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The Commonwe

In 1776, as Virginians sent their sons into battle with England, Virginia adopted English common law as the law of the newly created Commonwealth. More than two centuries later, English common law continues to play a prominent role in our courts. Virginia Code § 1-200 provides that the "common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." Thus, from 1776 until today, English common law — as adapted by Virginia courts — has been the governing rule of decision in all cases where a statute or constitutional provision does not otherwise prevail. And there have been many such cases. To be sure, the impact of English common law is one of the least understood and most underestimated aspects of our jurisprudence.

THE IMPACT OF ENGLISH COMMON LAW

On a host of issues, modern Virginia courts have applied English common law in the way those principles were understood at the time of the nation's founding. Some of the issues recently decided on the basis of English common law include:

- liability for tortious interference with the parent-child relationship,[1]

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ENGLISH COMMON LAW CONTINUES TO PLAY A PROMINENT ROLE IN VIRGINIA COURTS

- the availability of jury trials on statutory claims,[2]
- quieting title to an original copy of the Declaration of Independence,[3]
- the validity of a "citizen's arrest,"[4]
- tort remedies awardable to a child injured or killed in a motor vehicle accident,[5]
- tort liability for falling trees,[6]
- the abatement doctrine as applied to criminal defendants who die while their case is on appeal,[7]
- an appellate court's power to allow amendments to a litigant's appellate pleadings,[8]
- a criminal defendant's lack of access to the common-law writ of *audita querela*,[9]
- a litigant's ability to appeal a trial court's refusal to hold an opponent in contempt of court,[10]
- the absence of an inherent judicial power to acquit a guilty criminal defendant,[11]
- the "stranger rule" forbidding certain reservations of interest in real property,[12]
- dram shop liability for sellers of alcohol,[13] and
- landlord liability for failure to repair leased property.[14]

These are just a few of the many Virginia precedents applying English common law to cases raising numerous issues, including contracts, torts, crime and punishment, property rights, wills and trusts, and sovereign immunity.

One might think that the modern age of statutes would have marginalized the role of English common law. Ironically, the opposite is true. As statutes proliferate, we still must first know what the common law says about a subject before we can interpret (or even understand) a related statute one way or another. As Virginia courts have often said: "Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms."[15] When construing those express provisions, moreover, "[t]he best construction of a statute codifying common law principles is the one most near to the reason of the common law. ... The statute must therefore be read along with the provisions of the common law, and the latter will be read into the statute unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law."[16]

Thus, even when statutes appear to wholly occupy the field, English common law continues to play a pivotal role. Statutes seeking to codify the common law are construed broadly; those in derogation of the common law receive a narrow construction.

OUR COLONIAL AND REVOLUTIONARY HISTORY

Virginia's relationship with English common law is "older than the Commonwealth itself."[17] In 1606, King James I ordered the Jamestown Council to dispose of "all

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causes ... as near to the common laws of England, and the equity thereof as may be" ascertained.[18] Legislative adoption of English common law in the Virginia colony came during the General Assembly session of March 1661 under the reign of Charles II.[19] It was uniformly understood, as John Randolph later explained, that "[t]he Common Law and the principles of Equity, as they prevailed in England, were equally the rule in the colony."[20]

By the time of the American Revolution, our ancestors believed that English common law was "our birthright and inheritance," serving to define our character as a people.[21] The First Continental Congress declared in 1774 that the "respective colonies are entitled to the common law of England."[22] Two months before the Continental Congress issued the Declaration of Independence, the Virginia General Convention "ordained" that "the common law of England ... shall be considered as in full force, until the same shall be altered by the legislative power of this colony."[23] In 1792, the Virginia General Assembly repealed the portion of the 1776 ordinance that had enacted the acts of Parliament, but reaffirmed its continued adherence to English common law.[24] "The common law of England was the common law of Colonial Virginia," the Virginia Supreme Court has explained, "and after the Revolution became the common law of the Commonwealth."[25]

It is not hard to understand why Virginia, along with most of the other colonies,[26] thought it entirely consistent to revolt against England while simultaneously resolving to adopt English common law. English common law was not limited to arid principles of feudal property rights. The boast of the common law was its role as "guardian of our political and civil rights."[27] In this respect, "writers of the Revolutionary period often used the terms 'common law' and 'Magna Carta' as synonymous terms."[28] The American Revolution rests, in no small part, on the patriots' argument that they had exactly the same rights as any other Englishmen — rights which, in large part, found their most sublime expression in English common law.

