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# Reading Statutes in the Common Law Tradition

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READING STATUTES IN THE COMMON LAW TRADITION

*Jeffrey A. Pojanowski\**

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## INTRODUCTION

THERE is wide agreement in American law and scholarship about the role the common law tradition plays in statutory interpretation. Jurists and scholars of various stripes concur that the common law points away from formalist interpretive approaches like textualism and toward a more creative, independent role for courts. They simply differ over whether the common law tradition is worth preserving. Dynamic and strongly purposive interpreters often claim the Anglo-American common law heritage supports their approach to statutory interpretation, and that formalism is an unjustified break from that tradition. Many formalists reply that the common law mindset and methods are obsolete and inimical to a modern legal system of separated powers. They argue that because the legal center of gravity has shifted from courts to complex statutory regimes, judicial interpreters, especially at the federal level, should no longer understand themselves as bearers of the common law tradition.

Thus, Judge Guido Calabresi's case for judicial updating of outmoded legislation presents itself as *A Common Law for the Age of Statutes*,<sup>1</sup> while Justice Scalia celebrates how interpretive formalism imposes discipline on *Common-Law Courts in a Civil Law System*.<sup>2</sup> This dichotomy is not unique to the federal context. Judith Kaye, writing as Chief Judge of the New York Court of Appeals, rejected a Scalia-style formalism based on her court's role as a "keeper[] of the common law."<sup>3</sup> By con-

<sup>1</sup> Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

<sup>2</sup> See 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: Federal Courts and the Law* 3 (Amy Gutmann ed., 1997).

<sup>3</sup> Judith S. Kaye, Chief Judge, N.Y. Court of Appeals, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, The Justice William J. Brennan, Jr. Lecture on State Courts & Social Justice (Mar. 31, 1995), in 70 N.Y.U. L. Rev. 1, 6 (1995).

trast, Michigan Supreme Court Chief Justice Robert Young Jr., a textualist, rejects Chief Judge Kaye's approach because statutory interpretation is "not a branch of common-law exegesis."<sup>4</sup> If anything, rhetoric on common law and statute is more dramatic at the state level, with Chief Judge Kaye offering paeans to "the common law, that 'golden and sacred rule of reason,'"<sup>5</sup> while Chief Justice Young likens the common law to a "drunken, toothless ancient relative" who has overstayed his welcome.<sup>6</sup>

Contemporary debate in statutory interpretation offers a choice between either continuity with the common law tradition (and thus, creative statutory interpretation) or formalist interpretation that breaks with that heritage. As with much conventional wisdom, this framework captures a good deal of truth. Nevertheless, those who accept this neat frame, including myself in past work,<sup>7</sup> miss an important part of the picture. As this Article will argue, formal theories of interpretation like textualism, which today generally distance themselves from the common law tradition, can claim support in that heritage. Furthermore, nonformal approaches to statutory interpretation rely on a partial, controversial vision of the common law tradition. A more nuanced understanding of traditional common law thought undercuts an important justification for nonformal theories of statutory interpretation—namely their continuity with our common law legal tradition. More broadly, we need not understand the debate between formalists and their critics as a disagreement about the common law tradition's continued validity; rather, it concerns which interpretation of that tradition best suits a modern, complex polity.

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<sup>4</sup> Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, Okla. City U. School of Law William J. Brennan, Jr. Lecture on State Constitutional Law & Government (Oct. 18, 2007), in 33 Okla. City U. L. Rev. 263, 280 (2008).

<sup>5</sup> Kaye, *supra* note 3, at 5 (quoting Charles F. Mullett, *Fundamental Law and the American Revolution, 1760–1776*, at 48 (1966)).

<sup>6</sup> Robert P. Young, Jr., *A Judicial Traditionalist Confronts the Common Law*, 8 Tex. Rev. L. & Pol. 299, 302 (2004).

<sup>7</sup> See Kaye, *supra* note 3, at 6 (linking nonformalist interpretation to a state court's role as "keepers of the common law"); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 Tex. L. Rev. 479, 522–36 (2013) (exploring the effect state courts' undisputed common law powers have on interpretive method compared to federal courts of limited jurisdiction); Peter L. Strauss, *The Common Law and Statutes*, 70 U. Colo. L. Rev. 225, 225 (1999) [hereinafter Strauss, *The Common Law*] (arguing that "our fundamental commitment to the common law . . . is inconsistent with" textualist statutory interpretation).

To establish these points, this Article takes up central ideas that classical common lawyers held about legislation, interpretation, and the legal system to show how these notions recommend formal, faithful agency in statutory interpretation.<sup>8</sup> The central relevant feature of classical common law thought is its participants' understanding of their practice as the disciplined refinement and embodiment of a polity's customs and beliefs. Law, in a common law system, rose up from the practices and beliefs of the people, rather than descending in systematic form from the will of a ruling cadre. This understanding unified the common law justification for law developed in adjudication and legislation alike.<sup>9</sup> In fact, the common law method of adjudication—with its reactive and incremental development of law through structured argument—anticipates the formal, rule-laden, and nonsystematic manner in which American legislatures today translate popular norms and preferences into statutes.<sup>10</sup> Common law adjudication and common law legislation pursue similar ends in analogous fashion.

Advocates of nonformal statutory interpretation take this congruence as a cue for courts to depart from faithful agency in the development of statutory regimes.<sup>11</sup> This standard, antiformalist move is a misapplication, or at least a controversial reading, of the common law tradition itself. Common law legislation by its nature is often a product of untidy compromises necessary to secure supermajority support, and is rooted in

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<sup>8</sup> The aim here is not to establish that sixteenth- and seventeenth-century common lawyers were unwavering textualists or original intentionalists in statutory interpretation. That was not likely the case. See Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 *Oxford U. Commonwealth L.J.* 1, 17–21 (2003) [hereinafter Postema II] (describing Hale's approach to statutory interpretation in relatively nonformal terms). But see generally Jim Evans, *A Brief History of Equitable Interpretation in the Common Law System*, in *Legal Interpretation in Democratic States* 67, 67, 85 (Jeffrey Goldworthy & Tom Campbell eds., 2002) (challenging broad claims about common lawyers' departures from faithful agency in statutory interpretation). Nor does this analysis rest on the already established point that many eighteenth- and nineteenth-century common law jurists took formal approaches to statutory interpretation. See Hans W. Baade, *The Casus Omissus: A Pre-History of Statutory Analogy*, 20 *Syracuse J. Int'l L. & Com.* 45, 93 (1994) (“[T]he ‘equity of the statute’ fell victim to the sovereignty of Parliament.”); John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 53–54 (2001) (“The shift away from equitable interpretation had become perceptible during the eighteenth century. By the nineteenth century, the trend was unmistakable.”).

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 *Colum. L. Rev.* 990, 998–1009 (2001).

reasoning that is difficult for outsiders to reconstruct after the fact. If legislation is a modern iteration of common law lawmaking, dynamic interpreters who seek to update or smooth the rough corners of statutes resemble classical common lawyers' archrivals: philosophers and royalists who sought to rationalize the untidy warrens of common law doctrine. Like those academic lawyers who sought to privilege their isolated reasoning over the shared wisdom of the common law, a dynamic interpreter puts herself in the position not only of a legislator, but a legislature, whose translation of public views and practices into concrete norms she as an individual cannot replicate. By contrast, classical common law lawyers contended their lay competitors' natural reason was inferior to the disciplined, shared "artificial reason" of the common law in identifying and integrating the common customs of the people. Interpretive formalists respect the artificial reason of common law legislation when refusing to upset awkward legislative compromises or update statutes to comply with contemporary values.<sup>12</sup>

In this light, the central disagreement between formalists and their opponents is an argument *within* the common law tradition about the deference courts owe to the legislature, an institution that also identifies and translates social norms into common—shared—law. An interpretive formalist can see the legislature as the culmination of the common law tradition, not its nemesis. Accordingly, while such formalists need not reject judicial development of common law in the absence of legislative direction, they defer to reasonably clear statutory norms out of respect for the legislature's superior and inimitable process of forging shared norms. To be clear, the formalist argument is a development of the classical common law tradition, not a secret history. Nevertheless, the mindset of the interpretive formalist coheres with central ideas in classical common law theory and can be seen as the natural development of a tradition that has increasingly linked law with popular custom and consent. In fact, given the challenges a complex, pluralistic society poses to developing common law through adjudication, the formalist's emphasis on legislative primacy may be necessary for the tradition to survive.<sup>13</sup>

One final note on scope: This work leaves for another day the role of administrative agencies in statutory interpretation and the common law tradition. To some, agencies are today's true practitioners of the com-

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<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part V.

mon law.<sup>14</sup> To others, they represent an anathematic return to the Star Chamber.<sup>15</sup> Unpacking this analysis's implications for the fourth branch of government is neither obvious nor trivial and deserves a separate work.

The Article will proceed as follows. Part I will catalog the received wisdom that our common law heritage presses against formal approaches and in favor of more dynamic methods. Part II will offer a fresh look at the relationship between the common law and legislation, arguing that important figures in the common law tradition championed parliamentary legislation and understood it as an important source of common law. The common law, in fact, plays a central role in a broader conception of law that views law as ascending from the people, rather than descending from a select few. Legislation by assembly, like common law adjudication, aspires to identify and channel popular custom into formal law.

Part III will explicate a theory of legislation as a form of common law. It picks out key features of classical common law theory—the “artificial reason of the law” and its development—and explains how they are manifest not only in adjudication, but also in the style of legislation by American assemblies. Part IV will unpack the interpretive implications of legislation in common law style. In particular, it identifies important breaks between today's dynamic statutory interpreters and the common law tradition, while also highlighting unappreciated affinities between that heritage and more formal approaches to legislation. Part V will step back to underline mutually reinforcing features of the common law tradition and statutory formalism. From this broader perspective, the statutory formalism's deference appears a faithful development of the common law tradition *and* an advance on the more juriscentric versions championed by dynamic interpreters.

## I. STATUTORY INTERPRETATION THEORY AND THE COMMON LAW TODAY

Statutory interpretation theory does not lack labels for methodological schools. For simplicity's sake, this Article groups these various ap-

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<sup>14</sup> See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 *Duke L.J.* 1013, 1019–20 (1998) (“[A]gencies have become modern America's common law courts, and properly so.”).

<sup>15</sup> See Philip Hamburger, *Is Administrative Law Unlawful?* 28–29 (2014) (“American administrative law revives the extralegal government familiar from the royal prerogative. . . it restores a version of the absolute prerogative . . . that purported to bind and that flourished before the development of constitutional law.”).

proaches under two headings: formalist and nonformalist approaches. As used here, formalist approaches to interpretation are those more committed to treat the “objective” meaning enacted statutory language (roughly, the reasonable reader’s meaning) or original legislative intent (roughly, speakers’ meaning) as precluding further independent judgment by the interpreter.<sup>16</sup>

Nonformalism or antiformalism, for lack of better organizing headings,<sup>17</sup> while giving weight to original meaning or intention, affords the interpreter greater authority to broaden, narrow, or, in some cases, reject the most plausible available understanding of that original meaning or intention. An interpreter like Judge Richard Posner may do this to fulfill what he hypothesizes as the original purpose or what the enacting legislature would have wanted in a given case.<sup>18</sup> Alternatively, dynamic theorists like Professor William Eskridge or Judge Guido Calabresi would give courts discretion to update or deem obsolescent statutes that conflict with contemporary public values.<sup>19</sup>

Many statutory formalists see legislative primacy at odds with the common law tradition. Nonformalists, by contrast, seek to adapt that tradition to our age of statutes. This Part elaborates these standard takes on the relationship between common law and statutory interpretation.

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<sup>16</sup> See Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509, 511–20 (1988) (distinguishing this understanding of formalism from the version associated with late nineteenth-century common lawyers like Christopher Columbus Langdell). This does not mean formalists never apply standards or creatively develop the law. When legislation is unclear, prescribes a standard, or otherwise confers decision making authority to the interpreter, a formalist will exercise that judgment within the confines of other clear rules.

<sup>17</sup> See David A. Strauss, *The Anti-Formalist*, 74 *U. Chi. L. Rev.* 1885, 1886, 1890–94 (2007) (characterizing the approach of Judge Richard Posner). Formalism is often contrasted with “functionalism,” but the label’s affiliation with social science and instrumentalism does not chime with some nonformalist approaches. For example, Ronald Dworkin is no formalist, but his celebration of high principle and broad moral vision is hardly functionalist.

<sup>18</sup> See *United States v. Marshall*, 908 F.2d 1312, 1333–37 (7th Cir. 1990) (en banc) (Posner, J., dissenting).

<sup>19</sup> Calabresi, *supra* note 1, at 82–83, 146–49; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 *U. Pa. L. Rev.* 1479, 1554–55 (1987) (arguing that “federal courts should interpret statutes in light of their current as well as historical context” and that “[d]ynamic interpretation is most appropriate when the statute is old yet still the source of litigation, is generally phrased, and faces significantly changed societal problems or legal contexts”).



*A. Nonformalism and the Common Law Tradition*

Continuity with the common law tradition is a touchstone for nonformalist statutory interpretation. Drawing on law's conservative, preservationist character, and the appeal of systemic coherence, many nonformalists invoke the common law tradition to defend their approach while casting formalist rivals as suspicious, radical interlopers.

