Setting Boundaries: State Courts, Common Law, and Separation of Powers

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INTRODUCTION

For hundreds of years, common law courts, including American state courts,[1] have developed through judicial opinions many of the legal rules governing such subjects as torts, contracts, and property. The great English jurist William Blackstone defined common law as "the monuments and evidences of our legal customs [that] are contained in . . . judicial decisions," which "receive their binding power, and the force of laws, by long and immemorial usage."[2] Blackstone contemplated an important but greatly constrained role for the courts in articulating common law—a view that is vastly at odds with the role of many state courts in advancing what this Article's lead author has referred to as "living common-lawism"[3]—the judicial creation of sweeping legal rules with little regard for the judiciary's limited constitutional role.

Common law intimately affects the lives of everyone, providing rules for where one's property rights begin and another's end, which agreements between individuals are enforceable or not, and who is responsible when one person injures another. In aggregation, common law rules provide for much of the order of society, resolution of disputes among individuals, and the vibrancy of our economy.[4]

As Justice Clarence Thomas observes, traditionally "common law doctrines, as articulated by judges, were seen as principles that had been discovered rather than new laws that were being made."[5] "It was the application of the dictates of natural justice, and of cultivated reason, to particular cases."[6] But the unfettered judicial development of common law eventually was disrupted, as the late Justice Antonin Scalia remarked, by "a trend in government that has developed in recent centuries, called democracy."[7]

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1. We focus on state courts because although Congress has the power to regulate interstate commerce, U.S. CONST. art. I, § 8, cl. 3., federal courts generally do not possess common law powers. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2. 1 WILLIAM BLACKSTONE, COMMENTARIES *63–64.

3. Torres v. JAI Dining Servs. (Phx), Inc., 536 P.3d 790, 799 (Ariz. 2023) (Bolick, J., concurring).

4. *See generally Common Law*, CORNELL L. SCH. LEGAL INFO. INST. (May 2020), https://www.law.cornell.edu/wex/common_law [https://perma.cc/5YVA-EQ9F].

5. Gamble v. United States, 587 U.S. 678, 715 (2019) (Thomas, J., concurring) (quoting G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 129 (1988)).

6. *Id.* (quoting J. KENT, 1 COMMENTARIES ON AMERICAN LAW 439 (1826)).

7. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 9 (Amy Gutmann ed., 1997).

Along with democracy, in the setting of a constitutional republic, came separation of powers among the legislative, executive, and judicial branches of government. As pertinent here, the legislative branch was empowered to fashion public policy in areas that previously were the province of common law courts. As Justice Scalia added, "once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of separation of powers) becomes apparent."[8]

As society grows more complex, so too do the rules necessary to govern economic and interpersonal affairs. Often, courts defer to the legislature to determine such rules.[9] Other times, courts, acting ostensibly under their common law powers, impose sweeping rules governing social interactions.[10] In our view, such cases typically exceed judicial competence and invade legislative prerogatives.

Yet such courts rarely pause to consider whether, in a regime of separation of powers, they actually possess that authority. In terms of academic scholarship, the intersection of judicial common-lawmaking and separation of powers is almost completely unexamined, which is rather shocking because it informs a central question: who gets to decide what the law is?

In this Article we consider cases in which state courts have established major new public policy through common law decisions and argue that such decisions exceed judicial competence and authority within the separation of powers framework. We then propose boundaries for the judicial "evolution" of common law.

I. THE TRANSFORMATION OF COMMON LAW

Common law developed over hundreds of years in England.[11] As England does not have a written constitution, common law acknowledged the rights of Englishmen in addition to recognizing rules for resolving disputes among individuals.[12] Although the U.S. Constitution and the Bill of Rights to some extent supplanted (or arguably through the Ninth Amendment, incorporated)

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8. *Id.* at 10.

9. *See* Torres v. JAI Dining Servs. (Phx.), Inc., 536 P.3d 790, 800 (Ariz. 2023) (Bolick, J., concurring) ("[T]he legislative power to create public policy should be considered the default rule to which the judicial power, absent express constitutional limitation, should submit.").

10. *See infra* Part II.

11. Mary Ann Glendon et al., *Common Law*, BRITANNICA, https://www.britannica.com/topic/common-law [https://perma.cc/UKA4-TNHR] (Jan. 15, 2025).

12. *See id.*

common law rights, the common law rules for dispute resolution were largely imported intact into American jurisprudence.[13]

The leading expositor of the common law was William Blackstone, whose 1765 *Commentaries on the Laws of England* is one of the great scholarly foundations of American jurisprudence.[14] Blackstone explained that judicial decisions developing common law "receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom."[15] These decisions came not from the policy judgments of judges but from observation of customary usage in resolving disputes regarding property, contracts, personal injuries, estates, and the like.

Although Blackstone's work preceded the U.S. Constitution and modern debates over separation of powers, he nonetheless anticipated such concerns and resolved them unambiguously in favor of legislative (parliamentary) and executive (the crown) authority. Noting that the English legislation traced at least back to the Magna Carta, he observed two types of legislative power: "either *declaratory* of the common law, or *remedial* of some defects therein."[16] With regard to the latter, Blackstone's prescription for judicial humility was clear: "[I]t is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy."[17] Depicting an early understanding of separation of judicial and legislative powers, Blackstone remarked emphatically that "[w]here the common law and a statute differ, the common law gives place to the statute."[18]

The common law was largely (but not entirely) imported into the United States and regarded as an inheritance of Englishmen residing in the new world.[19] So too was the notion that courts discovered and applied law and did not create it. As Justice Scalia observed, "Blackstone—and the Framers who were [in]formed by Blackstone—would clearly have regarded [a] *change* in law as a matter for the legislature, beyond the *power* of the court."[20] Indeed, Blackstone's view was embraced by nearly all the great thinkers of early

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13. *See* Richard Bailey, *ADR a Comparative Study in Common Law Jurisdiction—How Does North America Compare with the Rest of the World*, 55 DERECHO & SOCIEDAD 223, 224 (2020).

