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Hedgehogs and Foxes: The Case for the Common Law Judge

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With the epigram, "The fox knows many things, but the hedgehog knows one great thing," Ronald Dworkin, America's foremost contemporary legal philosopher, summarized his lifelong quest for the objectively true laws necessary to a just democratic society and for perfectionist judges of single-minded integrity—hedgehogs—to recognize and implement them through the moral reading of the Constitution. I make the contrary case for the common law judge—the fox who sees many things. I argue that common law judges—foxes—are essential to preserve, protect, and defend the dynamic empirical American ideal—that of a just, self-governing constitutional society of laws made by the people to further their own safety and happiness, or the common good.

*I review different contemporary views of the role of judges, but particularly perfectionist and common law judges, and I find the latter to be generally disregarded as mere "conventionalists." I then trace the history of common law judging. I argue that, as historically carried forward, common law judging employs practical moral reason to preserve and protect the moral vision of a self-governing people as embodied in the laws they make and approve as best to further their own common good. Common law judging is thus the tie that binds the social compact to a shared conception of the just society. And it is directly contrary to the objectivist rational idealism of perfectionist judges, hedgehogs, who see judges as empowered to discern and implement as constitutional law, through their decisions in "hard cases," the "best" construction of the objectively true moral law. I illustrate perfectionist and common law judging in practice by reference to the landmark substantive due process cases—*Lochner, Roe, Windsor, *and* Obergefell*. And I call on us to preserve justice for foxes.*

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TABLE OF CONTENTS

INTRODUCTION

"The fox knows many things, but the hedgehog knows one big thing."
—Ronald Dworkin[1]

With this epigram for his last work of jurisprudence, *Justice for Hedgehogs*, Ronald Dworkin, America's foremost contemporary legal philosopher, summarized his lifelong quest for the objectively true laws necessary to a just society and for judges of single-minded integrity—hedgehogs—to recognize and implement them through the moral reading of the Constitution.[2]

Dworkin makes the case for the perfectionist judge. I make the case for the common law judge—the fox who sees many things. In this Article, I analyze different conceptions of the role of judges, but, in particular, traditional common law judging—judging by foxes—and perfectionist judging—judging by hedgehogs. I argue that both are grounded in the rational implementation of moral vision. But common law judges preserve and protect over time the societal values of a self-governing people as expressed in their constitutional principles and laws—the social compact. By their decisions, these judges bind the social compact to a shared conception of the just society. Perfectionist, or progressive, judges, by contrast, attempt to discover and implement as law the objectively true principles of an ideally just society. They exercise their authority to "say what the law is" in the cases they decide to bring about

1. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 1 (2011) (referencing line by ancient Greek poet Archilochus made famous by Isaiah Berlin in his essay, *The Hedgehog and the Fox*).

2. *See id.*

an objectively just society with equal liberty for all under the "best" conception of a living Constitution.

I first survey the forest of contemporary jurisprudence and find common law foxes to be an endangered species. I then ask where the common law and common law judging came from, how they developed, and how they differ from popular conception. I address how common law judging—judging by foxes—works in a dynamic self-governing constitutional republic dedicated to the happiness and safety of all its members to protect and further a shared conception of justice and the common good. I argue that common law judges, like perfectionist judges, conceive of themselves as reasoning morally from just principles to just consequences, hence as doing justice. But the process of common law judging differs radically from that of perfectionist judging, as does the concept of the role of judging in implementing the laws of a just society.

I argue that common law foxes incorporate the two great objective formal principles of fairness—due process of law and equality under the law—into the process of judging rationally and morally. In so doing, foxes reach judgments that are not only valid but sound within the dynamic, multifarious, empirical system of substantive laws the people have made to further their own conception of the just society. The judgments of foxes thus preserve and further the moral vision of a self-governing people while respecting the dignity and worth of every person affected by the law. Hedgehogs, by contrast, seek to discern and implement the objectively true laws of an ideally just society. Thus, they collapse the substantive values in the positive law into the procedural values of due process, or liberty under the law, and equal protection, or equality under the law, as they deem them best construed. They then collapse both again into one great substantive value of equal liberty, which they implement in their decisions as the true substantive moral law of ideal society. I illustrate the difference between hedgehogs and judges in practice with the landmark substantive due process cases—*Lochner v. New York*,[3] *Roe v. Wade*,[4] and the "gay marriage" cases, *United States v. Windsor*[5] and *Obergefell v. Hodges*.[6] I conclude that, while hedgehogs see themselves as furthering the evolution of the law toward objectively true moral justice, foxes see hedgehogs as myopically threatening the rule of just laws made by a free and equal people for themselves that foxes preserve and protect. And I call on us to preserve justice for foxes.

3. 198 U.S. 45 (1905).
4. 410 U.S. 113 (1973).
5. 133 S. Ct. 2675 (2013).
6. 135 S. Ct. 2584 (2015).

I. The View from the Bench

I am a state court appellate judge, and the view of the law from my bench is that of a forest composed of many different trees. Some are hardwoods destined to survive for half a millennium; some are softwoods good only for the short haul; some evergreen; some deciduous; some bear fruit; some bear nuts; some good for furniture or ship or house-building. Among the trees are vines and shrubs of many sorts suited to the climate, and in the clearings are grasses and wildflowers. All are necessary to the healthy growth of the forest over time. Together the trees make a home for many creatures and birds, large and small. They make a lair for foxes. Yet the trees that make up this forest of the common law are neither seen nor valued by those federal judges and academic legal philosophers who prefer the orderliness of an orchard planted and tended by skilled gardeners and bounded by orderly hedgerows in which a hedgehog may shelter and see the forest as a perfected whole. Today it is hedgehogs, not foxes, who dominate legal Anglo-American legal philosophy. Very few foxes are anywhere to be seen on the philosophical landscape beyond the forest, and when they are spotted, it is in an obscure journal where their outdated ideas still seem to be worthy of filling a few pages. And yet one might ask: Is there a place in this brave new world for foxes?

American and Anglo-American legal philosophy has not been developed by state court common law judges. They are generally too busy and too little inclined to theory to develop a comprehensive philosophy of law when there is the great task at hand of incrementally applying the law, case by case and controversy by controversy, trying to do justice for the parties before them, or, if you will, making their way carefully among the trees. Instead, the theory of just adjudication—or the role of judges in implementing the laws of a just society—has largely been developed by academics, like H. L. A. Hart and Ronald Dworkin, or by federal judges, like Antonin Scalia and Richard Posner. Only rarely is there development by a Charles Fried, who has served both as a state court supreme court justice and as a professor of law or, earlier, from an Oliver Wendell Holmes.

Many of these philosophers have not had much patience with the common law. Indeed, in the first line of *Justice for Hedgehogs*, Dworkin states that he is defending a different thesis from that of foxes, "a large and old philosophical thesis: the unity of value."[7] Quoting the epigram cited above, Dworkin says:

> The fox knows many things, but the hedgehog knows one big thing. Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what

7. Dworkin, *supra* note 1, at 1.

> we think about any one of these must stand up, eventually, to any argument we find compelling about the rest. I try to illustrate the unity of at least ethical and moral values: I describe a theory of what living well is like and what, if we want to live well, we must do for, and not do to, other people.[8]

The idea that ethical and moral values support one another and form a coherent whole that tells us what we must do for others, Dworkin states, is a creed that proposes a way to live.[9] And that creed is evident throughout his lifelong work. Ultimately, it comes down to belief in a theory of social justice to be actualized in law under two ultimate guiding principles:

> No government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern for the fate of every person over whom it claims dominion. Second, it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life.[10]

For Dworkin, it is the responsibility of government to assure equal justice. And the legitimacy of government is secured by judges of moral integrity, especially Supreme Court Justices, who decide hard cases—or constitutional cases in which conceptions of social justice clash—in ways that will give effect to the two objectively true principles of justice Dworkin describes, which may be characterized as an *equality* principle and a *liberty* principle. Judges, Dworkin argues, should read the Constitution "morally," that is, they should construe the principles of liberty and equality in the Constitution in accordance with the intellectual community's best construction of the moral requirements of decency and fairness and should implement the true democratic conditions of equal liberty for all.[11]

From the point of view of the hedgehog, the common law judge's adherence to precedents in the positive law, with all of its limbs and branches and twigs and leaves, is mere "conventionalism" based on "backward looking factual reports" that cannot provide any justification—moral or otherwise—for the resolution of issues that have not been settled by whatever institutions have conventional authority to decide them.[12] Thus common law judges must go outside the law to decide cases, and there is no guarantee that anything they decide will be grounded in morality, that is, will be *just.* But this characterization of foxes by hedgehogs is, from the foxes' point of view, false.

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8. *Id.*

9. *Id.*

10. *Id.* at 2.

11. *See* RONALD DWORKIN, LAW'S EMPIRE 114–17, 225 (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

12. *See* DWORKIN, LAW'S EMPIRE, *supra* note 11, at 114–17, 225.

Foxes do not know just "one big thing . . . [like t]he truth about living well and doing good."[13] Rather, they know there are many valuable things. And they rely on the people as they are to shape their own conception of lives lived well under the rule of law and on judges' application of legal reason—a particular form of applied moral reason—to ensure by fair and impartial judgments the realization of the people's own shared ideals. They do not look to ideally moral people—like the abstract "representative men" who make just laws from behind a veil of ignorance posited by Dworkin's predecessor and mentor, John Rawls[14]—or to Dworkin's own judges of integrity to tell them what laws are just. Foxes take a practical view of the law of particular cases. But this view does not entail the conclusion that the law as implemented by foxes is merely "conventional" and is implemented without reference—or with only fortuitous reference—to principle. Rather, foxes look on a just society as an ongoing, self-creating, and self-adjusting—or "autopoietic"—social compact composed of laws made by self-governing people for themselves.[15] And they see traditional common law judging as the tie that binds the social compact to a shared conception of a just society.

Foxes do indeed decide cases and controversies one by one on their facts and in accordance with precedents in the positive law, as hedgehogs claim. But—as I shall show below—they make those decisions in accordance with legal reason as traditionally understood. That is, they decide in accordance with an intrinsically fair formal process of deciding cases under their particular facts and existing law to further the common good as representatives of the people freely and equally define it in their self-made laws. In this jurisprudence, neither procedural nor substantive justice is determined by reference to abstract moral principles held by judges. Procedural justice is determined by the adherence to an objectively fair process of legal decisionmaking—legal reason. And substantive justice is determined by judges' respect for the will of the people, who determine for themselves what laws are most conducive to their own safety and happiness, who build their own values into the law,

13. DWORKIN, *supra* note 1, at 1.

14. *See* JOHN RAWLS, A THEORY OF JUSTICE 118–22 (Harvard Univ. Press rev. ed. 2003) (1971) (positing ideally just persons as "representative men" who make their decisions regarding the fair distribution of social goods from behind a veil of ignorance as to their own place in society and who coalesce behind a "difference principle" and a "liberty principle" much like Dworkins' two principles of justice).

15. The term "autopoiesis" is derived from the Greek word for "self-creating." *See* HUMBERTO R. MATURANA & FRANCISCO J. VARELA, AUTOPOIESIS AND COGNITION: THE REALIZATION OF THE LIVING, at xvii (Robert S. Cohen & Marx W. Wartofsky eds., 1980). The term was coined by biologists, Humberto Maturana and Francisco J. Varela, to describe living systems, or autonomous and strictly bound systems that are shaped by their interactions with the environment over time so as to maintain the system and the relations between its parts. *See id.* at 78–79.

and who rely on judges to respect those values and to keep the law sound, just, and reliable in their estimation, earning their consent to it.

How legal reason works in the common law system to ensure a just society of self-made laws—justice for foxes—is described and argued for below. For now, to my knowledge, none of the leading contemporary legal philosophers has articulated a conception of common law judging as the exercise of a particular type of moral reason called legal reason that operates to further a shared conception of the just society.

Justice Antonin Scalia, an originalist in construing constitutional texts and a textualist in interpreting statutes, is at the other end of the philosophical spectrum from Dworkin. He nevertheless agreed that the common law and common law courts have but two functions: "to apply the law to the facts" and "to *make* the law,"[16] acting in the first instance as conventionalists and in the second as legislators. He opens his classic, *A Matter of Interpretation*, with the image of the common law judge as a broken field runner

> who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him for the rear, until (bravo!) he reaches the goal—good law.[17]

Justice Scalia concedes,

> [T]he common law, and the process of developing the common law, . . . has proven to be a good method of developing the law in many fields—and perhaps the very best method. . . . [and] a desirable limitation upon popular democracy. But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"—is appropriate for most of the work that I do, and much of the work that state judges do.[18]

For Justice Scalia, ours is "an age of legislation, and most new law is statutory law, . . . [t]he lion's share of the norms and rules that actually govern[] the country [come] out of Congress and the legislature," and "[t]he rules of the countless administrative agencies [are] themselves an important, even crucial, source of law."[19] For him, "[t]his is particularly true in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law," whereas

16. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 6 (Amy Gutmann ed., 1998).

17. *Id.* at 9.

18. *Id.* at 12–13. Justice Scalia titled his first chapter, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws." *Id.* at 3.

19. *Id.* at 13.

"[e]very issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."[20]

This view of the law, however, leaves Justice Scalia no room to look for justice in the law or for justification of the law beyond the text and the commonly accepted definitions of words. And it is unfair to the common law because it implies that once the common law turns statutory it ceases to inform the interpretation of texts and, indeed, ceases to exist. Perhaps it is the other way around. Perhaps when statutory interpretation enters into case law it becomes part of stream of the common law process, which has always absorbed statutory construction in the long run. Or so it seems to foxes.