*1. The Courts*

Federal and state courts often draw connections between the common law tradition and nonformal statutory interpretation. A foundational nonformalist opinion in federal law, *Holy Trinity Church v. United States*, justifies the Court's preference for legislation's spirit over its letter by relying upon William Coke and common law cases reported by the sixteenth-century English lawyer Edmund Plowden.<sup>20</sup> *Holy Trinity Church* is also the centerpiece of the majority opinion in *United Steelworkers of America v. Weber*, a touchstone for modern dynamic theorists.<sup>21</sup> The Supreme Court's admiralty decision in *Moragne v. States Marine Lines*, which arguably extended the reach of a statute by analogy,<sup>22</sup> echoes Chief Justice Stone's invocation of "the duty of the common-law court to . . . interweave the new legislative policies with the inherited body of common-law principles."<sup>23</sup> Supreme Court dissents from formalist opinions also invoke the common law.<sup>24</sup>

<sup>20</sup> 143 U.S. 457, 459–61 (1892).

<sup>21</sup> 443 U.S. 193, 201 (1979); Ronald Dworkin, *A Matter of Principle* 316–31 (1985); Eskridge, *supra* note 19, at 1488–94 (discussing *Weber*); see also *id.* at 1492 (identifying Justice Blackmun's concurring opinion in *Weber* as more persuasive an example of dynamic interpretation than the majority opinion); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 *Minn. L. Rev.* 241, 247 (1992) (arguing that "[t]o defend *Weber*, then, one needed a theory of statutory interpretation" more elaborate than mere invocation of spirit).

<sup>22</sup> See Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 *Fordham L. Rev.* 1689, 1719–20 (2014).

<sup>23</sup> 398 U.S. 375, 392 (1970); see also William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 *Harv. L. Rev.* 26, 29 n.6 (1994) ("Stable equilibrium is the common law ideal, best exemplified at the Supreme Court level in admiralty cases" like *Moragne*).

<sup>24</sup> See, e.g., *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 563 (1994) (Ginsburg, J., dissenting) (approving of a method that would "evolve[] not through a 'rules first' approach, but in the traditional, fact-bound, case-by-case common-law way"); *Griffin v. Oceanic Contractors*, 458 U.S. 564, 578 (1982) (Stevens, J., dissenting) (quoting *Holy Trinity Church*, 143 U.S. at 459).

The relationship is even more pronounced for state courts unburdened by the post-*Erie* notion that federal courts lack general common law “powers.” Chief Judge Kaye argued that state law is a complex tapestry of common law and statute, making the court an interlocutor with the legislature, not just a passive interpreter of statutory commands.<sup>25</sup> This “common-law method compels courts” to depart from a statute’s plain meaning at times.<sup>26</sup> State court decisions rejecting the U.S. Supreme Court’s formalist, restrictive approach to implied private rights of action highlight their common law powers to supplement statutory remedies.<sup>27</sup>

## 2. Ronald Dworkin’s Common Law Romanticism

Legal theorists have elaborated the courts’ intuitive link between the common law tradition and nonformal statutory interpretation. Perhaps most prominent is the work of legal philosopher Professor Ronald Dworkin, whose ideal judge “will use much the same techniques of interpretation to read statutes that he uses to decide common-law cases.”<sup>28</sup> And, given Dworkin’s reputation as “a common law romantic”<sup>29</sup> there is little doubt that his common law theory is in the driver’s seat. In statutory interpretation, as with common law adjudication, the ideal judge seeks “to find the best justification he can” that fits with the legal materials at hand.<sup>30</sup> Legislative text, like common law precedents, presents the judge the task of constructing “some justification that fits and flows through the statute and is, if possible, consistent with other legislation in force.”<sup>31</sup> His method is hostile to “checkerboard laws” that do not em-

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<sup>25</sup> See Kaye, *supra* note 1, at 5–11.

<sup>26</sup> *Id.* at 26. Similarly, the Supreme Court of Connecticut’s rejection of the plain meaning rule traced its purposive approach’s roots to the common law classic *Heydon’s Case*. *State v. Courchesne*, 816 A.2d 562, 581, 585 (Conn. 2003).

<sup>27</sup> See, e.g., *Nat’l Trust for Historic Pres. v. City of Albuquerque*, 874 P.2d 798, 801 (N.M. App. 1994); *San Lorenzo Educ. Ass’n v. Wilson*, 654 P.2d 202, 204 n.5 (Cal. 1982); see also *Gandy v. Wal-Mart Stores*, 872 P.2d 859, 862–63 (N.M. 1994) (using “public policy” manifested in a discrimination statute to give rise to an additional common law tort action for retaliatory discharge).

<sup>28</sup> Ronald Dworkin, *Law’s Empire* 313 (1986).

<sup>29</sup> David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in *Common Law Theory* 134, 134 (Douglas E. Edlin ed., 2007).

<sup>30</sup> Dworkin, *supra* note 28, at 338; see also *id.* at 313 (“He will ask himself which reading of the act . . . shows the political history including and surrounding that statute in the better light.”).

<sup>31</sup> *Id.* at 338.

body principled consistency.<sup>32</sup> Rather than viewing legislation as “negotiated compromises that carry no more or deeper meaning than the text,” we are to treat “legislation as flowing from the community’s present commitment to a background scheme of political morality.”<sup>33</sup> Like the common law judge, an interpreter of legislation “must justify the story as a whole, not just its ending.”<sup>34</sup>

This framework leads Dworkin to a nonformalist stance. He rejects the concept of “original intent” as a lodestar for interpretation<sup>35</sup> as well as the textualist’s distinction between semantically clear statutes that demand adherence and ambiguous provisions that require creative judgment.<sup>36</sup> Dworkin’s ideal judge sometimes also “must take” legislative history into account when “deciding which story of the legislative event is overall the best story.”<sup>37</sup> Dworkin centers his jurisprudential argument on a defense of *Riggs v. Palmer*, a case invoking background common law principles to contravene what a formalist dissent saw as reasonably clear statutory rules on voiding wills.<sup>38</sup> Similarly, his discussion of statutory interpretation is an extended critique of *Tennessee Valley Authority v. Hill*, which held that the plain meaning of the Endan-

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<sup>32</sup> Id. at 178–84.

<sup>33</sup> Id. at 345–46.

<sup>34</sup> Id. at 338; see George C. Christie, Dworkin’s “Empire,” 36 Duke L.J. 157, 177 (1987) (reviewing Dworkin, supra note 28) (“In short, Hercules aims to make the legislative story, as a whole, as good as it can be.”). Dworkin does distinguish between legislation and common law adjudication. For him, adjudication is primarily concerned with questions of principle and individual rights, whereas the legislature can make “policy” decisions that roughly promote general or particular interests. See Dworkin, supra note 28, at 221–24, 410. An ideal judge will proceed differently “when a statute rather than a set of law reports has been placed before him,” but only because a judge interpreting legislation can factor in not just legal principles, but also policy. Id. at 337.

<sup>35</sup> See Dworkin, supra note 28 at 317–27; cf. Richard Ekins, Legislative Intent in *Law’s Empire*, 24 Ratio Juris 435, 444–50 (2011) (defending a concept of original intent immune from Dworkin’s criticism).

<sup>36</sup> See Dworkin, supra note 28, at 350–54; cf. John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 91–109 (2006) (identifying adherence to clear semantic meaning over background policy context as textualism’s central differentiating tenet).

<sup>37</sup> Dworkin, supra note 28, at 346.

<sup>38</sup> 22 N.E. 188, 189–90 (N.Y. 1889); see Dworkin, supra note 28, at 15–20 (discussing *Riggs*).

gered Species Act required the protection of the snail darter “in spite of,” in Dworkin’s words, “great waste of public funds.”<sup>39</sup>

### 3. *Dynamic Legal Realists*

Dworkin rejects the legal realist thesis that judges legislate in the context of adjudication, even in so-called hard cases.<sup>40</sup> Other nonformalists understand the common law as a form of judge-made law. Working within this legal realist understanding, they argue that the common law tradition recommends a dynamic approach to interpretation that gives courts authority to make law that may contravene original intent or meaning.

In *A Common Law for the Age of Statutes*, Judge Calabresi proposes that courts, under limited circumstances, be granted “authority to determine whether a statute is obsolete,” and treated as if it “were no more and no less than part of the common law.”<sup>41</sup> Courts could “alter a written law or some part of it in the same way (and with the same reluctance) in which they can modify or abandon a common law doctrine or even a whole complex set of interrelated doctrines.”<sup>42</sup> This common law task is one courts can accomplish “using traditional judicial methods and modes of reasoning.”<sup>43</sup> Such courts will be engaging in the traditional function of managing the law’s “continuity and change by applying the great vague principle of treating like cases alike.”<sup>44</sup> If, like with common law doctrines, a statute “comes not to fit, or to fit awkwardly” in the broader fabric of the law, “courts are able to say so and are as justified in inducing a reconsideration of the statute as they are in reworking the common law.”<sup>45</sup> Because updating courts use the “judicial skills” of “looking for consistencies and analogies, the task for which [a court] is

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<sup>39</sup> 437 U.S. 153, 172–88 (1978); Dworkin, *supra* note 28, at 21; see *id.* at 337–54 (explicating his method of statutory interpretation through the lens of *Tennessee Valley Authority v. Hill*).

<sup>40</sup> See, e.g., Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1058 (1975) (“[J]udges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading.”).

<sup>41</sup> Calabresi, *supra* note 1, at 2. Judge Calabresi does not seek to revive a lost Golden Age of juriscentric common lawyering at the expense of legislation. *Id.* at 163 (rejecting “a nostalgic restoration of courts as the primary makers of law, in our system”).

<sup>42</sup> *Id.* at 82.

<sup>43</sup> *Id.* at 164.

<sup>44</sup> *Id.* at 165.

<sup>45</sup> *Id.* at 108.

trained,” the legitimacy of such revision “remains the same as at common law.”<sup>46</sup>

Professor Peter Strauss draws on the common law to defend dynamic interpretation and to indict more formalist methods. In our common law tradition, unlike civil law systems, “[c]ourts ‘make law’ as a consequence of the operation of a system of precedent,” including when they interpret statutes.<sup>47</sup> Similarly, our legislatures make law in a common law style, “creating statutes to achieve marginal changes” in reaction to particular problems, rather than enacting comprehensive codes in continental fashion.<sup>48</sup> Thus, “a common law system [of] any realistic description” identifies legislatures and courts as “partners in the work of government” even if the courts are the junior partner.<sup>49</sup> In common law fashion, the “legislature and court operate in parallel, working marginal change in response to social pressure.”<sup>50</sup> It is fair for the legislature to assume that courts will take up its handiwork and pursue “the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.”<sup>51</sup>

On these grounds, “once we have admitted the common law into that field,”<sup>52</sup> the textualist *bête noirs* of legislative history and unenacted purpose are essential. To privilege enacted text over background purpose is to invite “interbranch war.”<sup>53</sup> Professor Strauss thus laments the Supreme Court’s formalist “resegregation” of the worlds of common law and statute.<sup>54</sup> “Accretive change and integration of law, so characteristic of common law courts, seem no longer to be federal judges’ responsibilities in dealing with statutes.”<sup>55</sup> A true common law system, however, permits extension of statutes by analogy and dynamic interpretation in light of broader change in social circumstances and the legal system.<sup>56</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> Strauss, *The Common Law*, *supra* note 7, at 253.

<sup>48</sup> *Id.* at 225.

<sup>49</sup> *Id.* at 252; see also *id.* at 254 (“The legislature is the primary law-maker, and the judiciary a secondary law-maker.”).

<sup>50</sup> *Id.* at 243.

<sup>51</sup> *Id.* at 238 (quoting Harlan Fiske Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4, 12 (1936)).

<sup>52</sup> *Id.* at 253.

<sup>53</sup> *Id.* at 246.

<sup>54</sup> Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 *Sup. Ct. Rev.* 429, 527–28 [hereinafter Strauss, *Resegregating*].

<sup>55</sup> *Id.* at 434.

<sup>56</sup> See *id.* at 436–37.

Professor Eskridge also uses the common law as a shield to defend his approach and as a sword against formalist theories. Per Eskridge, courts interpret common law “‘dynamically,’ that is, in light of their present societal, political, and legal context,” rather than merely through their text and historical context.<sup>57</sup> This approach to common law challenges the notion that statutes are “static texts,” whose meaning and purpose are fixed at the moment of enactment.<sup>58</sup> In defense of his dynamic approach, he appeals to the “common law-making powers” that Article III, Section 2’s grant of “judicial Power” vests in federal courts.<sup>59</sup> He invokes William Blackstone and the common law classic *Heydon’s Case*<sup>60</sup> to establish that the original understanding of the judicial power contemplates courts’ authority to depart from textual meaning in favor of “the statute’s overall purposes and the current demands of equity.”<sup>61</sup>

Eskridge argues that “modern formalism” is a break from the Anglo-American legal tradition, a suspect interpolation of “late nineteenth century assumptions” and dogma that effaces the cooperative role of the judiciary central to our common law heritage as understood by “[e]ducated lawyers” at the Founding.<sup>62</sup> Statutory formalism, a Victorian-era artifact that understands law as a matter of “will and choice,” rather than developing reason, was alien to the Framers and “has little persuasive power for our society today.”<sup>63</sup> Disposing of this anomalous, jurisprudential intermeddler will bring coherence across the fields of common law, statutory, and constitutional interpretation while connecting American contemporary legal practice with its historical roots.<sup>64</sup>

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<sup>57</sup> Eskridge, *supra* note 19, at 1479.