14. *See* BLACKSTONE, *supra* note 2.

15. *Id.* at *64.

16. *Id.* at *86.

17. *Id.* at *87.

18. *Id.* at *89.

19. *See* Rogers v. Tennessee, 532 U.S. 451, 473–77 (2001) (Scalia, J., dissenting).

20. *Id.* at 477.

American jurisprudence, including Joseph Story, James Kent, and John Marshall.[21]

But that conception changed, especially during the twentieth century, with the emergence of what might be called a purposivist view of common law—that is, common law influenced by judges' values and policy preferences, such as economic efficiency, equity, or risk avoidance.[22] Oliver Wendell Holmes, Jr. argued that legal maxims, such as those embodied in common law, may be sufficient for "the man of the present," but "the man of the future is the man of statistics and the master of economics."[23] In "determining the rules by which men should be governed," he argued, judges are properly guided by "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, [and] even the prejudices which judges share with their fellow-men."[24] To put a fine point on it, Holmes declared that "judges do and must legislate."[25] In the state common law context in particular, Holmes urged, every state supreme court "says, with an authority that no one denies . . . that thus the law is and shall be."[26]

Holmes has had legions of followers and heirs, both on the bench and in legal academia, advocating their own value-laden visions of common law.[27] An influential contemporary example is Richard Posner, a University of Chicago law professor and judge on the U.S. Court of Appeals for the Seventh Circuit, who extols pragmatism and economic efficiency in judicial decisions, including common law decisions.[28]

These revisionist views cast judges as policymakers—or, more pejoratively but no less accurately, as philosopher-kings—creating new legal rules, essentially statutes, that they believe benefit society. While living

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21. Stephen B. Presser, *The Development and Application of Common Law*, 8 TEX. REV. L. & POL. 291, 295 (2004).

22. *See generally* Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007).

23. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

24. O.W. HOLMES, JR., THE COMMON LAW 1 (1881). As a Supreme Court justice, Holmes was not hesitant to express and effectuate his moral and political theories, intuitions of public policy, and prejudices. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a compulsory sterilization law for the mentally feeble and proclaiming that "[t]hree generations of imbeciles are enough").

25. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

26. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting).

27. *See, e.g.*, Gennaioli & Schleifer, *supra* note 22.

28. *See generally* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) (advocating for the use of a pragmatic approach in judicial decision-making).

constitutionalism has been subjected to extensive criticism, living common-lawism has not. But it is equally corrosive to the rule of law and trespasses upon the powers assigned primarily to the legislative branch.

II. *LOOMIS V. AMAZON*: JUDICIAL COMMON-LAWMAKING ON STEROIDS

On April 26, 2021, a sweeping new regulation was imposed in California upon one of the world's largest companies, profoundly altering the economic landscape. On that day, Amazon, the massive worldwide product distribution company, was compelled to become an insurance company as well, assuming strict liability[29] for injuries caused by the third-party products for which it provides a sales platform. This new de facto law was not adopted after thoughtful deliberation by the people's elected representatives weighing and debating the costs and consequences across a broad societal context. It was not even promulgated by an executive agency charged with implementing consumer safety legislation following administrative procedures, including public notice and comment. Rather, the rule was adopted by a three-judge panel of the California Court of Appeal in the context of a personal injury lawsuit.[30]

The main opinion was written by a trial judge sitting on the court of appeal by assignment.[31] But most scholarly attention is paid to the concurring opinion by Justice John Shepard Wiley Jr.,[32] who plows the same ground as the court's opinion and never explains why he felt impelled to write separately.

The facts were straightforward. The plaintiff, Kisha Loomis, purchased a hoverboard for her son from a Chinese-based third-party company through Amazon.com.[33] While plugged in to charge in Loomis' bedroom, the hoverboard caught fire and burned Loomis while she fought the fire.[34] She

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29. "Strict liability" is defined as "liability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule on the breach of an absolute duty to make something safe." *Strict Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

30. *See* Loomis v. Amazon.com LLC, 277 Cal. Rptr. 3d 769 (Ct. App. 2021).

31. *Id.* at 772. Judge Ohta now serves on the U.S. District Court for the Southern District of California. *Hon. Jinsook Ohta*, U.S. DIST. CT.: S.D. CAL., https://www.casd.uscourts.gov/Judges/Judge-Info.aspx [https://perma.cc/3ZGY-3ASK].

32. *See Loomis*, 277 Cal. Rptr. 3d at 786–96 (Wiley, J., concurring). Judges on the California Courts of Appeal are called justices. *See, e.g.*, *What Appellate Court Justices Do*, CAL. CTS.: CTS. APP., https://appellate.courts.ca.gov/about-courts/what-appellate-court-justices-do [https://perma.cc/ESS5-B75X].

