

SOME THOUGHTS ON BLACKSTONE, PRECEDENT, AND ORIGINALISM

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"I hear that they have sold nearly as many of Blackstone's *Commentaries* in America as in England."¹

Daniel J. Boorstin has noted in *The Americans: The National Experience*, that the English common law was the seminal influence on the formative generation of American lawyers.² In New England, the cradle of American legal culture, the common law method was particularly attractive because it was the perfect analogue to the New England mentality of confronting problems in a pragmatic, one-at-a-time fashion. Boorstin wrote:

New Englanders faced problems one at a time One thing at a time!—as this might have been the motto of the ancient English common law, so it could have been the motto of the new American common law. Proceeding warily and undogmatically from case to case, the common law was rich in the prudence of individual cases but poor in theoretical principles; it was adept at solving problems but inept at philosophizing about them.³

In this manner, the common law helped New Englanders and soon all Americans solve their legal problems, as they came up, slowly but progressively, without embroiling society in conflicts among highly abstract and dogmatic ideologies.

Bernard Bailyn was also deeply impressed by the extent to which the seventeenth-century common lawyers had an overwhelming intellectual influence on American lawyers of the colonial and revolutionary periods.⁴ Bailyn summarized such

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1. Edmund Burke, *Speech on Conciliation with America, 1775*, in *PRE-REVOLUTIONARY WRITINGS* 206, 225 (Ian Harris ed., 1993).

2. DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 35-42 (1965).

3. *Id.* at 41.

4. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1st ed. 5th prtg. 1971).

influence thus: "English law—as authority, as legitimizing precedent, as embodied principle, and as the framework of historical understanding—stood side by side with Enlightenment rationalism in the minds of the Revolutionary generation."⁶

Similarly, James McClellan has written on the pervasive influence of the common law on colonial American legal institutions. Although he has acknowledged a difference of opinion about the degree of substantive incorporation, he has concluded that "the common law rules for adjudicating these [common law] rights—*stare decisis*, rule of reason, and trial by jury—were indisputably adopted in every colony."⁶

R. Kent Newmyer maintains that the early United States Supreme Court adopted the common law method to a very significant degree. With particular reference to respect for precedent in the common law scheme, Newmyer writes:

But, for lack of its own jurisprudential system and because the justices were trained in the common law tradition, the Court adopted large portions of the methodological and philosophical premises of the common law. These self-imposed rules [of *stare decisis*] restrain the judge's natural inclination to read his own policy preferences into a decision.⁷

Boorstin, McClellan, Bailyn, and Newmyer have all specifically noted that Sir William Blackstone was the common law scholar with the most profound influence on shaping the legal thought of the Revolutionary and Founding generations.⁸ David A. Lockmiller, in his classic study of Blackstone, best described this influence when he wrote that even before the first American edition of *Commentaries on the Laws of England* was printed, "[t]he *Commentaries* became the chief if not the only law books in

5. *Id.* at 31 (emphasis added).

6. JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 190 (1971) (emphasis added) (footnote omitted).

7. R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 9 (1st ed. 2nd prtg. 1970).

8. DANIEL J. BOORSTIN, *Introduction to THE MYSTERIOUS SCIENCE OF THE LAW* 3-4 (Beacon Press 1958) (1941); MCCLELLAN, *supra* note 6, at 14-15, 106; BAILYN, *supra* note 4, at 30; R. KENT NEWMYER, *JUSTICE JOSEPH STORY: A POLITICAL AND CONSTITUTIONAL STUDY* 155 (unpublished Ph.D. thesis, University of Nebraska 1959) (copy on file with author).

every [colonial] lawyer's office, and the most important if not the only textbooks for [colonial] law students."⁹

James Iredell, who later became one of the original Associate Justices of the U. S. Supreme Court, was quite representative, as a young law student, in his enthusiasm for Blackstone's *Commentaries*. On July 31, 1771, the North Carolinian wrote to his father in London:

[W]ill you be so obliging as to procure Dr. Blackstone's *Commentaries on the Laws of England* for me, and send them by the first [o]pportunity. I have indeed read them thro' [sic] by the favour of Mr[.] Johnston who lent them to me, but it is proper I should read them frequently, and with great [a]ttention. They are [b]ooks admirably calculated for a young [s]tudent, and indeed may instruct the most learned.¹⁰