Even Justice Oliver Wendell Holmes, the great philosopher of the common law, writing over a century ago, called the common law merely "a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds," in whose "sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall."[21] Holmes had great reverence for the common law, but he did not believe that the common law was rule based in any formal, rational, or moral sense. Holmes famously wrote, as a legal realist, or expositor of the actual law, "the life of the law has not been logic; it has been experience,"[22] and "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[23] Thus, he concluded in a famous opinion, "courts do and must legislate from the bench" when prior legal decisions fail to provide answers to hard cases.[24]

Like his legal positivist successor, H. L. A. Hart, Holmes insisted not only upon the empirical nature of the positive law, but also upon the distinction between "ought" and "is," or the distinction between morality and the positive law, the legally promulgated and actually enforced law.[25] And, anticipating Posner, he looked forward to the day when more scientific and systematic approaches to judicial interpretation would be developed, writing, "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[26] Posner pays tribute to him for that.

For Hart, the foremost legal positivist of the mid to late twentieth century—and the teacher against whom Dworkin specifically rebelled—

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20. *Id.*
21. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).
22. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (2009).
23. Holmes, *supra* note 21, at 461.
24. S. Pac. Co. v. Jenson, 244 U.S. 205, 221 (1917).
25. *See* Holmes, *supra* note 21, at 459.
26. *See id.* at 469; *see also* HOLMES, *supra* note 22, at vii–xxiv.

the positive law consisted largely of conventional rules established through settled cases. But, "the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives."[27] Thus, in Hart's view, as in Holmes', judges ultimately become legislators when the settled law—the positive law—runs out. Hence, the "conventionalism"—or adherence insofar as possible to established rules set out in precedents in the positive law—of which Dworkin accused him in calling for a jurisprudence based on a reading of the Constitution in light of objectively true moral laws, not merely conventional ones.

Judge Posner, a legal philosopher and former chief judge of the federal Seventh Circuit Court of Appeals, calls himself a pragmatist and, in his latest work, a realist like Holmes.[28] But he is no proponent of the traditional common law approach to judging, even though his particular target is jurisprudence grounded in moral philosophy, like Dworkin's. "[M]oral philosophy," he contends, responding to Dworkin, "has nothing to offer judges or legal scholars so far as either adjudication or the formulation of jurisprudence or legal doctrines is concerned"; indeed, "it has very little to offer anyone engaged in a normative enterprise, quite without regard to law."[29] And "it is *particularly* clear that legal issues should not be analyzed with the aid of moral philosophy, but should instead be approached pragmatically."[30]

For Posner, the proper methods of inquiry for judges and legal philosophers are "those that facilitate pragmatic decisionmaking—the methods of social science and common sense,"[31] methods Holmes had advocated before him. He condemns moral theorists, like Dworkin, not because they are influential with judges—they are not—but because "their influence is pernicious; it is deflecting academic lawyers from the vital role . . . of generating the knowledge that the judges and other practical professionals require if they are to maximize the social utility of law."[32] Posner calls for the development and application of scientific social theories to law and to the collection of data about how the legal system operates and at what cost and with what consequences.[33] He calls, in sum, for a *sociological* approach to law.[34] But this does not mean that Posner thinks common law judges employ those methods. Indeed, he

27. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612 (1958).
28. RICHARD A. POSNER, REFLECTIONS ON JUDGING 5–6 (2013).
29. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY viii (1999).
30. *Id.*
31. *Id.*
32. *Id.* at xi.
33. *Id.* at xiii.
34. *Id.* at xiii, 241.

takes pains to distinguish the pragmatist judge from what he calls the "judicial positivist," or, in most people's conception, the traditional common law judge.

The judicial positivist, Posner claims, "would begin and usually end with a consideration of cases, statutes, administrative regulations, and constitutional provisions—the 'authorities' to which the judge must defer in accordance with the principle that judges are duty-bound to secure consistency in principle with what other officials have done in the past."[35] Such judges, he states, do not go against the authorities without compelling reasons, as to do so would violate a duty to the past. One such compelling reason, however, might be where two lines of cases diverge so that one line has adopted a principle inconsistent with the authorities relevant to the present case.[36] In such a case, Posner states, positivist judges compare the two lines and by "bringing to bear other principles manifest or latent in case law, statute, or constitutional provision, . . . find the result in the present case that would promote or cohere with the best interpretation of the legal background as a whole."[37] Judicial pragmatists, by contrast, seek to make "the decision that will be best with regard to present and future needs," utilizing precedent, statutes, and constitutional text as "sources of potentially valuable information about the likely best result of the present case for the truly novel case."[38] For that, "[h]e looks to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify," which he calls "essentially Dworkin's approach."[39]

In his latest work, Posner, notes the "growing complexity [of] []largely technological" federal cases, and adopts what he calls a legal realist position while continuing to emphasize "the affinity between legal pragmatism and science."[40] He opines that, "in many cases, and those the most important, the judge will have to settle for a reasonable, a sensible, result, rather than being able to come up with a result that is demonstrably, irrefutably, 'logically' correct."[41] For him, realist judges have a rich sense of the factual basis of law that encompasses science and systematic and other data. Even though that sense is not limited to the facts found in judicial records,[42] it still does not lend itself to systematic logical judicial decisionmaking. To him, "[w]hat is reasonable or sensible will often depend on moral feelings, common sense, sympathies, and

35. *Id.* at 241.
36. *Id.* at 241–42.
37. *Id.* at 242.
38. *Id.*
39. *Id.*
40. POSNER, *supra* note 28, at 5–6.
41. *Id.* at 6.
42. *See id.*

other ingredients of thought and feeling that can't readily be translated into a weighing of measurable consequences."[43] The law, he opines, "is, and I dare say always will be, *ad hoc* and *ad hominem* to a fault."[44] "As a positive theory," he tells us, "[legal realism] teaches that legal decisions and doctrine are fact-driven, not theory-driven. As a normative theory, it teaches that that's how law should work."[45] And it is in that fact-driven jurisprudence that he now locates himself as a pragmatic realist.

So we have a united front across the legal philosophical landscape: common law judges and the common law itself are inadequate to resolve the great moral, social, or political—the philosophical—legal questions. Common law judges are mere conventionalists, and the common law is but a series of conventional, backward-looking judicial decisions. Judges must go outside the rules and precedents of common law and outside the record of the case—to moral theory, to texts and rules of construction, to sociology, to science, to facts, and to emotions—to solve hard cases. The proper construction of the law as made by the people for their own governance is too important, we are told, to be left to judges simply following other judges, who are theoretically learned in the law and elected or appointed on the basis of their legal credentials, but are not necessarily learned in legal theory, sociology, or textual construction. This is so at least where it counts—at least in important or "hard" cases.

To be truly just, the best minds agree, legal decisionmaking must be informed and driven by philosophical theory and construed and applied so as to effect philosophically approved ends—the true conditions of democracy, or the original meaning of the texts, or the best sociological goals and practices—or it must do the best it can with no systematic theory, on an *ad hoc* basis. True philosophical understanding and the application of what is *best* in the law to the facts of particular cases is beyond mere foxes who daily apply the laws that affect our lives.

None of these philosophers reflects that perhaps the law is a societally agreed upon and enforced system of shared values and standards into which the people have systemically built their own moral principles and their own conception of justice—their *common morality* or *shared values*. Nor do they reflect that the people might have a legitimate expectation that the judges they appoint or elect to construe and apply the law will adhere to those principles and standards in accordance with a type of moral or practical reason specific to the law—*legal reason*—and will not independently substitute their own conceptions of *better* laws according to the "best" moral theory. Justice Scalia, I believe, would have said that his textualist reading of the law is the only scientific

43. *Id.*

44. *Id.* at 7 (quoting Grant Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 107 (1970)).

45. *Id.*

method for preserving the people's intent in making the law, if not their actual shared moral principles.[46]

But perhaps our leading legal theorists are simply too busy envisioning or shaping the forest to see the trees. Or even to see that it takes the trees to make the forest and foxes to guard it. Or to ask where the forest came from, or what happens if you trim or thin it severely, or leave only pollarded lindens planted in formal rows between regular and proliferating garden paths, or raze the forest altogether to plant a more fashionable parterre, or simply fail to tend it. Or perhaps they see only a thicket and no forest at all—nothing of any shape or consequence, nothing that requires protecting. To quote a famous politician: "What difference at this point does it make" if we put the common law behind us?

All of these philosophers, except Holmes, take little account of the common law—where it comes from, what it is actually composed of, how it is continually made and continues to grow, and, most critically, how it functions and why that matters. Dworkin, the hedgehog, lies curled under a hedge beyond the boundary of the forest, seeing it as one and dreaming of a well-formed forest, one where every perfect tree is made to flourish equally by the latest and best methods of forestry. Scalia and Posner are woodsmen: Scalia hewing down all but the primeval oaks to revive the original Eden; Posner once clearing the land for cultivation according to the latest scientific methodology and now resting on his axe contemplating a complexity of trees without form or method in their planting, although knowledge of the science of forestry helps inform the woodsman's task. No prominent legal philosopher today seems to ask, "What *is* the common law anyway, and why should I want to preserve it? And, if I do, what should I do?" No one argues that the forest is still there, real and worth preserving for its own sake—for the foxes and all the other creatures that flourish in its shade, frolic in its clearings, partake of its bounty, and rest at last beneath its boughs. Someone needs to make the case for the common law and the common law judge. This, then, is an argument for foxes.

II. The Common Law Tradition

"Common law" or "the common law"? Is there just "common law," and then more rigorous or disciplined or systematic or theoretical law? Or is there something called "*the* common law" that actually has a referent somewhere below absolute truth, or God, which takes no article adjective—something on the level of *the* sovereign or *the* rule of law? What *is* the common law? And what is common law judging?

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46. *See generally* Antonin Scalia & Bryan A. Garner, Reading Law (2012) (explaining important principles of constitutional, statutory, and contractual interpretations in a creative yet informative style).

Scalia would tell us confidently that the common law is just "case law"—judge-made law—and thus tainted with a whiff of the faintly disreputable, the arbitrary and capricious, the definitely inferior and all too feeble efforts of mere circuit riders who do not learn and objectively report the "original meaning" of statutes and the Constitution as commonly understood "by intelligent and informed people of the time" they were drafted.[47] Rather, common law judges "in fact 'make' the common law, and . . . each state has its own,"[48] so that "[j]udge-made law is special legislation," whereas "[t]he legislature must act on general views, and prescribe at once for a whole class of cases."[49] Thus, in the federal courts, "with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."[50] And, in that context, words "have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[51] For Posner and Dworkin, the common law is just a set of backward looking conventional reports of past cases that, along with statutes, administrative regulations, and constitutional provisions, constitute the "authorities" to which the legal positivist judge defers.[52] And for the legal theorists before them—the legal positivists and realists—it was much the same. But for the great expositors of the common law and the great common law judges, it was not. They were foxes.

The first great expositor and defender of the common law was Sir Edward Coke, Chief Justice of the Common Pleas, the highest judge of the common law court that protected the rights of the people. He was subsequently Chief Justice of the King's Bench, the court that protected the King's rights, under James I of England. Coke, in his *Institutes*, traced the common law to *Magna Charta* as "for the most part declaratory of the principall [sic] grounds of the fundamentall [sic] laws of England," to the *Charta de Foresta*, a great charter concerning the laws of the forest, and to "the laws and statutes of divers[e] kings before the conquest."[53] Thus, for Coke, the origins of the common law lay in written and unwritten constitutional documents and in ancient statutes and laws.

The next great classic authority on the common law and common law judging was Sir Matthew Hale. Sir Hale's treatise, *The History of the*

47. SCALIA, *supra* note 16, at 38; *see generally id.* at 5–48.

48. *Id.* at 10.

49. *Id.* at 11 (quoting Robert Rantoul, Oration at Scituate (July 4, 1836), *in* Kermit L. Hall et al., *American Legal History* 317, 317–18 (1991)).

50. *Id.* at 13.

51. *Id.* at 24.

52. *See* POSNER, *supra* note 29, at 241–42.

53. EDWARDO COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES A6, A10 (1986).

Common Law of England, originally published posthumously in 1713,[54] essentially agreed with that of Coke. Hale, the Lord Chief Justice of England under Charles II and a jurist for most of his adult life, defined the common law as "that Law by which Proceedings and Determinations in the King's *Ordinary Courts* of Justice are directed and guided."[55] He set out the formal constituents of the common law as "Usage and Custom," comprising received and accepted portions of ecclesiastical canon law and admiralty law; "Acts of Parliament" lost over time and thus "not now to be found of Record"; and "Judicial Decisions."[56]

Judicial decisions, Hale wrote, were of three kinds: (1) those resting solely on "the Laws and Customs of this Kingdom"; (2) those that interpret the laws and deduce judgments from them; and (3) decisions that "seem to have no other Guide but the common Reason of the Thing, unless the same Point has been formally decided."[57] Thus, for common law judges "the Rule of Decision is, First, the Common Law and Custom of the Realm, which is the great *Substratum* that is to be maintain'd; and then Authorities or Decisions of former Times in the same or the like Cases, and then the Reason of the Thing itself."[58] According to Hale, judicial decisions

> do bind, as a Law between the Parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.[59]

In deciding the law, Hale argued,

> the Judge does much better herein, than what a bare grave Grammarian or Logician, or other prudent Men could do . . . [because] in many Cases there have been former Resolutions, either in Point or agreeing in Reason or Analogy with the Case in Question; or perhaps also, the Clause to be expounded is mingled with some Terms or Clauses that require the Knowledge of the Law to help out with the Construction or Exposition[,] . . . [so that] a good Common Lawyer is the best Expositor of such Clauses.[60]

Thus, while Hale distinguished between the case law made by judges and the statutes of Parliament and kingly decrees, it was the

54. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (Charles M. Gray ed., 1971).
55. *Id.* at 17.
56. *Id.* at 44–45.
57. *Id.* at 46.
58. *Id.*
59. *Id.* at 45.
60. *Id.* at 46.

common law judge, learned in the law, who, construing all constitutional, statutory, and prior case law, created precedents upon which other judges might rely to determine the best construction of the law.

