceptible to the influence of partisan politics.⁸⁰ And although juries could also bring their politics to the jury box, their impermanence provided a surer safeguard. Injustice might be perpetrated once by a politically charged jury, but it would be propagated again and again by permanent, partisan magistrates. Because of this, Hamilton affirmed, “we have more Necessity to cling to the right & Trial by Jury, as our greatest Safety.”⁸¹

Regarding the particular points of law—whether the jury should be able to determine the publisher's intent in a criminal libel action—Hamilton referred

77. LPAH, 1: 811. Hamilton was quick to praise the court, however, stating that “No man can think more highly of our judges and I may say personally so, of those who now preside, than myself; but I must forget what human nature is, and what her history has taught us, that permanent bodies may be so corrupted, before I can venture to assert that it cannot be” (Ibid., 1:810).

78. Ibid., 1:811.

79. This quote is taken from James Kent's notes on Hamilton's speech, Ibid., 1:834. Oftentimes Kent's notes provide more succinct paraphrases of Hamilton's comments than does Waite's published version of Hamilton's speech.

80. Hamilton proved prescient. In the years after the New York legislature's 1805 declaration of criminal libel law, New York judges, including James Kent, managed to apply libel law instrumentally in order to suppress unfavorable political criticism. See Donald Roper's “James Kent and the Emergence of New York's Libel Law,” *American Journal of Legal History* 17 (1973): 223–31.

81. James Kent's notes, LPAH, 1:834.

to the general principles of the New York constitution, rather than King's Bench doctrine. He declared, "What then do I conceive to be true doctrine. That in the general distribution of power in our Constitution it is the province of the Jury to speak to fact, yet in criminal cases the consequences and tendency of acts, the law and the fact are always blended. As far as the *safety of the citizen* is concerned, it is necessary that the Jury shall be permitted to speak to both."⁸² This concern for citizen security was also what made Congress' Sedition Act such a "valuable" statute, as the sedition law allowed the jury to consider the truth of the publication as a defense.⁸³ According to Hamilton, Congress premised the 1798 Sedition Act on "common law principles," and in doing so, it followed the wise example set by the Framers of the United States Constitution.⁸⁴ Because the United States Constitution relied on the substantive and procedural common law, it created a strong, but limited, government that could not infringe on individuals' rights. "The Constitution of the U.S.," Hamilton warned, "would have been melted away or borne down by Faction, if the *Com[mo]n law* was not applicable."⁸⁵

Finally, Hamilton attempted to appeal directly to his audience by emphasizing that common-law principles even protected impartial judicial magistrates suffering because of the prevailing political rancor. After noting the "Impeachments of an extraordinary nature [that] have echoed thro' the land,"⁸⁶ Hamilton extolled substantive common-law principles as the protective standard by which even magistrates could benefit: "If then we discharge all evidence of the common law [referring to "treasons, crimes, and misdemeanours"], [judges] may be pronounced guilty *ad libitum*; and the crime and offence being at once at [Congress'] will,

82. *Ibid.*, 1:823–24. Emphasis added.

83. *Ibid.*, 1: 829.

84. *Ibid.*, 1: 829–30. Hamilton on the wisdom of reading common-law principles into the United States Constitution: "The Habeas Corpus is mentioned, and as to treason, it adopts the very words of the common law. Not even the Legislature of the union can change it. Congress itself can not make constructive, or new treasons. Such is the general tenor of the constitution of the United States, that it evidently looks to antecedent law. What is, on this point, the great body of common law? Natural law and natural reason applied to the purposes of Society."