Young Iredell then proceeded to describe his particular enjoyment of the *Commentaries* to his father, concluding that "[p]leasure and [i]nstruction go hand in hand."¹¹

Charles Warren, in *A History of the American Bar*,¹² reported that the American publication of Blackstone's *Commentaries* in 1771-1772 created much excitement. Fourteen-hundred copies alone were ordered in advance from the Philadelphia publisher. Among the list of initial subscribers were four governors and three lieutenant-governors. The first name on the subscriber list, among private citizens, was "John Adams, Barrister at [L]aw, Boston."¹³ In his 1775 Speech on Conciliation, Edmund Burke noted that almost as many copies of the *Commentaries* had been sold in the sparsely populated American colonies as in England.¹⁴ The members of the Constitutional Convention of 1787 were so immersed in the common law as expounded by Blackstone, as were the members of the early state constitutional conventions, that Lockmiller has concluded: "Thus the language of constitutions in the United

9. DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE* 170 (1938).

10. 1 *THE PAPERS OF JAMES IREDELL* 74 (Don Higginbotham, ed., 1976).

11. *Id.*

12. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* (1911).

13. *Id.* at 178.

14. BURKE, *supra* note 1, at 225.

States cannot well be understood without reference to the common law, and Blackstone's classic has generally been accepted as the best exposition of that law."¹⁵

Robert Ferguson, a legal and literary scholar, made the same observation regarding Blackstone's influence in his *Law and Letters in American Culture*.¹⁶ He wrote:

All of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in Sir William Blackstone's *Commentaries on the Laws of England* (1765-1769). So much was this the case that the *Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions.¹⁷

In Blackstone, early American lawyers encountered a legal authority who regarded precedent as the cornerstone of the common law, the principal bulwark against the usurpation of the rule of law by judicial tyranny. Blackstone, in his *Commentaries on the Laws of England*, wrote:

And therefore, even so early as the conquest, we find the "*praeteritorum memoria eventorum*" [the remembrance of past events] reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriae optime instituti*" [best instructed in the laws of the country]. For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is

15. LOCKMILLER, *supra* note 9, at 174-75.

16. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984).

17. *Id.* at 11 (footnote omitted).

not in the breast of any subsequent judge to alter or vary from, according to his private sentiments.¹⁸

And he concluded, "[t]he doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust."¹⁹

Alexander Hamilton was singularly immersed in and impressed by Blackstone,²⁰ and the *Commentaries* served as "his principal source [of legal education]."²¹ Hamilton provided us with the definitive elucidation of Article III of the Constitution in *The Federalist Papers*.²² Hamilton maintained that the common law method, and more specifically, a Blackstonian reverence for precedent as the principal guarantee of the rule of law, was inherent in Article III. He wrote of the Article III courts in No. 78: "To 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"²³

Justice Joseph Story reverently considered Blackstone's work to be "that most elegant of all commentaries."²⁴ Upon his appointment as Dane Professor of Law at Harvard in 1829, Justice Story commenced to reinvigorate the law school by centering the curriculum squarely on Blackstone's interpretation of the law. Gerald T. Dunne wrote, "Blackstone . . . was the core of the [law] school which Story refounded at Harvard, and it was Sir William's *Commentaries*, supplemented by standard English works and a growing number of American ones, that formed the basis of the curriculum."²⁵

18. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (Dublin: Gilbert, Potts & Jones, 11th ed. 1788) (Introduction).

19. *Id.* at 70.

20. Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit, in 6 THE PAPERS OF ALEXANDER HAMILTON 54, 62-63 (Harold C. Syrett and Jacob E. Cooke, eds., 1962).

21. JACOB E. COOKE, ALEXANDER HAMILTON 29 (1982).

22. THE FEDERALIST NO. 78 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

23. *Id.* at 442.