Coke and Hale both emphasized the role of common law judges in maintaining the rule of law with reference to tradition, precedent, and reason. But, even at the time Coke and Hale were writing, the English common law had another aspect—a moral aspect—that they did not specifically address. Even then, the common law was understood to be supplemented by principles of *equity* or *fairness*. And courts of equity—chancery courts—had evolved as such in the fifteenth and sixteenth centuries to supplement the common law courts and to relieve the severe legality of purely legal writs. These courts authorized judges to use their discretion to apply recognized impartial principles of equity to resolve disputes fairly, and thus justly, when strictly legal solutions would operate harshly, as in matters involving trusts, inheritance, and the protection of the insane. Today, courts of chancery have been abolished, even in England, but the maxims of equity upon which they relied have been absorbed into case law and written into our Constitution and statutes where they continue to play an integral role in shaping our conception of justice.

Around the time of the founding of the American republic, Sir William Blackstone, a law professor, barrister, member of Parliament, and, subsequently, Justice of the Common Pleas, wrote his *Commentaries on the Laws of England*.[61] This was in accord with the description of the common law process given by his great predecessors and with the then-evolving vision of the common law as incorporating both legal and equitable—or moral—principles. Locating himself in an ancient philosophical tradition, Blackstone wrote that all human laws rest upon "two foundations, the law of nature and the law of [divine] revelation," and that "no human laws should be suffered to contradict these."[62] He went on that there are many points where "both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits.[63] And herein it is that human laws have their greatest force and efficacy," adding to and not merely declaring the law.[64] As to conventional matters, in essence, "matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful

61. 1 WILLIAM BLACKSTONE, *Of the Nature of Laws in General*, *in* BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND (Wayne Morrison ed., 2003) (1803).

62. *Id.* at 42.

63. *Id.*

64. *Id.*

which before was not so."[65] In short, the law is essentially moral, becoming conventional only at the edges. And to remain moral—or just—it must not contradict either the divine law or the natural law of liberty, and its constraints upon individual liberty will be justified only insofar as they are necessary for the benefit of society.

Blackstone saw the laws of England built on this foundation as "divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law."[66] The "*lex non scripta*" was the originally unwritten law; and it included "not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions."[67] These went back to ancient societies whose laws were originally orally preserved, but were "at present . . . contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity."[68] These parts of the law were, nevertheless, styled "*leges non scriptae*," Blackstone wrote, "because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom."[69] And so it is with case law today, which derives from "long an immemorial usage" and "universal reception," and is made formally binding in legal judgments enforceable by the state.

For *statutory* interpretation, or the interpretation of *leges scriptae*, Blackstone set out the canons of construction that loom large in Scalia's contemporary textualism (as well as in Hale's treatise) and declared that "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it."[70] For Blackstone, "[f]rom this method of interpreting laws, by the reason of them, arises what we call *equity*," which, quoting Grotius, he defined as "'the correction of that, wherein the law (by reason of its universality) is deficient.'"[71] He explained that, "since [] all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come

65. *Id.* at 43.

66. 1 WILLIAM BLACKSTONE, *Of the Laws of England*, *in* BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 61, at 63.

67. *Id.*

68. *Id.* at 63–64.

69. *Id.* at 64 (citation omitted).

70. BLACKSTONE, *supra* note 64, at 61.

71. *Id.*

to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted."[72] But, he cautioned:

> Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light, must not be indulged too far; lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.[73]

Sound judicial decisions, for Blackstone, could not be based solely on a judge's reasoning from universal principles or even legislative intent. Each case—to be equitably or justly decided—must take into account particular circumstances. Principles of law and justice complemented each other in the common law, each acting as a constraint upon the other.

"The doctrine of the law then is this," wrote Blackstone: "that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration."[74] Yet, he cautioned, "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen, that the judge may *mistake* the law," but, "we may take it as a general rule, 'that the decisions of courts of justice are the evidence of what is common law:' in the same manner as, in the civil law, what the emperor had once determined, was to serve for a guide for the future."[75] In other words, judges' reliance on precedent and rules, so long as not absurd, unjust, or mistaken, imparts continuity, reliability, and stability to the law.

I have quoted these great expositors of the law because I think they make it clear that common law judging has never departed from its origins. It is today (at its best) as it was in Coke's or Hale's day, or, especially, Blackstone's. The common law today, as then, is recorded in *case law*, just as Justice Scalia said. But "case law," as Coke, Hale, and Blackstone all showed, is a broad concept. It consists of *all reported judicial decisions* that have not been overturned at a given time, including

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72. *Id.*
73. *Id.* at 62–63.
74. BLACKSTONE, *Of the Laws of England*, *supra* note 66, at 70.
75. *Id.* at 71.

all decisions interpreting and applying preceding case law, statutes, and constitutional provisions from antique origins to *Magna Charta* and the *Charta de Foresta in England*—the acknowledged bases of the unwritten British Constitution, which informed the U.S. Constitution—to the present day. And these judicial decisions of American state and federal courts with precedential value are still to be found recorded in official "reporters" that line the walls of law libraries or are electronically reproduced online in official and unofficial sources.

Judicial decisions made by common law judges today, much as in Coke's, Hale's, and Blackstone's times, are informed and constrained by (1) constitutional provisions, statutes, and established tradition; (2) precedents that interpret constitutional and statutory provisions, as well as the common law; (3) "the reason of the thing"; and (4) principles of equity applied under the circumstances of the particular case.

Judicial decisions and the whole body of the law upon which they draw together comprise *the common law system* within which all American judging takes place. This system is a forest made for foxes. It is both organic and dynamic. The existing body of the positive law forms a substratum for the determination of the law of the particular case, as Hale said—a substratum composed of past case law and established substantive and procedural rules and principles "that is to be maintain'd" by precedent and "the Reason of the Thing," as well as by those principles of equity that Blackstone recognized as constraints upon the universal application of the law.[76] This common law based case law forms a body of law for judges to call upon in future cases to determine whether a proposed decision—interpreting past case law, or a statute, or a constitutional provision—rationally and equitably fulfills the purpose of the law under the applicable laws and facts of the particular case. And, when judges reason legally from the law and the facts of a case to a judgment, these "Authorities or Decisions of former Times in the same or the like cases" are indispensable guides to sound judicial decisionmaking.[77] Moreover, it is *only* through these recorded judicial decisions, working together with precedent, constitutional provisions, statutes, rules, orders, and administrative decisions that the positive law is authoritatively construed and preserved for future interpretation, application, and enforcement. It is indeed only in this way that a reliable body of precedent construing the positive law exists and the rule of law is maintained over time.

Yes, it is possible to draw clean lines between and among constitutional law, statutory and regulatory law, and the common law as Justice Scalia does, and as other theory-driven jurists do when they

76. *See* HALE, *supra* note 54, at 46.
77. *See id.*

condemn case law as "judge-made law" or as "ruleless law,"[78] or as "backward looking factual reports" that cannot resolve the novel and controversial legal and moral issues presented by important legal cases. It then follows that a legal system like that of the United States is a *hybrid* legal system in which common law, statutory law, and constitutional law are all separate legal tracks with their own modes of interpretation going nowhere in particular. The problem is that it ultimately is futile (or pernicious) to insist on such systemic purity. Thus, while it is true that a common law cause of action is readily distinguishable from a cause of action grounded in a constitutional or statutory right, a simple and practical definition of the *common law process* of deciding cases is simply the "case law" process; and the system of determining the law in particular cases and controversies through this process is the common law system.

Within the common law system, the one constant is judicial decisionmaking through case law in light of precedent. Thus, it makes no sense to try to draw a clean line between the common law process and the strains of statutory and constitutional law that twist together with judicial decisions to make up the substratum of the laws that define the enforceable public conception of justice. And so this general descriptive term—the common law system—has become attached to the whole system and process of precedential judicial decisionmaking that construes and applies the positive law in particular cases and controversies and thus defines the parts and the boundaries of the positive law. And it is this common law system, including both *lex scripta* and *lex non scripta*, that constitutes the forest we see when we survey the law as a whole—the forest the hedgehog sees as one big thing (in need of shaping) and the fox sees as a self-sustaining ecosystem, in different parts of which dogwoods, apples, magnolias, poplars, pines, beeches, oaks, cedars, and sequoias all flourish and to whose sustainability all contribute.

It seems simply misguided to the fox for judges or legal philosophers to abjure common law judging—which integrates constitutional, statutory, and case law texts, principles, rules, and precedents through reason and equity—as backward-looking conventional reports that rest upon no common core of rule or principle or structure, that cannot show the way forward, and that can, at best, only "predict" what judges may sometimes do. Nor is it fruitful to excise the past interpretation of constitutional provisions or statutes from the common law process and then to declare that statutory or constitutional interpretation proceeds by an altogether different method of construction from that employed in mere case law.

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78. *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 10–11, 13, 21 (1996). Posner, likewise, approaches this position in his latest work. *See* POSNER, *supra* note 28, at 7.

As Coke, Hale, and Blackstone all attest, it has never been the case that good legal decisionmaking in the common law system has separated itself from the common law and the common law process when it comes to "hard" cases or constitutional or statutory interpretation. The reported judicial decisions that comprise case law—the body of precedents interpreting prior cases, orders, statutes, and constitutional provisions—interact with the written texts of administrative codes, and statutes, and substantive and procedural rules and standards of adjudication to form the body of the positive law and to embody and carry forward the legal and equitable principles that shape the public life of a nation whose legal system is a constitutional common law system. So it is no mean thing to assert that precedents and common law principles are merely "conventional" and may be discarded when judges are faced with "hard" cases in complex or novel situations or that they do not apply to constitutional or statutory law, where the best construction of the law matters.

No one other than legal philosophers contends that precedents within the common law system can mechanically give us the answer to every substantive judicial question (except "hard" and "novel" ones) by mere logical deduction and that when deduction fails, the common law system runs out. Sometimes the appropriate construction of a term or a phrase is in doubt, or there is no precedent for the interpretation of a newly enacted law or a genuinely novel and not easily analogized set of circumstances calling for the application of law. Sometimes precedents conflict or give absurd results, or results that offend our sense of justice. Adjustment is required. How are these adjustments made? And, critically, can they be made within the common law process itself, or must judges of integrity go beyond the positive law (with all of its parts) and the facts of particular cases to construe the laws justly, as these philosophers contend?

Blackstone argued that equity constrained law and united universal principles to the particular circumstances of cases in the judicial process to achieve justice. I agree. But most contemporary legal philosophers do not.

Dworkin counsels judges to reject the constraints of particular circumstances and precedents and to decide "hard" cases morally—that is, by reference to the "best" conception of the requirements of the great moral principles of liberty and equality. This is exactly the path Blackstone cautioned against. Posner takes precedent as a guide, but he also looks to the judge's best estimation of the sociological consequences of his decision according to available data. Scalia would direct us backwards, to the original meaning of the language of a constitutional provision or statute when parsed according to rules of construction, which he elevates to uniquely powerful rules of decision—another path Blackstone cautioned against. None recognize the traditional common

law method of adjudication—the rational evaluation of the facts of particular cases in light of precedent under principles of law and equity and rules and standards in the positive law—as either authoritative or sufficient to decide hard cases and to further the purposes of the laws of a just society.

I suggest, however, that a common law judge in the United States today views her role as something quite different from the role any of these contemporary legal philosophers would have her play and much more like the role described by Coke, and Hale, and Blackstone. I suggest that the common law judge perceives her role as being to preserve, protect, and defend the integrity and purpose of the laws the people have made for themselves. These are laws upon which they rely to restrain the power exercised by private persons against each other and by government against all. They are laws to which they have given their consent to enforce those publicly affirmed relations deemed necessary and appropriate to their own safety and happiness and to serve as guidance for private and public action and for future judicial decisionmaking. And she does this by applying precedential decisions construing constitutional principles, legislative acts, and prior cases in accordance with reason and principles of equity to preserve the integrity and functionality of the law and to further the purpose of laws of the people.

But if this is the noble role of the common law judge, how does she fulfill it? How does common law judging preserve, protect, and defend the forest of the law, and why is such common law judging *fair* and the judgments of common law judges *just*?

III. The Common Law Process and the Social Compact

Legal realists and positivists tell us that, while there is great overlap between the law and morality, the only necessary link between them is the link consistently found between rules and basic moral principles.[79] In general, morality stands apart to critique the law or, illegitimately, to attempt to enforce the "positive morality" accepted and shared by a majority social group against individuals in the moral minority who disagree with the majority's views.[80] Or they tell us that attempting to find a necessary relationship between law and morality is the source of much confusion between the law that actually is, and the law as we think it should be.[81] Pragmatists tell us that good law reflects social science and maximizes utility, while pragmatic realists tell us that "moral feelings, common sense, sympathies, and other ingredients of thought and feeling" all enter into the making of the law and guide judicial

79. Hart, *supra* note 27, at 623.
80. *See* H.L.A. Hart, Law, Liberty and Morality 17–24 (1963).
81. *See* Hart, *supra* note 27, at 622; Holmes, *supra* note 21, at 459.

decisionmaking.[82] And originalists do not address the morality of the law at all.

Finally, perfectionists like Dworkin see the "true" law as nothing but abstract objective moral concepts into which all "true" social and legal rights ultimately collapse.[83] But they agree with the positivists and legal realists that these moral concepts are not intrinsic to the positive law. Rather, they are present in American constitutional law only in the two great principles of due process of law and equal protection of the law; and it is the role of judges of integrity to bring about a just society by construing and implementing these two principles in adjudicating constitutional cases so as to implement the true concepts of ideal liberty and equality as the positive laws of the just society.[84] The fox's idea that the positive laws not only are value-based but also reflect the common moral and social values of the society that approves and enforces them does not enter into any of these theories.