85. James Kent's notes, *Ibid.*, 1: 838.

86. Hamilton is most likely referring to the investigation of Supreme Court Justice Samuel Chase and District Court Judge Richard Peters, along with the impeachment trial of District Judge John Pickering. A few days after his arguments in *People v. Croswell*, Hamilton would respond to Robert G. Harper's "letter on the subject of the impeachment of the Judges" Chase and Pickering. Hamilton told Harper, a Federalist lawyer, that he had "very little doubt that [the impeachments] are in prosecution of a deliberate plan to prostrate the independence of the Judicial Department, and substitute to the present judges creatures of the reigning party, who will be the supple instruments of oppression and usurpation, under the forms of the Constitution." (PAH, 26:190–91.)

there would be an end of that [U.S.] Constitution.” And so, “[b]y analogy a similar construction may be made of our own [New York] Constitution, and our Judges thus got rid of. This may be the most dangerous consequences.” Hamilton implored the court to use any arguments against substantive and procedural common-law principles with caution, and “To take care how we throw down this barrier”—the common law—“which may secure the men we have placed in power; to guard against a spirit of faction, that great bane to community, that mortal poison to our land.”⁸⁷

With these remarks, Hamilton soon brought his arguments to a close. Over the course of two days of oral argument, Hamilton suggested that common-law jury process afforded a necessary safeguard to individual rights in New York’s fiercely politicized government. He also emphasized that Congress had borrowed from Parliament’s example to declare and endorse the true common-law principles of criminal libel, which included a jury determination of intent and truth as a defense.

Hamilton considered substantive common-law rights too. Common-law writs (habeas corpus), crimes (treason), and processes (impeachment) informed the federal constitution, and provided explicit protection to federal judges against the whims of party politics. Justices of New York State also benefitted from these common-law concepts as adopted by New York’s constitution.

By looking to not one, but to all of these sources—to the courts at Westminster, to the “general principles” of English law, to Parliament, to Congress, to the United States Constitution, and to the everyday due process already adopted and ensured by New York’s constitution—Alexander Hamilton connected his concern for the protection of individual rights to the common law, broadly conceived. Under his “extensive” conception of the common law, Hamilton argued not only for Harry Croswell’s particular rights, but with the rights of all American citizens in mind. In his *Croswell* speech, as in his Phocion, *Federalist*, and Lucius Crassus essays, Hamilton consistently underscored the importance of substantive and procedural common-law principles to securing an individual’s rights, liberty, and property.

Conclusion: Rethinking the Nature of Common Law in the Early Republic

James Willard Hurst singled out Alexander Hamilton as a “prime mover in making law” in America.⁸⁸ Although Hurst had Hamilton’s treasury tenure

87. LPAH, 1: 830.

88. James Willard Hurst, “Alexander Hamilton, Law Maker,” *Columbia Law Review* 78 (1978): 483.

primarily in mind, *People v. Croswell* demonstrates that Hurst's analysis applied to Hamilton's courtroom impact as well, and Justice James Kent would have agreed. In 1832, Kent recounted Hamilton's finest performance before the New York bench: "I have always considered General Hamilton's argument in [*People v. Croswell*] the greatest forensic effort that he ever made. He had bestowed unusual attention to the case, and he came prepared to discuss the points of law with a perfect mastery of the subject." Kent continued, "[Hamilton] believed that the rights and liberties of the people were essentially concerned in the vindication and establishment of those rights of the jury and of the press for which he contended. His whole soul was enlisted in the cause, and in contending for the rights of the jury and a free press he considered that he was establishing the finest refuge against oppression..."⁸⁹ Kent, like Hurst, thought that Hamilton had made a profound impact on the law. By examining *People v. Croswell*, we see how Alexander Hamilton shaped the development of American law by strategically deploying the tools of English common law.

I have offered a new perspective on Hamilton as a legal thinker and strategist who considered the entire English common-law tradition to be intimately and integrally tied to American jurisprudence as a source of precedent, process, and substance for republican law. Hamilton's career, which culminated only a few months after his arguments in *Croswell*, demonstrates that defending a client's rights claim offered the best opportunity for him to invoke the "extensive" common law, and thus to mine English constitutional history for precedent relevant to American legal questions. Hamilton was openly and consistently concerned with the problem of securing individuals' rights under republican government, and to him, common law, in its most expansive sense, provided the last line of defense between an individual and his government. When Hamilton referenced the security of common-law principles, he did not rely exclusively on the process and substantive law coming out of the central courts at Westminster. He looked instead to varied English and American sources to find evidence of the common law. It then fell to the courts to determine which of the oftentimes overlapping, sometimes contradictory, English and American jurisdictions provided the best account of common law to be received under New York's constitution.