24. WARREN, *supra* note 12, at 175.

25. GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 318-19 (1970).

In 1833, Story published his own *Commentaries on the Constitution of the United States*.²⁶ In this seminal American constitutional treatise, which was regarded as "a towering sequel to the Federalist Papers,"²⁷ Story made clear that the common law method, as characterized by a Blackstonian style of reverence for precedent, was rooted in Article III; it was essential to all federal judicial decision-making as the primary bulwark against judicial tyranny. Story wrote:

What is to be understood by "cases in law and equity," in this clause [from Article III]? Plainly, cases at the common law, as contradistinguished from cases in equity, according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American states were familiarly acquainted. Here, then, at least, the Constitution of the United States appeals to, and adopts, the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union. If the remedy must be in law, or in equity, according to the course of proceedings at the common law, in cases arising under the Constitution, laws, and treaties, of the United States, it would seem irresistibly to follow, that the principles of decision, by which these remedies must be administered, must be derived from the same source.²⁸

Furthermore, with specific reference to precedent and its place in all Article III adjudications, Story wrote:

Ours is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to

26. Ronald D. Rotunda & John E. Nowak, *Introduction to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* xi, xi-xii (1987).

27. DUNNE, *supra* note 25, at 308.

28. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 608 (Carolina Academic Press 1987) (1833).

bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.²⁹

Chancellor James Kent, who wrote the first great American treatise that generally analyzed American law, has, like Story, been thought of as the "American Blackstone."³⁰ After Kent's monumental treatise was published, the *Law Reporter* wrote: "It is with the immortal *Commentaries on the Laws of England* that those on American law are now classed, and the names of Blackstone and Kent are fated never to be disjoined."³¹ In fact, Kent was inspired to study law by a chance reading of Blackstone's *Commentaries* after his studies at Yale College were disrupted by British troops. Kent wrote, in his *Memoranda*:

When the college was broken up and dispersed in July, 1779, by the British, I retired to a country village, and, finding Blackstone's *Commentaries*, I read the four volumes. Parts of the work struck my taste, and the work inspired me, at the age of 15, with awe, and I fondly determined to be a lawyer.³²

In his *Commentaries on American Law*, Kent emphasized, with favor, our ubiquitous inheritance—the common law. He wrote:

29. *Id.* at 126-27.

30. Gerald T. Dunne, *The American Blackstone*, 1963 WASH. U.L.Q. 321, 321-37 (1963).

31. *Law Reporter*, VI, 294.

32. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 18 (1898).

[The common law] has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes.³³

Kent approvingly quoted from Du Ponceau's *Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*:

"We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep, when we travel and when we stay at home; and it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning, at the same time, another language."³⁴

Kent also wrote that the proper judicial methodology of the federal courts was to be that of the common law; he stated that "[w]ithout such a [common law] guide, the courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations."³⁵ Roscoe Pound perfectly summed up the influence of the nineteenth-century American treatise writers, as exemplified by Kent and Story, when he wrote that their "doctrinal writing gave the courts at a critical period what they could take to be authoritative statements of the received common law."³⁶

During the nineteenth century there was a movement to import the thinking of Jeremy Bentham, the Blackstonian pupil who rebelled against his master and advocated complete codification of the common law.³⁷ Its goal was to undermine both the substance and the method of the common law. Robert

33. JAMES KENT, COMMENTARIES ON AMERICAN LAW 472-73 (John M. Gould, ed., Little, Brown and Co. 14th ed. 1896) (1873) (footnote omitted).

34. *Id.* at 343.

35. *Id.* at 341 (footnote omitted).

36. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 151 (1938).

37. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 141 (1975).

Cover has perceptively noted that the occasional philosophical tempering among nineteenth century American common law thinkers, which was more apparent than real, was merely a defensive maneuver against the American Benthamites.³⁸ In any case, the Benthamites did not succeed in putting their somewhat utopian program into widespread operation within American, pragmatic, common law culture.³⁹ As Roscoe Pound described the status of the codification effort, "the results of . . . [the] movement fell far short of the anticipation with which it began."⁴⁰ In fact, Blackstone's *Commentaries*, the embodiment of common law method, "had the authority of precedent" during the nineteenth century and was frequently cited as such by attorneys in court.⁴¹