33. *Loomis*, 277 Cal. Rptr. 3d at 772.

34. *Id.* at 772–73.

sued Amazon, and the trial court granted summary judgment in the company's favor.[35] The question presented on appeal was whether Amazon could be held strictly liable for the injuries.[36]

Amazon describes itself as an online mall, offering products for sale itself and from third-party sellers.[37] Third-party sellers are identified as such on the product page, and they both source their products and hold title to them.[38] They also indemnify Amazon for liability arising from their products.[39] Although Amazon monitors and sometimes removes products for safety reasons, it guarantees only the product's delivery and condition.[40] Amazon expressly warns in its conditions of use that for third-party products, it is "not responsible for examining or evaluating, and [does] not warrant, the offerings of any of these businesses" and that "Amazon does not assume any responsibility or liability" for products sold by third-parties.[41]

Amazon argued it should not be liable because it neither manufactured nor sold the hoverboard and had no control over it.[42] But the court held that under California common law, Amazon was strictly liable for products sold through its platform.[43] The strict liability doctrine, the court instructed, derives not from statute, but "from judicially perceived public policy considerations," including enhancing product safety and maximizing protection to the injured plaintiff.[44] The court rejected Amazon's argument that the legislature, rather than the courts, should determine strict liability, stating that the doctrine "was created by the courts and expanded and contracted where warranted by its purposes."[45]

Applying those policies, California consumers may sue any business involved in the chain of production and marketing, from the manufacturer to the distributor, wholesaler, and retailer, whose liability is joint and several[46]—meaning that every part of the production and marketing chain is

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35. *Id.* at 775.
36. *Id.* at 772.
37. *Id.* at 773.
38. *Id.*
39. *Id.*
40. *Id.* at 774.
41. *Id.*
42. *See id.* at 775.
43. *Id.* at 778–79, 785.
44. *Id.* at 777 (quoting Arriaga v. CitiCapital Com. Corp., 85 Cal. Rptr. 3d 143, 149 (Ct. App. 2008)).
45. *Id.* at 779.
46. *Id.* at 777 (quoting Wimberly v. Derby Cycle Corp., 65 Cal. Rptr. 2d 532, 537–38 (Ct. App. 1997)).

potentially fully and independently liable for the entirety of any injury.[47] Not only that, but the court ruled that even though such defendants may have no knowledge of defects or dangers, they may be liable for punitive damages as well.[48] All that is required is a defendant's "participatory connection" in the stream of commerce for profit motives.[49]

This type of sweeping judicially imposed liability rule is commonplace in California. In his concurring opinion, Justice Wiley traced this phenomenon largely to California Supreme Court Justice Roger Traynor, whom he referred to reverentially as "California's most esteemed jurist."[50] In a series of cases, Traynor decreed that "tort doctrine must aim to minimize the social costs of accidents."[51] In strict liability cases in particular, Traynor expressly looked to what he believed "policy demands," and rendered decisions that critics characterized as "untethered from legal authority."[52]

The judicially decreed objective of risk avoidance trumps all other considerations, according to Justice Wiley, whose opinion drips with hubris. "Thus we have an easy case that beautifully illustrates the deep structure of modern tort law: a judicial quest to minimize the social costs of accidents," he wrote.[53] "Judges have been applying this social cost-benefit analysis as a felt instinct for a long time . . . ."[54] It is difficult to conceive of a more apt depiction of the judge as philosopher-king, or of the intellectual basis for living common-lawism, than acknowledging judicial decisions are made on the basis of "felt instinct." Although "[u]nbeknownst to Amazon, a manufacturer may use Amazon's site to sell a defective product that will cause future accidents," Justice Wiley found whether to impose strict, boundless liability on Amazon "simple to decide."[55] Emphasizing again that "[t]his case is easy," Justice Wiley concluded that "Amazon is well situated to take cost-effective measures to minimize the social costs of accidents. Strict liability will prompt this beneficial conduct."[56] Chiding Amazon for using the word "justice" only a single time in its briefs, Justice Wiley declared

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47. Joint and several liability means that all defendants are responsible for the entirety of damages. *Joint and Several Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

48. *See Loomis*, 277 Cal. Rptr. 3d at 775 n.4.

49. *Id.* at 780 (quoting Kasel v. Remington Arms Co., 101 Cal. Rptr. 314, 323 (Ct. App. 1972).

50. *Id.* at 788 (Wiley, J., concurring).

51. *Id.*

52. Matthew Steilen, *The Democratic Common Law*, 10 J. JURIS. 437, 441 (2011).

53. *Loomis*, 277 Cal. Rptr. 3d at 787 (Wiley, J., concurring).

54. *Id.*

55. *Id.* at 786–87.

56. *Id.* at 796.

that "[i]f they ever do, moral justice and cost-benefit analyses do not conflict in this case."[57]

III. *LOOMIS* AND THE LIMITS OF JUDICIAL COMPETENCE

Loomis is the poster child for why courts should not make major and sweeping economic policy through their decisions.