<sup>58</sup> *Id.* at 1479–80; see also *id.* at 1481 (“[S]tatutes, like the Constitution and the common law, should be interpreted dynamically.”).

<sup>59</sup> *Id.* at 1499–1500; see also Eskridge, *supra* note 11, at 992 (“One of my challenges has been for the new textualists to justify their methodology by reference to the original understanding of Article III’s ‘judicial Power,’ which strikes me as friendlier to a pragmatic rather than strictly textualist methodology.”).

<sup>60</sup> Eskridge, *supra* note 19, at 1502 & n.91 (citing *Heydon’s Case*, 76 Eng. Rep. 637, 638 (Ex. Ch. 1584)).

<sup>61</sup> *Id.* at 1502.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1503.

<sup>64</sup> Eskridge seems to straddle the line between common law romanticism and realism. By relying on Blackstone and *Heydon’s Case*, and by casting formalism as a positivist interruption of the common law tradition, he channels the pre-legal realist tradition. By characterizing Article III as a grant of lawmaking power, however, he buys into the post-legal realist conception of common law adjudication as form of judicial legislation.

#### 4. Strong Purposivism

Finally, the common law exerts a pull on the purposivism of the legal process school.<sup>65</sup> Legal process theorists Professors Hart and Sacks thought courts should adopt an interpretation that best promotes the purpose of the statute and the legal system as a whole, so long as the text would “bear” that reading.<sup>66</sup> The purpose the court should impute to the legislature is not an actual, historical intent or purpose, but should flow from the assumption that legislation is an act of “reasonable persons pursuing reasonable purposes reasonably.”<sup>67</sup> Their central example of this technique for inferring purpose is, again, *Heydon’s Case*, which attends not to the text or historical intention, but rather the “mischief” in the old law and the “true reason for the remedy.”<sup>68</sup>

Judge Calabresi sees Hart and Sacks’s method as a predecessor to his own. Like him, they subordinate actual, historical legislative will in favor of “maintaining the fabric of the law” and recognize that interpreters, like common law courts, “make law,” thus breaking down “simplistic views of automatic, hard and fast barriers between written law and judicial roles.”<sup>69</sup> In Hart and Sacks’s pursuit of broader, reasonable coherence in the law we also see the early glimmers of Ronald Dworkin’s common law romanticism. Their writing on legislation “seeks to show that statutes should reflect, as much as possible, the sort of principles found in common law.”<sup>70</sup> For that reason, the legal process approach is “not primarily a theory of statutory interpretation, since it is as much (if not more) a theory of common law interpretation.”<sup>71</sup> And for Hart and Sacks, the common law can offer “a comprehensive, underlying body of law adequate for the resolution of all the disputes that may arise within the social order.”<sup>72</sup>

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<sup>65</sup> See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>66</sup> *Id.* at 1374.

<sup>67</sup> *Id.* at 1378.

<sup>68</sup> *Id.*

<sup>69</sup> Calabresi, *supra* note 1, at 87–88.

<sup>70</sup> Anthony J. Sebok, *Reading The Legal Process*, 94 *Mich. L. Rev.* 1571, 1592 (1996); see also Neil Duxbury, *Patterns of American Jurisprudence* 258 (1995) (“Hart and Sacks purport to favour neither common law nor legislation, . . . yet they seem to display a peculiar preference for the judicial decision.”).

<sup>71</sup> Sebok, *supra* note 70, at 1594.

<sup>72</sup> Hart & Sacks, *supra* note 65, at 647. Their distinction between comprehensive codes and isolated enactments is also telling. Isolated enactments may allow courts to resolve a dispute

*B. Statutory Formalism Against the Common Law Tradition*

At their most ambitious, nonformalists urge a court “openly to commit itself to a common law model of statutory interpretation,” in which statutes are “statements of consensually agreed-upon principles—modern analogues to common law rules of decision.”<sup>73</sup> Otherwise, courts abandon the common law tradition and become “mere servitors of a positivistic sovereign.”<sup>74</sup> They view formalism as resting on Victorian, “late nineteenth century assumptions”<sup>75</sup> that “resegregate[]”<sup>76</sup> the world of common law and statute (with common law having a separate and unequal status). Unmoved by such laments, modern formalists celebrate their break with the common law’s outdated, unjustified preference for the judicial prerogative.<sup>77</sup> They would rather have judges work as mere servitors of justified legislative authority than reign as prideful princes in law’s empire.<sup>78</sup>

*1. Textualists*

A prime example of statutory formalism in American law is textualism, which prioritizes a reasonably clear, public semantic meaning of

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“without any reference to the statute whatever” or “encourage[] or direct[] judicial change in accordance with the underlying policy or principle of the statute.” *Id.* at 1377–78. A comprehensive code may imply that the legislature is “the sole agency of growth of the law” after enactment. *Id.* at 1378. This contrast points to a division between a restrained civil law regime and a common law system permitting reasoned elaboration.

<sup>73</sup> Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 *Harv. L. Rev.* 892, 913 (1982). The author of this unsigned note is the now-prominent law professor Richard Pildes. See Richard H. Pildes, CV, at 6, <http://its.law.nyu.edu/faculty/profiles/CVFiles/vitawithoutlectures.pdf>.

<sup>74</sup> Note, *supra* note 73, at 898.

<sup>75</sup> Eskridge, *supra* note 19, at 1502.

<sup>76</sup> Strauss, *Resegregating*, *supra* note 54, at 528.

<sup>77</sup> A notable exception is Professor Caleb Nelson, whose inclination toward formalism does not lead to hostility toward common law. See generally Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 *Va. L. Rev.* 1 (2015) [hereinafter Nelson, *Legitimacy*]; Caleb Nelson, *The Persistence of General Law*, 106 *Colum. L. Rev.* 503 (2006) [hereinafter Nelson, *Persistence*] (explaining the continued relevance of unwritten law in the federal system); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 *U. Chi. L. Rev.* 657 (2013) [hereinafter Nelson, *State and Federal Models*].

<sup>78</sup> Compare Dworkin, *supra* note 28, at 407 (“The courts are the capitals of law’s empire, and judges are its princes . . .”) with John Milton, *Paradise Lost*, bk. I (Scott Ellege ed., Norton Critical ed. 1993) (1667) (“Better to reign in hell, than serve in heav’n”).



enacted text over unenacted purpose and background policy context.<sup>79</sup> The textualist Justice Antonin Scalia names his most famous methodological essay *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*.<sup>80</sup> There, he contrasts the role of a federal judge with that of “playing common-law judge,” namely “playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind.”<sup>81</sup> The primary task of a federal judge—operating in what Justice Scalia sees as a *civil law* system of limited discretion—is to resolve legal questions by “interpretation of text,” not exposition of common law rules and principles.<sup>82</sup> And “interpretation” here refers to identifying and adhering to an objective understanding of the text’s meaning at the time of enactment.<sup>83</sup> Similarly, in the context of private rights of action, Justice Scalia explains that “[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.”<sup>84</sup>

The textualist Judge Frank Easterbrook works on similar assumptions.<sup>85</sup> He argues that courts interpreting statutes should adhere to “cases anticipated by its framers and expressly resolved in the legislative process.”<sup>86</sup> Judicial creation of rules in common law fashion in the teeth of text is grounded on the “simply fallacious” premise “that courts can

<sup>79</sup> See John F. Manning, Second-Generation Textualism, 98 Calif. L. Rev. 1287, 1288 (2010); see also Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 232 (noting the rise of such formalism in the Supreme Court and offering “a plausible normative argument supporting” this development).

<sup>80</sup> Scalia, *supra* note 2.

<sup>81</sup> *Id.* at 7.

<sup>82</sup> *Id.* at 13.

<sup>83</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t. of Educ.*, 550 U.S. 81, 122 (2007) (Scalia, J., dissenting) (stating that courts should interpret “the law as Congress has written it, not as we would wish it to be”); see also *id.* (“The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail.”).

<sup>84</sup> *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

<sup>85</sup> See, e.g., Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol’y, 59, 65 (1988) (“We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words.”).

<sup>86</sup> Frank H. Easterbrook, Statutes’ Domains, 50 U. Chi. L. Rev. 533, 544 (1983).

establish a principled jurisprudence” on their own.<sup>87</sup> Furthermore, such freestanding judicial power contradicts Judge Easterbrook’s view that “there is no free-floating common law” in the federal system.<sup>88</sup> Federal courts may depart from the civil law model and craft new rules through precedent *only* when a statute like the Sherman Act “plainly hands courts the power to create and revise a form of common law.”<sup>89</sup> Otherwise they must apply the objectively reasonable textual meaning or, if the legislation does not clearly speak to the dispute, “put the statute down.”<sup>90</sup>

State-court textualists sound a similar theme. Michigan Supreme Court Justice Robert Young Jr., for example, argues that statutory interpretation is “not a branch of common-law exegesis” because the separation of powers requires the court to respect the legislature’s codified text.<sup>91</sup> In construing this text, unlike when expounding common law, courts have no authority to correct what they see as poor, but otherwise constitutional, legislative policy choices.<sup>92</sup> This is a happy result for Justice Young, who likens the common law to a drunken, elderly relative overstaying his welcome at a party—better ignored than welcomed into the discussion.<sup>93</sup> Other commentary on state jurisprudence, while less disdainful of the common law, justifies formalist approaches to legislation by distinguishing between the common law process and statutory interpretation.<sup>94</sup>

Academic textualists follow suit. Textualist John Manning, for example, argues that classical English cases adopting nonformal methods of interpretation should not inform federal practice because those common law courts blended lawmaking and adjudicative powers in a manner al-

<sup>87</sup> Id. at 534 n.2 (citing Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 *Harv. L. Rev.* 802, 811–32 (1982)).

<sup>88</sup> *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 553 (7th Cir. 1997) (Easterbrook, J., concurring in part and dissenting in part).

<sup>89</sup> Easterbrook, *supra* note 86, at 544.

<sup>90</sup> Easterbrook, *supra* note 85, at 65.

<sup>91</sup> Young, *supra* note 4, at 280; see also *O’Neal v. St. John Hosp. & Med. Ctr.*, 791 N.W.2d 853, 879–80 (Mich. 2010) (Young, J., dissenting) (criticizing the majority for “perform[ing] a spectacularly hubristic feat in treating a statutory medical malpractice claim as though it were a mere matter of common law and thus subject to its revisionary powers”).

<sup>92</sup> See Young, *supra* note 4, at 281.

<sup>93</sup> Young, *supra* note 6, at 302.

<sup>94</sup> See Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 *Baylor L. Rev.* 339, 342–48 (2012).

ien to our constitutional norms and structure.<sup>95</sup> Similarly, while not staking a firm position on state law, his defense of federal textualism contrasts state courts' general common law powers with the limited jurisdiction of post-*Erie* federal courts.<sup>96</sup> These distinctions are central to Manning's rebuttal of William Eskridge's argument that Article III's "judicial Power" authorizes nonformal, equitable statutory interpretation.<sup>97</sup>

## 2. Formal Intentionalists and Faithful Agency Theorists

Statutory formalism is not limited to textualists who preclude any strong role for legislative intent in interpretation.<sup>98</sup> For example, although intentionalism is usually associated with immersion in legislative history, a number of intentionalists advocate formalist interpretive methods—prioritizing text as evidence of intent, rejecting the use of legislative history, and resisting calls to interpret statutes in light of "purpose" understood at a high level of generality.<sup>99</sup> A prime example is Professor Richard Ekins, whose rule-like rejection of legislative history and strong emphasis on publicly enacted text often resembles textualism in practice.<sup>100</sup>

<sup>95</sup> See Manning, *supra* note 8, at 29–36.

<sup>96</sup> See John F. Manning, Response, Deriving Rules of Statutory Interpretation from the Constitution, 101 Colum. L. Rev. 1648, 1662–63 (2001).

<sup>97</sup> See notes 57–61 and accompanying text.

<sup>98</sup> The greatest role that orthodox textualists will give to legislative intent is the minimal intention that a speaker wishes to be understood pursuant to the community's objective, conventional norms of speech in the given context. See John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2457–58 & n.258 (2003) (citing Joseph Raz, Intention in Interpretation, *in* The Autonomy of Law: Essays on Legal Positivism 249, 257–60 (Robert P. George ed., 1996)).

<sup>99</sup> See, e.g., Richard Ekins, The Nature of Legislative Intent 254, 272 (2012); cf. Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967, 992 (2004) (arguing that textualism is best understood as a rule-like method for identifying legislative intent); Caleb Nelson, What is Textualism?, 91 Va. L. Rev. 347, 349 (2005) (same).

