

## **“New Products At Every Stage” – The Application of Common-Law Reasoning in an Age of Innovation<sup>i</sup>**

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed....But the most difficult labor will be to understand the combination of [history and existing theories of legislation] into *new products at every stage*.

Oliver Wendell Holmes, Jr.,<sup>ii</sup>

### **Introduction**

The time for common-law reasoning has returned. The basis of Anglo-American jurisprudence for centuries, then subjected to theories of “judicial realism” and displaced in significant part by the age of legislation and regulation, common-law reasoning is peculiarly well-suited for the FCC in a time of dynamic uncertainty. That may seem counter-intuitive; after all to generations of law students the idea of the common law reeks more of dusty tomes than digital transmissions.

In fact, as Cass Sunstein has explained, “administrative agencies have become America's common law courts”.<sup>iii</sup> As such, it is incumbent upon the FCC to demonstrate the strengths of common-law reasoning: Scrutinizing the facts at hand, scrupulously applying consistent principles, fairly offering interested parties access to decision-making, and forthrightly explaining why the “felt necessities of the times” may dictate new policies. The defects in process and fact-finding that Phil Weiser discusses could be eliminated by the application of the common-law approach.

But the common-law offers more – a mechanism of governmental oversight that combines logic and rigor with flexibility and learning. In other words, at a time when innovation is the cornerstone of long-term economic growth, the 21<sup>st</sup> Century common-law is advantageous because it is itself a good way of creating innovative public policies; a sensible method of adapting government oversight to changing

technological and economic conditions. The FCC, and all who are affected by it, would be advantaged by the explicit adoption of the common-law approach.

### **The Course of the Common Law**

Consider how the common law operates. Imagine you're a judge hearing a case in which Steve, a farmer, is suing Lori, a neighboring farmer, for canine trespassing. Steve alleges that Lori failed to keep her dog from entering his property and trodding over his crops. Steve bases his lawsuit on one of your prior decisions, in which you held a rancher liable for damage caused by the stampede of cattle across his neighbor's land. Lori says that the prior case concerned "livestock" not "domestic pets" and is thus distinguishable. In her defense, she invokes another of your past precedents in which you decided not to hold a property owner liable for minor damage caused by his cat wandering on a neighbor's property because, you reasoned, "the ordinary movement of domestic pets does not rise to the level of an actionable trespass."

What do you need to do to decide this case? You need to:

- **Ascertain the actual facts through examination and cross-examination.** For example, does Lori own one dog or is she in the dog-breeding business? What, if anything, did Lori do to maintain control over her dog?
- **Ensure to the best of your ability that similarly-situated people (and animals) are treated similarly.** Why would it make a difference if Lori is keeping dogs for profit or as a pet? Perhaps, pet-breeders as a class should be differentiated from pet-owners. Or, to take another tack, is it legitimate to classify animals into distinct groups, basing liability on the view that a dog is, on the one hand, more like cattle or, on the other, more like a cat?
- **Explain to the world, based on your analysis of facts and application of these "similarities," the larger principles on which you render a judgment.** Is there is a different rule for "livestock"

than “pets” because “livestock” connotes a commercial enterprise that requires a higher duty of care than mere pet ownership?<sup>iv</sup> Is the rule that Lori must be held liable if she did not quickly remedy any injury done by her dog?

- **Be acutely aware of the extent to which implicit assumptions hidden in past decisions have been altered by changes in society, thus requiring a revised rule of law.** For example, does the new availability of inexpensive electrical fences change the duty of a pet owner to keep her canine from roaming the neighborhood?<sup>v</sup>

Answer these questions and, congratulations, you’ve just applied the common law. The core of American legal reasoning depends on just this straightforward process: Find the facts, ask if they are the same as or different from previous facts while isolating the difference between the facts that matter (e.g., Lori was a dog-breeder) from those that do not (e.g., the incident occurred on a Tuesday); recognize the larger principle that arises from case-by-case decisions, and then, finally, ask whether the larger principle, as used in the past, still makes sense given societal changes.

A dynamic view of the common law is at odds with its seeming lack of innovation. That is, the political legitimacy of the common law has historically depended in large part on the belief that it is resolutely backward-looking, consisting simply of mechanistic application of black-letter law, systematically following well-established precedent.