Certainly, philosopher-king-style decisions like *Loomis* have their cheerleaders in the legal academy. Professor Catherine M. Sharkey lionizes Justice Wiley as "the heir apparent of Justice Traynor."[58] She explains that "Justice Wiley's concurrence elevates the deterrence or prevention of harm rationale as paramount."[59] This concurrence, along with prior decisions, Professor Sharkey enthuses, "assures his place in the torts canon."[60]

Indeed, law professors themselves sometimes get to play philosopher-kings. Although common law is judge-made, it is often cultivated in academia through an organization called the American Law Institute ("ALI"), which produces "Restatements" in various areas of law that courts often consider authoritative.[61] For example, Professor Sharkey traces the judicial expansion of strict liability in California in part to the *Restatement (Second) of Torts* § 402A.[62] These restatements, which are crafted by teams of legal scholars who are accountable to no one, purport to state what the prevailing law is (hence their utility to courts) but often instead stray into what the scholars think the law *should be*.[63] As Columbia law professor Shyamkrishna Balganesh recounts, the Restatements are then cited as legal authority for judicial decisions—by one recent count, nearly ten thousand times.[64]

Initially, the Restatements were based on the traditional common law premise that "the law consisted of relatively few fundamental principles that

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57. *Id.* at 789.

58. Catherine M. Sharkey, *The Irresistible Simplicity of Preventing Harm*, 16 J. TORT L. 143, 145 (2023).

59. *Id.* at 144.

60. *Id.* at 171.

61. *Restatement of the Law*, CORNELL L. SCH.: LEGAL INFO. INST. (Aug. 2020), https://www.law.cornell.edu/wex/restatement_of_the_law [https://perma.cc/X2E9-6PEK].

62. Sharkey, *supra* note 58, at 143–44.

63. *See, e.g.*, Quiroz v. Alcoa Inc., 416 P.3d 824, 843 (Ariz. 2018) (rejecting the Third Restatement's risk-creation framework for its broad presumption of duty owed by everyone to everyone else at all times, as this approach lacks specificity and fails to address the crucial question of to whom a duty is owed).

64. Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2121 (2022).

could be induced from cases chosen."[65] Over time, as jurisprudence evolved, often in divergent directions, the Restatements grew beyond the role of "restating" existing law. Today, ALI essentially codifies various legal opinions into rules that resemble statutes. That practice is problematic "since judicial reasoning emerges contextually from the circumstances of the dispute before a court."[66] More important, "in stark contrast to formal legislation, Restatements are produced through a decidedly nontransparent process," so that the "myriad compromises—political, ideological, and otherwise—that such text represents all remain hidden from courts."[67] Yet, "[i]nstead of undertaking a synthesis of precedent and an independent formulation of their own rules of decision, courts routinely outsource much of that work to the language of a Restatement provision."[68] Even though Justice Scalia urged "caution" in the use of restatements,[69] this phenomenon "appears to have provoked surprisingly little reflection and assessment from courts themselves."[70] Indeed, if it is troubling for courts to make major policy decisions under any circumstances, it is even more problematic when the source of much of that law is one step further removed from the elected officials who are constitutionally authorized to make policy and who are democratically accountable.[71]

The influence of the tort academy looms large in *Loomis*, which exemplifies what Professor Sharkey describes as the "torts lodestar: the irresistible simplicity of preventing harm."[72] This is a lovely sentiment and a laudable goal in the abstract—and it reduces all of tort law to a simple equation. Yet that one expression also sums up why courts have no business making major policy decisions in the guise of their common-lawmaking authority: the exclusive focus on one value (in this instance, harm-prevention) ignores and sublimates all other considerations. While courts may properly decide a specific controversy within the confines of a single body of law, legislatures are responsible for considering all competing values

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65. Jack Van Doren, *A Restatement of Jurisprudence: Why Not?*, 44 GONZ. L. REV. 159, 164 (2009).

66. Balganesh, *supra* note 64, at 2124.

67. *Id.* at 2125.

68. *Id.* at 2184.

69. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

70. Balganesh, *supra* note 64, at 2185.

71. Some states have restricted reliance on the Restatements, presumably evidencing a worthwhile desire that judicial opinions reflect the actual law of the state rather than the opinions of unknown third-party experts. *See id.* at 2184.

72. Sharkey, *supra* note 58, at 171.

and interests. While courts are designed to achieve a just result for the parties who come before them, the legislature is charged with achieving the broad public good.

Surely Justice Wiley and his admirers would see this as a false dichotomy: prevention of harm is a public good (and in their view, apparently, the ultimate public good, at least in the torts context). But what about other public policy goals that the decision impacts, such as employment? Consumer choices? Prices? The state's competitiveness in attracting businesses—and in California's case specifically, not driving them away? Not only is a court unequipped to weigh these competing factors, the factors themselves are legally irrelevant to a dispute between two parties.

By contrast, reaching the proper balance among those competing considerations is precisely the legislature's role. We all know how imperfectly suited a legislature can be to this task. Indeed, the lead author challenged as a litigator—and has struck down as a judge—more than a few products of imperfect legislative processes.[73] But only the legislature can hear from all who are affected by their policy choices and effectively accommodate competing interests. Lawmakers who get the balancing wrong can face electoral consequences. Similarly, legislation is readily amenable to change in light of experience, whereas court decisions can be revisited only in subsequent cases and are protected by principles of stare decisis. Moreover, and above all, as we argue in the final section, major policymaking decisions are constitutionally assigned to the legislature, and the judiciary is largely precluded from making them. Ultimately, the California legislature might have come up with the same rule as the court reached in *Loomis*, but if so, only after extensive deliberation, input from stakeholders, and consideration of trade-offs.