<sup>100</sup> See Ekins, *supra* note 99, at 268–72; see also Donald L. Drakeman, Charting a New Course in Statutory Interpretation: A Commentary on Richard Ekins' *The Nature of Legislative Intent*, 24 Cornell J.L. & Pub. Pol'y 107, 117 n.90, 120 (2014) (noting some practical similarities despite sharp theoretical differences between Ekins and textualists like John Manning); Hillel Y. Levin, Intentionalism Justice Scalia Could Love, 30 Const. Comment. 89, 96–99 (2015) (reviewing Richard Ekins, *The Nature of Legislative Intent* (2012)) (noting the practical similarities between Ekins's intentionalism and Justice Scalia's textualism).

Such intentionalists contrast legislation and its interpretation with the common law method. Ekins argues that enacted legislation, or “a detailed set of legal rules—a code,” tends to “posit[] law in the best form possible.”<sup>101</sup> This is because its “public, canonical text, which is the focus of legal reasoning,” can settle public questions more clearly and decisively than alternative candidates like custom or “the best understanding of a line of cases.”<sup>102</sup> Similarly, he argues that a legislature is particularly well suited for deliberating about the common good.<sup>103</sup> If courts treat legislative language like case holdings—collapsing canonical decisions into higher-level purposes or inchoate principles—they undermine the common good and the rule of law.<sup>104</sup>

Professor Thomas Merrill puts faithful agency to legislation and respect for statutory meaning atop his hierarchy of tasks in statutory interpretation.<sup>105</sup> Only when those tools run out should courts use “integrative” tools like precedent, canons, and coherence with other enactments.<sup>106</sup> Merrill explains that the originalist, faithful-agent mode of interpretation flows from the nineteenth-century positivist notion that subjects, including judges, must obey the commands of the sovereign.<sup>107</sup> By contrast, Merrill argues that the less formal, “integrative” mode, which seeks to “knit [multiple] sources together in order to produce the meaning that has the best ‘fit,’” has historical roots in common law judging.<sup>108</sup> The “positivist,” legislature-directed mode of interpretation

<sup>101</sup> Ekins, *supra* note 99, at 125.

<sup>102</sup> *Id.*; see also Paul Yowell, *Legislation, Common Law, and the Virtue of Clarity*, in *Modern Challenges to the Rule of Law* (Richard Ekins ed., 2011) (identifying ways in which the clarity of legislative direction promotes rule-of-law values better than does the common law).

<sup>103</sup> See Ekins, *supra* note 99, at 125 (“The legislature responds directly to the complexity of the common good in that its deliberation is open to whatever is relevant . . . including moral argument, empirical findings, and the interests of various members of the community . . .”).

<sup>104</sup> See, e.g., *id.* at 253 (arguing that courts should respect the means a legislature has chosen to pursue a particular end, “even if it may be unwise”); cf. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv. L. Rev.* 2003, 2007 (2009) (“[B]ecause legislators choose means as well as ends, an interpreter must respect not only the goals of legislation, but also the specific choices Congress has made about how those goals are to be achieved.”).

<sup>105</sup> Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 *Lewis & Clark L. Rev.* 1565, 1575, 1590–91 (2010).

<sup>106</sup> *Id.* at 1582–83.

<sup>107</sup> See *id.* at 1567, 1569.

<sup>108</sup> *Id.* at 1569.

must have primacy to respect “the bedrock principle of our constitutional government—popular sovereignty.”<sup>109</sup> Accordingly, he criticizes “nonoriginalist” interpretations for departing too far from faithful agency, and he finds “pragmatic,” openly consequentialist approaches “corrosive” to the legal system.<sup>110</sup>

## II. THE PLACE OF LEGISLATION IN THE COMMON LAW TRADITION

This Article challenges the received wisdom on the relationship between the common law and statutory interpretation. Doing so requires demonstrating that the common law tradition does not subordinate reasonably clear statutory norms to judicial creativity. The first step is to show how common law theory is less hostile to legislation than many contemporary formalists believe. As this Part will show, sophisticated classical common lawyers saw legislation as a central component in a common law *system* that sought to internalize the general customs and ways of the realm. Rules arising in adjudication and legislative statutes were two forms of law pursuing the same goal of embodying the custom of the realm. As Part III will show, the process for enacting statutes in common law systems resembles the formulation of rules in adjudication in significant respects. Common law, in short, is not just about the heroic judge. In fact, it is no exaggeration to say that the populism of classical common law theory laid the groundwork for parliamentary supremacy.

Accordingly, a sharp separation between common law rules and legislation is not sustainable, nor is the belief that the common law tradition champions judicial decisions to the detriment of legislation. So far, antiformalists who claim the common law tradition would agree. But it is also far from clear that understanding statutory legislation as a kind of “common law” entails a rejection of formalism in statutory interpretation. While this Part and Part III will undermine the standard formalist view of the common law tradition, Part IV will challenge the inferences antiformalists draw from these conclusions. It will argue that, even though modern statutes are central components of a common law sys-

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<sup>109</sup> *Id.* at 1575.

<sup>110</sup> *Id.* at 1598–99. Merrill raises similar points while arguing that federal courts should have only limited inherent common law powers. See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 *U. Chi. L. Rev.* 1, 12–32 (1985); Thomas W. Merrill, *The Judicial Prerogative*, 12 *Pace L. Rev.* 327, 344–46 (1992).

tem, a more careful look at common law theory reveals strong arguments for formalist interpretation of our common law statutes. But before we get too far ahead of ourselves, let us first challenge the notion that the common law had little time or respect for statutes.

#### A. *Classical Common Lawyers' Views on Legislation*

The standard story scripts the common lawyer as lavishing attention on judicial decisions and ignoring statutes when he is not deriding them. This story contains more than a few grains of truth. Lawyers like Edward Coke (1552–1634) and John Davies (1569–1626) spoke of the common law as capturing the custom and immemorial wisdom of the people—the “perfection of reason” that no individual or legislature could replicate or capture in the form of words.<sup>111</sup> These common lawyers viewed statutes with hostility. While common law was shared, perfected reason and “the custom of the realm,”<sup>112</sup> Parliament produced “arbitrary and heedless legislation” that constituted “the exercise of will of one party over another.”<sup>113</sup> In terms reminiscent of a Hobbesian notion of legal authority, such common lawyers saw “the model of a command” as fitting statute law to a tee.<sup>114</sup> To minimize and domesticate this alien and dangerous form of law, such common lawyers strained to read legislation as declaratory of the common law or “relegated [it] to an insignificant corner of the space they claimed for common law.”<sup>115</sup> The only salutary role Parliament played was correcting ill-advised judicial departures from perfect, immemorial custom.<sup>116</sup>

But that is only part of the story. Even before the Austinian positivism that allegedly gave rise to faithful-agent theories of statutory interpretation—and even before Blackstone—an alternative interpretation of the

<sup>111</sup> Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 *Oxford U. Commonwealth L.J.* 155, 169–72 (2002) [hereinafter Postema I] (describing the “Coke-Davies Position” on common law as custom of the realm).

<sup>112</sup> Thomas Hedley, *Speech in Parliament on Royal Impositions*, in 2 *Proceedings in Parliament*, 1610, at 182 (Elizabeth Read Foster ed., 1966).

<sup>113</sup> Postema II, *supra* note 8, at 18.

<sup>114</sup> *Id.*

<sup>115</sup> Postema I, *supra* note 111, at 169–72.

<sup>116</sup> See Charles M. Gray, *Editor's Introduction to Matthew Hale, The History of the Common Law of England*, at xxv (Charles M. Gray ed., 1971) (1713). Common lawyers' skepticism toward legislation did not die in the seventeenth century. See, e.g., James Coolidge Carter, *Law: Its Origin, Growth, and Function* 221 (1907) (“The popular estimate of the possibilities for good which may be realised through the enactment of law is, in my opinion, greatly exaggerated.”).

common law tradition afforded a much greater role for legislation. Matthew Hale (1609–1676) and his mentor John Selden (1584–1654), who were “more sophisticated, more sceptical and more moderate” than Coke,<sup>117</sup> regarded statutes, like judicial decisions, as integral to a common law that is custom of the realm.<sup>118</sup> For Hale, the common law had three “formal constituents”: usage and custom, Acts of Parliament, and judicial decisions.<sup>119</sup> While Hale, like us, recognized that the term “Common Law” was often used to distinguish judicial decisions from “Statute Law,” he held that the term derived its meaning “most truly” from the fact that it is the shared “Law or Rule of Justice” in the kingdom—the law that is “common to the generality of all Persons, Things and Causes.”<sup>120</sup> Tellingly, the very first chapter of Hale’s landmark seventeenth-century work, *The History of the Common Law of England*, concerns “*Statute Laws, or Acts of Parliament.*”<sup>121</sup>

This focus on legislation was no mere brush clearing. In Hale’s work, legislation “far from being an ambiguous character, is the hero of the piece,” serving as an engine for improving English law from medieval times on.<sup>122</sup> Hale was a law reformer whose treatise on “The Amendment of the Laws” embraced careful “legislative alteration of the common law,” and his bias was as “prolegislative, as Coke’s was antilegislativ.”<sup>123</sup> An understanding of a system in which legal change was “effected by judicial decisions alone” would have “offended” Hale “even if it had been accessible intellectually.”<sup>124</sup> In Hale’s eyes, the common law tradition embraced legislation as an integral part of the system. Classical common law theory therefore did not unequivocally “contrast[] the reasoned and considered judgments of the courts with the arbitrary and heedless legislation of Parliament.”<sup>125</sup>

For Hale, the difference between written statutory law and “unwritten” law was the mode in which law became valid. Written, statutory

<sup>117</sup> Postema I, supra note 111, at 172.

<sup>118</sup> See id. at 172–76 (outlining the “Hale-Selden Position” on common law as custom of the realm).

<sup>119</sup> Postema II, supra note 8, at 11 (internal quotation marks omitted); see also Postema I, supra note 111, at 172–76 (describing Hale’s position on the three constituents of the common law as “orthodoxy” at the time of its writing).

<sup>120</sup> Hale, supra note 116, at 36–37.

<sup>121</sup> Id. at 3. Hale’s *History* was published posthumously. Gray, supra note 116, at xiii–xv.

<sup>122</sup> Gray, supra note 116, at xxvii–xxix.

<sup>123</sup> Id. at xxix.

<sup>124</sup> Id. at xxxv.

<sup>125</sup> Postema II, supra note 8, at 18.

law was valid “by virtue of having been explicitly made by an authorized law-maker.”<sup>126</sup> Unwritten law—either in the form of precedent, custom, or even rules embodied in parliamentary legislation that disappeared from the historical record—gained its authority by “incorporation into the use and practice” of the common law system.<sup>127</sup> On these grounds, Hale also treated Roman and canon law, which were undoubtedly committed to writing, as “Unwritten” law because the common law chose to incorporate them in limited areas.<sup>128</sup> The authority of precedential norms—and statutes from other polities—depended on the courts taking them up into the system, while extant parliamentary legislation had inherent force of its own right by the sheer fact of enactment “according to established constitutional rules.”<sup>129</sup>

Hale was no marginal or idiosyncratic figure, but rather represented a significant—and arguably more sophisticated and accepted—line of thought in the classical common law tradition.<sup>130</sup> In this line, statutes, along with judicial decisions and custom, were a crucial, respected component of the common law system. More needs to be said about the nature of and relationship between these constituent parts of the common law. Hale’s view that legislation is valid by virtue of parliamentary enactment alone could suggest a radical difference between statutes and precedent within the common law system—perhaps even laying the groundwork for “late nineteenth century assumptions” that written statutes are like orders of a “positivistic sovereign.”<sup>131</sup> Yet intellectual historians also interpret Hale as seeing legislation and precedent as manifestations of the same common law in different “modes of existence,” not as radically different legal creatures.<sup>132</sup> To begin to solve this puzzle, and to dispel the notion that classical common lawyers’ respect for statutes flowed from Hobbesian premises, it is useful to explore the com-

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<sup>126</sup> *Id.* at 19.

<sup>127</sup> *Id.*; see Hale, *supra* note 116, at 16–17.

<sup>128</sup> See Hale, *supra* note 116, at 19.

<sup>129</sup> Postema II, *supra* note 8, at 19.

<sup>130</sup> Professor Gerald Postema, a leading contemporary historian of common law thought, places Hale’s writings on the nature of the common law system and adjudication at the center of his reconstruction of classical common law theory. See generally Postema I, *supra* note 111, at 172–76; Postema II, *supra* note 8; Gerald J. Postema, *Bentham and the Common Law Tradition* 6–35 (1986) [hereinafter Postema, Bentham].

<sup>131</sup> Eskridge, *supra* note 19, at 1502; Pildes, *supra* note 73, at 898.

<sup>132</sup> Postema II, *supra* note 8, at 19.



mon lawyers' understanding of legislation itself, not just its place in the legal system.