But does all "true" law really collapse into a single abstract moral principle of equal liberty as authoritatively construed by judges, as hedgehogs contend? Or is the relationship between morality and law really fortuitous, or confusing, or basic and unilluminating, or even sometimes antagonistic, as Holmes and Hart may be heard to argue? Is the positive law really nothing more than a system of conventionally enacted rules without moral force so that we must go to moral theory to correct its shortcomings, as Dworkin argues? Are laws to be morally tested against the utilitarian principle, or are "moral feelings" merely a hodgepodge of ingredients of thoughts and feelings in legal decisionmaking, as Posner has said? May we just remain silent about the morality of the law, as Scalia did? Because if morality has no integral relationship to law, why *should* we give the law our allegiance? Why *ought* we to obey it? Would we not be merely perpetuating convention in defiance of truth and justice? And how then could we say that traditional common law adjudication is *fair*, is conducive to the *good*, and yields

82. POSNER, *supra* note 28, at 6.

83. *See* DWORKIN, *supra* note 1, at 1; DWORKIN, LAW'S EMPIRE, *supra* note 11, at 114–17, 225, and accompanying text; *see also* DWORKIN, FREEDOM'S LAW, *supra* note 11, at 73 (describing the Bill of Rights as "set[ting] out a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction," and stating that, "[t]aken together, these principles define a political ideal: they construct the constitutional skeleton of a society of citizens both equal and free"). These "two major sources of claims of individual right[s]" describe a system that is "comprehensive, because it commands both equal concern and basic liberty," so that "anyone who believes that free and equal citizens would be guaranteed a particular individual right will also think that our Constitution already contains that right." *Id.* Moreover, "since liberty and equality overlap in large part, each of the two major abstract articles of the Bill of Rights is itself comprehensive in that same way," so that "constitutional rights that follow from the best interpretation of the equal protection clause . . . will very likely also follow from the best interpretation of the due process clause." *Id.*

84. DWORKIN, *supra* note 1, at 1.

justice? Where does *equity* come in? Or must we simply acknowledge and accept the authority of the hedgehog on these matters?

I think, rightly considered, traditional common law judging in the tradition of Coke, Hale, and Blackstone responds to a fundamentally different idea of the relationship between law and society, and law and morality from that of any of these legal philosophers. I think, as I have said, that common law judging is the tie that binds the social compact of a free and equal people to a shared conception of the just society. It preserves justice because the *social compact* that common law judges preserve and protect—*the positive law* of the nation—consists of nothing more nor less than the officially sanctioned and enforceable *publicly approved values* reflected in the Constitution and subordinate law. And the method of judging common law judges use to construe and apply the law and to preserve and protect these values is nothing more nor less than a form of *applied moral reason*, or *practical reason,* called *legal reason*.

A constitutionally grounded common law system like our own is not accepted by the people merely because it is conventional or authoritative, or coherent and functional. Rather, in a representative democracy, founded like ours to ensure the safety and happiness of its members and constitutionally grounded in moral principles of liberty, equality, and justice for all, there is an integral relationship between the personal and social morality of the members of the society and the constitutive principles and laws they agree upon.

Indeed, it is hard to conceive of a more idealistically moral conception of the purpose of the social compact, the justification for rebellion from an existing social order, and the founding of a new state on principles that express *the self-creating empirical ideal of a sovereign people* than that set out in America's founding documents. Unlike the many states founded on conquest from within or without, the U.S. government was intentionally founded on principles of *liberty*, *equality*, and *the pursuit of happiness* as expressed in its Declaration of Independence and Constitution. As Chief Justice Marshall wrote in *Marbury v. Madison*, "[t]hat the people have an *original right* to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."[85]

The American Declaration of Independence justified separation of the republic from the British crown on the moral ground that "that all men are created *equal*, that they are endowed by their Creator with certain unalienable *Rights*, that among these are *Life, Liberty* and the pursuit of *Happiness*. That to secure these rights, Governments are

85. Marbury v. Madison, 5 U.S. 137, 176 (1803) (emphasis added).

instituted among Men, deriving their just powers from the consent of the governed," and "[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[86] Likewise, the preamble to the U.S. Constitution states that the Constitution was promulgated and approved by delegates of the people "in Order to *Form a more perfect Union*, establish *Justice*, insure domestic *Tranquility*, provide for *the common defence*, promote the *general Welfare*, and secure the *Blessings of Liberty* to ourselves and our Posterity."[87]

The Constitution, as drafted, adopted, interpreted over time, and continually ratified by successive generations, has remained the central structural document of the positive law. Thus it also serves as a central document of the dynamic social compact compounded of positive procedural and substantive laws made by the people through their self-governing institutions. In addition to incorporating the original moral and political right of self-government, the Constitution sets out what the Founders deemed to be the fundamental structural principles of *ordered liberty*. It establishes the government upon the principles of the separation of governmental powers and the subordination of representatives to the will of the people as expressed in periodic elections on a free and equal basis. It empowers Congress to enact general laws to carry out its mandate,[88] and it confers upon it the power to make those laws it deems necessary and proper to best further the safety and happiness of the people it represents.[89] It vests the president and the executive branch with power to execute the laws.[90] And it grants the courts the jurisdiction to decide particular cases and controversies[91] and implies the principle of judicial review.[92]

Through the Bill of Rights, the Constitution ensures the protection of those procedural and substantive *individual rights* deemed fundamental by the American people against public infringement by both the federal government and the states, setting out fundamental rights. The First through Eighth Amendments enumerate fundamental

86. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

87. U.S. CONST. pmbl. (emphasis added).

88. *Id.* art. I, § 1.

89. *Id.* art. I, § 8.

90. *Id.* art. II, § 1.

91. *Id.* art. III, § 2.

92. *See* Marbury v. Madison, 5 U.S. 137, 176–77 (1803); THE FEDERALIST No. 78, at 465–67 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.").

substantive rights.[93] The Ninth and Tenth Amendments reserve to the people and to the states the right to determine and write into law the boundaries of those substantive personal liberties traditionally held by the people but not enumerated in the Constitution.[94] And the Tenth Amendment assures to state legislatures the "police power," enabling them to protect the public health, safety, welfare, and morals of their residents.[95] In addition, the Fifth Amendment expressly incorporates the procedural principle of due process of law as a constitutional constraint on all federal governmental decisionmaking, whether by Congress, judges, or the executive branch.[96] And the Fourteenth Amendment, enacted after the Civil War, enjoins due process for all upon the states and expressly adds to it the fundamental principle of equal protection of the law, ensuring fundamental procedural fairness to all in the making, interpretation, and enforcement of state laws.[97] Meanwhile the Thirteenth and Fifteenth Amendments assure that no American may be barred from the privileges of citizenship by race or a formerly imposed condition of servitude.[98]

Thus, through the Fifth and Fourteenth Amendments, the Constitution integrally incorporates as *fundamental procedural values* the principles of equality under the law and procedural due process. But, at the same time, the Constitution recognizes the right of the people to define for themselves in law those various *substantive values* they deem most conducive to their own safety and happiness to the extent they are not enumerated in the Constitution. Then the people may retain for themselves individually those liberties—or rights—they have not mutually agreed to subject to societal constraint; and to adjust the empirical applications of the law for the common good. The recognition and

93. *See* U.S. CONST. amends. I–VIII.

94. *See id.* amend. IX ("[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"); *Id.* amend. X ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

95. *Police Power*, BLACK'S LAW DICTIONARY (5th ed. 1979). The "police power" is:

> [a]n authority conferred . . . in the Tenth Amendment . . . upon the individual states . . . through which they are enabled to . . . place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process.

Id.

96. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

97. *See* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

98. U.S. CONST. amends. XIII, XV.

enforcement of these self-imposed societal constraints upon individual and governmental liberty in the positive law, in turn, constrains the liberty of judges within the common law tradition to say what the law is and ensures the ongoing integrity and vitality of the law and the continued consent of the people to the law.

The Constitution constructs a government of self-ordered liberties and concomitant constraints upon the power of the federal and state governments. It establishes the permissible boundaries of the positive law. It empowers Congress to make general laws. It empowers the executive to enforce the laws. And it empowers judges to construe and apply the laws fairly and impartially to do justice in particular cases and to maintain the integrity and justice of the law in furtherance of the common good as the people themselves have defined it. It empowers judges to preserve, protect, and defend the rule of law. The process for guaranteeing procedurally fair—or just—government dedicated to the common good as the people themselves perceive it to be is thus built into the Constitution. And the Constitution underpins and justifies all valid subordinate laws, both legally and morally.

Within this constitutional system, common law judges, by interpreting and applying the positive law in all its forms, create a dynamic body of judicial opinions and judgments that enter into and become part of the organic body of the positive law together with the rules, statutes, and constitutional provisions they construe. These opinions and judgments reflect and refine the shared values in the positive law as an ongoing, self-creating and self-adjusting—an autopoietic—social compact. Thus, common law judging is the engine of the self-creating empirical ideal. It ensures that a society whose laws are founded on just constitutional principles, are made by the people in a fair process to further their own safety and happiness, and are impartially applied and adjusted to serve the ends remains a just society over time. And it ensures that the laws made by all and for all are not subverted or manipulated to the private ends of political factions, or corrupt and self-interested, or ideologically driven officials.

Traditional common law judging serves at least eight functions vital to the flourishing of a constitutionally grounded civil society of free and equal members:

> (1) It leads toward the development of a consensus regarding the fundamental structural principles of a flourishing civil society designed to secure the safety and happiness of all, which can be then formally embodied in a written constitution and subordinate statutes built upon and accompanying the common law substratum.
>
> (2) It formalizes and keeps alive a dynamic set of common principles of just procedural and substantive laws as a social compact.
>
> (3) It publishes the laws, so that they are available to be recognized and followed by all, and so that transgressions may be

> punished by all in accordance with principles of adjudication recognized by all. Thus, it serves as a means for checking individual and societal impulses detrimental to the health of the community of all.
>
> (4) It constrains the formidable powers of government within their constitutionally prescribed framework.
>
> (5) It maintains the stability, reliability, and predictability of the laws.
>
> (6) It maintains the functionality and flexibility of the law over time.
>
> (7) It confirms the legitimacy of the law and earns the consent of the people to the law by assuring that laws are enacted by duly elected representatives of the sovereign people, are fairly and impartially interpreted and applied in consonance with legislative intent, are brought forward by cases that reflect the circumstances in which they have been applied, are in consonance with the body of ongoing law, and are equitably adjusted or referred to the legislature when necessary to further the people's changing conception of the common good.
>
> (8) And thereby, it guarantees the rule of law.

Within the common law system, no legal opinion or judgment stands alone. Each relies upon past opinions and judgments; utilizes recognized principles, rules, and standards in the law; and contributes to the ongoing, organic, self-creating, self-sustaining, and self-correcting system of publicly enforced legal principles, rules, standards, rights, and duties—the positive law—in which it takes its place. Far from its being the legitimate province of judges in such a system to be unfettered to "say what the law is," at the highest level, by rules and precedents,[99] judges are constrained to adhere to this complex process so that the legal judgments they reach will be *accepted* as both *valid* and *sound*—and therefore as both *rational* and *fair*—by the parties and the public. Tested within the legal process and over time, each judgment of each court that has not been overturned by a higher court or later law contributes to the integrity and functionality of the system of publically enforceable laws of which it becomes a part. And each tends either to advance the common good of the people fairly, ensuring their consent, or to harm it, rendering itself subject to revision or rejection.

Common law judging is thus radically unlike—although complementary to—legislation. Legislation is the drafting of general laws, which requires for its vitality the free expression of ideas in an assembly of equals mutually constrained to effect the people's will, subject only to constitutional constraint. Common law judges are not

99. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

licensed to become legislators, although their judgments may have far-reaching effects on policy. It also follows that common law judging is not theory-driven or sociologically based judging, which aims to realize the judge's personal conception of justice rather than the considered and systemically tested and refined common law conception of justice that traditional common law judging carries forward.

A traditional common law judge fulfills the constitutionally contemplated role of a judge by reasoning rationally and equitably from the facts of the particular case and the applicable laws in accordance with the principles incorporated into the law. And she thereby reaches judgments that instantiate the individual *rights and obligations* of the parties before her fairly and rationally—or justly—and in a way that is consistent with, and becomes part of, the positive law and is available to guide future cases in materially similar circumstances, subject to further equitable and legal adjustments, the better to further the common good. Thus, together with its counterparts, a rational and fair legislative process, and impartial administration of the law, traditional common law judging assures not only the *legal* but the *moral* integrity and purpose of the law over time.

Moreover, it is by adhering to the various rules and principles in the positive law within the procedural and substantive constraints incorporated into the law and into the methodology by which it is applied that judges fulfill their constitutional function of preserving, protecting and defending the boundaries of the laws made by the people, rather than substituting their own private and personal judgments for those sanctioned by the people. Indeed, the integrity and functionality of the system, and the fulfillment of its purposes, depends upon the shared expectation that lawmakers and judges will play by the rules of the game. That is, that they will follow the rules and precedents produced by the system itself and will not change the rules to fit their own personal conceptions of the "best" construction of the requirements of morality or to achieve the "best" social consequences or the "best" semantic interpretation of the text of the law.

Looking at the positive law that embraces constitutional provisions, statutes, common law principles and rules, and the body of cases interpreting and applying prior law according to "strict rules and precedents" and the principles of equity built into the law,[100] we may discern in it an empirically established dynamic system of mutually agreed upon, publically enforceable, and yes, intrinsically moral, directives promulgated by a sovereign people and maintained over time to further their own common good—a constitutionally structured social compact. And it is to effect the purpose of this compact that the people

100. THE FEDERALIST No. 78, *supra* note 92, at 471.

mutually consent to subordinate their own private wills and personal liberties to the common will within the ordered constraints of delegated powers and retained procedural and substantive rights.

The ultimate *purpose* of the interpretation and application of the common law by traditional common law judges is thus not merely to preserve the integrity and functionality of the legal system, regardless of how that system was conceived or the ends it serves. It is to maintain the social compact by preserving the integrity and functionality of a system that is fair to all and intended to further the common good, or happiness, of all as understood by the people themselves, and thus *to maintain and further the self-creating empirical ideal of the just society* and to secure the ongoing consent of the people to it.