Hamilton's legal maneuvers in *People v. Croswell* present new insights into the nature and meaning of common law in the early republic. First,

89. James Kent to Elizabeth Hamilton ("Chancellor Kent's Memories of Alexander Hamilton"), December 10, 1832, in William Kent, *Memoirs and Letters of James Kent* (Boston: Little, Brown, and Company, 1898), 323–24, 326.

Hamilton and his colleagues transformed the prosecution's narrow meaning of "common law" into a vast synonym for the entire English legal tradition. This "extensive" interpretation treated common law as nothing less than the entire legal framework that constituted the realm—the English constitution itself—and fit England's various jurisdictions, substantive law, procedures, and institutions into this common-law framework.⁹⁰ By treating the common law as the expansive, constitutive law of the land, the defense turned English law into a grab bag of potential arguments and examples to use to define relevant, legally valid common-law principles to apply in American courts. As such, Hamilton's conception of common law directly contradicts the notion that the common law was no more than a set of stifling, strict rules from which nineteenth-century American lawyers and judges sought to break free.⁹¹

In addition, Croswell's lawyers viewed English common law as a methodological opportunity to recombine familiar legal materials to fit new, distinctly American conclusions. The lawyers' historiographical approach allowed them to offer competing arguments about what constituted the true English law received in America, thus allowing the judge to determine what legal precedent would be most appropriate for republican law. Paradoxically, by accepting the broadest conception of the nature and scope of English common law as the basis of New York law, and by closely studying English legal history, American jurists were able to determine the

90. The idea that common law constituted the English polity, and regulated the English people along with all of the institutions, jurisdictions, and authorities of the government, derived from sixteenth- and seventeenth-century English common lawyers and their notions of the ancient constitution of England. See Glenn Burgess' *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (University Park: The Pennsylvania State University Press, 1992) which describes the central place of common law in pre-Civil War legal thinking, including the common law's relationship to the ancient constitution (ch. 1–3). Americans of the revolutionary generation also found common law to be the constitutive force of the eighteenth-century British constitution, and a defining feature of the American colonies' relationship to the King and Parliament. See Reid, *Constitutional History of the American Revolution*, 3–25.

91. This is the main argument in chapter 1, "The Emergence of an Instrumental Conception of Law," in Morton Horwitz's *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977), 1–30. I do not deny that some Americans thought of the common law in exactly the way Horwitz described it—as inflexible precedent—but Horwitz does not account for a counterperspective of common law. The Hamiltonian view of common law allows for the same transformation in substantive legal doctrines that Horwitz describes, but his "extensive" common law did not require judges to become so audaciously assertive. According to Hamilton's argument, judges could analyze rules functionally without causing Horwitz's "fundamental shift in the conception of law" (4). Instead, the "extensive" common law allowed the same economic or social policy ends to be accomplished without departing sharply from traditional practice.

precise law that best conformed to their state's republican constitution. Even two decades after the end of the American Revolution, English constitutionalism remained intimately related to American constitutionalism.

With this expansive interpretation of common law, the defense also managed an important legal sleight-of-hand: their arguments allowed the court to declare new legal outcomes while denying that the judges were actually innovating on existing law or improperly legislating. Because the Hamiltonian strategy treated common-law doctrine as part of an expansive legal tradition rather than as only those rules handed down from the Westminster courts, the defense's arguments suggested that American judges had a substantial array of valid jurisprudential options available to them to determine the law of the land. The judge remained squarely within his proper judicial duty to "find" the law through other sources—like ancient or declaratory statutes—even if he declared that the law in force differed from Westminster precedent.⁹²