### B. Two Models of Legislation

Jeremy Waldron's book, *Law and Disagreement*, is a helpful starting point for theorizing about legislation and legislatures.<sup>133</sup> There, he identifies two different conceptions of legislation: one which descends from a sovereign legislator versus one which ascends from the custom of the people.<sup>134</sup> The first, which he argues is dominant among legal theorists today, draws a "Hobbesian picture."<sup>135</sup> There, following Hobbes, Jeremy Bentham, and John Austin, "legislative proposals [are] put forth by individuals, one of which is adopted authoritatively by the sovereign legislator and then promulgated with the marks of valid law."<sup>136</sup> The roots of this conception, Waldron argues, trace back to the Roman law notion that the will of the prince makes a rule law. The prince is "autonomous, independent and, to use a modern term which seems quite legitimate to employ in this context, . . . sovereign."<sup>137</sup>

Drawing on the work of historian-professor Walter Ullmann, Waldron describes this theory of legislation by a unitary sovereign as the "descending" model of legislative authority.<sup>138</sup> This is not the only conception of legislation available, though it is one that common lawyers often used in their polemics against legislation.<sup>139</sup> An alternative conception, whose origins also predate the common law, is the "ascending" model. It views law as an embodiment of shared custom—"the law of the people

<sup>133</sup> Jeremy Waldron, *Law and Disagreement* (1999) [hereinafter Waldron, *Law and Disagreement*]; see also Jeremy Waldron, *The Dignity of Legislation* 1 (1999) (positing that contemporary jurisprudence lacks a "model that is capable of making normative sense of legislation as a genuine form of law, of the authority that it claims, and of the demands that it makes on the other actors in a legal system").

<sup>134</sup> See Waldron, *Law and Disagreement*, supra note 133, at 55.

<sup>135</sup> *Id.* at 40.

<sup>136</sup> *Id.*; see *id.* at 43–45 (tracing this vision's connection with Hobbes, Bentham, and Austin).

<sup>137</sup> *Id.* at 56 (quoting Walter Ullmann, *Principles of Government and Politics in the Middle Ages* 19 (1961)).

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., James C. Carter, *The Proposed Codification of Our Common Law* 6 (Gale 2015) (1884) (contrasting a common law that by process of "natural growth . . . springs up from, and is made by, the people" with "Codes, enacted by the arbitrary power of the sovereign, or by the authority of a legislative assembly").

or the law of the land, rather than the king or the will of the prince.”<sup>140</sup> Law “wells up from those who are subject to it, rather than being handed down from on high.”<sup>141</sup> While the descending, unitary theory of authority fits neatly with a monarchical legislator, Waldron argues that the modern analogue to the ascending, customary model is legislation by a pluralistic assembly.<sup>142</sup> There, legislation emerges

from a process that is *deliberative*, a process distinguished not just by its Hobbesian decisiveness, but also by the engagement with one another in parliamentary debate of all the views that might reasonably be thought competitive with whatever legislative proposal is under consideration. Modern legislatures are structured to secure this, with rules about representation . . . rules about hearings, rules about debates, rules about amendments, and above all rules about voting.<sup>143</sup>

Waldron discusses the late-medieval and feudal roots of the ascending, customary model of legislation and analyzes how the contemporary legislative process replicates it in modern form. The ascending model arose in England with a feudal king making decisions in consultation with the nobility, with both parties bound by reciprocal rights and obligations.<sup>144</sup> Growing from this base, the rise of democratic assemblies “was not a matter of the people seizing sovereign legislative authority hitherto held by the monarch,” but rather “elected representatives coming to be regarded as indispensable members” of a consultative community.<sup>145</sup>

Accordingly, while “custom and assembly-legislation look quite different as sources of law,” Waldron finds “surprising affinities” between the two in how a group larger than a prince or a king—“the people”—plays a central role in shaping the law.<sup>146</sup> Waldron finds many of these affinities in medieval jurisprudence,<sup>147</sup> but essential to the present argument is identifying the links in the chain between medieval customary

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* at 55.

<sup>143</sup> *Id.* at 40.

<sup>144</sup> See Ullmann, *supra* note 137, at 151–53.

<sup>145</sup> Waldron, *Law and Disagreement*, *supra* note 133, at 59.

<sup>146</sup> *Id.* at 55.

<sup>147</sup> See *id.*; see also Joseph Canning, *The Political Thought of Baldus de Ubaldis* 100–01 (2003) (“Custom and statute do not differ in their efficient cause and its efficacy, but [rather] in their mode and form.”).

law and the modern legislation that Waldron sees as its contemporary instantiation. Classical common law thought, I argue, helps bridge that temporal and conceptual gap.

*C. The Common Law, Including Legislation, as Custom of the Realm*

In England, the ascending model of legal authority took root in the form of the *lex terrae*—feudal law governing estates.<sup>148</sup> In time, this law became the font for what we now know as the common law, “the third great European system of law” after Roman and canon law.<sup>149</sup> In important respects, the development of common law thought is a story of increasing identification between law and popular custom. However, the twelfth- and thirteenth-century common lawyers who wrote the treatises Bracton and Glanvill were more likely to link the common law with the will of the monarch than with the customs and ways of the people.<sup>150</sup> By 1528, however, Christopher St. Germain was tracing linkages between the technical doctrine of the common law and the “general customs of old time used through all the realm.”<sup>151</sup> His conception of custom was “unambiguously populist.”<sup>152</sup>

The great lawyer John Selden, in turn, saw the superiority of the common law not in its antiquity, but in how it fit the needs and ways of the people subject to it.<sup>153</sup> Similarly, he traced the common law’s authority to its customary links. Living in accordance with custom was, to Selden, a form of consent. Identifying custom at the root of common law made it possible to claim that this positive law grew up from the community.<sup>154</sup> By the late seventeenth century it was unremarkable for Hale

<sup>148</sup> See Ullmann, *supra* note 137, at 166–67; see also Postema, Bentham, *supra* note 130, at 3 (“Classical Common Law theory was born at a time when, emerging from feudalism, modern English society and the modern state were taking shape.”).

<sup>149</sup> Ullmann, *supra* note 137, at 167; see Hale, *supra* note 116, at 36 (stating that the common law “[t]is called sometimes by Way of Eminence, *Lex Terrae*”); Ullmann, *supra* note 137, at 166 (“If we may borrow a term from later generations we may justifiably call the *lex terrae* the early thirteenth-century expression for the English common law.”).

<sup>150</sup> See Alan Cromartie, *The Idea of Common Law as Custom*, in *The Nature of Customary Law: Legal Historical and Philosophical Perspectives* 203, 204–206 (Amanda Perreau-Saussine & James B. Murphy eds., 2007).

<sup>151</sup> *Id.* at 211 (quoting Christopher St. Germain, *Doctor and Student* 35 (T.F.T. Plunkett & J.L. Barton eds., 1974)).

<sup>152</sup> *Id.* at 211.

<sup>153</sup> See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale* 103 Yale L.J. 1651, 1698 (1994).

<sup>154</sup> See *id.* at 1699–700.

to identify the “custom of the realm” as “the great substratum” of the common law.<sup>155</sup> Common lawyers by then read the king’s promise in Magna Carta to honor the *lex terrae* as a pledge to adhere to this common law. This equating of *lex terrae* and common law allowed common lawyers to put mutual obligation and consensual governance between king and subjects at the center of English law, supporting the claim that “the common law” is a basic component of the English legal system.<sup>156</sup>

It comes as no surprise that Hale described Hobbes’s conception of the sovereign—an individual dictating authoritative rules unconstrained by anything but conscience and God’s judgment—as “utterly falce,” “agst all Naturall Justice,” “Pernicious to the Govern.,” “Destructive to the Comon good,” and “Without any Shaddow of Law or reason to Support them.”<sup>157</sup> The common law emerged in opposition to political theories of absolutism that sought to centralize authority in sovereign monarchs who made law “guided by nothing but their own assessments of the demands of justice, expediency, and the common good.”<sup>158</sup> Common lawyers “reasserted the medieval idea” that law is discovered and expressed by “king, Parliament, or judges,” not made and imposed by them from above.<sup>159</sup>

Classical common lawyers did not view the law discovered and expressed as pertaining to universal, rational truths (or at least not directly), but rather as “historically evidenced national custom.”<sup>160</sup> This repeated refrain that common law represents the custom of the realm dovetails with Waldron’s ascending model of legislation: The law is “something held in common, something essentially ours, something in-

<sup>155</sup> Hale, *supra* note 116, at 84; see Cromartie, *supra* note 150, at 221–22 (discussing Hale).

<sup>156</sup> Hale, *supra* note 116, at 36 (stating that when Magna Carta uses the term “*Lex Terrae*, . . . certainly the Common Law is at least principally intended by those Words”); Ullmann, *supra* note 137, at 167 (“The ingenuity of the makers of Magna Carta in applying the term *lex terrae* is indeed in no need of comment.”).

<sup>157</sup> Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe (1835), *reprinted in* 5 W.S. Holdsworth, *A History of English Law* 500, 509 (1927).

<sup>158</sup> Postema, Bentham, *supra* note 130, at 3–4.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 4; see also Philip Hamburger, *Law and Judicial Duty* 51–52 (2008) (explaining the classical understanding of common law as a form of custom “recorded in popular memory” and instantiated in the “use and practice” of the courts); Brian Simpson, *The Common Law and Legal Theory*, *in* A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* 359, 373 (1987) (identifying and embracing “the traditional notion of the common law as custom, which was standard form in the older writers” like Hale and Blackstone).

deed which only exists to the extent that it is embedded in and part of a shared way of life”; furthermore, “metaphors of organic growth rather than artificial innovation” will more commonly describe substantive change in the system.<sup>161</sup> Hale and Selden understood common law as custom to be “constantly changing” through interpretation and “sometimes outright legislation.”<sup>162</sup> Over time and changed circumstances, the law would change, but what mattered was the continuity of the legal system’s framework and the law’s congruence with the “‘frame’ and ‘disposition’ of the people” subject to it.<sup>163</sup> The appeal to custom, in this sense, is not a claim about “historical origins” or the particular form or instantiation of law, but a claim about law’s “essential nature and its foundations or authority.”<sup>164</sup> For this reason, the three “constituents” of the common law—statute, judicial decisions, and custom—are three different “modes of existence of law, or forms of legal validity” for law grounded in a shared sense of reasonableness.<sup>165</sup>

Few today surpass Waldron’s championing of legislation in the Anglo-American legal system. But if he is correct that our system of legislation is a bottom-up affair, and if this model arose in protean form in twelfth-century England as customary feudal law,<sup>166</sup> the common law tradition appears to form links in the chain from medieval customary law to legislation as we know it. This implication is less counterintuitive when we recall how Hale saw legislation as integral to the common law system. In fact, “the increasing salience of customary law” in common law thought “owed something to the role played by statute” as an increasingly important means of legal change.<sup>167</sup> Legislation and judicial precedent are different “modes of existence” of the same common law in

<sup>161</sup> Waldron, *Law and Disagreement*, supra note 133, at 56–57.

<sup>162</sup> Postema I, supra note 111, at 173.

<sup>163</sup> Gray, supra note 116, at xxvii (stating that for Hale, “only one feature of the [legal] system was clearly immemorial . . . : the constitutional frame” of the English polity); Postema I, supra note 111, at 175.

<sup>164</sup> Gerald J. Postema, *Some Roots of Our Notion of Precedent*, in *Precedent in Law* 8, 16 (Laurence Goldstein ed., 1987).

<sup>165</sup> Postema II, supra note 8, at 11, 19 (internal quotation marks omitted).

<sup>166</sup> See Ullmann, supra note 137, at 155–56 (describing how the notion of descending, theocratic kingship gave way to ascending, feudal notions of kingship during the reigns of Kings Henry II, Richard I, and John).

<sup>167</sup> Cromartie, supra note 150, at 213–14 (referring to the role statutes played in “putting through the English Reformation” and stating that “[i]f statute had power to alter the country’s religion, the obvious corollary was that the highest law was a law made by popular consent”).

that they seek to channel popular custom. And while they operate through different methods, neither are limited to an understanding of legal development as top-down imposition of the will of a sovereign (or sovereign few).<sup>168</sup>

### III. LEGISLATING IN THE COMMON LAW TRADITION

In the common law tradition, both legislation and judicial decision making seek to develop law that reflects the customs and beliefs of those subject to it. This shows a basic connection between decisional and statutory law. For many statutory antiformalists, this shared root is methodologically crucial: If “common law and statutes” are not speciously segregated as a conceptual matter, the style of reasoning in common law adjudication, not formalist restraint, should prevail in statutory interpretation.<sup>169</sup> This Part drills down on the premise underlying this interpretive conclusion, exploring how the development of precedent and statutes are congruent in the common law tradition. It does so first by distilling what classical common lawyers thought to be distinctive about the “artificial reason” of the common law jurist—a topic that is the most frequent focus of common law theory then and today. This Part then identifies parallels between this artificial reason of common law adjudication and current methods of legislating in the United States. These similarities show continuity between judicial decision making and legislation in the common law tradition that persists today. As will become clearer in Part IV, however, many of these structural similarities point toward formalism in the interpretation of such “common law” statutes.

#### *A. Artificial Reason of the Common Law*

The first step is appreciating what common lawyers thought to be distinctive about their practice. Classical common lawyers frequently and unfavorably compared the natural reason of an ordinary person, a monarch, or “Casuists, Schoolmen, [and] Morall Philosophers” with the “ar-

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<sup>168</sup> Cf. Geoffrey Goldsworthy, *The Sovereignty of Parliament* 109 (1999) (stating for many common lawyers “the authority of the common law and that of Parliament were one and the same: the common law embodied the wisdom of the community, as expressed in immemorial customs,” while that wisdom “lives still in that which the law calls the ‘reason of the kingdom,’ the votes and ordinances of Parliament”).