One commentator observes that "[w]hen a court makes a new law through a judicial decision, there are no bills, public hearings, amendments, written comments, speeches, or other attributes of a legislative process."[74] Usually there is "no warning at all that a law might be changed, nor is there any publicly accessible debate about how the law should be changed."[75] The new rule "will be written in a legal opinion that is full of concepts, citations, and language that are entirely alien to almost everyone who will have to comply with the opinion," which "will be almost entirely obscure and undiscoverable to everyone outside the bench and bar."[76]

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73. *See, e.g.*, Granholm v. Heald, 554 U.S. 460 (2005).
74. Jason Boatright, *End Judicial Lawmaking*, 24 TEX. REV. L. & POL. 355, 392 (2020).
75. *Id.*
76. *Id.*

Given the rarefied forum in which it was decided, it is unsurprising that *Loomis* will inflict costs that the court failed to—and could not—take into account. One note argues that by making e-commerce platforms strictly liable for third-party products over which they have control, *Loomis* "could have drastic and damaging consequences" for such businesses.[77] Specifically, Amazon may tighten rules for third-party sellers, which may cause them to flee for international platforms (and therefore defeat the decision's harm-avoidance goal).[78] The note observes that "[t]he fallout of this decision is virtually limitless as other courts may adopt" the same rule.[79] In the meantime, of course, Amazon and its domestic competitors face a balkanized regulatory environment, in which the tort rules in one state may greatly diverge from those in another.

Other commentators note that the imposition of strict liability for third-party products may increase prices and reduce consumer choices.[80] Ironically, the decision may shield Amazon from competition if new entrants cannot afford the potential liability.[81] Again, a court simply cannot take these consequences into account.

Fortunately, not all courts are embracing the sweeping view of common law policymaking exemplified by *Loomis*. In *Stiner v. Amazon.com, Inc.*, the Ohio Supreme Court, without dissent, rejected strict liability for Amazon based on a defective third-party product.[82] In an opinion by Justice Judith French, the court rejected the *Restatement (Second) of Torts* § 402A as inconsistent with Ohio products liability law.[83] Even if the Restatement's goal of reducing harm from unsafe products applied, "Amazon's control over its website does not establish that Amazon is in a position to eliminate the unsafe character of products in the first instance."[84] And exhibiting far greater judicial modesty than the California Court of Appeal in *Loomis*, the court rejected the plaintiff's arguments regarding risk-spreading and cost allocation, stating they "implicate policy concerns that we reserve for the

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77. Owen Daly, Note, *"Heavy Is the Crown": King Amazon May Tighten Their Rules for Third-Party Sellers. How Can Amazon Remain the Most Attractive Marketplace for Roll-Up Companies Amidst a Sea of International Marketplaces?*, 21 J. INT'L BUS. & L. 235, 246 (2022).

78. *Id.* at 259.

79. *Id.* at 238.

80. *See* Yassine Lefouili & Leonardo Madio, *The Economics of Platform Liability*, 53 EUR. J.L. & ECON. 319, 342 (2022).

81. *Id.*

82. 164 N.E.3d 394, 401 (Ohio 2020).

83. *Id.* at 400–01.

84. *Id.* at 401.

General Assembly to address."[85] Although *Stiner* may never attain canonical status in the tort academy, the Ohio Supreme Court deserves praise for abiding by its constitutional boundaries rather than indulging "felt instincts" and policymaking ambitions.

IV. A DIFFERENT APPROACH

In the torts context, the Arizona Supreme Court also takes an approach markedly different from the one exemplified in *Loomis*. In *Quiroz v. Alcoa Inc.*, the court confronted whether the family of a man who died from mesothelioma could sue the employer of the man's father because the father brought home asbestos fibers on his clothing from work.[86] It is hard to imagine a more sympathetic case in the plaintiff's favor. Yet the court held 5–2 that the case failed as a matter of law because the company did not have a special relationship with the son that could establish a duty of care.[87] Applying traditional tort law principles, the court held that "duty is based on either special relationships recognized by the common law or relationships created by public policy."[88] In turn, "in the context of duty, the primary sources for identifying public policy are state and federal statutes. In the absence of such legislative guidance, duty may be based on the common law—specifically, case law or Restatement sections consistent with Arizona law."[89]

This holding is consistent with Arizona's "reception statute,"[90] which adopts common law so long as it is "not repugnant to or inconsistent with . . . the laws of this state."[91] In other words, it establishes statutory hegemony over contrary common law principles or judicial opinions.[92]

The plaintiffs argued that the court should decide the case on public policy grounds but did not cite a statutory or common law basis. The majority noted that under Arizona case law, "in the absence of a statute, we exercise great

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85. *Id.*
86. 416 P.3d 824, 827 (Ariz. 2018).
87. *See id.* at 826–27.
88. *Id.* at 827.
89. *Id.*
90. All states have adopted the common law as it existed at the time and so long as it is not inconsistent with state constitutions and statutes, mostly through so called reception statutes. *See* KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 10 (1996).
91. Seisinger v. Siebel, 203 P.3d 483, 490 (Ariz. 2009) (en banc).
92. *See id.*

restraint in declaring public policy."[93] Quoting an earlier opinion, the court took a Blackstonian approach to developing the common law:

> The declaration of "public policy" is primarily a legislative function. The courts unquestionably have authority to declare a public policy which already exists and to base its decisions upon that ground. But in the absence of a legislative declaration of what that public policy is, before courts are justified in declaring its existence such public policy should be so thoroughly established as a state of public mind, so united and so definite and fixed that its existence is not subject to any substantial doubt.[94]

