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Rediscovering the Common Law

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SPEECH

REDISCOVERING THE COMMON LAW

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Thank you for inviting me to join you today. I always enjoy speaking to law students, and it is a particular honor and a great pleasure to be here at Notre Dame, a school I hold in the highest esteem.

I want to begin my talk today with a simple definition familiar to anyone with a modicum of legal training: that the common law is judge-made law. Although a useful shorthand definition, it is also laden with particular assumptions about the practice of judging—assumptions whose often pernicious effect on law I wish to examine more closely.

The idea of the judge as lawmaker is a fundamental theme of legal education. We are trained to appreciate and to emulate the skills of the common lawyer—deftly distinguishing cases and drawing telling analogies between them; forcefully mastering and shaping long and intricate lines of legal doctrine; wisely correcting the failures and excesses of legislators. In his pithy but profound book, *An Introduction to Legal Reasoning*, the late Edward H. Levi rightly observed that "[t]he basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case."[1] Our common law heritage thus inheres in our characteristic method of reasoning.

With typical acuity, Justice Antonin Scalia has pointed out that common law reasoning is a thrilling way to train law students, "because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind,

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. These remarks were delivered to the Notre Dame Law School Chapter of the Federalist Society for Law and Policy Studies on October 16, 2003, in Notre Dame, Indiana. The views expressed herein are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I would like to acknowledge, with thanks, the assistance of Andrew McStay, my law clerk, in preparing these remarks.

1 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949).

those laws that ought to govern mankind."[2] Justice Scalia and other commentators note that the origins of this view can be found in Justice Oliver Wendell Holmes's opus, *The Common Law*, which enshrined a judge-centered view of legal development. Indeed, Holmes can fairly be said to be the source of the simple equation of common law with judge-made law. For Holmes, law could be boiled down to judicial preconceptions, as expressed in his famous formulation, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[3]

The Holmesian concept of the common law has had far-reaching consequences. The jurisprudential theory of legal realism, for example, which sees law as merely the expression of judges' politics, can be traced to Holmes's emphasis on judges as the primary agents of legal change. And the idea of the judge as lawmaker forms a crucial component of the approach to constitutional adjudication known as "living Constitutionalism."

I have spoken elsewhere of my firm opposition to the notion of a "living Constitution."[4] I reject the idea that the Constitution evolves to reflect contemporary political and moral understandings. Rather, the Framers adopted a written constitution to prevent change: to fix the meaning of certain rights and to put them beyond the capacity of overreaching majorities or an aggrandizing State to take them away. By allocating powers between the state and federal governments and further dividing authority in separate branches, the Constitution enshrines the principle of limited government—a Leviathan chained. And it goes almost without saying that the Framers' plan has served us well.

Of necessity, however, the theory of a living Constitution requires judges willing to act as lawmakers. Who better to adapt the Constitution to the exigencies of the moment than those versed in the techniques of common law adjudication and imbued with the Holmesian view of law as the product of judicial creation?

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2 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7 (1997).

3 OLIVER WENDELL HOLMES, JR., *Lecture 1: Early Forms of Liability*, *in* THE COMMON LAW 5 (Mark D. Howe ed., Belknap Press of Harvard Univ. 1963) (1881).

4 *See* Diarmuid F. O'Scannlain, Today's Senate Confirmation Battles and the Role of the Federal Judiciary, Commencement Address to the Class of 2003, Northwestern College of Law of Lewis & Clark College, Portland, Or. (May 24, 2003).

Yet I do not wish to imply that our common law heritage holds no value for us today. Indeed, against the familiar idea of the judge as lawmaker, I would like to propose a return to an older, truer spirit of common law adjudication. Steeped in English legal culture, the Framers understood the common law as a repository of both liberty and tradition. Justly proud of their common law heritage, they formed their nascent constitutional and statutory law—both federal and state—against a backdrop of common law principles. And in great contrast to our contemporary understanding of the common law, the Framers viewed common law adjudication not as a license for judicial invention, but as an activity conducted above all with a spirit of restraint, in which judges were bound by past precedents and the dictates of reason, natural law, and tradition.