Here’s an example. When I was a very young man, I met a very old man who had written the government’s briefs in the cases where the Supreme Court changed its view of the Constitution and upheld the New Deal’s governmental activism. Everyone believed – then and now -- that the Court had reversed itself in order to decelerate the political momentum for President Roosevelt’s court-packing plan. But the old man cited a line of Supreme Court cases from the opening decades of the Twentieth Century to explain that the Court in the 1930’s had really just followed past precedent. The world had

concluded otherwise, of course, but the old man’s argumentation, recited from memory almost a half-century later, presented a timeless example of common-law reasoning. The New Deal, in his view, wasn’t new. More famously, then-Judge Cardozo, writing for the New York Court of Appeals, welcomed the new law of product liability while insisting he was merely expounding on the established law of negligence.<sup>vi</sup>

The famous Holmes quotation that begins this short comment, however, embodies a radically different temporal view. Holmes’ common law is forward-looking, not trapped by the past. It is creative, not just reactive. It can innovate, not just follow.

That’s what Holmes meant when he said that the life of the law has been “experience”. He wasn’t saying that the law *should* be irrational or that it *should* be based on judicial prejudices. Instead, he was recognizing that the “felt necessities of the times”, among other factors, created “new products” from old precedent.

The creation of new products is necessary, in other words, to preserve the fair application of rational policy. Holmes explains that, “the law [is] always approaching, and never reaching, consistency.....It will become entirely consistent only when it ceases to grow.”<sup>vii</sup>

What could this – cattle, dogs, cats and Civil War veteran Oliver Wendell Holmes – possibly have to do with today’s Federal Communications Commission?

### **The New Relevance of Common-Law Reasoning**

Phil Weiser’s paper demonstrates that fact-finding, learning and the application of logic through transparent processes are not strengths of the FCC. He catalogues a stunning array of deficiencies – failure to use administrative law judges to execute even the most cursory form of evidence-based decision-making; the politicized struggle over the “fact” of cable penetration, (applying the so-called

70/70 rule), the failure to release written orders at the time of decision and the reliance on ex parte, unsworn statements not subjected to cross-examination.

As Phil suggests, the recent Comcast Order – whatever its merits as a matter of policy and consumer protection -- is particularly troubling from the perspective of a fact-focused process. The complaint filed by Free Press and Public Knowledge raised important questions of public policy – arguing that Comcast had intentionally degraded its own customers’ use of BitTorrent. And the Commission’s subsequent adjudication rested on equally important conclusions of public policy – that Comcast’s “discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management. Moreover, Comcast’s failure to disclose the company’s practice to its customers has compounded the harm.”<sup>viii</sup>

But how do we know what actually happened? The starting point for adjudicating facts must be, of course, the facts themselves. Yet, according to a dissenting Commissioner the evidentiary record was “thin and conflicting,” resting in the main on un-signed assertions, opinions and conjecture<sup>ix</sup>. Without sworn evidence or stipulations, cross-examination or even the submission of expert testimony, the Commission was inherently hobbled in its ability to find the truth.

The FCC is simply not good at separating the evidentiary wheat from the rhetorical chaff. The essence of common-law fact-finding lies in confrontation – forcing inconsistent contentions to meet head-on. But paper assertions, carefully worded by expert advocates, can be phrased to avoid, rather than confront, the facts. And one-sided ex parte conversations, despite the best efforts of Commissioners and staff, never consistently force parties to answer the factual contentions of their opponents.

This institutional flaw in finding facts goes directly to the inability of the FCC to create “new products” that are robust and respected. Factual inadequacy also imperils the interests of both complainants and

respondents – successful complainants deserve a record that can withstand judicial scrutiny on appeal; respondents deserve the right to confront effectively the evidence that is offered against them.

Moreover, as Holmes makes clear, the mere invocation of rulemaking, with its legislative connotations, does not obviate the need to focus on the reality of facts. He uses the term “rule” to describe the pattern of consistent precedents created by common-law courts. And he is clear about the need to ask whether the continuing existence of rules accords with current facts:

When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory.<sup>x</sup>

The reconsideration of which Holmes speaks may, of course, include policy expertise. The context of Holmes’ reasoning, however, is firmly embedded in the common-law courts where judgments are dependent on the finding of facts. In such a system, rigorous fact-finding must precede any verdict.

In other words, common-law reasoning is neither a mathematical formula nor a roving commission.

Rather, it should operate much like the due process clause of the Fourteenth Amendment as described by Justice Harlan:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided

speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.<sup>xi</sup>

The spirit of Justice Harlan's approach cannot be met simply by selecting one or more of the elements of common-law reasoning, like the willingness to decide whether past practices accord with current realities, as if they were alternative items on a restaurant menu. In common-law reasoning, facts matter – indeed, the hallmark of this approach is the careful comparison of one set of facts to another with an eye to Holmesian reasoning. The fact-finding deficiencies described by Phil Weiser demonstrate the failure of the past FCC to grasp this point.