The dissent argued that the court should adopt § 7 of the *Restatement (Third) of Torts*, which provides that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm," which the dissent depicted as "creat[ing] the presumption of a duty."[95]

The majority rejected § 7. "Creating a tort law system based on a presumed duty owed by everyone all the time carries with it serious consequences."[96] In the take-home asbestos context, given that foreseeability is not a factor in determining duty in Arizona, the presumed duty could extend to everyone who came in contact with the employee, or anyone to whom the employee might have transferred asbestos fibers—neighbors and friends, babysitters and cab drivers, children's playmates.[97] Such limitless duty and potential liability, the court concluded, "is at odds with the judicial restraint we exercise in declaring public policy."[98] As we argue in the next section, policy decisions of such great magnitude should be exercised only by the legislature.

But even a court that exercises appropriate restraint in creating public policy in the torts context is not immune from doing so in other common law contexts. In *Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, the Arizona Supreme Court, in a 6–1 decision, refused to enforce a liquidated damages provision in a loan contract negotiated between two sophisticated parties, even in the absence of statutory law regulating such provisions.[99] As the dissent charged, the decision "will inevitably have a corrosive effect on the making and enforcement of contracts in Arizona, with predictable and

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93. *Quiroz*, 416 P.3d at 830.
94. *Id.* at 830 (quoting Ray v. Tucson Med. Ctr., 230 P.2d 220, 229 (Ariz. 1951)).
95. *Id.* at 848 (Bales, J., dissenting).
96. *Id.* at 841 (majority opinion).
97. *Id.*
98. *Id.* at 842.
99. 393 P.3d 449 (Ariz. 2017).

substantial adverse economic consequences, notwithstanding that freedom of contract is enshrined in our organic law."[100]

Similarly, in *Zambrano v. M & RC II LLC,* the Arizona Supreme Court by a 5–2 vote refused to enforce an express warranty of habitability in a homebuilder's contract that supplanted a judicially created implied warranty of habitability, holding that it could not be waived even by sophisticated parties.[101] The majority invoked a far more robust common-lawmaking power than the court did in the torts context. Rejecting as "unpersuasive and confusing" the dissent's assertion that such policymaking is better left to the legislature, the majority proclaimed: "Who declares the common law by focusing on public policy? We do, with appropriate restraint."[102] By contrast, the dissent, invoking separation of powers, cautioned that "we are not equipped to evaluate offsetting policy considerations such as the impact to home prices or other economic consequences to the public at large," issues "we are unable to consider because we are limited to the parties' arguments and facts in this case."[103]

In our view, such doctrinal inconsistency—exercising restraint in creating public policy in some common law areas while aggressively doing just that in others—owes to insufficient consideration of appropriate judicial boundaries in light of separation of powers principles. It is to those constitutional boundaries that we now turn.

V. COMMON LAW-MAKING AND SEPARATION OF POWERS

Although common law and the power of (mostly) state courts to apply it were imported from our English forebears, two distinctive features of the American constitutional republic required modifications to that system.

First was the emergence of more robust legislative bodies. As Texas Supreme Court Justice Evan Young observes, the English Parliament traditionally "was ill equipped to promulgate capacious and systematic legal codes."[104] As an arm of the Crown, it was necessary for the judiciary to fill in the gaps, establishing rules based on experience that gave stability to society.[105]

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100. *Id.* at 461 (Bolick, J., dissenting).
101. 517 P.3d 1168, 1179 (Ariz. 2022).
102. *Id.* at 1180.
103. *Id.* at 1186 (King, J., dissenting) (joined by Bolick, J.).
104. Elephant Ins. Co. v. Kenyon*,* 644 S.W.3d 137, 156 (Tex. 2022) (Young, J., concurring).
105. *Id.*

By contrast, in the United States, the legislative branches at both the national and state levels were empowered to create enormous bodies of statutory law. "[F]or that very reason," Justice Young explains, "one basic premise of the common law—the need for courts to fill in the gaps because the rest of government would or could not—is less urgent than before."[106] Thus, "[a]s other sources of law proliferate, our common-law garden will require more pruning than fertilizing."[107] Moreover, as Arizona State University law professor Charles Capps argues, very few gaps now really exist in the law, numerous legal doctrines exist to close those gaps without resorting to judge-made law, and therefore "it is a mistake to think that common-law adjudication inevitably involves lawmaking because often the law runs out."[108]

The second American innovation, of course, was constitutional separation of powers. No longer is the judiciary an arm of another branch of government; it has its own powers and, concomitantly, restrictions on those powers. "The common-law courts served the People by marking boundaries when the legal terrain was otherwise uncharted," states Justice Young.[109] "Today's courts serve the People by facilitating self-government, which may mean . . . that we disclaim direct judicial lawmaking and instead limit ourselves to construing and applying the law that the political branches have enacted."[110]

In recent years, the U.S. Supreme Court has repeatedly applied the separation of powers doctrine to clip the wings of executive agencies that were intruding into legislative or judicial powers.[111] We believe the same principles should apply where the judiciary attempts to exercise legislative powers.

Indeed, this concern animated the U.S. Constitution's framers in assigning the judiciary's powers. In *The Federalist* No. 78, Alexander Hamilton set forth a vision of a judiciary that would limit the political branches to the boundaries of their constitutional authority without making laws from the bench. Hamilton urged that courts must have power "to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the

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106. *Id.* at 158.