What the Constitution does *not* provide for—either expressly or implicitly—is the power of judges to exercise their own wills to legislate according to their personal conception of the good and the valuable, or their estimation of general social utility, or their conception of how an objective observer would have construed a constitutional or statutory provision at the time of drafting. Rather, it ensures the right of the people to readjust the empirical objectives of society over time under changing circumstances, not only by making, repealing, and amending laws, but by amending even the Constitution itself.[101]

The role of judges under the plain language of the Constitution is not that of moral philosophers, policymakers, social engineers, or archeologists of original intent. It is that of reviewers, interpreters, and implementers of just constitutional, legislative, and common law principles and rules in the positive law who decide particular cases over time in such a way as to maintain the integrity, functionality, and purpose—the justice—of the positive law and to further the common good as the people have determined it to be. But how do common law judges perform this function? How do they reason at once legally and morally? What *is* legal reason?

IV. Legal Reason, Practical Reason and the Common Law Process

All judging is *practical*, *evaluative*, and *normative*. It decrees what people should or must do in given empirical circumstances—terms that imply that it proceeds not merely from reason, but also from experience and *moral and social standards*.[102] This makes it especially shocking when Judge Posner says that morality "has very little to offer anyone engaged in a normative enterprise, quite without regard to law," and that "it is *particularly* clear that legal issues should not be analyzed with the aid of

101. *See* U.S. Const. art. V.

102. *See, e.g.*, Joseph Raz, The Morality of Freedom 135–36 (1986) ("In this book 'moral' is used . . . in a very wide sense in which it is roughly equivalent to 'evaluative.'").

moral philosophy, but should instead be approached pragmatically."[103] One wonders what Posner thinks morality even is, or what role he thinks it plays in setting standards for society at all. Indeed, one wonders what kind of people do *not* build their moral values—their sense of *justice* and *good* behavior—into their laws. And if judges neither try to further the peoples' values in their judgments nor substitute their own, on what *do* they base their judgments?

Holmes knew that the life of the law was not merely logic but experience. But he thought when judges reach the end of collective past experience as recorded in law books they must look to their own experience and legislate. But this is not what common law judges really do, and it is not what Holmes did. He was right that legal judgments made by common law judges through the exercise of practical legal reason do not merely follow by deductive logic from the application of legal principles, standards, and rules as recorded in past cases. But the guidance offered by past decisions and the judicial process does not run out either, leaving judges only the choices of legislating or following their own best lights. Rather, traditional common law judges both *reason logically* from legal principles to valid conclusions to resolve conflicts rationally and *evaluate alternatives* under the facts of the case and applicable laws and standards to reach sound prescriptions for action that further the common good as society has defined it. In this way, legal judgments in a common law system reflect the people's determination of which liberties and constraints should be enforced as societal values through a rational and fair judicial process.

That common law judging—the exercise of legal reason to resolve particular cases and controversies—is a type of *practical reason*, or *moral reason applied under empirical circumstances*, is to me undeniable. In this process, a judge's adherence to the substantive, empirically given, intrinsically moral concepts in the positive law and to the formal process of fair adjudication is as important to the fairness and soundness of legal judgments as adherence to the principles of deductive reason is to their validity. Traditional common law judging in accordance with legal reason is not, therefore, mere deduction or "conventionalism" based on "backward looking factual reports," or ruleless judging, *ad hoc* and *ad hominem* to a fault, or broken field running through earlier cases that leaves the judge free to impose her preferred rule. But it also is not the judging advocated by hedgehogs, in which objectively true applied moral judgments are simply deduced from moral intuitions and universal abstract moral concepts given *a priori* to the philosophical few.

Unlike hedgehogs, traditional common law judges do not posit objectively true universal substantive moral laws and deduce the answers

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103. POSNER, *supra* note 29, at viii.

to legal questions from them in "hard" cases. They start with the body of the applicable positive law—procedural and substantive—and the facts of the particular case and *reason legally*. That is, they reason by the process of *practical reason* or *applied moral reason* peculiar to moral and legal judgment to reach results the people themselves will recognize as just in the particular case and in conformity with the purpose of the law overall.

So how does a common law judge reason legally in a particular case? She begins with the whole body of the positive law as the structural framework within which she must work. At the most general and abstract level of the law in the United States are those deep-rooted *fundamental principles of substantive law*, whether constitutional (such as freedom of speech, religion, or assembly) or private (such as basic principles of tort, contract, and property law), traditionally deemed to be essential to ordered liberty and conducive to the safety and happiness of all, or the common good. These abstract principles are the great enabling and constraining concepts that shape the contours of the positive law, but their empirical scope is almost entirely undefined other than by constitutional and statutory text and long-standing precedents in the common law.[104] Subordinate to these are *substantive rules of law* abstracted over time from the application of the law in particular cases in innumerable sets of factual circumstances. These define the limits or extensions of situations that fall within the scope of abstract principles. They are defined by precedent and rules of construction, are applied rationally, and are always subject to legal and equitable empirical adjustment to accommodate novel facts, new case law, and new legislation.

Equally integrated into the judicial decisionmaking process are the great and enduring *formal procedural principles of fairness and impartiality—equality under the law and due process of law*. These, like the substantive law, are grounded ultimately in the concept of ordered liberty. They define the rational and equitable boundaries of the application of legal concepts so that the judgments reached by common law judges are procedurally fair. Subordinate to these are rules and standards of procedure that formally guide the decisionmaking process. These define the formal process of judging and are essentially unchanging.

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104. *See* M'Culloch v. Maryland, 17 U.S. 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.").

In determining how to apply the law in a particular case, common law judges look first to c*onstitutional or statutory or common law* and to *precedent* to determine the boundaries of the applicable law. They then employ the traditional rational and fair common law judicial *process* to prescribe the fair and more beneficent outcome under the facts of the case. When precedents conflict, or when there is no precedent, they look to rules of construction, analogy, dissociative reasoning, and similar means of expanding and contracting the scope of the rule to encompass a wider or narrower set of materially similar circumstances to which the law applies.

In all "hard cases," or cases requiring the exercise of judicial discretion, the common law judge's first task is to determine the scope, or extension, of unclear or overlapping legal concepts in light of the totality of the circumstances and the relevant legal and equitable principles, rules, and standards in the positive law that drive the decisionmaking process. She then derives the logical conclusions from that interpretation and evaluates alternatives rationally and equitably under the facts of the case to find the *best* or the *soundest* fit between the law as applied and the law going forward.

All persons in the same position are treated the same under the law, as required by due process and equal protection, or liberty and equality under the law. All laws are impartially construed. And when a logically justifiable outcome of the application of relevant legal principles or rules will predictably produce an absurd or harsh outcome, or when one outcome will better serve the functionality and purpose of the law than another, the common law judge compares, or evaluates, the foreseeable consequences of the alternatives and applies the law both rationally and equitably to determine the outcome that will predictably best impartially preserve and further the safety and happiness of the parties and of those who will rely on that decision in the future. If, despite this care, the results of the decision turn out to be harmful for the people or the law, the rule as instantiated will be repudiated or modified—perhaps immediately by a higher court or perhaps by future case law or legislation.

The repeated exercise of legal reason by judges in particular cases and controversies defines and redefines over time and under different circumstances the boundaries of the liberties the members of a group or society are free to exercise against each other and determines the hierarchy of values in the law. And it places the constraints of the positive law—the authoritatively promulgated and publically recognized and enforced law—upon individual liberties and upon the powers of government itself. Needless to say, the *substantive content* of any body of judgments that depends upon the interpretation of legal concepts and the evaluation of potential and actual outcomes under standards, rules, and

principles in different empirical circumstances present in particular cases and controversies over time will be to some degree subjective and indeterminate, and thus subject to correction by successor or higher courts, or to modification or overruling by legislatures. But the *formal process* of just and fair common law decisionmaking is objective and does not change from case to case and judge to judge.

In this way the law remains at once objectively structured and public, and yet flexible and capable of growth. And the case law thus continually made and adjusted creates and sustains a dynamic body of judicial decisions construing and applying prior laws under accepted rules and standards. These decisions, together with the whole body of the positive law, form an organic whole that defines the ordered liberties of the people and constrains the license of judges to make the laws they please. The common law judge does not move beyond these substantive and procedural constraints of the positive law to decide cases in accordance with the dictates of moral theory or social utility as she independently "best" construes them. Nor does she find a warrant in the law for paring away all past decisionmaking that does not conform to her own reconstruction of the original meaning of a constitutional principle or statute (while relying on such precedents in construing private, non-statutory law).[105] Nor does she make ruleless *ad hoc* and *ad hominem* or extra-jurisdictional decisions—not if she is a good common law judge.

The interpretive and evaluative constraints of the positive law upon adjudication apply even at the level of constitutional interpretation upon which most jurisprudential theory concentrates. For example, in construing the Equal Protection Clause of the Constitution, no common law judge cognizant of her responsibility to maintain the functionality, integrity, and purpose of the law, and of her oath to preserve, protect, and defend the laws of the United States, could simply ignore the language of the clause, the precedent constraining its interpretation, the facts of the case before her, or the tools of legal interpretation in determining what the law says. She could not find license to impose her own conception of the "best" law upon the actual law. Nor could she ignore the foreseeable consequences of her decision for the parties, the social fabric, and the law itself.

Rules of law in a common law system are thus not merely "predictions" of what a future court will do; nor are they informational guides to be consulted but not obeyed when they conflict with the judge's construction of the original meaning of the text, or with sociological considerations, or with the aims of social justice theory. And the opinions and judgments that follow upon the application of the rule of law are not "ruleless," as some theoreticians have suggested, because they are not

105. *See* SCALIA, *supra* note 16, at 10.

theory driven. Nor is traditional common law jurisprudence backward looking and incapable of resolving "hard" cases presented by new circumstances.

"Hard cases" are simply those cases that present an empirical nexus in which the scope of two or more legal concepts overlaps or in which the scope of one or more legal concepts is unclear under the circumstances of the case. Thus hard cases are those that must be resolved by interpretation, deduction, and evaluation in accordance with the facts of the case and the principles, standards, and rules in the positive law. Or they are those cases in which different resolutions are logically sustainable but one is better under principles of equity, or justice, to avoid harsh or absurd consequences for the parties or the law that violate traditional concepts of procedural fairness and furtherance of the common good. In other words, *all cases that present genuine material issues of law or fact are hard cases*. And therefore, all can be, and should be, resolved by judges who observe the law and adhere to the traditional common law process. It takes the trees to make the forest of the law, and it takes common law judges to tend the trees and to preserve, protect, and defend the forest.

Yet a mere recitation of how common law decisions are made and how they carry forward the intent of the people expressed in the positive law does not answer questions that have long dominated Anglo-American legal theory at its most fundamental level: How does the common law system assure *justice*? What is the relationship between law and equity, or law and justice? Or, most broadly, what is the relationship between law and morality in the common law judicial process?

V. The Common Law Process and the Moral Law

I have said that common law judging is grounded in a moral process and the just application of intrinsically moral laws that further the people's own conception of the common good. But, say the proponents of perfectionist legal philosophy, it is *hedgehogs* who read the Constitution morally. How can the decisions of common law judges, with their empirically grounded, heteronymous *foxes'* views of just judging, reconcile the divergent moral views of a diverse people or reflect anything other than convention, pragmatism, or precedent, without moral direction—especially when hedgehogs assure them that the forest they labor to preserve is not deeply rooted in tradition and moral truth but only in the thin soil of convention?

Foxes might reply that it is less than certain that hedgehogs have as clear a view of objective moral truth as they profess. For hedgehogs might miss from up close what common law judges see from afar. Common law judging is sound, and therefore acceptable to the people, precisely because it employs practical moral reason—*legal reason*—to

enforce shared concepts of the common good that the people have enacted into law.[106]

Foxes agree with hedgehogs that at the moral core of both the Constitution and the judicial process are the two great moral concepts of *liberty*, or due process of law, and *equality*, or equal protection of the law. And they agree that it is through these two principles that judicial decisions are made fair and justice is done. But for foxes these are *procedural* principles of justice. They are, indeed, the two great principles by which *equity* is formally actualized in each judicial decision. And they are the principles by which moral values are incorporated into legal judgments, uniting the laws made by the people with legal judgments under the facts of particular cases and controversies that construe and implement those laws—and with them the values incorporated in them. But for hedgehogs these principles are both substantive and procedural. And, it is the duty of judges of integrity to construe and instantiate these principles as fundamental constitutional laws of the just society when they are presented with hard cases requiring the resolution of divisive social issues. Where does this radical difference arise, and what does it mean for the judicial process and the social compact?

In terms of moral philosophy, both common law judging—judging by foxes—and perfectionist or progressive judging—judging by hedgehogs—may be said to reflect an approximation of Immanuel Kant's *categorical imperative*.[107] But for foxes, the imperative of all judging requires practical, empirical adjustment. For hedgehogs it does not. And this distinction determines the different outcomes of actual legal cases involving profound and divisive social issues reached by common law and perfectionist judges.

Common law judges and progressive judges can—and I believe do—agree that, in judicial decisionmaking, (1) all persons must be treated as ends in themselves; (2) all moral agents must implement those laws that they could will to be universal laws of nature; and (3) all moral agents must act as legislators in a universal realm of ends.[108] The practical difference is that the moral vision of foxes is grounded in *respect for the liberty and equality of actual human beings* as makers and subjects of the law, while the moral vision of hedgehogs—like that of Kant himself—is grounded in *respect for the moral law itself as actualized in persons*. Thus, for common law judges, the empirically construed categorical imperative places intrinsically moral *procedural* constraints of fairness on legal judgments that accord due process and equal protection to those actual persons affected by the judgment. And it is judges' adherence to the

106. *See* Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 GEO. J.L. & PUB. POL'Y 1 (2011).

107. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor et al. eds., rev. ed. 2012).