Such failure inevitably goes, as well, to political legitimacy. The purpose of common-law reasoning is, as Justice Scalia has explained, precisely “to make the law.”<sup>xii</sup> Independent administrative agencies, like the FCC, are supposed to apply their “expertise” to make policy decisions within the allowable ambit of legislation.

But the power to decide is not synonymous with the power to persuade. Nor is compliance with the Federal Administrative Procedure Act a guarantee of political legitimacy. The persuasive power of a decision can come, of course, from unanimity, which demonstrates overarching political consensus<sup>xiii</sup>, but the tenets of common-law reasoning are the means by which the FCC can demonstrate that its decisions deserve deference – in the appellate courts and in the court of public opinion.

The traditional objection to making administrative agencies act like judges is that they need freedom to act in a quasi-legislative role. This is an important point. Practical politics is a not a game for the faint-

hearted; consideration of policy options is difficult in public when initial outcries can short-circuit development of alternatives. But, as Phil's paper notes, the current FCC's descent into disorder finds no justification in sound principles of public policy. Facts can be found, consideration of alternatives can be given, fair process can be executed and rationales can be promptly published, all without violence to the full role of the FCC in executing congressional mandates.

In sum, the FCC would operate better, in traditional terms, were it to employ the common-law approach.

But, even more importantly, the "felt necessities" of these times make the common-law approach particularly well-suited to the challenges that the new FCC will face. Robert Atkinson has argued persuasively that telecommunications regulation for the Twenty-First Century must be streamlined, must develop better quality evidence, in part through conscious "experimentation", and must be flexible enough to adapt to changing market conditions.<sup>xiv</sup> Common-law reasoning meets this standard.

Contrast, for example, traditional rulemaking. First, rules are by definition slow. Rules take time to create and often as much or more time to modify. Second, rules, especially complicated, tactical rules, exist in a world in which "getting it right at the outset" is not achievable. That's because rules do not anticipate – they simply represent the state of knowledge at one, fixed moment in time. Rules deal with what we know about the past and what we can imagine about the future at any given point in time. Thus, as our understanding of the past changes and our view of the future expands, rules start to fall behind, their relevance and efficiency corrode. That is why rules tend to "fall behind" as our understanding of past and present trends grow more complex and as we experience more and more of the "future".<sup>xv</sup>

If rules have these defects, what is another approach? We are used to applying a variety of verbs to the actions of governments. "Regulates", "adjudicates", "oversees", "overreaches", "burdens", "controls",

even “liberates”. But one verb not often associated with government are the verbs to “learn”, “experiment” or “innovate”.

In a fast-moving world of technological and economic change, the most important requirement of governmental action is that it is constantly learning and monitoring its prior actions against new market, technological and social evidence.

How can government best “learn”? And how can government retain the flexibility to “experiment” – the process of seeking opportunities to understand how policies work – in anticipated and unanticipated ways?

The FCC’s 2007 establishment of openness standards for the C-block spectrum looks different when viewed from this prism.<sup>xvi</sup> Consider this explanation – the “C”-block openness standards are an “experiment” that will allow government to learn how best to identify and, where necessary, take additional steps to adjudicate between the clashing interests evident in ongoing debate between “open” and “closed” systems. Sound far-fetched? Consider what the FCC could have done. It could have:

- Applied a market-structure rationale to disqualify all incumbent firms,
- Adopted a general set of openness requirements for all wireless networks, or
- Required that the new owner of the spectrum “wholesale” connectivity to other firms that wished to act as competitive providers of wireless broadband connectivity.

The FCC did none of these things. Instead, it said: Let’s experiment with the rules of access to governmental property. That’s smart. The FCC, and everyone else, will be able to see if they produce the expected results. By comparing action on that spectrum with other wireless networks, we will also be able to see if the “expected results” actually required governmental intervention. We will be able to compare any unexpected adverse outcomes on innovation. Finally, with alternative structures of

“regulation” in the marketplace, we will be more likely to be able to tell whether the passage of time has rendered previous forms of governmental intervention or non-intervention inadequate, irrelevant or pernicious.

In other words, the “C”-block openness standard is experimental. It sets up bargaining – between and among the various wireless models.<sup>xvii</sup> And it creates an incentive for the government – as a player in its own regard – to continually learn how best to achieve public-policy aims.

An explicit approach of “experimentation” is quite an advantage over rigid rulemaking as a way to establish policy. It may also be an advantage over civil-law systems, which can restrict the discretion of adjudicators in a manner that is formalistic, backward-looking and overly restrictive. To be sure, common-law judges would not have put forward a decision as a “one-time only” experiment<sup>xviii</sup>, but the process of creative exploration inherent in government-sponsored experiments is, like the commissioning of independent research discussed in Phil’s paper, an advantageous means for the FCC to devise “new products at every age.”