Two important reflections of the relationship of precedent to constitutional interpretation in American tradition appear in the works of Francis Lieber and Henry Campbell Black. In 1837, Francis Lieber first published *Legal and Political Hermeneutics*, a classic study of legal interpretation and construction. Lieber's array of recipe-like principles, according to the editor of the 1880 edition, was "probably more familiar to the present generation of American lawyers than any other part of his work; perhaps more so than any part of any other work on the same subject."⁴² With respect to his treatment of precedent, Lieber was essentially Blackstonian. Most importantly, Lieber wrote: "All the rules which relate to precedents *demand peculiar attention* in the construction of constitutions."⁴³

In 1895, Henry Campbell Black published his celebrated summary of constitutional law, the *Handbook of American Constitutional Law*.⁴⁴ As with Lieber, his understanding of the status of precedent was decidedly Blackstonian. After stating that "[i]t is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the

38. *Id.* at 140-44.

39. *Id.* at 144.

40. POUND, *supra* note 36, at 38.

41. Rotunda & Nowak, *supra* note 26, at xi.

42. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 289 (1880) (Appendix).

43. *Id.* at 175 (emphasis added).

44. HENRY CAMPBELL BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* (3d prtg. 1910) (1895).

intention of the people, who adopted it,"⁴⁵ Black concluded the following about precedent in the context of such intention: "The principle of *stare decisis* applies with special force to the construction of constitutions, and an interpretation once deliberately put upon the provisions of such an instrument *should not be departed from without grave reasons*."⁴⁶

Justice Harlan F. Stone, in a 1936 law review article, described the respect for precedent in case-by-case adjudications as, "the most significant feature of the common law, past and present, and the essential element in its historic growth."⁴⁷ With some ambivalence, but with characteristic honesty, Justice Stone firmly acknowledged the founding generation's debt to Blackstone's conception of precedent. He wrote: "the common law as it had developed in the United States, [was] largely under the tutelage of the Blackstonian conceptions. His was the notion prevailing during most of the nineteenth century that . . . it was only needful for the judge to 'find the law' by diligent search of the precedents."⁴⁸

Justice Stone then went on to characterize the common law method, with its healthy respect for precedent in a case-by-case context, as the traditional and proper method for constitutional adjudication. He explained:

[One of the] two main features of the constitutional scheme . . . is the fact that its framework has admitted of the solution of the clashing demands of the interests which it has created by judicial decision in conformity to the methods of the common law. . . . Just where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action for the larger good, so as to insure the least sacrifice of both types of social advantage, is the perpetual question of constitutional law. It is necessarily a question of degree which may vary with time and place. While these are variations in the nature of the subject matter of judicial inquiry, they involve no necessary

45. *Id.* at 76.

46. *Id.* at 81 (emphasis added) (footnote omitted).

47. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6 (1936).

48. *Id.* at 12.

variation of the methods by which the common law has been accustomed to solve its problems. Its method of marking out, as cases arise, step by step, the line between the permitted and the forbidden, by the process of appraisal and comparison of the experiences of the past and of the present, is as applicable to the field of public law as of private. Courts called upon to rule on questions of constitutional power have thus found ready at hand a common-law technique suitable to the occasion.⁴⁹

In light of this history of the common law's influence, by way of Blackstone, on federal judicial (including constitutional) methodology, it is most ironic that self-styled "originalists" reject the original common law interpretative method. Charles Fried responded appropriately to this troubling phenomenon during his tenure as Solicitor General:

Originalism was not the original interpretive doctrine of the framers nor of the framing generation. It was taken for granted that the Constitution, like other legal texts, would be interpreted by men who were learned in the law, arguing cases and writing judgments in the way lawyers and judges had done for centuries in England and its colonies. Argument from precedent and by analogy would allow the Constitution to be applied to changing circumstances. There was certainly no notion that every new circumstance would be resolved by invoking the amendment process.