<sup>169</sup> See Strauss, *The Common Law*, *supra* note 7; Strauss, *Resegregating*, *supra* note 54.

tificial reason and judgment” of the common law.<sup>170</sup> The “unstable reason” of those untutored in the law will fall into “jangling and Contradiction”<sup>171</sup> and reflect not disciplined, shared reason, but “the arbitrary incursion of political will.”<sup>172</sup> This notion of artificial reason is as controversial as it is central to common law theory. For critics like Bentham, artificial reason was a façade that “Judge & Co.” used to protect their power and prestige.<sup>173</sup> For common lawyers, it was essential to the enterprise, though rarely defined with precision.

As Professor Gerald Postema explains, common law’s artificial reason was pragmatic and contextual, not abstract and systematic.<sup>174</sup> Unlike Bentham’s legislator “surveying the problems” and formulating systematic rules from on high, common lawyers worked close to the ground, “with their eyes down,” to find practical solutions to discrete problems.<sup>175</sup> As a corollary to this pragmatic, contextual orientation, aspirations for systemic theoretical coherence played a limited role in the common law. To its critics and champions alike, the common law was a corpus “wholly without conformity, and altogether dismembered” and “a chaos with a full index.”<sup>176</sup> Tennyson described that “codeless myriad of precedent” as a “wilderness of single instances.”<sup>177</sup> According to legal historian Brian Simpson, the “common law is more like a muddle than a

<sup>170</sup> Holdsworth, *supra* note 157, at 503; Prohibitions del Roy, *in* Edward Coke, 12 The Reports of Sir Edward Coke, 63, 64–65 (London, E. & R. Nutt & R. Gosling 1727). See generally Postema II, *supra* note 8, at 1–11 (giving an overview of the classical common lawyers’ conceptions of “artificial reason”).

<sup>171</sup> Holdsworth, *supra* note 157, at 503.

<sup>172</sup> Postema II, *supra* note 8, at 2.

<sup>173</sup> Postema, Bentham, *supra* note 130, at 273–75.

<sup>174</sup> Postema’s reconstruction of this “artificial reason” is the most sophisticated and prominent rendition in contemporary jurisprudence. In addition, after writing what is considered an authoritative book on the common law tradition and Jeremy Bentham, see Postema, Bentham, *supra* note 130, Professor Postema was selected to author the chapter on the philosophy of the common law in the magisterial *Oxford Handbook of Jurisprudence and the Philosophy of Law*.

<sup>175</sup> Postema II, *supra* note 8, at 3 (quoting S.F.C. Milsom, *Historical Foundations of the Common Law* 7 (1981)) (internal quotation marks omitted).

<sup>176</sup> Postema II, *supra* note 8, at 5–6 (quoting John Dodderidge, *The English Lawyer* 190 (1631)); T.E. Holland, *Essays upon the Form of the Law* 171 (London, Butterworths 1870) (internal quotation marks omitted).

<sup>177</sup> Lord Alfred Tennyson, *Aylmer’s Field*, *in* *The Poetic Works of Alfred, Lord Tennyson*, 240, 240–52 (W.J. Rolfe ed., Cambridge ed. 1898) (1793).

system,” and the common law mind is “repelled by brevity, lucidity, and system.”<sup>178</sup>

The classical common lawyer, rather than seeking a small set of principles uniting whole fields of law,<sup>179</sup> was content to have small pockets of the law work and make sense, even if the broader doctrinal structure did not hang together in one elegant constellation. Although common law thought does not categorically forswear the search for principles across legal domains, “it recognises that often practical life can be better managed intelligently when portions or domains are treated as relatively discrete.”<sup>180</sup> To seek only “local coherence” along those lines is usually “a more manageable task and enables more supple responses to changing circumstances.”<sup>181</sup> Very often these pragmatic preferences will maintain rules and “categories that may appear, from a more global perspective, to be unsupported by good reason” or a legal regime that “from a more theoretical perspective, might have appeared to be a lack of systemic coherence.”<sup>182</sup> This feature of common law practice frustrated academic lawyers steeped in the civil law tradition, who wanted judges to undertake “learned explication” that would make “English law more complete and rational.”<sup>183</sup> Common law reasoning, moreover, was “*discursive*, that is, as a matter of deliberative reasoning and argument in an interlocutory, indeed *forensic*, context.”<sup>184</sup> Even the wisest individual could not reach sound conclusions about the common law by reasoning alone. Rather, practitioners had to present and evaluate arguments in the

<sup>178</sup> Simpson, *supra* note 160, at 24; see also Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections*, 10 *Tel-Aviv U. Stud. L.* 33, 33 (1990) (“[T]he distinguishing marks of the common law . . . are its resistance to systematization, its refusal to consider more than the case at hand, and [its resistance to] attempts at ‘academic’ or comprehensively analytical statements of substantive rules and their presuppositions.”).

<sup>179</sup> See Gerald J. Postema, *Law’s System: The Necessity of System in Common Law*, 2014 *N.Z. L. Rev.* 69, 69–70 [hereinafter Postema, *Law’s System*] (criticizing modern attempts at this systemization).

<sup>180</sup> *Id.* at 97.

<sup>181</sup> *Id.*; cf. Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 *Law & Phil.* 355, 368 (1984) (arguing that in legal reasoning “room has to be made for what can be called ‘area specific coherence’”).

<sup>182</sup> Postema, *Law’s System*, *supra* note 179, at 97; Postema II, *supra* note 8, at 5; see Hamburger, *supra* note 160, at 38 (“[C]ommon lawyers did not forgo their attention to reason, but they were . . . confident that common law was binding even if it was unreasonable or contrary to natural law.”).

<sup>183</sup> Hamburger, *supra* note 160, at 116.

<sup>184</sup> Postema II, *supra* note 8, at 7 (spelling of “discursive” de-Anglicized for expositional purposes).



structured, indeed solemn, forum of a court of justice.<sup>185</sup> The ritualized argument of the courtroom “disciplined” individuals’ reasoning by subjecting arguments “to cross-examination in a public forum according to public standards of success and failure” and forcing disputants “to strive for common judgment in the face of dispute and disagreement.”<sup>186</sup> Relatedly, artificial reason was “common or shared” reason, a competence learned through this practice of argument and immersion in the life and experience of the community.<sup>187</sup> Artificial reason is different than the speculative reason of the philosophers, and common law theory’s corresponding model of adjudication rejects the notion that courts in challenging cases simply appeal to natural reason or conscience.<sup>188</sup>

Artificial reason is a product of discipline, argument, and experience that seeks to identify, or approximate by construction (“artifice”), the community’s shared reason on social problems. Artificial reason aspires to find the “convergence of the views and judgments of the larger community, and forging and maintaining a common sense of reasonableness.”<sup>189</sup> In contrast to the speculation of the philosopher or the isolated judgment of sovereigns, artificial reason is “social [as] opposed to individual.”<sup>190</sup> Accordingly, “[s]aliency, not vision, and pragmatic convergence,” not broad “theoretical coherence” with a “single moral vision or systematic rationality” are the common law’s aim.<sup>191</sup> Requiring broad coherence under such demanding criteria will often frustrate the search for common reason.

Finally, even though the validity of a piece of artificial reasoning turns on its compliance with a shared sense of reasonableness, the resulting law must offer public guidance. While not prioritizing clear rules as much as some later theorists, common law thought comprehended that

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<sup>185</sup> See *id.* (quoting 9 Edward Coke, *The Reports of Sir Edward Coke* xiv (George Wilson ed., Dublin, James Moore 1793) (“[N]o one man alone with all his true and uttermost labours, nor all the actors in them themselves by themselves *out of a court of justice* nor in court *without solemn argument* . . . could ever have [come to the right reason of the rule].” (emphasis added))).

<sup>186</sup> *Id.* at 8.

<sup>187</sup> *Id.* at 8–9 (emphasis omitted).

<sup>188</sup> See *id.* at 9. The classical common lawyer rejects “the Hobbesian idea that once the sources of law run out the judge must appeal to his natural reason, or the civilian view . . . that the judge must appeal to conscience.” *Id.*

<sup>189</sup> *Id.* at 10.

<sup>190</sup> *Id.* at 11.

<sup>191</sup> *Id.* at 10.

its rules must be “intelligible to those who are subject to it.”<sup>192</sup> Those rules must “make practical sense” and broadcast “what kind of behavior the law calls for and . . . give them some reason for complying.”<sup>193</sup> This guidance has the substantive component of practical sensibility, but also suggests a formal aspect. The common law offers guidance because of its publicity. Not only is the process of reasoning public, the resulting guidance “is addressed *in public to* a public of rational agents that it seeks to guide.”<sup>194</sup> Thus, the common law offers a “theoretically untidy, but practically accessible and widely and publicly intelligible, framework for legal reasoning.”<sup>195</sup> What it lacks in elegance, it makes up for in “public accessibility and with it effective public accountability.”<sup>196</sup>

### *B. Legislating as Artificial Reasoning*

In case law, the artificial reason of classical common law looks for workable solutions to particular problems through a disciplined practice of public argument and deliberation. It aims to forge a shared understanding of what is reasonable that, in part because of its reasonableness, offers public and normative guidance. If sophisticated, orthodox common law theory also includes legislation as a critical element, it would not be surprising to see statutes develop in a fashion similar to the judicial reasoning that is the more frequent focus of common law theory.

In fact, central features of statute making in United States federal law show parallels with, or at least fruitful analogies to, the artificial reason that develops doctrine in common law adjudication. It is harder to generalize, but similar arguments may also apply to much state legislation.<sup>197</sup> This analysis will focus on federal law for simplicity’s sake and because federal law offers the strongest challenge to the argument that the common law tradition remains relevant. It is a frequent refrain that federal courts, unlike state courts, are not general common law courts.<sup>198</sup>

<sup>192</sup> Postema, *Law’s System*, *supra* note 179, at 88–89.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 89.

<sup>195</sup> *Id.* at 103.

<sup>196</sup> *Id.* (emphasis omitted).

<sup>197</sup> The success of codification movements in some jurisdictions and the prevalence of uniform laws in many others may weaken the analogies between legislation and common law development discussed *infra* note 235 and accompanying text.

<sup>198</sup> See *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (“Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.”) (citations omitted). See generally Nelson, *State*

The argument here is that even in federal law the common law tradition persists, at least in the style of legislation. Others, notably Professor Peter Strauss, have flagged this resemblance.<sup>199</sup> This Section develops that insight in light of classical common law theory.

Take first how common law reasoning and development was pragmatic, contextual, and nonsystematic. Federal legislation is famously (or notoriously) piecemeal and reactive, responding in incremental fashion to discrete and particularly salient problems.<sup>200</sup> Even systemic reform statutes like the Affordable Care Act and the Sarbanes-Oxley Act build off existing structures and leave wide swaths of problems unanswered, usually for administrative agencies to resolve in discrete rulemakings. Less common are statutes on the model of continental codes, which “emerge [as] a single legislative act, after exquisite intellectual consideration” and are amended only after similar comprehensive study.<sup>201</sup> Federal legislation may not be a “chaos with an index,” but it bears recalling that the United States Code is an after-the-fact reorganization and indexing of strands of session laws of varying size, enacted at different times, targeting discrete problems.<sup>202</sup>

This particularism and inelegance is in part, as Waldron has argued, a feature of bottom-up legislation produced when a large group of people with diverse views come to agreement through deliberation and argument, not “Hobbesian decisiveness” from above.<sup>203</sup> In fact, a common criticism of the ascending style of legislation is that nothing “coherent” can arise from the “babel” of multiple legislators’ “cross-cutting pro-

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and Federal Models, *supra* note 77 (discussing state court use of common law to resolve silences in statutes, unlike federal courts which find answers in the statute itself); Pojanowski, *supra* note 7 (examining federal courts’ lack of common law power, as opposed to state court powers, and their treatment of statutes).

<sup>199</sup> Strauss, *The Common Law*, *supra* note 7.

<sup>200</sup> See *id.* at 225 (describing the American tendency toward “common law legislating,” namely “the practice of creating statutes to achieve marginal changes in existing law in response to perceived deficiencies, rather than legislating comprehensively as continental codes seek to do”).

<sup>201</sup> *Id.* at 235.

<sup>202</sup> See Tobias A. Dorsey, *Some Reflections on Not Reading Statutes*, 10 *Green Bag* 2d 283, 284 (2007) (noting that rather than looking to authoritative session laws published in serial form in the United States Statutes at Large, lawyers overwhelmingly use the U.S. Code, which “is—no disrespect intended—a Frankenstein’s monster of session laws”).

<sup>203</sup> Waldron, *Law and Disagreement*, *supra* note 133, at 40 (“For us, it matters that legislation should emerge from a process that is deliberative, a process distinguished not just by its Hobbesian decisiveness, but also by the engagement with one another in parliamentary debate . . . .” (emphasis omitted)).

posals and counter-proposals.”<sup>204</sup> The descending, unitary model of law has greater potential for systemic legislation because centralization of authority (whether through a ruler/ruling group or deference to expert-authors) reduces the risk that differing opinions will shatter consensus around a global proposal.

