

§ 114. Construction with reference to common law.

Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question.⁴ The common law to be applied in construing constitutional provisions must be correlated in time with the Constitution, and cannot be a common-law principle which was evolved or changed after the adoption of the organic law. Where the scope and meaning of a constitutional provision depend upon the common-law rule existing at the time of its adoption, the rule is to be determined as it existed at that time, without respect to subsequent changes therein.⁵

It is apparent, therefore, that the common law does not govern the construction of all constitutional provisions; and the Supreme Court has declared that in applying the doctrine which justifies recourse to the common law for constitutional construction, that doctrine, like other canons of construction, must yield to more compelling reasons whenever they exist.⁶ Such compelling reasons include incongruity with the intent of the adopters or alteration of the plain purpose of the provisions.

It is a cardinal rule of construction that a constitution must be so construed as to give effect to the intention of the people who adopted it, and while it will be construed with reference to the doctrines of the common law, its intent will never be overruled by them.⁷ Manifestly, where a constitution is in conflict with the common law, the former will prevail over the latter; and this is so, whether the conflict is as to a right or a remedy.⁸

The application of the doctrine is further subject to the qualification that the common-law rule, if and when invoked, shall be one not rejected by our ancestors as unsuited to their civil or political condition.⁹ Not all English practices prior to the American Revolution should be thought to be part of American constitutional law, for if that were so, the procedure of the first half of the 17th century would be fastened upon the American jurisprudence like a straightjacket, only to be unloosed by constitutional amendment.¹⁰ Furthermore, many English common-law practices were exceedingly primitive, especially in the area of the First Amendment freedoms, and it has been noted that a large purpose of the First Amendment was to repudiate the English common law.¹¹ The same can be said in reference to other areas of American constitutional law. Eighteenth century English or colonial law should never stand in the way of the Supreme Court fashioning a new rule to better reflect the more humane values of a maturing society.