108. *See id.* at 3–20.

procedural constraints of the categorical imperative in all their judging—as well as legislators' adherence to it in formulating legislation—which assures that a society's laws will be just, will be justly applied, will be perceived as just, and will remain just. Thus, when the content of the laws applied is conducive to the common good, and judges respect the constraints of the categorical imperative on procedural fairness in their judging, the judgment that follows is both just and good. But for hedgehogs, not only the *process* of making intrinsically moral judgments but the *substantive moral law itself* is given *a priori*, so that a truly moral legal judgment is one that respects and applies the moral law as ideally moral persons would respect and apply it, and judges of integrity instantiate that law—the true law of equal liberty—in cases that present divisive moral issues.

With respect to the first formulation of the categorical imperative, common law judges treat both those *actual persons* who make the laws, and those who are subject to the laws as *ends in themselves*—as autonomous moral beings whose conception of those positive laws most conducive to their own happiness and that of the communities in which they live is worthy of respect. And they treat as likewise worthy of respect and instantiation the *actual empirical intrinsically moral interests* of those affected by their decisions—those actual empirical moral interests of affected persons that conform to the procedural constraints of the Kantian categorical imperative and the substantive constraints of furthering the common good.[109] Common law judges thus review precedent, together with the texts of applicable statutes and constitutional provisions, to determine what legislators and judges have done in materially similar legal and factual situations to further the people's own conception of justice and to respect and carry forward that conception of justice fairly and rationally. By contrast, hedgehogs abstract from the actual persons before them to persons as representatives of abstract moral interests and issue those prescriptions that would rationally satisfy the true moral interests of those ideal persons. They thus set themselves apart from the decisionmaking process in which actual people in their wisdom, and not impartial observers in theirs, make and enforce the laws to which all are subject.

With respect to the second formulation of the categorical imperative, common law judges envision the laws they are to apply as *formally universal laws of nature*,[110] that is, as *empirical* laws that apply always and everywhere the same in materially similar circumstances. For them, the practical or applied moral law consists of a heteronymous set of prescriptions, universal in form and suitable to govern all, including

109. *See id.* at 40–41.
110. *See id.* at 43.

themselves, under empirical circumstances in a realm of sovereign moral agents like themselves. But for hedgehogs, as for Kant himself, the universal laws of nature are pure moral principles that are universally applicable without regard to the empirical consequences of their application, and it is the duty of truly moral agents, including judges of integrity, to instantiate the moral law as a universal law for the governance of the truly moral or just society.

With respect to the third formulation of the categorical imperative, common law judges act as *legislators in a universal realm of ends* by treating all similarly situated *actual persons* the same. They ask themselves, in light of their knowledge of the law and the foreseeable empirical consequences of their decision for affected persons and the positive law, whether they could will their judgment in the particular case to be applied impartially always to all persons in materially similar positions with respect to the law under materially similar empirical circumstances in the future.[111] And they ask whether their decision in the particular case will rationally and fairly further the good of those affected by the decision as determined by the laws to which the people have consented. They differ from perfectionist judges in that they do not confine themselves to considering the universal law and universal ends in terms of the ideal, but rather consider the effects of their judgments on actual people, not representative ones.

In sum, the ends furthered by the legal reasoning of common law judges are the furtherance of the *individual empirical moral interests* of those subject to the law as they are built into the positive law and constrained by principles of law and equity. But for hedgehogs the ends furthered by moral judging are the *universal moral ends of equally free ideal persons* as best construed by impartial judges with authority to say what the objectively true moral law is.

The effects for jurisprudence of these different conceptions of the commands of the moral law that distinguish hedgehogs from foxes are far-reaching. For common law judges, the consequences of moral judicial decisionmaking redound upon and further the purposes of *universal realm of empirical moral ends* in which both the autonomous moral agent and the objects of her decisionmaking are conceived of as ends in themselves and their moral objectives as worthy of respect. And just as a moral agent makes herself worthy of respect by acting morally, so a common law judge of integrity makes her judgments worthy of respect by making them justly and to good ends within a body of intrinsically moral laws, inspiring confidence in those affected by them that the laws are just and further the good, assuring their *consent* to them. A common law judicial decision is not just if it is not impartial. It is not impartial if it

111. *See id.* at 17, 34.

does not respect the equal liberty of all to participate through their duly elected representatives in making the law for all, the equality of all similarly situated persons under the law, and the equal right of all to due process of law. And it is not impartial if it does not preserve and further the common good of all those who are subject to the law. In such a case, the law as amended by the decision is, to the extent of the modification, unjust and subject to revocation or amendment.

In the fox's view, the categorical imperative describes the moral process for making a just legal judgment, or a just law, or a just society of self-made laws. But it does not dictate the *substance* of a good law; that is dictated by the people's own conception of their safety and happiness as formalized in law. These substantive laws do not remain static but are subject to change by statutory enactment, amendment, and repeal within the constitutional framework at the federal level or in the laboratories of the states, or by judicial decisionmaking in particular cases and controversies, as the people's views of the public good change. But that which does not change, yet is shared by every legitimate general law and every valid and sound judicial decision, is the *formal process* of moral public decisionmaking that reflects the categorical imperative as applied through the exercise of legal reason, which is a form of practical moral reason. Indeed, it is just this application of an intrinsically fair and impartial formal judicial and legislative process within a body of substantive laws judged by the people to be best to further their own safety and happiness under actual empirical circumstances that ensures the *consent* of the people to the law as good and to its application as fair.

A nation's positive laws almost certainly will not wholly correspond to the values held by *any* particular person or group. But all will consent to them because they are duly promulgated and enforced by a system constructed and approved by all as fair to all and conducive to their own common good. And, to the extent they are deemed unjust, they will invite resistance and change, for which the system also provides. All substantive moral and legal rights do not collapse into one great right of equal liberty whose substantive content is supplied by judges; and consent to the law is not commanded because judges are charged with saying what the law is.

But none of this is the case with rational Kantian idealists—hedgehogs—who strive to determine and pronounce the best construction of what the true moral law is. And this, foxes believe, is where hedgehogs go wrong. They assign objective, moral truth values to substantive empirical ends and apply universal substantive ideal laws regardless of the empirical consequences and without heed to the formal and empirical constraints upon the justice of the law's application to real people under actual circumstances. Neither common law judges nor moral agents applying the law or the rules of the common morality do

this. Both recognize that a law is no less universal and objective in *form* because, being substantive, it does *not* apply and prescribe right action in all circumstances always and everywhere, but only as appropriate to fairly further the common good in the actual circumstances.

Common law judges are distinct not only from perfectionist or progressive judges in the Kantian rational idealist tradition, but also from pragmatic and realist (if not originalist) judges in that the prescriptions of common law judges are designed to further the intrinsically moral empirical interests built into the laws by the people governed by them, while those of progressive judges in each of these traditions are designed to further the ends given by theory. Thus, not only the prescriptions of rational idealist perfectionist judges, but likewise the prescriptions of realists and pragmatists are ultimately referable to the good will or predilections of the judge herself and not to the will of the people as embodied in their laws. Common law judging is thus radically unlike judicial "strategies" that substitute the judge's own private and personal will—even her deepest personal moral convictions, her conception of an ideally just society (or of maximum social utility), or her pragmatic judgment—for the judicial will to make those judgments in particular cases that fairly and impartially best further the societally agreed upon conception of a just society as expressed in its intrinsically moral laws that are freely and equally made.

What, then, are the implications of the two most radically opposed conceptions of the role of just judges when applied in actual cases? That is, what are the implications of the conception of the hedgehog who sees justice as one great thing, the equality of liberty as discerned and applied by the courts, and that of the fox who sees justice as many heteronymous things subject to one great procedural imperative in judicial decisionmaking and to one overarching purpose with many objectives, the furtherance of the safety and happiness of the people as they themselves define it?

VI. Hedgehogs in the Courts: Saying What the Moral Law Is

In perfectionist legal philosophy, such as Dworkin's, enlightened Supreme Court Justices actualize the objectively true substantive moral laws as philosopher judges best construe them.[112] They are hedgehogs. And, in the hedgehog's realm, the highest court of the select few is empowered to determine the truly moral content of the law for all. Thus, for perfectionist hedgehogs, the "true" law is *not* the law the people have made for themselves according to their own conception of fairness and happiness. It is the law as determined by the philosopher judge and enforced for all as the best conception of the requirements of the objectively true principles of justice. It follows that judges have no

112. *See, e.g.*, Dworkin, Freedom's Law, *supra* note 11, at 7–12.

responsibility to enforce the laws made by the people; the positive law is entitled to no respect unless it conforms to the best moral legal theory in the considered opinion of judges. And judges who have the power "to say what the law is" have no accountability to the people or their laws; they are accountable only to their own best lights in determining for all what the law *should* be; and the law as they determine it should be is, by definition, just. The people's own conception of the laws most conducive to their own safety and happiness is replaced by a more enlightened conception of justice and the just society.

But, from the standpoint of the fox, there are drawbacks to counting on the most enlightened jurists of the day to get the law right for those who must obey it. For the fox, there is no touchstone for moral truth other than the categorical imperative as a formal constraint on just judging and the common pursuit of safety and happiness as a free and equal people deem it to be as a constraint on the substantive content of just and good laws.

So, if the common law process is a form of practical moral societal decisionmaking, as I have argued, how do common law judges—foxes—as stewards of the forest assure that the law remains just and directed to good ends? And how do hedgehogs employ the judicial process to assure that society truly protects moral interests in socially divisive cases? For that we must turn to actual "hard" cases decided by hedgehogs and foxes.

A. *LOCHNER V. NEW YORK*

The divide between hedgehogs and foxes is not new. It was the crux of the matter in the landmark substantive due process case, *Lochner v. New York*,[113] decided over 100 years ago. In that case, the Supreme Court majority found in the Fourteenth Amendment of the Constitution an unenumerated constitutional right of freedom of contract that invalidated wage and hour regulations in New York bakeries enacted by the state under its Tenth Amendment police power, that is, under its power to regulate "the safety, health, morals, and general welfare of the public."[114] The Court acknowledged the right of the states to exercise police power under the Tenth Amendment, but it held that the Fourteenth Amendment placed a limit on the valid exercise of that power. It raised that,

> [i]n every case that comes before this court . . . where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question[,] . . . [i]s this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in

113. 198 U.S. 45 (1905).
114. *Id.* at 53.

> relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[115]

In short, the Supreme Court pronounced itself—and not the people—to be not just the arbiter of procedural fairness, but the arbiter of divisive social disputes under substantive principles not enumerated in the Constitution but discerned by the justices to be implicit in it.[116]

As Justice Holmes cautioned in his famous *Lochner* dissent, however, the majority had decided the case "upon an economic theory which a large part of the country does not entertain."[117] In his view, the Constitution was "not intended to embody a particular economic theory"—in that case, pure laissez faire economic theory.[118] Nor, as we might analogize today, was it intended to embody a particular theory of social justice. The Constitution, he wrote, "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[119]

Justice Holmes concluded his dissent with the now famous statements:

> General propositions do not decide concrete cases. . . . I think that the word liberty in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[120]

For Justice Holmes, whatever he might say about judges as legislators in a treatise on the law, the liberty of judges in a self-governing common law society "to say what the law is" was constrained by the people's own conception of the requirements of liberty under law as positively expressed in their traditions and their laws. Judges were not at liberty to disregard those constraints in the name of a substantive conception of economic liberty implicit, in their view, in the Constitution but not enumerated.

Justice Holmes would have let the people's conception of social justice develop in the political arena, unopposed and unconstrained by judicial opinion, so long as the positive law did not infringe fundamental principles of justice set out in the Constitution or the traditions and laws of the people. Yet, the *Lochner* majority opinion represented the

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115. *Id.* at 56.

116. For the perfectionist justification for the Supreme Court's discovering implicit substantive constitutional rights in the Due Process and Equal Protection Clauses, see DWORKIN, FREEDOM'S LAW, *supra* note 11, at 7–11.

117. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

118. *Id.*

119. *Id.* at 76.

120. *Id.*

hedgehogs' "best" libertarian reading of the Constitution of the day. And, had it not been overruled by a future Supreme Court, the *fundamental liberty of contract* the *Lochner* majority found in the Due Process Clause would have remained as a *constitutional right* blocking the enactment of future social welfare legislation, despite changing times and mores, and subjecting each state and federal statute regulating conditions in the workplace—such as those permitting the unionization of workers or those regulating utility rates or environmental conditions—to judicial review to determine whether they violated the unwritten constitutional substantive due process right to economic liberty.

In overruling *Lochner*, almost fifty years later, in *Ferguson v. Skrupa*,[121] Justice Black set out the philosophical dichotomy between judicial hedgehogs and foxes. In *Ferguson*, a three-judge federal district court had found unconstitutional, under the Due Process Clause of the Fourteenth Amendment, a Kansas statute making it a misdemeanor to engage in the business of debt adjusting except as incident to the practice of law.[122] The Supreme Court reversed the three-judge panel, overruling *Lochner*'s holding that the Due Process Clause contained a substantive right to freedom of contract.[123] It observed:

> [T]he District Court . . . adopted the philosophy . . . that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used . . . , for example, to nullify laws prescribing maximum hours for work in bakeries, outlawing "yellow dog" contracts, setting minimum wages for women, and fixing the weight of loaves of bread. This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,
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> > "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conception of public policy that the particular Court may happen to entertain."

121. 372 U.S. 726 (1963).
122. *Id.* at 726–27.
123. *Id.* at 731–33.

> And in an earlier case he had emphasized that, "The criterion of constitutionality is not whether we believe the law to be for the public good."[124]

The Court opined:

> The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth amendment was intended to secure." It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."[125]

It took the Supreme Court only ten years after *Ferguson*, however, to return to writing substantive constitutional rights—this time individual moral rights—into the Fourteenth Amendment's Due Process Clause. The hedgehog had reawakened.

B. *ROE V. WADE*

Dworkin frequently took the great abortion rights case of *Roe v. Wade*,[126] decided in 1973, to illustrate the hedgehog's moral reading of the Constitution.[127] In that case, the plaintiff, Jane Roe, asked the Supreme Court to discern a right of a pregnant woman to choose to terminate her pregnancy "in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras; or among those rights reserved to the people by the Ninth Amendment."[128] The Court's legal argument was succinct. After reciting historic instances of acceptance of abortion, it observed that "[t]he Constitution does not explicitly mention any right of privacy" but a line of Supreme Court decisions had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[129] It concluded,

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124. *Id.* at 728–30 (citations omitted).