107. *Id.*

108. Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 55) (on file with Ariz. State Univ.).

109. *Elephant Ins. Co.,* 644 S.W.3d at 159 (Young, J., concurring).

110. *Id.*

111. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024). It was this power the U.S. Supreme Court exercised when it recently overturned the *Chevron* doctrine. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (deferring to executive agencies in determining their legal authority).

reservations of particular rights or privileges would amount to nothing."[112] Yet because the judiciary would have "neither FORCE nor WILL, but merely judgment," by its nature it would be "the least dangerous to the political rights of the Constitution."[113]

But this is true only if the courts hewed to their constitutional boundaries. Thus, Hamilton observed that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[114] Justice John Marshall applied this principle in an early Supreme Court decision, proclaiming that there are some "important subjects, which must be entirely regulated by the legislature itself" and others "of less interest, in which a general provision may be made, and power given to [others] . . . to fill up the details."[115]

While implicit in the federal constitution, this separation of powers is explicit in the constitutions of forty-one states.[116] Thirty-five of them apply what Sixth Circuit Judge Jeffrey Sutton calls a "belt-and-suspenders approach, spelling out each branch's power and denying that power to other branches."[117]

Arizona's Constitution devotes an entire section to separation of powers, consisting of a single-sentence command: "The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."[118] By this plain and categorical language, it is clear that *any* exercise of legislative (or executive) powers by the courts, unless otherwise provided for in the Constitution, exceeds their constitutional boundaries.

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112. THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (Ian Shapiro ed., 2009).

113. *Id.* at 392.

114. *Id.* (quoting MONTESQUIEU, 1 THE SPIRIT OF LAWS 186 (1748)).

115. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 20 (1825).

116. *Separation of Powers*, STATE CONST. TOOL, https://stateconstitutiontool.org/topic/separation-of-powers [https://perma.cc/6LJZ-4QL4] (to see all state constitutions containing explicit separation of powers provisions, select "all states" in the sidebar on the left). While North Dakota's provision is not exactly explicit, the North Dakota Supreme Court has clarified that because "all of the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others." City of Carrington v. Foster County, 166 N.W.2d 377, 382 (N.D. 1969).

117. JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 194 (2022).

118. ARIZ. CONST. art. III.

Judge Sutton notes that at least forty-three states have invoked the separation of powers to apply the nondelegation doctrine[119]—the principle that certain legislative powers cannot be delegated to other branches of government under any circumstances, or that such powers may be delegated only with sufficient instruction with regard to their application. As the Arizona Supreme Court put it, "[s]eparation of powers limits both the power that may be delegated and the method by which it is delegated."[120]

At the federal level, in the context of executive agencies exercising legislative or judicial powers, the U.S. Supreme Court has applied the "major questions" doctrine to determine the respective constitutional boundaries. The doctrine traces to state court decisions in the mid- to late-nineteenth century ruling against implied delegations of power.[121] Major policy questions encompass, among others, matters of great political significance, subjects of widespread public debate, and issues whose resolution carries significant economic consequences.[122]

Justice Neil Gorsuch articulated the doctrine: "Under our precedents, an agency can fill in statutory gaps where 'statutory circumstances' indicate that Congress meant to grant it such powers. But we don't follow that rule when the 'statutory gap' concerns 'a question of deep "economic and political significance" that is central to the statutory scheme.'"[123] As the Court recognized three years later in *West Virginia v. EPA*, in such circumstances, separation of powers mandates that "[t]he agency . . . must point to 'clear congressional authorization' for the power it claims."[124]

The Arizona Supreme Court recently applied these same principles, declaring that "[s]eparation of powers limits both the power that may be delegated and the method by which it is delegated from the legislative branch to the executive,"[125] and holding that "[a] unilateral exercise of legislative power by an executive agency violates separation of powers."[126]

Given that separation of powers applies to all three branches of government, the same principles constraining the exercise of legislative

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119. SUTTON, *supra* note 117, at 222.

120. Roberts v. State, 512 P.3d 1007, 1016 (Ariz. 2022).

121. Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 191 (2023).

122. *See* West Virginia v. EPA, 597 U.S. 697, 743–44 (2022) (Gorsuch, J., concurring).

123. Gundy v. United States, 588 U.S. 128, 167 (2019) (Gorsuch, J., dissenting) (first quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001); and then quoting King v. Burwell, 576 U.S. 473, 485–86 (2015)).

124. 597 U.S. at 723 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

125. *Roberts*, 512 P.3d at 1016 (Ariz. 2022).

126. *Id.*

power by the executive branch should apply to the judiciary.[127] The federal major questions doctrine has at least two important implications for state courts exercising common law powers. First, the doctrine embraces the assumption that matters of major political and economic significance are *legislative* concerns. Second, given that judicial common law-making powers are usually implied, rather than express—and that reception statutes are general rather than specific delegations of authority, often expressly recognizing legislative supremacy—the courts, just like executive agencies, transgress separation of powers if they regulate matters of major political or economic significance (such as homebuyer warranties and liquidated damages,[128] much less sweeping strict liability rules).