In a fine new book entitled *Common-Law Liberty: Rethinking American Constitutionalism*, Professor James Stoner, recently a James Madison Fellow at Princeton University and currently at Louisiana State University, reminds us of the importance and potential vitality of this "original understanding of common law."[5] The Framers thought deeply about their common law heritage and its relation to the new governmental structures they were enacting. In breaking with England, they had no desire to jettison the common law—indeed, they often couched their argument for independence in terms of the preservation of the common law rights and privileges of English citizens. The founding generation also took care to ensure by statute or constitution that the common law remained part of the law of each new independent state. A Virginia law of 1776 provides a typical example: "[The] common law of England, [and] all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first . . . shall be considered as in full force."[6] Such reception statutes nearly always made reference to local adaptations of the common law and clearly reflected a desire to maintain the inheritance of the common law as it had evolved in accord with the specific customs, traditions, and conditions of each colony.

But what, exactly, did the common law mean to the Founding generation? A good place to begin is with the prestige accorded to Blackstone's *Commentaries* by the Founders. Sir William Blackstone's 1765 four-volume survey of English law was first published in an Amer-

5 JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 10–16 (2003).

6 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 110 (2d ed. 1985) (citing 9 VIRGINIA STATUTES AT LARGE 127 (William Walter Henning rep., Richmond, J. & G. Cochran 1821)).

ican edition in 1771–1772, and it immediately became the most important legal text in early American law.[7] At a time when printed caselaw was scarce, the *Commentaries* were a mainstay of personal law libraries and the foundation of legal education. Even as the colonists threw off the monarchy whose legal authority Blackstone explored, they continued to study and to revere their common law heritage.

For Blackstone, the common law was the product of what he called "immemorial usage . . . [of which] judicial decisions are the principal and most authoritative evidence."[8] Comprised of established customs, rules, and maxims, the common law provided rules of decision in disputes over real property, contracts, and torts. It governed the inheritance of lands, and provided rules for construing wills, deeds, and statutes—establishing, for example (and rather conveniently), that acts of parliament should generally be interpreted so as not to conflict with common law principles. And, of course, the common law was the source of essential rights and privileges in criminal proceedings, guaranteeing trial by jury and the privilege against self-incrimination. A maxim like "no man shall be bound to accuse himself," although succinct, expressed a hallowed tradition of personal liberty.

Yet Blackstone provided for early Americans more than just a compilation of common law maxims. The *Commentaries* also laid out the method of common law adjudication—the way careful judges were supposed to apply the common law in particular cases. It is here we can perhaps best perceive the vast difference between our contemporary understanding of the common law and the view that held sway at the time of the Founding.

For Blackstone, judges were "the depositaries of the laws[,] the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land."[9] Deeply knowledgeable in the law, judges were the guardians of the common law because they were "long personally accustomed to the judicial decisions of their predecessors."[10] Yet such a flattering evocation of the judicial mind did not add up to view of judges as creative agents of legal change. To the contrary: the *Commentaries* put forth a conception of judging that is profoundly restrained. Bound by past precedents, a common law judge was not free to give rein to his own preferences. Instead, the judge's task was, in Blackstone's vivid phrase

7 *Id.* at 102.

8 1 WILLIAM BLACKSTONE, COMMENTARIES *68–69.

9 1 *id.* at *69.

10 1 *id.*

over two centuries ago, "to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion."[11]

At the core of this conception of the common law is the idea that law is something standing apart from the decisions of judges. Although evidence of the state of the law, decisions did not themselves constitute the common law. Instead, they revealed immutable legal principles. Judges did not make law, but declared it. Thus, as the *Commentaries* noted, even on those rare occasions when judges overturned precedents as contrary to reason or natural law, "the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation."[12] The former precedent was merely an erroneous determination; the newly established rule correctly stated the underlying law.