125. *Id.* at 730–31.

126. 410 U.S. 113 (1973).

127. *See, e.g.*, RONALD DWORKIN, JUSTICE IN ROBES 253–59 (2006); DWORKIN, FREEDOM'S LAW, *supra* note 11, at 44–129.

128. *Roe*, 410 U.S. at 129 (citations omitted).

129. *Id.* at 152.

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[130]

But ultimately it was impossible for the Court to argue that abortion was purely personal liberty of privacy upon which *no* limitation traditionally had been, or morally could ever be, placed by the states and that *no one else's* moral interests were implicated in an abortion decision but that of the pregnant woman.[131] Acknowledging that "some state regulation in areas protected by that right is appropriate,"[132] the Court opined that state protected abortion is, at least in part, not a merely *negative* personal liberty precluding state intervention but a *positive* moral liberty secured by the state.[133] But, instead of letting the states set the boundaries between negative and positive liberty with respect to abortion by enacting legislation under their Tenth Amendment power to regulate the public health, safety, welfare, and morals, the Supreme Court itself determined the limits of that liberty. And, as justification for taking away from the states the right to place public limits on the personal privacy right to an abortion under the Tenth Amendment, the Court found in the Due Process Clause an unenumerated, substantive constitutional right to an abortion subject to its own construction and application that trumped the right of the people to define the limits of that individual right in their legislatures.[134] Finding no compelling state interest in regulating abortions before the fourth month of pregnancy, the Court asserted its own authority to recognize, define, and prescribe the limits of the right to abortion as a due process right implied by the Fourteenth Amendment.[135]

The Supreme Court thus terminated the national debate on the limits of abortion rights by constitutionalizing a judicially articulated substantive moral and legal right to reproductive liberty without seeking the consent of the people to its moral vision. The resulting majority opinion of the Court exemplified the view of the hedgehog for whom "value is one big thing"; ethical and moral values support one another and form a creed that proposes an objectively good way to live, and no

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130. *Id.* at 153.

131. *Id.*

132. *Id.* at 154.

133. *See Liberty*, BLACK'S LAW DICTIONARY (5th ed. 1979) ("The word 'liberty' as used in the state and federal constitutions means, in a negative sense, freedom from restraint, but in a positive sense, it involves the idea of freedom secured by the imposition of restraint, and it is in this positive sense that the state, in the exercise of its police powers, promotes the freedom of all by the imposition upon particular persons of restraints which are deemed necessary for the general welfare.").

134. *Roe*, 410 U.S. at 153–54.

135. *Id.*

government is legitimate unless it respects "fully the responsibility and right of each person to decide for [her]self how to make something valuable of [her] life."[136] Paradoxically, however, the Court removed from the people by its decision the constitutional right to decide for themselves in their self-made laws the morality and social good or harm of abortion rights, or to determine where individual rights become positive rights or liberties requiring regulation by the state; and it substituted its *own* view of what belongs within the sphere of the individual to decide for herself and what within the sphere of the states—with no express guidance from the Constitution. The "evolving Constitution" or "living Constitution" had arrived, whose judicially decreed substantive due process and equality rights are designed to reflect the objectively best social policies of the day—or those which most closely meet the substantive requirements of equal liberty as hedgehogs see them—and not the best social policies as the people see them.[137]

C. *United States v. Windsor* and *Obergefell v. Hodges*

In the wake of *Roe*, and, to some extent preceding it, a number of moral due process and equal liberty cases issued from the Supreme Court broadened the concept of constitutionally mandated substantive sexual and reproductive liberties, as well as criminal rights.[138] But in these cases, until the present, the Court either determined that certain rights were "negative" privacy rights—individual rights with which the

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136. Dworkin, *supra* note 1, at 2.

137. *See* Scalia, *supra* note 16, at 5–47. Scalia described "the Great Divide with regard to constitutional interpretation . . . between *original* meaning . . . and *current* meaning," stating,

> [t]he ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law. . . . Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.

Id. at 38. Scalia cautioned, however, "at the end of the day an evolving constitution will evolve the way the majority wishes." *Id.* at 46. Dworkin's perfectionist "[l]aw as integrity" theory as "creative interpretation" that

> begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did . . . in an overall story worth telling now.

Dworkin, Law's Empire, *supra* note 11, at 225–28. For Dworkin, "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." *Id.* at 225. For Scalia, it is the opposite.

138. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (concerning execution of criminals under eighteen at the time of crime); Lawrence v. Texas, 539 U.S. 558 (2003) (concerning anti-sodomy laws); Atkins v. Virginia, 536 U.S. 304 (2002) (concerning execution of mentally retarded); Romer v. Evans, 517 U.S. 620 (1996) (concerning discrimination against homosexuals).

government might not interfere[139]—or declared a law unconstitutional because it violated procedural due process or equality under the law and was irrational to achieve a legitimate state purpose.[140] In this way, the Court relied on principles of privacy and rationality that both hedgehogs and foxes could accept and affirmed the principles underlying the changing mores of the people while avoiding writing unenumerated substantive due process liberties and substantive equality rights into the Constitution.

The 2013 case of *United States v. Windsor*,[141] however, presented the same opportunity as *Roe* for the Supreme Court to see for itself "one great thing"—in this case, an equal right of homosexuals and heterosexuals to marry implicit in the Due Process Clause of the Fifth Amendment to the Constitution and the Equal Protection Clause of the Fourteenth. At issue was the constitutionality of § 3 of the federal Defense of Marriage Act ("DOMA"), which defined marriage for purposes of federal law as "a legal union between one man and one woman."[142] The suit was brought by Edith Windsor, a New York taxpayer legally married in Canada to another woman who had predeceased her, leaving her estate to Windsor.[143] Although New York, in which both resided, recognized their Canadian marriage as valid, Windsor was denied the benefit of a spousal deduction from her federal estate taxes in New York under DOMA.[144]

Like the majority in *Roe*, the *Windsor* majority, in an opinion authored by Justice Kennedy, found constitutional protection in the Due Process Clause of the Fifth Amendment for state laws that recognize the equal liberty of marriage between heterosexual and homosexual couples.[145] The majority reasoned that at the time the country was founded the states possessed full power over marriage and divorce and the Constitution delegated no authority on that subject to the federal government.[146] Section 3 of DOMA departed from the history and tradition of reliance on state law to define marriage by imposing

139. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000) (concerning parental rights of fit parents); Griswold v. Connecticut, 381 U.S. 479 (1965) (pre-dating *Roe*, concerning right to use contraceptives).

140. These cases are not to be confused with the great civil rights cases which construed *enumerated* constitutional rights accorded by the Thirteenth, Fourteenth, and Fifteenth Amendments that corrected the injustice of slavery and assured that *all* persons subject to the law were accorded due process and equality under the law and all the rights and privileges of citizens. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (concerning prohibition of interracial marriage); Brown v. Board of Education, 347 U.S. 483 (1954) (concerning racial segregation in public schools prohibited by Fourteenth Amendment).

141. 133 S. Ct. 2675 (2013).

142. 28 U.S.C. § 1738C (2011); *see also Windsor*, 133 S. Ct. at 2683.

143. *Windsor*, 133 S. Ct. at 2682.

144. *Id.*

145. *Id.* at 2695–96.

146. *Id.* at 2691.

restrictions and disabilities on the class of gay and lesbian persons to whom the State of New York had accorded the right to marry.[147] Thus, the Court held that by overriding New York's recognition of a right of marriage equality, DOMA denied Windsor constitutional due process and equal protection rights embodied in New York law.[148] The Court concluded that, although Congress has great authority to design sound national policy, "it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment,"[149] which "contains within it the prohibition against denying to any person the equal protection of the laws."[150]

Section 3 of DOMA was thus invalid, the Court opined, because it instructed that same-sex marriage is less worthy than the marriages of others[151] and "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[152] It stated, "[b]y seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."[153] Thus, like the majority in *Roe*, the majority in *Windsor* found in the Due Process Clause of the Fifth Amendment constitutional protection for a substantive individual right of self-determination recognized by a state—an individual right to marriage equality—that was burdened by a federal law with no constitutionally legitimate basis.

Windsor provoked several dissents, but it was Justice Scalia's dissent that defined the crucial philosophical issue in the case. Scalia stated, "This case is about . . . the power of our people to govern themselves, and the power of this Court to pronounce the law."[154] For him, the majority's ruling that DOMA was "'a deprivation of the liberty of the person protected by the Fifth Amendment'" marked the return of "substantive due process."[155] He pointed out that gay marriage is not a liberty "'deeply rooted in this Nation's history and tradition,'" so that the majority opinion could not be defended by an appeal to liberties retained by the people[156]—those liberties protected by the Ninth and Tenth Amendment—and, likewise, "the Constitution neither requires nor forbids our society to approve of same-sex marriage."[157] Moreover, same-

147. *Id.* at 2692–93.
148. *Id.* at 2693.
149. *Id.* at 2695.
150. *Id.*
151. *Id.* at 2696.
152. *Id.*
153. *Id.*
154. *Id.* at 2697 (Scalia, J., dissenting).
155. *Id.* at 2706.
156. *Id.* at 2706–07 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).
157. *Id.* at 2707.

sex marriage was not an enumerated constitutional right but a privilege, accorded in this case by the state of New York under authority delegated to it by the Tenth Amendment. And, as to this right, § 3 of DOMA was constitutionally neutral.[158]

In Justice Scalia's view, the only rationale for the Supreme Court's overturning § 3 of DOMA was the majority's determination that the law had no legitimate basis. Setting aside traditional moral disapproval of same-sex marriage, he found sufficient bases for the legislation in its rationality and practical consequences.[159] And he strongly opposed the majority's stated justification for striking down § 3, namely, that it was motivated by the "bare . . . desire to harm a politically unpopular group," without its having made any argument to justify its condemnation of the motives of the coordinate branches of government in enacting the legislation.[160] Justice Scalia stated, "We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the majority will not do."[161] For him, the specter of moral authoritarianism lodged in the highest Court in the land had reared its head, substituting opprobrium of moral opponents written into constitutional law for the debate of the people over how best to proceed through the moral thicket. And, in his view, the moral reading of the Constitution was not without costs to be paid at the expense of the right of the people to govern themselves in their most intimate affairs.[162]

Thus, while Justice Kennedy and the majority adopted the philosophy of the hedgehog, for whom the interpretation and enforcement of a living Constitution under the best construction of the objectively true requirements of social justice are within the province of the courts—especially the highest court—Justice Scalia, the originalist, and his fellow dissenters plunged into and defended the forest of the laws made by the people for themselves.

Windsor, like *Lochner* and *Roe* before it, was a hard case. And it presented novel questions of law. So we may ask ourselves what the consequences of applying the jurisprudence of the hedgehog were, and what would have happened if, instead of reading the Constitution morally and invalidating § 3 of DOMA, the majority had upheld the law as not violating the Constitution and had left the issue of gay marriage to work itself out in state law in accordance with the people's changing mores. What would have happened had foxes dominated the decisionmaking process?

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158. *Id.*
159. *See id.*
160. *Id.* at 2693.
161. *Id.* at 2711.
162. *See id.* at 2708–09.

First, if § 3 of DOMA had been upheld, then, unless and until repealed, it would have continued to define marriage for purposes of federal law as a union of one man and one woman, retaining uniformity in the application of federal laws across the country. But it is reasonable to predict that laws regarding homosexual unions would have continued to evolve in state legislation and in case law, since critical legal issues involving these emerging unions would have remained to be resolved, including by the recognition of homosexual marriages or civil unions, or by the recognition of gay marriages made in other states by states that had no such law, or the resolution of child custody issues involving gay couples who separated. And, as the need for more general laws became apparent, the law would likewise have continued to evolve in state legislatures, where the justice of laws accommodating gay unions, including gay marriage, was rapidly gaining adherents and where old and outmoded laws that had not kept pace with social change would have remained subject to revision and replacement.

The difference is that the people themselves—and not the courts—would have continued to define and redefine the law to accommodate the realities of their circumstances and their considered moral judgments. The people, not the courts, would have propelled the evolution of the law of marriage. Courts would not have been called upon to define the existence, scope and applicability of an emergent fundamental unenumerated constitutional right to marriage equality, its relationship to the deeply rooted right to marry under the Ninth and Tenth Amendments, and its effect on a wide variety of existing general laws by generalizing from the facts of particular cases presented under widely varying circumstances. To invoke *Lochner*, the question would *not* have been raised,

> [i]n every case that comes before this court . . . where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question[,] . . . is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty.[163]

Rather, the scope of the statutory rights accorded by existing legislation—both federal and state—would have been judicially and legislatively defined and redefined by the people as necessary and appropriate to accommodate novel circumstances and changing social mores.

The *Windsor* decision moved this evolutionary process from common law state courts and state legislatures traditionally and constitutionally charged with defining and enforcing marriage laws to

163. Lochner v. New York, 198 U.S. 45, 56 (1905).

federal courts construing federal constitutional law. In the first year and a half after *Windsor* was decided, eighty-four federal courts, including the Fourth, Seventh, and Tenth Circuit Courts of Appeals invalidated state laws in thirty-two states as unconstitutional on the basis of the *Windsor* holding.[164] In that time, only one federal circuit court, the Sixth Circuit, failed to find a constitutional right to marriage equality and upheld the right of four states to ban gay marriage,[165] prompting the Supreme Court to grant certiorari to resolve the split in the circuits.

State law thus continued to evolve in the wake of *Windsor*. But it did not evolve under the Tenth Amendment. Instead, it evolved in accordance with the lower federal courts' interpretation of the Supreme Court's majority opinion in *Windsor*. The inference taken by the states was that Congress could not regulate marriage, but a state constitution could provide a constitutional right to gay marriage—*and* that state constitutional right might reflect an unenumerated right in the *federal* Constitution.