Any coherence in bottom-up legislation will, like common law precedent, tend to be “local” in character, for it can be challenging enough to secure agreement on one proposal, let alone the corpus of legislation as a whole. Even with respect to a proposed solution to a particular problem, broad coherence in bottom-up legislation is unlikely. Among large groups, there may be substantial disagreement; even if legislators share the same particular goal and general values, they may disagree about the means of pursuing a goal or the tradeoffs against other aims. Ascending legislation will often be the product of compromise, leaving coherence an admirable aim, but not always a feasible one.<sup>205</sup> Federal scholars, particularly formalists, appreciate how such compromise often leads to awkwardness rather than elegance in legislation.<sup>206</sup>

The legislative process in ascending regimes will not have the character of ordinary conversation, but will rather be a formal, rule-laden, and procedure-driven enterprise that aims at including a wide range of views from diverse representatives while also structuring that discussion to focus on a limited set of proposals.<sup>207</sup> For large assemblies there is rarely a seamless translation from policy ideal to statute; a proposal must travel the gauntlet of legislative procedure and often will not look the same coming out as it entered.<sup>208</sup> Further, where some classical common law-

<sup>204</sup> *Id.* at 53.

<sup>205</sup> See Jeremy Waldron, *Legislating with Integrity*, 72 *Fordham L. Rev.* 373, 386 (2003); see also Manning, *supra* note 79, at 1304 (“[L]egislation often represents unknowable compromise, [and] that compromise often requires legislators to embrace means that do not fully effectuate the ends that inspired the law’s enactment.”).

<sup>206</sup> See Manning, *supra* note 79, at 1310 (“[S]tatutes typically represent the product of compromise, and compromises are not always tidy.”).

<sup>207</sup> See Waldron, *Law and Disagreement*, *supra* note 133, at 70 (“[W]hat happens in the legislature [is] more like proceedings than conversation.” (emphasis omitted)); *id.* at 40 (“Modern legislatures are structured to secure [reasoned deliberation], with rules about representation . . . rules about hearings, rules about debates, rules about amendments, and above all rules about voting.”).

<sup>208</sup> See John F. Manning, *Textualism and Legislative Intent*, 91 *Va. L. Rev.* 419, 424 (2005) (“[The legislative process] conditions [Congress’s] ability to translate raw policy impulses or intentions into finished legislation. For them, intended meaning never emerges unfiltered; it must survive a process that includes committee approval, logrolling, the need for floor time, threatened filibusters, conference committees, veto threats, and the like.”).

yers skeptical of parliamentary legislation feared the jangling contradictions of the mob, a more charitable and nuanced view could discern intricate procedures that structure the chaos and reach outcomes that, however inelegant, are not entirely arbitrary.<sup>209</sup>

This formalized, nearly ritualized process of deliberation is the parliamentary analogue to the classical common lawyer's "disciplined," indeed "solemn," practice of artificial reason.<sup>210</sup> The structure and order that mark each stage of legislative deliberation prevent cacophony and allow legislators to benefit from diverse "perspectives to come up with better decisions than any one of them could make on his own."<sup>211</sup> Like common lawyers, legislators draw on this collected wisdom and experience while reasoning and arguing "in a public forum according to public standards of success and failure."<sup>212</sup> To put a twist on a classical common law theme, structured deliberation in large assemblies, rather than the "the moral vision of any individual," best secures "effective practical outcomes through convergence of judgment on common solutions."<sup>213</sup> In this light, Coke's claim that "no one man alone . . . out of a court of justice nor in court without solemn argument" can discover the common law<sup>214</sup> recapitulates itself in Waldron's hypothesis that when many gather to deliberate under parliamentary discipline, each person contributes "to a practical intelligence that outstrips the intelligence of which any one of them is capable."<sup>215</sup>

<sup>209</sup> See Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 49–50 (1991) ("Legislatures apparently use a variety of structures, rules, and norms to ameliorate the problem of cycling majorities. As a result, legislatures possess 'structure-induced equilibrium.'"); *id.* at 50 ("[These] various institutional features of legislatures may promote stability and coherence."). For a discussion of shifting views in public and social choice theory about legislative rationality, see Manning, *supra* note 79, at 1293–303.

<sup>210</sup> Cf. Postema II, *supra* note 8, at 8.

<sup>211</sup> Waldron, *Law and Disagreement*, *supra* note 133, at 72; see *id.* at 71 ("[A legislature] must deliberate at every stage and in every aspect of its proceedings . . . so that a procedure involving drafting, consultation, committee hearings, bicameralism, conference committees, first, second and third readings, and so on, can add up to a structured but unified legislative process."). For a discussion of how the intricacy of legislative procedures assist reasoned decision making, see Ekins, *supra* note 99, at 164–69, 224–30.

<sup>212</sup> Postema II, *supra* note 8, at 8; see Holdsworth, *supra* note 157, at 503 (discussing the superiority of common lawyers' experience in "[c]onversation between man and man").

<sup>213</sup> Postema II, *supra* note 8, at 10.

<sup>214</sup> Coke, *supra* note 185, at xiv; see Postema II, *supra* note 8, at 7 ("right reason").

<sup>215</sup> Waldron, *Law and Disagreement*, *supra* note 133, at 72 (citing Aristotle, *Politics*, bk. III, ch. 11, at 66–68 (Stephen Everson ed., Cambridge Univ. Press 1988) (c. 350 B.C.E.)).

The practice and procedures of large assembly legislation, like classical common law, aim at “common judgment in the face of dispute and disagreement.”<sup>216</sup> In federal legislation, some of these procedures are entrenched in the written Constitution. One of the most important of such structures—the requirement of bicameralism and presentment—has the effect of forging common judgment by encouraging compromise. The requirement that both chambers of Congress and the President agree on the same proposal creates an effective supermajority requirement for legislation, forcing political majorities to negotiate with minorities if they want a proposal to succeed.<sup>217</sup> Thus not only does federal legislative procedure allow Members of Congress to pool and direct their knowledge, it can force dominant coalitions to incorporate concerns of the opposition in reaching practical solutions to problems.

As defenders and critics of bicameralism and presentment have noted, these veto-gates can further limit legislative coherence.<sup>218</sup> Legislation that survives the federal crucible commends the support of a supermajority of plural voices, including those who may have initially began the process as uncommitted or in the opposition. Custom, the root of the ascending model of law, connotes an informal, near-unanimity that no complex legal system can depend upon exclusively. But the many-gated federal legislative process, by regularly producing law that more than a threadbare majority is willing to accept, constructs—artifices—through procedural form a kind of legislative custom of the second best. Such legislation does not grow from the natural, organic consensus of a homogenous community, and many policies that slimmer majorities prefer

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<sup>216</sup> Postema II, *supra* note 8, at 8.

<sup>217</sup> See John F. Manning, *Competing Presumptions about Statutory Competence*, 74 *Fordham L. Rev.* 2009, 2039 (2006) (“[P]olitical scientists have shown that by dividing the legislative process among three institutions answering to distinct constituencies, the bicameralism and presentment requirements . . . in effect create a supermajority requirement . . . [That requirement] assign[s] political minorities extraordinary power to stop (or at least slow) the passage of legislation and, more important, to insist upon compromise as the price of their assent.” (footnote omitted)).

<sup>218</sup> See Ekins, *supra* note 99, at 176 (“[American legislatures] may enact legislation that is not fit to be chosen by a reasoning person, because it is rendered incoherent by the various riders insisted on by veto-players.”); Manning, *supra* note 217, at 2010 (“The design of the legislative process emphasizes the need for compromise, and compromises are often complex, awkward, and even incoherent . . .”).

will not become law.<sup>219</sup> Yet resulting statutes will reflect what a large portion of the community's representatives agrees to accept as their own law.<sup>220</sup>

Finally, legislative debate and resulting statutes comport with the common law's aspirations for "public accessibility and with it effective public accountability."<sup>221</sup> To be sure, much deliberation occurs behind closed doors; committee reports may be crafted more to anticipate litigation than to capture history; and meticulously recorded legislative debate may resemble Kabuki Theater more than *Mr. Smith Goes to Washington*. But one component of the process unites deliberating legislators, the observing public, and later readers: the formal legislative proposal under consideration.<sup>222</sup> This text, like the common law as conceived by classical theorists, "is addressed *in public to* a public of rational agents that it seeks to guide."<sup>223</sup>

This emphasis on canonical text is in tension with the common law tradition's denial that its law can be captured in a definitive form of words.<sup>224</sup> But as Waldron and others have argued persuasively, canonical text is critical for rational deliberation by large, diverse groups.<sup>225</sup> While a small, leading cadre may be able to function with tacit, conversational understandings, the absence of a formal proposal gives debates

<sup>219</sup> But see Farber & Frickey, *supra* note 209, at 61–62 ("[B]ecause pure majority rule is incoherent . . . a viable democracy requires that preferences be shaped by public discourse and processed by political institutions so that meaningful decisions can emerge.").

<sup>220</sup> Cf. *id.* at 62 ("When our institutions work properly, they have a valid claim to represent the public interest.").

<sup>221</sup> Postema, *Law's System*, *supra* note 179, at 103 (emphasis omitted).

<sup>222</sup> See Waldron, *Law and Disagreement*, *supra* note 133, at 82 ("[T]he positing of a formulated text as *the resolution under discussion* provides a focus for the ordering of deliberation at every stage.").

<sup>223</sup> Postema, *Law's System*, *supra* note 179, at 89.

<sup>224</sup> See Simpson, *supra* note 160, at 16 ("[T]he general position in the common law is that it lacks an authoritative authentic text . . ."); cf. Ronald Dworkin, *How to Read the Civil Rights Act*, in *A Matter of Principle* 316, 319 (1985) [hereinafter: Dworkin, *Civil Rights*] (distinguishing between a "statute, which is a canonical set of sentences enacted by Congress, and the legislation created by that statute, that is, the set of legal rights, duties, powers, permissions, or prohibitions the statute brings into existence or confirms").

<sup>225</sup> See Waldron, *Law and Disagreement*, *supra* note 133, at 81 ("[T]he determinacy of that proposition, as formulated and as amended, is important for establishing a sense that we are all orienting our actions in voting to the same object."); see also Ekins, *supra* note 99, at 234 ("The open proposal that legislators vote to adopt defines the legislative act. The content of that proposal must be capable of being known . . .").

in large bodies an “air of babel-like futility.”<sup>226</sup> A canonical proposal ensures “participants’ contributions are relevant to one another and that they are not talking at cross purposes.”<sup>227</sup> For this reason, the structured, deliberative process of bottom-up legislative reasoning and canonical legislative proposals are mutually reinforcing.<sup>228</sup> Common law legislation—the development of ascending, customary law by the hands of a deliberating multitude—requires a formality in exposition that common law adjudication does not (or perhaps, given the increasing formality of judicial decision making, *used to not require*<sup>229</sup>).

### C. Summary and Caveats

In classical form, the artificial reason of the common law pertained to the “convergence of the views and judgments of the larger community, and forging and maintaining a common sense of reasonableness.”<sup>230</sup> Its lodestars were “salience,” not broad moral vision, and “pragmatic convergence, not theoretical coherence.”<sup>231</sup> Common lawyers constructed this artifice of custom through a “disciplined practice of argument and disputation in a public forum,” which they saw as giving the bench and bar wisdom, insight, and an ability to speak for the community that eluded individual rulers and philosophers.<sup>232</sup> This law was, ultimately, *common* law because it was shared, fit to the complexion and the Constitution of the people and, however indirectly, because it arose from their customs and drew on their norms.<sup>233</sup>

<sup>226</sup> Waldron, *Law and Disagreement*, supra note 133, at 81; see id. at 82 (surmising that perhaps “a one-person deliberative body” or a “small group or junta” could do without formal proposals).

<sup>227</sup> Id.

<sup>228</sup> See id. at 80 (“My hunch is that this textual canonicity and . . . procedural formality . . . are connected . . . [D]ebating rules are oriented towards and ordered by the idea that at any time there is a *specific proposal under discussion*.”).

<sup>229</sup> See Simpson, supra note 160, at 24 (hypothesizing that the “breakdown in the cohesion of the common law” and the accompanying press for authoritative doctrinal rules stems in part from the fact that it is no longer overseen by “12 men in scarlet,” but rather “well over a hundred”); Peter M. Tiersma, *The Textualization of Precedent*, 82 *Notre Dame L. Rev.* 1187, 1187–88 (2006) (describing how judicial opinions have become more formal in explaining their holdings and how that has affected practicing lawyers).

<sup>230</sup> Postema II, supra note 8, at 10.

<sup>231</sup> Id.

<sup>232</sup> Id.

<sup>233</sup> See Hale, supra note 116, at 36–38.