This view of the common law is known as the declaratory theory of adjudication, and it is often portrayed as hopelessly naive in our post-positivist age. In the eyes of legal realists, the declaratory theory fails to take into account the dominant role of judicial preferences in shaping the law. I have no desire to recapitulate the long-running debate between proponents of natural law and advocates of legal positivism. But for our purposes here today, I do wish to observe that the Framers' conception of the judicial power cannot be separated from the declaratory theory. As Hamilton noted in *The Federalist* No. 78, "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[13] In emphasizing the limited role of judges under the new Constitution, Hamilton and the other Framers assumed that judges merely interpreted existing law rather than made new law.

The result was the rightful subordination of the judiciary to the legitimate lawmakers in our system—the legislative branch. Just as the common law itself acknowledged that its unwritten principles could be trumped by acts of Parliament, the Constitution firmly lodges the legislative power in Congress. Lawmaking is reserved for legislators, and the proper province of the judiciary is the interpretation of duly enacted laws. And in confining the judicial power to specific cases and controversies—the only appropriate arena for judicial activity under the common law—Article III implies that courts will proceed to interpret the Constitution and statutes under it by employing the

11 1 *id.*

12 1 *id.* at *70.

13 THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

methods of common law adjudication. Although common law language is of course scattered throughout the Constitution and common law rights and privileges are enshrined in the Bill of Rights, this embedding of the common law in the very structure of the Constitution is sometimes overlooked. The very nature of the judicial power, and its necessary separation from the legislative power, is a reflection of a common law way of thinking.

Why else would Hamilton conclude that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[14] The Framers quite naturally thought of judges as common law judges—as expositors and not inventors of legal principles. And constitutional and statutory interpretation would therefore occur in particular cases. We need not go so far as some scholars, who have suggested that nearly all constitutional law is itself a species of common law—frequently unmoored, I might add, from any connection to the text of the Constitution.[15] But it does seem clear that the Framers contemplated that the practice of judging would occur according to common law methods.

In calling attention to the understanding of the common law that prevailed at the time of the Founding, I do not mean to minimize the revolutionary importance of a written Constitution. As a committed textualist, I well recognize the Framers' achievement in fixing our nation's fundamental law in written form. And I recall, of course, that the Framers' desire to limit the reach of government through positive law led the Marshall Court, in the famous case of *United States v. Hudson & Goodwin*,[16] to forbid the development of a federal common law of crimes. Nevertheless, the deeper significance of common law thinking in the Constitution is inescapable. And so I suggest that rediscovering the original understanding of the common law might have important implications for constitutional interpretation today.

I have already noted that traditional common law principles informed the restrained judicial role envisioned by the Framers. Judges' limited role in our system of government stems in large measure from the common law and its emphasis on custom, popular consent, reason, and natural law. In a broad sense, then, a contemporary awareness of the original understanding of the common law might

14 *Id.* at 471.

15 *See, e.g.*, Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

16 11 U.S. (7 Cranch) 32 (1812).

serve as a reminder that unprincipled judicial lawmaking is illegitimate. Common law adjudication should *restrain* judicial creativity rather than encourage and endorse it.

More specifically, the original understanding of the common law would reinvigorate considerations of tradition and custom in the judiciary. Regrettably, many recent judicial decisions give short shrift to deeply-rooted traditions. In uncovering new constitutional rights, some federal courts have dismissed claims that such newly-fashioned rights do not comport with long-standing communal values.[17] For advocates of a living Constitution, talk of tradition and custom in constitutional interpretation masks historical injustices and majoritarian oppression. Yet it is precisely these concerns that must have a prominent place in constitutional adjudication. As Justice Scalia has noted, "[S]uch traditions are themselves the stuff out of which the [Supreme] Court's principles are to be formed."[18] Otherwise, constitutional law reflects not the democratic traditions of the sovereign people, but the varying political and philosophical preferences of judges.

To give one example, an en banc panel of my court, by contorting the doctrine of substantive due process, found a constitutional right to physician-assisted suicide.[19] Although *Compassion in Dying v. Washington* was later unanimously reversed by the U.S. Supreme Court,[20] the Ninth Circuit's decision ignored restrained principles of common law adjudication in two ways. First, as I emphasized in my dissent from my court's refusal to rehear the case, the majority "usurp[ed] the state legislative function, and in so doing silence[d] the voice of the people of Washington,"[21] who only five years before had rejected an assisted suicide law.[22] This, of course, violated the core common law principle of legislative supremacy—for contrary legislative will necessarily trumps the common law. Second, the majority engaged in a stunning misreading of historical evidence that showed no tradition of protecting an ostensible liberty interest in physician-assisted suicide. Indeed, the common and statutory law of nearly all the western states that comprise the Ninth Circuit forbade assisted sui-

17 *See, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (establishing a substantive due process right to sexual autonomy).