Foxes were faced with a dilemma. When, in state after state, the federal courts have declared state statutes, and even state constitutional requirements, respecting marriage unconstitutional under the moral reading of the evolving Constitution, must that right not be said to have become a constitutional requirement simply by force of changing law, even if those changes were impelled, or hastened, by a Supreme Court decision and were not freely made by state legislatures?[166] If Congress can have no role in creating a uniform statutory definition of marriage for purposes of federal law, as *Windsor* decreed, is it not necessary to have *some* means of providing for uniform laws across the states in this critical area in order to maintain the organic functioning of the law? And, if not statutory, must not that means for reconciling differences in state laws and differences between state and federal law, be constitutional? For foxes realize that, at some point, uniform laws are required to maintain the functionality and integrity of the law and that the Constitution is the ultimate means of reconciling conflicts, if only by recourse to the Full Faith and Credit Clause of the Constitution.[167]

And yet the substantive moral divide was not being closed by the people. It was being closed by the courts, leaving the scope and details of the constitutional right to marriage equality to be further refined and elaborated by the federal courts in federal case law referable for

164. *See Pending Marriage Equality Cases*, LAMBDA LEGAL, http://www.lambdalegal.org/pending-marriage-equality-cases (last visited Apr. 10, 2016).

165. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

166. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571–79 (2003) (recognizing changing sodomy laws).

167. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

authority only to itself—exactly as Justice Holmes predicted in the *Lochner* case. Recall there, the Supreme Court majority found a substantive right to freedom of contract in the Due Process Clause of the Fourteenth Amendment that made illegitimate all state attempts to enact laws to regulate social welfare under the Tenth Amendment.[168]

Then, in *Obergefell v. Hodges*,[169] decided in 2015, the same Supreme Court majority that had decided *Windsor* overruled the Sixth Circuit and ended the social debate. Without relying on legal argument, it explicitly found, in the Due Process Clause of the Fourteenth Amendment, a constitutional right to marriage equality.[170] It simply quoted the Due Process Clause, declared that "[t]he fundamental liberties protected by this Clause . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," and proclaimed, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."[171] The majority then opined, "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[172] It stated, "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles," and that "[t]his interrelation of the two principles furthers our understanding of what freedom is and must become."[173]

The *Obergefell* majority did not present an argument for its ruling from the text of the Constitution, or from the intent of its drafters, or from precedent, or from the ancient laws and traditions of the people for the fundamental constitutional right of marriage equality. It justified its opinion solely by its own duty "to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[174] It also applied its own conception of social justice as requiring a redefinition of marriage to fit its notion of "the transcendent purposes of marriage" and to resolve the "inconsistency" between the limitation of marriage to opposite-sex couples and "the central meaning of the fundamental right to marry" as it saw it.[175] The Court opined,

168. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).
169. 135 S. Ct. 2584 (2015).
170. *Id.* at 2597–99.
171. *Id.* at 2597–98.
172. *Id.* at 2602.
173. *Id.* at 2602–03.
174. *Id.* at 2598.
175. *Id.* at 2602.

> The idea of the Constitution "was to withdraw certain subject from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."[176]

The majority opinion in *Obergefell* exemplifies the philosophy of the hedgehog. It allows litigants deeply committed to a moral viewpoint not traditionally recognized in law and not enumerated in the Constitution to appeal for protection and enforcement of their views to the Court as the impartial final authority in saying what the truly moral law is. On this view, the people should not be forced to wait for justice to work itself out empirically in a democratic forum, for justice delayed is justice denied. It is the duty of a just government to say "what living well is like and what, if we want to live well, we must do for, and not do to, other people."[177] When the moral views of a diverse people conflict, it is the province and duty of the courts to say what the law is and to resolve the debate by invalidating objectively unjust laws.

It was left to the dissenting justices to expound the contrary jurisprudential philosophy of the fox—and each did. Chief Justice Roberts took the lead. He emphasized that he was not considering whether same-sex marriage was a good idea but whether Supreme Court justices have the constitutional power to fundamentally impose their own conception of marriage on the people.[178] He wrote, "Under the Constitution, judges have power to say what the law is, not what it should be"; the "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage"—that right is reserved to the people "acting through their elected representatives"; and "a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational."[179] Quoting *Windsor*, the Chief Justice opined that "[t]he Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with '[t]he whole subject of the domestic relations of husband and wife.'"[180] Finally, he pointed out that every state throughout the history of the United States until a dozen years ago had "defined marriage in the traditional, biologically rooted way."[181]

As Chief Justice Roberts' dissent makes clear, for foxes, the substantive rights enumerated in the Constitution do not collapse into one great right of equal liberty whose contours and applications the judiciary is uniquely empowered to discern and implement as the final

176. *See id.* at 2605–06.
177. *See* DWORKIN, *supra* note 1, at 1.
178. *Obergefell*, 135 S. Ct. at 2611 (Roberts, J., dissenting).
179. *Id.* at 2611, 2613.
180. *Id.* at 2613–14 (quoting United States v. Windsor, 133 S. Ct. 2675, 2691 (2013)).
181. *Id.* at 2614.

authority in socially divisive moral disputes. Rather, the people resolve their moral disputes by reconciling conflicts in the principles of the common morality they share through the legislative process in lawmaking, and through the opinions of judges interpreting the law in accordance with a fair process and the common good as defined by the people. The Constitution enumerates those individual rights the people have agreed upon as fundamental and reserves to the states the right to determine for themselves the parameters of those substantive rights to be protected and enforced that are not enumerated in the Constitution. The Constitution does not allow judges to override with their own views the people's conception of just laws conducive to the good, so long as the laws made by the people are rationally related to legitimate governmental ends, are procedurally fair, and do not conflict with express substantive constitutional guarantees, superior law, or deeply rooted traditional laws and liberties. On this view, the Constitution evolves within its own systemic constraints, not with the moral and political philosophy of judges.

As foxes read the Constitution, debates over the recognition and scope of liberties that are neither enumerated in the Constitution nor deeply rooted in our traditions but that also do not violate the Constitution or superior law—liberties such as economic freedom, abortion, or gay rights—are constitutionally neutral and are consigned for delineation to the laboratory of the states under the Ninth and Tenth Amendments. There their scope is worked out incrementally in case law by reference to the rationality and foreseeable consequences of judgments in particular cases for the good or ill of the parties and the law. And, as the need for general laws becomes apparent, their scope is determined by legislation, which in turn is construed by judges in particular cases. Case law, statutes, and even constitutional provisions remain subject to change as the moral views of the people change and as more and more people are affected by laws that have not caught up with changing mores. But neither procedural nor substantive constitutional constraints on the power of the courts to act are subject to enlargement by judicial decree issued by the very courts whose power is thus constitutionally constrained.

When a federal or state law or private or governmental action violates an express constitutional guarantee or is not rationally related to a legitimate state purpose, foxes, like hedgehogs, respect the constitutional guarantee as fundamental and recognize their responsibility to construe and enforce it so as to preserve, protect, and defend the structural and moral integrity of the law. But, to foxes, the jurisprudence of hedgehogs breeches both the legal and the moral structure of the Constitution when it substitutes the moral views of a majority of judges in construing the law in a particular case for the moral views of a majority of the people as expressed in general laws that violate no express constitutional provision, superior law, or longstanding tradition. On this view, the hedgehog's

jurisprudence replaces the constitutionally constrained moral autonomy of the people with its own unconstrained moral autonomy. And, in so doing, it undermines the integrity of our fundamental institutions and social structures and even the most basic moral right: the original right of the people to make for themselves those laws that they deem just, so long as they do not violate the principles of just government they themselves have approved for their own governance.

The flaw in the progressive jurisprudence of the evolving living Constitution from the fox's perspective is not clearly apparent when the opinion of hedgehogs coincides with popular moral opinion or the dominant moral opinion of opinionmakers or the most influential social thinkers of the day. The damage it does may not become apparent until later when popular opinion changes and social progressives find their vision of social justice blocked by *Lochner*, or libertarians find that progressive conceptions of social justice enforced as constitutional rights have deprived them of the right to govern themselves. But such consequences are implied by the hedgehog's jurisprudence.

Thus, in the wake of *Obergefell*, the small voice of caution whispers in the fox's ear: What happens after the widely shared euphoria of social justice well served has worn off? What happens if and when the new fundamental constitutional right to marriage equality comes into conflict with the enumerated right to religious freedom set out in the First Amendment? Must the enumerated right give way under the evolving Constitution? And who makes that determination? What happens when a polygamous sect relies upon its own interpretation of scripture and the Supreme Court's decision to assert a fundamental right to define marriage for itself—and to require the states to recognize that right in all their laws affecting domestic relations? Under the majority's reasoning in *Obergefell*, only the courts are authorized to make determinations of the existence and scope of fundamental rights, and they are empowered to do so according to their own best lights. It is entirely up to the courts—and, in particular, five philosophically like-minded justices on the Supreme Court—to "say what the law is." And it is required of the people that they obey the decrees of the Court. The right of the people to make the law—including the right to amend the text of the Constitution as set out in Article V—is set aside and is lodged ultimately in the Supreme Court alone.

So perhaps it is worthwhile to go back historically for a moment and to consider what foreseeably would have happened if the Supreme Court's previous forays into substantive due process had not been overruled. As Chief Justice Roberts points out in his *Obergefell* dissent, "[t]he Court first applied substantive due process to strike down a statute[, the Missouri Compromise,] in *Dred Scott v. Sandford*, [] . . . on the ground that legislation restricting the institution of slavery violated

the implied rights of slaveholders."[182] And, as in *Obergefell*, "[t]he Court relied on its own conception of liberty and property in doing so."[183] The result was that "*Dred Scott*'s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox."[184] But suppose it had not been? The inviolable law of the land would have remained institutionalized slavery and the deprivation of Black Americans of the rights of citizenship—even of respect as persons—specifically including the rights to due process and equal protection of the laws expressly accorded them by the Thirteenth, Fourteenth, and Fifteenth Amendments in correction of the greatest injustice in American constitutional history.

Chief Justice Roberts also quotes from the dissent of Justice Curtis in *Dred Scott* a passage equally applicable, in the fox's view, to the majority opinion in *Obergefell*, stating,

> Justice Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."[185]

The words are almost eerily reminiscent of Justice Black's opinion in *Ferguson* fifty years earlier, overruling *Lochner*.[186]

And what if the *Lochner* decision had not been overruled but had been reaffirmed in subsequent case law and had been used to cut off the development of social welfare laws and regulations? What if, following *Lochner*, judges had substituted themselves for legislators in making fundamental decisions regarding the legitimate parameters of social welfare legislation according to their own best interpretation of the requirements of economic liberty as individual cases were brought before them by employers seeking to invalidate multifarious laws and regulations they claimed burdened their substantive due process right to economic liberty? What if courts had construed the fundamental right to economic liberty as a constitutional right to work and had declared union shops and even unions themselves not merely illegal but *unconstitutional*? What if it had extended the right to economic freedom to declare unconstitutional the antitrust laws or the regulation of utilities or the environment?

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182. *Id.* at 2616 (Roberts, J., dissenting).

183. *Id.*

184. *Id.* at 2617.

185. *Id.* at 2616–17 (quoting Dred Scott v. Sandford, 60 U.S. 393, 621 (1856) (Curtis, J., dissenting)).

186. *See supra* note 113 and accompanying text.

Or what if, in *Roe*, instead of finding in the Fourteenth Amendment a constitutional right to an abortion, the Supreme Court had found a constitutional *right to life* and had declared all laws *permitting* abortion unconstitutional? What constraints are there on the willfulness of judges if they are the final authority with power to "say what the law is" according to their own best construction of either economic or moral law? What is to stop the rise of moral authoritarianism and the loss of the freedom of the people to govern themselves as they think best if judges may find in the Constitution *better* substantive principles than are enumerated there or in our ancient laws and traditions, relying only on their self-asserted "power to declare what the Constitution is, according to their own views of what it ought to mean."[187]

The core constitutional question for foxes is not whether they agree with the Supreme Court majority's moral vision in *Roe*, or in *Obergefell* and *Windsor*, or with its economic vision in *Lochner*. It is whether something precious and deeply rooted in the constitutional democratic tradition—even critical to its survival—is lost when judges move beyond their constitutionally assigned role of delineating the boundaries of the positive liberties written into the Constitution and insert their own, seeking to prevent the natural evolution of the laws made by the people by declaring illegitimate laws that do *not* "infringe fundamental principles as they have been understood by the traditions of our people and our law,"[188] supported only by their own moral vision and the conviction that "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions . . . and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning"[189]—a meaning they deem the courts uniquely empowered to discern.

CONCLUSION: JUSTICE FOR FOXES

Perhaps then, the forest of the common law is not merely an untamed thicket, wild, impenetrable, and filled with marauders unpredictable and ready to pounce upon hedgehogs, or with noisome woodland creatures that nibble away at the roots of the hedgerows, enemies to the orderly shaping of society to admirable ends. It might be that the forest of the common law, guarded and respected by common law judges who move unnoticed among the trees, is ecologically sound. It might be that it provides a haven for foxes and hedgehogs alike who seek

187. *Obergefell*, 135 S. Ct. at 2616–17 (Roberts, J., dissenting) (quoting *Dred Scott*, 60 U.S. at 621 (Curtis, J., dissenting)).

188. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

189. *Obergefell*, 135 S. Ct. at 2598.

a balanced environment where all can flourish and new ideas can spring up to wither or thrive as they serve the ends of the people. Speaking as a common law judge, I say we should train our eyes to look into the forest to see its beauty and to recognize its own intrinsic value. We must take responsibility for its preservation and protection as we seek collectively to further the purposes of a just society. Or we may lose what it provides that is quintessential to the maintenance of a self-governing society of free and equal people: the overarching canopy of the rule of law. So I say, save the forest: preserve justice for foxes!

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