As Solicitor General, Judge Bork had much the same experience I did—reading, editing, and sometimes writing hundreds of briefs as the head of a busy appellate law office. That experience taught me that, even in constitutional cases, precedent and analogy are the stuff of legal argument and that legal argument is what moves the Court—or moves it when all involved are doing their work right. Certainly the Justices sometimes ignore or run over or through the arguments, but when this

49. *Id.* at 22-23.

happens it is felt as unfair and wrong. And judges too must feel that precedent and analogy are the straw out of which their bricks are made. A brief to the Court is largely analogy and precedent. (I used to tease the lawyers in my office that the ideal SG's brief would have not one word that is not in quotation marks and attributed to some prior Supreme Court opinion.) This has been the texture of common lawyers' reasoning for centuries.⁵⁰

Another recent and powerful response to the "originalists" and their approach to precedent has come from Justice Lewis Powell. Like Fried, Powell has maintained that the "originalist" jurisprudence has little or nothing to do with the intent of the Framers, and that their rejection of precedent in constitutional context is, in fact, an outright rejection of the Framers' adjudicatory method. Powell has written, "[a]fter two centuries of vast change, the original intent of the Founders is difficult to discern or is irrelevant. Indeed, there may be no evidence of intent. . . . Yet the doctrine of *stare decisis* has remained a constant thread in preserving continuity and stability."⁵¹

Powell has also written that traditional respect for precedent is critically essential to the view of the Supreme Court as legitimate authority, rather than as tyrant:

Perhaps the most important and familiar argument for *stare decisis* is one of public legitimacy. The respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law.⁵²

Chief Justice Rehnquist, writing for the Court in *Payne v. Tennessee*,⁵³ and dissenting and concurring in *Planned*

50. CHARLES FRIED, ORDER AND LAW 66 (1991) (footnote omitted) (parenthetical in original).

51. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J.S. CT. HIST. 13, 18 (1991) (emphasis added).

52. *Id.* at 16.

53. *Payne v. Tennessee*, 501 U.S. 808 (1991).

Parenthood v. Casey,⁵⁴ has lucidly delineated the originalist's vision of precedent. In the name of reliance, Rehnquist supports the doctrine of precedent when property or contractual rights are implicated, but disparages the importance of precedent in most constitutional cases. In fact, this originalist theory of precedent does not trace back to the Founders, but rather, to the activist pen of Chief Justice Roger Taney. The Taney Court, in *Louisville, Cincinnati, and Charleston Railroad v. Letson*,⁵⁵ was actually the very first Supreme Court to overrule a constitutional precedent.⁵⁶

In *The Passenger Cases*,⁵⁷ Taney explained:

I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.⁵⁸

In *The Propellor Genesee Chief v. Fitzhugh*,⁵⁹ Taney overruled a unanimous decision of the Marshall Court, on constitutional grounds, despite the fact that an alternative statutory construction would have sufficed to resolve the case. In his opinion for the Court, the activist Chief Justice elucidated on his new theory of precedent, stating that "[if the earlier Court had propounded] any rule by which the right of property should be determined, . . . [precedent] should always be adhered to . . . [because] it is in the power of the legislature to amend [the rule], without impairing rights acquired under it."⁶⁰ In essence, Taney believed that unlike constitutional decisions, judicial decisions

54. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2851-73 (1992) (Rehnquist, J., concurring in part and dissenting in part).

55. *Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844).

56. *Id.* at 556 (overruling *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) and *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)).

57. *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

58. *Id.* at 470.

59. *The Propellor Genesee Chief v. Fitzhugh et. al.*, 53 U.S. (12 How.) 443 (1852).

60. *Id.* at 458 (overruling *The Steam-Boat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825)).

that establish reliance on property have strong precedential value, because they can subsequently be amended by the legislature.

It is clear that the common law method, as adopted by the Framers' generation and rooted in Article III, emphasized Blackstonian precedent in all cases, not primarily for commercial predictability, but as the principal bulwark against usurpation of the rule of law by judicial tyranny. Originalism, then, is a most ironic misnomer. It would appear to be just another modern methodology in the service of judicial legislation. Well-equipped with a Taney creation, an activist theory of precedent, the originalists disparage our traditional common law method when it gets in the way of their desired policy outcomes. They forsake the original judicial approach of our forefathers when that approach leads to results that either impede their economic agenda or broaden civil liberties. They eschew the pragmatic methodology of Blackstone, Hamilton and Story for the more utopian notions of something they mislabel "original." They forget what the Framers knew all too well: Heaven on Earth is indeed elusive, and it certainly will not be brought about from the Supreme Bench. Rather, we can only sweat it out, hard case by hard case, applying our inherited common law methodology.