## **Conclusion**

The current financial crisis ought to stimulate just this kind of learning and experimentation. When Alan Greenspan concedes that, “the whole intellectual edifice” of his view of regulation was flawed,<sup>xix</sup> there are important questions to be asked about the implicit assumptions that have formed the foundation of our view of private action and public responsibility. Are risks to private capital formation also risks to investment in advanced communications technologies? Are the new found externalities of risk from the financial sector the same as, or different from, the risks that come from other sectors, including information technology? What governmental policies, if any, are premised on the existence and behavior of capital markets or management structures that have been called into question?

Learning and innovation are, as Holmes taught us in 1881, at the heart of the common law. That is the promise of “new products at every stage” of development – better and better outcomes based on principle, reason, facts and explanation. It may be that common-law reasoning, accepted as black-letter doctrine in the 18<sup>th</sup> Century, re-interpreted in the 19<sup>th</sup>, sometimes shunted aside in the 20<sup>th</sup>, is precisely what is needed as the FCC works its way towards an era of informed and principled decision-making in the 21<sup>st</sup> Century.

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<sup>ii</sup> “The Common Law”, 1 (1881)(emphasis added).

<sup>iii</sup> “Is Tobacco a Drug? Administrative Agencies as Common Law Courts”, 47 Duke L.J. 1013, 1068 (YR TK)

<sup>iv</sup> Holmes refers to the reasoning of the British Lord Holt, chief Justice of the King’s Court, who in the 18<sup>th</sup> Century concluded, “that one ground on which a man is bound at his peril to restrain cattle from trespassing is that he has valuable property in such animals, whereas he has not dogs, for which his responsibility is less. *Id.*, at 22.

<sup>v</sup> As Holmes explained, “When we find that in large and important branches of the law the various grounds of policy on which the various rules have been later justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory.”

<sup>vi</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 105 (N.Y. 1916). Judge Cardozo was in good company. Justice Blackstone, in his commentary on English common law delivered in the mid-18<sup>th</sup> Century, took the position that precedent could never actually change:

For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be dearly contrary to the divine law. **But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law;** that is, that it is not the established custom of the realm, as has been erroneously determined. (emphasis added). <http://www.lonang.com/exlibris/blackstone/bla-003.htm>. (Last accessed 12/29/2009)

<sup>vii</sup> Or, as Woody Allen once wrote on a related subject, “A relationship, I think, is like a shark. You know? It has to constantly move forward or it dies. And I think what we got on our hands is a dead shark.”

<sup>viii</sup> Federal Communications Commission, Memorandum Opinion and Order, Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, August 20, 2008

<sup>ix</sup> Federal Communications Commission, Dissenting Statement of Commissioner Robert M. McDowell, Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, August 20, 2008

<sup>x</sup> The Common Law at 37.

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<sup>xi</sup> Poe v. Ullman, 367 U.S. 467 (1961)(Harlan, J., dissenting).

<sup>xii</sup> “Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws,” <http://www.tannerlectures.utah.edu/lectures/documents/scalia97.pdf> (emphasis in original).

<sup>xiii</sup> See Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)(Warren, C.J. writing for a unanimous Court).

<sup>xiv</sup> Atkinson, Robert C., “Telecom Regulation for the 21<sup>st</sup> Century: Avoiding Gridlock, Adapting to Change,” *Journal on Telecommunications and High Technology Law*, Volume 4, Issue 2 (2006)

<sup>xv</sup> That is precisely happened, for example, with the regulatory classifications of “telecommunications” and “information” services – two definitions whose genesis lies in earlier, and very different, market conditions and whose use at the present is made almost laughingly irrelevant by the changes in technology and market conditions that has ushered in, to take one prominent example, widespread access to VOIP services.

<sup>xvi</sup> Phil describes the questionable process used by the FCC in this instance. (see fn. 25-29 & accompanying text).

<sup>xvii</sup> Maybe contrast this with D block – another experiment. Useful because it did not work.

<sup>xviii</sup> But see Bush v. Gore, 531 U.S. 10 (2000)(“Our consideration is limited to the present circumstances.”). “That sentence, translated from high legal jargon into English, was often taken to mean this: The decision was a ticket for one ride only. It was not a precedent. It was a ruling, yes, but it was not law.”

<http://www.nytimes.com/2008/12/23/us/23bar.html?scp=1&sq=bush%20gore&st=cse>. (Last accessed 12/29/2008)

<sup>xix</sup> <http://www.nytimes.com/2008/10/24/business/economy/24panel.html> (Last accessed 12/29/2008)