Applying these principles to the judiciary, courts should yield when considering conflicts between statutory and common law. As the Arizona Supreme Court categorically has stated, "when a substantive statute conflicts with the common law, the statute prevails under a separation of powers analysis."[129] But courts should also refrain from deciding major policy issues even if the legislature is silent on the matter, because doing so, even in the guise of "evolving" the common law, constitutes an improper exercise of legislative power. Indeed, as Duke University law professor Steven E. Sachs argues, judicial common law-making limits legislative authority by, among other things, "depriving them of their ordinary ability—so crucial to striking bargains on other issues—to choose to leave well enough alone."[130]

The Arizona Supreme Court recognized precisely this in *Quiroz*. The court channeled Blackstone's conception of common law, stating that "in the absence of a legislative declaration of what th[e] public policy is, before courts are justified in declaring its existence such public policy should be so thoroughly established as a state of public mind, so united and so definite and fixed that its existence is not subject to any substantial doubt."[131] That is the touchstone that courts adhered to for hundreds of years until the twentieth century. The advent of constitutional separation of powers renders such judicial self-restraint not merely prudent, but mandatory.

Similarly, courts should adopt new restatement provisions with great restraint, doing so only when they reflect statutory law or well-established

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127. *See* THE FEDERALIST No. 78, *supra* note 112, at 392; Torres v. JAI Dining Servs. (Phx.), Inc., 536 P.3d 790, 800 (Ariz. 2023) (Bolick, J., concurring).

128. *See* cases discussed *supra* notes 99–103.

129. Seisinger v. Siebel, 203 P.3d 483, 490 (Ariz. 2009).

130. Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 580 (2019).

131. Quiroz v. Alcoa Inc., 416 P.3d 824, 830 (Ariz. 2018) (quoting Ray v. Tucson Med. Ctr., 230 P.2d 220, 229 (Ariz. 1951)). For a thorough exposition of how courts can "discover" rather than "make" common law, see Sachs, *supra* note 130.

common law.[132] Otherwise, courts supplant the legislative role by self-authorizing decisions that conform to the judicial adoption of public policy.

In considering whether to create, extend, change, or adapt judge-made common law, courts should first do what most often fail to do in this context: *pause* to consider whether the court, or solely the legislature, possesses authority to bring about a particular outcome. As this is essentially a jurisdictional question, the court should do so even if a party has not urged the question upon it. If a statute already governs the matter, the court should yield to the statute and merely interpret and apply it. If a statute does not occupy the field, the court properly may apply existing common law to new circumstances. But it should not adopt new common law principles (such as imposing strict liability in a new field) or make major public policy decisions through its common law powers, even absent a statute.

The temptation to right an injustice, to create new rules to serve the perceived goals of the common law (such as risk-avoidance, efficiency, or justice), or to fill a legislative vacuum can be mighty. The courts succumbed to it in *Loomis*,[133] in the Arizona Supreme Court rulings limiting freedom of contract in the areas of homebuilder liability and liquidated damages,[134] and in many other instances around the country.[135] A common refrain is the so-called doctrine of legislative acquiescence: that if courts adopt a new rule, the legislature can always correct it, and its failure to do so represents tacit consent.[136] That ignores what may be a conscious decision by the legislature *not* to legislate, or an inability to do so because no consensus exists on the matter. To reach a court decision requires assent from only a majority of judges. To create a statute requires hurdling numerous procedural obstacles, gaining assent from a majority of legislators representing diverse constituencies, and usually approval from the executive. Legislation is

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132. *See Quiroz*, 416 P.3d at 841–42.

133. *See supra* Part II.

134. *See supra* text accompanying notes 99–103.

135. *See, e.g.*, City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) (holding that a city could bring a public nuisance claim against gun manufacturers for negligent marketing and distribution practices contributing to illegal firearms use, expanding the scope of public nuisance to address complex societal harms not traditionally covered); Kesner v. Superior Court, 384 P.3d 283 (Cal. 2016) (recognizing that employers and premises owners owe a duty of care to household members exposed to asbestos through contact with employee clothing, broadening the contours of tort duty); Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (eliminating common law distinctions among licensees, invitees, and trespassers in premises liability, restructuring the duty of care standard to align with broader policy goals of fairness and foreseeability and enabling greater access to redress for injured parties).

136. *See* Delgado v. Manor Care of Tucson AZ, LLC, 395 P.3d 698, 703 (Ariz. 2017).

intentionally difficult to accomplish. Judicial legislation, no matter how expedient, is no substitute for democratic processes.

Regardless, the absence of legislative action does not expand the power of the courts to legislate. The courts have little reluctance to invalidate executive actions that are justified on the basis of legislative inaction;[137] so too should courts acknowledge their own institutional and constitutional limits regarding de facto legislation. As courts typically define the boundaries of their own powers, this requires judges to resist the temptation to become legislators. Indeed, to the extent they fail to do so, they legitimize complaints that courts are simply a third political branch.

In sum, courts should stay in their constitutionally designated lanes, interpreting the Constitution and laws, without themselves engaging in affirmative lawmaking. For better or worse, our constitutions primarily assign such lawmaking to the legislative branches, which are designed to weigh competing interests and policy goals and are directly accountable to the voters. Courts should reject the hubristic temptation to improve upon that product, whatever its shortcomings. Given the separation of powers principles to which courts no less than the other branches of government are subject, courts that exercise legislative powers are guilty not merely of judicial activism, but judicial lawlessness.

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137. *See, e.g.*, DHS v. Regents of the Univ. of Cal., 591 U.S. 1, 49–51 (2020) (Thomas, J., concurring in part and dissenting in part) ("At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action. . . . Congress has failed to provide similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.").