To accomplish these legal feats, Hamilton and his colleagues assumed that the nature and practical meaning of "common law" encompassed many more jurisdictions and institutional actors than historians tend to acknowledge today. This expansive conception of common law was not, however, novel to jurists in the early republic.⁹³ Also, the defense's historical approach to legal argument allowed them to uncover alternative sources of common-law doctrine to present to the court. American jurists would not have found this methodology new or exceptional either, as the revolutionary generation was steeped in seventeenth-century English legal traditions that derived the common law's authority from both its rationality and its assumed existence from time immemorial.⁹⁴ American lawyers therefore inherited, and Crosswell's

92. Philip Hamburger has defined the "judicial duty" of the Anglo-American judge as deciding a case in accordance with the law of the land. Judicial review, he argues, is merely a part of the larger duty of the common-law judge. See, in general, *Law and Judicial Duty*.

93. Early Republic judges and lawyers recognized that "the common law" contained sub-categories of law, including the law of nature, the law of nations, the civil law, the law merchant, equity principles, admiralty law, and *lex loci*. (G. Edward White, *The Marshall Court and Cultural Change, 1815–1835*, Abridged Edition [New York: Oxford University Press, 1991], 112.) Speaking in the early nineteenth century, moderate Pennsylvanian Republican Alexander Dallas even sounded distinctly Hamiltonian in his conception of common law: "... independent of the common law, rights would remain forever without remedies and wrongs without redress. The law of nations, the law of merchants, the customs and usages of trade, and even the law of every foreign country in relation to transitory contracts originating there but prosecuting here, are parts of the common of Pennsylvania." (Quoted in Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* [New York: Oxford University Press, 1971], 179.)

94. See Kunal M. Parker's *Common Law, History, and Democracy in America, 1790–1900: Legal Thought before Modernism* (New York: Cambridge University Press: 2011), 15–23. Parker describes how Americans found the common law useful because it reached back to a time "beyond the memory of man" and thus defied historical specification or

defense expertly put to use, a historiographical methodology that sought to trace common-law doctrine back to an immemorial, “time out of mind.”⁹⁵

Alexander Hamilton thus mapped an alternate route to instrumentality in American law where the common law supplied a corpus of legal arguments, rather than rigid rules. At the same time that Hamilton deeply respected common-law legal traditions—particularly those concerning common-law rights—he simultaneously demonstrated how the common law could be flexible, vast, and capable of adapting to American policy ends when used strategically in court.⁹⁶ His strategy allowed for judges to adjudicate new legal doctrines within their traditional authority; it offered a way for the court to resist sudden departures from established legal doctrine, and to enable lawyers and judges to excavate the past in order to meet the legal needs of the present. By rethinking *People v. Croswell*, we can begin to rethink the nature and scope of “common law” in the early republic. And by reconsidering both, we can better understand the legal legacy of Alexander Hamilton.

95. On the relationship between historiographical methodology and the common law, see J.G.A. Pocock’s *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (New York: Cambridge University Press, 1957) and Burgess, *The Politics of the Ancient Constitution*.

96. Bernadette Meyler has argued that Americans of the revolutionary generation considered the common law to be flexible and adaptive, but she focuses mainly on interpreting references to the common law in the federal Constitution (“Towards a Common Law Originalism,” *Stanford Law Review* 59 [2006]: 572–80). Michael Lobban also argues that common law is inherently flexible, although his reasoning differs from the Hamiltonian “extensive” common law described here. For Lobban (who writes only with England in mind), the common law was a system designed to provide remedies, and as long as the rigors of pleading remained intact, the outcome of any common-law action—the remedy—was flexible, adaptive, and able to provide different outcomes according to the circumstances of each case. According to Lobban, the typical eighteenth-century common lawyer viewed the common law as an adaptive system and not as a body of rules that could be distinctly defined. (*The Common Law and English Jurisprudence, 1760–1850* [New York: Oxford University Press, 1991], 1–16.)

determination. Americans could then conceive of parts of the common law as contingent and applicable to the American Republic. At the same time, the entire common law itself became an agent of history, moving American society away from a feudal past and toward commercial society.