THE COMMON-LAW DEFINITION OF COMMON LAW

By adopting English common law, Virginia did not thereby transfer *de facto* law-making powers to its judges. In a constitutional republic, the people retain the exclusive prerogative to change, abrogate, or repudiate existing law — whether arising out of common law, statutory provisions, or constitutional law. And they do so through their democratically elected legislators or by constitutional convention. In Virginia, we see in English common law "a library of discrete legal principles honed over centuries of judicial application"[29] that, as Sir William Blackstone observed, have "been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary."[30] True, the honing process itself involved a case-by-case application of settled principles of law to new and changing circumstances, and that incremental interpretative process continues to this day. Even so, it would be quite absurd for a modern common-law judge to outright create *new* law and give it the name *common law*. The very attempt to do so would be self-contradictory.

For this reason, Virginia courts have never treated the common law as merely "a metaphor of judicial lawmaking power, one which [judges] may rely upon to enact improve-

> ***Virginia courts** have never treated the **common law** as merely a **metaphor** of **judicial lawmaking power**.*

ments in the unwritten law or to justify innovations on topics not specifically addressed by statutes."[31] To Virginia judges, the point is not just a virtuous exercise in judicial self-restraint. It is a constitutional mandate implicit in the separation-of-powers doctrine. In his edition of Blackstone's Commentaries, St. George Tucker emphatically warned: "In Virginia, it would be a violation of the constitution for the *courts* to undertake to supply all defects of the common law not already supplied by statute. That is the exclusive province of the *legislature*."[32] Nearly two centuries later, Justice Spratley confirmed Tucker's understanding, holding that Virginia had "expressly adopted" English common law and had "expressly provided that it shall 'be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly.' These words are simple and clear. They mean what they say. They apply with full force to all of the courts of this Commonwealth. Law-making by the courts in the face of this language would be an unconstitutional assumption of legislative power."[33]

As a result, Virginia judges traditionally stand down when the "Legislature, which is the representative of the sovereign power of the people, and specially charged with the duty of making or amending laws to meet their needs, has not at any time enacted any law changing the rule of the common law with respect to the matter under consideration."[34]

The reason for this is subtle, but simple: Virginia adopted *English* common law "as understood at the time of the American Revolution,"[35] not some sophistic theory about the common law. Abstract ideological assumptions concerning the nature of the judicial decision-making process are not *principles of law*. They are merely speculative (and relatively recently asserted) *theories about judges*. We cannot import Oliver Wendell Holmes's positivist philosophy into English common law any more than we can, as Holmes famously insisted in *Lochner v. New York*, import into constitutional law the once-popular "Social Statics" theory of economics.[36] Legal theories come and go. They reflect the intellectual mood and temper of the times, but they do not constitute *law*. To say that our adoption of English common law licenses Virginia judges to "make law" is little more than a crude reductionism.

This does not mean that Virginia judges play no role in adapting English common-law principles to fit the differing and ever-changing conditions in the Commonwealth. Code § 1-200 adopted only the English common-law rules that are "not repugnant" to our constitutional values. Though unstated in the statute, it is equally clear that this repugnancy exception must be applied with a heavy dose of common sense. As Justice Story cautioned: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them and adopted only that portion which was applicable to their situation."[37]

Thus, the common-law reception statute established a historically fixed baseline of jurisprudence for Virginia courts.[38] That baseline was initially set in 1607 at the time of the Jamestown settlement, formally declared in 1776 by the Virginia Convention at the time of the Revolution, and later reaffirmed by the Virginia General Assembly in 1792 shortly after the ratification of the U.S. Constitution.[39] Writing in 1803, St. George Tucker explained in his edition of Blackstone's Commentaries that "[t]he common law of this country remains the same as before the revolution."[40] Subsequent variations in common law recognized by post-1792 English courts therefore have little persuasive, and no prescriptive, force in Virginia.[41]

THE REGRESSION OBJECTION

To some, the thought of deciding modern cases based upon historic principles of English common law seems highly regressive and ought to be discouraged. Several reasons, however, should dissuade us from dismissing English common law so easily.