18 Rutan v. Republican Party of Ill., 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).

19 Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc).

20 *See id.*, *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

21 Compassion in Dying v. Washington, 85 F.3d 1440, 1443 (9th Cir. 1996) (O'Scannlain, J., dissenting from order rejecting request for hearing en banc by the full court).

22 *Id.* at 1440 n.1 (O'Scannlain, J., dissenting).

cide.[23] In disregarding this evidence, the judges of the majority substituted their own well intentioned but expansive belief in personal autonomy for deeply-rooted legal and communal traditions.

The true spirit of the common law, by contrast, accords appropriate deference to tradition and custom. At common law, a custom hallowed by continuous and peaceable use was understood to reflect a communal consensus. The legal force such customs acquired under the common law was not something to be easily dismissed. Indeed, common law precedents were not to be overruled unless, in Blackstone's words, "most evidently contrary to reason . . . [or] clearly contrary to the divine law."[24] This establishes a burden of justification for those opposed to the extension of traditions. I hasten to add that "contrary to reason" did not mean merely inexpedient under current circumstances. Reason was not the creative thought process of an individual judge, but, as Professor Stoner deftly puts it, "[a] duty to keep the law consistent with itself."[25] Common law reasoning was a moral activity that carefully and humbly considered new cases in light of tradition and natural law's respect for inherent human dignity. A common law judge was thus the custodian of the communal achievement, forged across generations, of law.

In place of the common law's respect for communal values and tradition of moral reasoning, our courts often substitute an incoherent theory of stare decisis. I am hardly the first to observe that our judiciary's treatment of precedent often seems driven by concerns of expediency.[26] I think it no accident, for example, that our jurisprudence has had a difficult time developing a consistent theory of stare decisis. When stare decisis serves only to express policy concerns, we are in the world of legal realism and not that of Blackstone. For those engaged in the modern mode of common law judging, precedent is only one more weapon in the lawmaking judge's arsenal. A treatment of precedent that can briskly dismiss long-standing communal and familial values while elevating the importance of a court's institutional

23 *Id.* at 1445–46 (O'Scannlain, J., dissenting); *see also Glucksberg*, 521 U.S. at 710–18.

24 1 BLACKSTONE, *supra* note 8, at *69.

25 STONER, *supra* note 5, at 28.

26 *See* Diarmuid F. O'Scannlain, Remarks at the Federalist Society Lawyers' Convention Panel on Judicial Decisionmaking, Washington, D.C. (Nov. 17, 2001) (manuscript at 3–5, on file with author); *see also* Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1143 (1994); Symposium, *Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law*, 17 HARV. J.L. & PUB. POL'Y xix (1994).

legitimacy is profoundly at odds with the Framers' understanding of the restraining influence of the common law.[27]

I have dwelled upon the original understanding of the common law today not out of any nostalgic (and quixotic) desire to revive feudal land tenures or the law of coverture. But I do hope I have made clear that common law adjudication as envisioned by the Framers was meant to be something more than an exercise in legal creativity. In carefully establishing structures that limited the judicial role, the Framers also assumed that the common law tradition of principled judging would persist.

Although not a living Constitution, of course, the Framers' grand design—suffused throughout with the common law's heritage of judicial restraint and ordered liberty—nevertheless remains a living resource for us today. And just as common law judges were duty-bound to interpret the law in the light of tradition and the dictates of reason, so too must we fulfill our obligation to interpret the Constitution with restraint.

Thank you for your attention today. I welcome your questions.

27 *See, e.g.*, Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 854–71 (1992) (plurality opinion of Justices O'Connor, Kennedy, and Souter) (discussing why stare decisis counseled against overturning *Roe v. Wade*).