Consider first that we owe many of our constitutional liberties to the English common law. "That the Constitution is predicated on the existence of the Common Law cannot be questioned," James Madison explained, "because it borrows therefrom terms which must be explained by Com[mon] Law authorities."[42] Examples include the right of *habeas corpus*,[43] the protection from *ex post facto* laws,[44] the right of an accused to confront his accusers,[45] the right to keep and bear arms,[46] the use of juries in criminal cases,[47] the freedom from unreasonable searches and seizures,[48] and the immunity from being placed in double jeopardy for the same offense.[49] The one thing these constitutional freedoms have in common is that they were all *pre-existing rights* protected by English common law.

The Bill of Rights did not grant us these rights; it simply declared as inviolate rights we already possessed. The very thought of the newly created government, in its manifold

beneficence, *granting* us these rights would have been an insulting heresy to the hearty American revolutionaries of that age. Truth be told, English common law at the time of the founding was, and continues to be, the vanguard of our most cherished freedoms.

The real anomaly is not that we adopted too much of the English common law, but too little. If we had been truly faithful in our adoption of English common law at the time of the founding, we could have avoided our greatest failure as a nation: race-based chattel slavery. At the time the General Assembly reaffirmed the common-law reception statute in 1792, the greatest jurists and commentators of English common law had declared, "As soon as a man sets foot on English ground he is free: a negro may maintain an action against his master for ill usage, and may have a *Habeas Corpus* if restrained of his liberty."[50] Lord Mansfield, in his famous 1772 decision in *Somerset v. Stewart*, described the "state of slavery" as "so odious, that nothing [in common law] can be suffered to support it," holding that the enforcement of slavery on English soil cannot be "allowed or approved by the law of England."[51] Blackstone agreed, stating that "pure and proper slavery does not, nay, cannot, subsist in England" because "the law of England abhors, and will not endure the existence of, slavery" within its borders.[52] These views echoed the earlier axiom, first attributed to the Queen's Bench in 1569, that "England was too pure an air for a slave to breathe in."[53] William Cowper later immortalized those words in verse:

> *Slaves cannot breathe in England; if their lungs*
> *Receive our air, that moment they are free;*
> *They touch our country, and their shackles fall.*[54]

To our shame, however, Virginia declined to apply English common law to the issue of slavery. In a lament included in his notes on Blackstone's Commentaries, St. George Tucker explained the hypocrisy this way:

> Local circumstances, likewise, gave an early rise to a less justifiable *departure* from the principles of the common law in some of the colonies, in the establishment of slavery; a measure not to be reconciled either to the principles of the law of nature, nor even to the most arbitrary establishments in the English government at that period; absolute slavery, if it ever had existence in England, having been abolished long before.[55]

"All the colonies were subject to the common law of England," a later historian would note with regret, "and if in Virginia and Jamaica there had been a judge as upright and able as Lord Mansfield ... it would seem that slavery might have been dissolved by a few judicial trials."[56] Imagine how the history of our Commonwealth, and perhaps the trajectory of the entire nation, would have been favorably altered if English common law on the issue of slavery had been securely planted in our jurisprudence at the time of our nation's founding.

THE DEMOCRACY OF THE DEAD

The modern relevance of English common law to Virginia jurisprudence means that most of us face a steep learning curve.[57] Few of today's law schools teach historic English common law. Instead, they focus on the trendiest, and sometimes purely rhetorical, multi-prong "tests" applied in the newest (and often ephemeral) judicial pronouncements. Admittedly, some aspects of modern law appear to have devolved into such juristic narcissism — but, thankfully, Virginia law has not.

Our laws, like our institutions, remain strong because we have built them upon a uniquely democratic premise: tradition. As G.K. Chesterton put it, "Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking around."[58] Imbued by this rebellious spirit of tradition, our ancestors at once defeated England, the greatest empire of that age, and yet adopted English common law, the glory of Western jurisprudence. We today live, litigate, and legislate in the Commonwealth they created and bequeathed to us.[59] ■

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The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or the author's opinion as an appellate judge in the context of any specific case.