The incremental, pragmatic, compromise-driven fashion of common law legislation similarly and, in contemporary contexts, crucially, allows law to remain “custom transformed, and not merely the will or reason of the lawmaker” descending from the top.<sup>234</sup> A form of artificial reason is visible in the operations of legislatures of common law legal systems like our own: Its focus on *salience* emphasizes the importance of a particular legislative text. Its *pragmatic*, reactive, incremental style of law development migrates to a legislative process that downplays systemic coherence. The common law’s desire for normative *convergence* recapitulates in legislative compromise that sacrifices elegance for widespread acceptance. Legislation in common law fashion too emphasizes the centrality of procedure that *disciplines* argument to draw on the wisdom of the many in a fashion that surpasses the acuity of any one visionary. All told, it is a *bottom-up*, pluralist, and sometimes chaotic style of law that more often than civilian systems eschews deference to rationalist experts bearing white papers and finely reticulated, comprehensive legislative schemes.

In these respects, the development of common law legislation is congruent with the reasoning in common law adjudication. One might object that this rendition of the legislative process is an overly romantic one. After all, per its critics, Congress is gridlocked, polarized, and pointlessly bombastic.<sup>235</sup> This objection is not persuasive. If champions of common law adjudication (and interpretive antiformalism) can theorize based on an idealized judge, sketching an ideal type for the cognate form of legislating simply compares aspirational apples to apples. Furthermore, the model of common law legislation assumes that ordinary politics is a messy, often frustrating enterprise. To the extent that impatience with Congress centers on the body’s unwillingness to speedily enact systematic legislation supported by a narrow majority, that objection goes to the advisability of common law legislation and its compromise-inducing veto-gates. That distaste may be well founded as a matter of political theory, but it does not disturb the parallel between common law adjudication and legislation.

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<sup>234</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 556 (1983).

<sup>235</sup> See, e.g., Robert G. Kaiser, *Even When It Succeeds, Congress Fails*, *Wash. Post*, May 26, 2013, at B1; David Nakamura & Zachary A. Goldfarb, *Obama Assails House Inaction on Immigration*, *Wash. Post*, July 1, 2014, at A3 (“If Congress will not do their job, at least we can do ours.”).

Nevertheless, the resemblance between the two modes of legal development is not complete. The range of available positions and considerations for compromise will usually be wider for legislatures than courts. Legislatures have less of an obligation to be consistent with earlier decisions, and judicial negotiation, even if considered within the pale, has fewer logs to roll.<sup>236</sup> Indeed, the consensus classical common lawyers sought in judicial reasoning harkened more to discovery of unknown agreement than brokered deals. Furthermore, Congress, unlike the courts considering a particular case, can delegate decisions to other institutions like administrative agencies.<sup>237</sup> A legislature also has more freedom than a court to not decide when no clear solution to a problem emerges.<sup>238</sup> These differences may have implications for statutory interpretation and the common law, but they do not obviously point toward the antiformalism advocated under the banner of the common law.<sup>239</sup>

One final qualification: This work leaves for another day the role of administrative agencies in statutory interpretation and the common law tradition. To some, agencies are today's true practitioners of the common law.<sup>240</sup> If so, a common-law-inspired administrative law would aim at cultivating the virtues and practice of artificial reason in the administrative process. To others, modern agency power and practice is an anathema to the common law system and an unwelcome return of the centralized, descending law of the royal prerogative and Star Cham-

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<sup>236</sup> This may be more a difference of degree than kind. Even if Congress is unconstrained by the work of previous legislation, and even if courts are not strongly inclined to seek global coherence, it is hard for a legislature to escape the practical and interpretive effects of other legislation, especially in instances of ambiguity or vagueness. See Martin Krygier, *The Traditionality of Statutes*, 1 *Ratio Juris* 20, 30 (1988) ("Statutes arrive into legal orders in which much of the available space is filled . . . [W]hat they do not change will remain. Where it is deemed relevant they will be read in light of what remains. And that is usually a lot.").

<sup>237</sup> Again, this may be a difference of degree given the role the jury plays (or used to play) in common law systems or even judicial deference to administrative interpretations of unclear statutory provisions. Regarding the latter, Congress is the formal delegator, but given that the legislature's delegation is usually implicit (or a "fiction" in the words of Justice Scalia), it is sensible to attribute this delegation to the courts. See John Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113, 189–211 (1998).

<sup>238</sup> Yet again, this could be a difference of degree, especially for appellate courts with discretionary review. See also Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 40–42 (1961) (praising use of doctrines like justiciability to avoid judicial resolution of controversial questions on the merits).

<sup>239</sup> See *infra* Section V.A.

<sup>240</sup> See Sunstein, *supra* note 14, at 1019.

ber.<sup>241</sup> If that is so, a more radical revision of administrative law would be necessary to restore the judicial and legislative aspects of our common law to the courts and the legislatures.

With these caveats in place, it is time to consider the interpretive implications of this congruence between common law development in the courts and legislatures.

#### IV. INTERPRETING LEGISLATION IN THE COMMON LAW TRADITION

The previous Parts demonstrated parallels between the work of courts and legislatures in a common law system. Nonformalist interpreters draw on this congruence to argue that, because the line between precedent and statute in a common law system is artificial, the formalist's constraint in the statutory domain is misguided. While not without basis, this inference is problematic, but not because the common law tradition is irrelevant in our federal system of separated powers. Rather, this justification for dynamic interpretation faces challenges on its own common law terms. Not only are there unappreciated resemblances between formalist statutory interpretation and common law judicial reasoning, but there is also a strong argument for formalism on the grounds that the legislature is the superior artificial reasoner in a common law system. "Superior" here does not mean that the content of statutes are necessarily better as matters of moral truth or ideal policy, but rather that legislating assemblies have a greater capacity to channel general customs and bridge disagreements in a sound, reliable, and normatively appealing fashion.<sup>242</sup>

##### *A. Classical Common Lawyers and Statutory Interpretation*

Common law theory doubtless provides support for judicial flexibility with enacted legislation. Many classical common lawyers claimed that the artificial reason of the common law perfected inferior legislation. Legislation—in that era the work of King-in-Parliament—was posed as

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<sup>241</sup> See Hamburger, *supra* note 15, at 26–29.

<sup>242</sup> That legislatures may enact morally erroneous statutes in a valid fashion is not alone persuasive. Courts may err as well. Furthermore, even unapologetic natural lawyers believe that on many questions of law and policy there is a wide range of reasonably available options. In those (many) circumstances, legal authority is necessary to choose intelligibly among those valid options. See John Finnis, *The Truth in Legal Positivism*, in *The Autonomy of Law: Essays on Legal Positivism* 195, 201–02 (Robert P. George ed., 1996).

the domineering command of a sovereign lawmaker or, at best “a temporary aggregate of wills” unconstrained by “any rational discipline.”<sup>243</sup> Accordingly, these common lawyers worked to “interpret and stretch statutory language” to make it congruent with the common law even while begrudging the supreme authority of Parliament.<sup>244</sup>

As noted, others like Hale offered a more sophisticated and less skeptical treatment of legislation.<sup>245</sup> Yet even Hale might have thought courts should not handle statutes much more rigidly than precedents. On one reading, he thought that statutes “initially ha[ve] [a] greater claim than precedent to treatment as valid law,” but that over time incorporating legislation into the common law mattered more than the fact that the statute passed through the “formal rules of authorized law-making.”<sup>246</sup> Like precedents, courts would smooth the rough edges of statutes, reading them narrowly if they conflicted with the body of law as a whole and invoking them more frequently if they were consonant with that broader corpus juris.<sup>247</sup> If the common law courts “refus[ed] to ‘receive’ the legislation as law of the land,” a statute could remain formally valid but legally inert.<sup>248</sup>

This antiformalist rendition of Hale is not unassailable. His discussions of legislation, and thus historical reconstructions of this treatment, often focus on statutes whose original texts were lost to history and survive only in the practice of the courts.<sup>249</sup> Hale regards such lost legislation as “unwritten law” that is incorporated in common law fashion. Hale’s discussion of statutes as a “Constituent” element of the common law focuses on legislation believed to be “made before Time of

<sup>243</sup> Postema II, supra note 8, at 18; see also id. at 18–19 (citing work of William Blackstone, Thomas Hedley, and Edward Coke as exemplifying this attitude).

<sup>244</sup> Id. at 19.

<sup>245</sup> See Postema, Bentham, supra note 130, at 19 (“In Hale we find a more consistent, and indeed richer and more suggestive, treatment of the relationship between enacted and Common Law.”).

<sup>246</sup> Postema II, supra note 8, at 20 (emphasis added).

<sup>247</sup> See id. (citing Hale, supra note 116, at 46).

<sup>248</sup> Postema, Bentham, supra note 130, at 24.

<sup>249</sup> See Hale, supra note 116, at 4–6 (discussing acts of Parliament “before Time of Memory; whereof . . . we have no Authentical Records”); id. at 39–45 (discussing the lack of historical record of early statutes that have subsequently been incorporated as common law); Postema, Bentham, supra note 130, at 24 (citing Hale, supra note 116, at 4).

Memory.”<sup>250</sup> It is not clear that similar treatment should follow for extant authoritative texts.<sup>251</sup> Indeed, one can find early examples of common law judges identifying legislative intent with original public meaning and even seeking the aid of grammarians in statutory interpretation.<sup>252</sup>

Nevertheless, the classical common lawyers’ approach to legislation often resembled modern arguments that judges can update or reinterpret outmoded statutes in light of contemporary public values. For this reason, today’s nonformalists understandably trace their lineage back to that tradition. Less appreciated are breaks between contemporary anti-formalism and its ancestors when we consider the artificial reason of classical common law theory. Similarly neglected are continuities between classical common law theory and formalist approaches to interpretation. This other side of the story suggests formalist implications of the fact that legislatures are increasingly the locus of artificial reason in a common law system.

### *B. Aspirations for Coherence*

One point of continuity between modern statutory formalism and the common law tradition is a limited aspiration for systemic legal coherence. Classical common lawyers’ pragmatic, incremental approach to case law led them to often accept “categories that may appear, from a more global perspective, to be unsupported by good reason”<sup>253</sup> or a legal regime that “from a more theoretical perspective, might have appeared to be a lack of systemic coherence.”<sup>254</sup> They accepted such rough corners because more ambitious aspirations encouraged disagreement more than normative convergence. Our constitutional system of legislation also proceeds in a similar fashion, producing reactive, nonsystemic statutes that reflect supermajoritarian compromise, not the work of a single

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<sup>250</sup> Hale, *supra* note 116, at 44–45. Were it not for Hale’s other statement that the “Common Law” refers “most truly” to the shared law of the land, *id.* at 37, one could infer that he understands legislation to be an entirely different category of law.

<sup>251</sup> See Postema, Bentham, *supra* note 130, at 25 n.52 (raising the possibility that “Hale’s view here may be that statutory rules remain valid only as long as the constitutional rules empowering the parliamentary body to create them remain in force”).

<sup>252</sup> See Hamburger, *supra* note 160, at 53 n.53 (citing Y.B. 35 Henry 6, pl. 25, fol. 16b (1456) (Eng.); Hill v. Good, (1673) 89 Eng. Rep. 120 (C.P.); 1 Freeman 167).

<sup>253</sup> Postema, *Law’s System*, *supra* note 179, at 97.

<sup>254</sup> Postema II, *supra* note 8, at 5.

visionary or cadre of like-minded leaders. The “artificial reason” of legislation parallels the classical common lawyer’s treatment of case law.

In this respect, Ronald Dworkin’s approach to statutes departs from the common law tradition. His method is but a slightly modified version of his theory of common law adjudication.<sup>255</sup> His theory seeks to make the law the best it can be, weaving as tightly as possible an individual piece of legislation into a broader, coherent web of principle.<sup>256</sup> The aspirations toward coherence in his approach are strong and far-reaching.<sup>257</sup> Statutes are not to be read “as negotiated compromises” limited to “the text of the statute,” but rather are to be understood as “flowing from the community’s present commitment to a background scheme of political morality” that animates the law as a whole.<sup>258</sup> As statutes age, the best interpretation integrates legislation with subsequent developments in case law, further statutes, and changes in public values.<sup>259</sup> Dworkin thus praises the Supreme Court’s antiformalist approach to the Civil Rights Act in *United Steelworkers v. Weber*, while criticizing its formalist interpretation of the Endangered Species Act in *Tennessee Valley Authority v. Hill*.<sup>260</sup>

Even if there were no significant difference between precedent and enacted legislation, classical common lawyers would view the interpretive method of Dworkin’s Hercules to be Icarian in its pursuit of systematic coherence.<sup>261</sup> Guido Calabresi’s vision of the judicial role is more

<sup>255</sup> See *supra* Subsection II.A.2.

<sup>256</sup> Dworkin, *supra* note 28, at 338 (noting that the court should aspire to find “some justification that fits and flows through [the] statute and is, if possible, consistent with other legislation in force”); Ronald Dworkin, *Taking Rights Seriously* 283 (1978) (emphasizing how courts should decide which argument is most coherent with the normatively best theory of the law).

<sup>257</sup> See Levenbook, *supra* note 181, at 356 (stating that in Dworkin’s view, “coherence is a property of an entire system of law, and that the legally justified judicial decision, at least in a hard case, is one that strengthens this systemic coherence or itself coheres best with the coherent system”).

<sup>258</sup> Dworkin, *supra* note 28, at 345–46; see Dworkin, *Civil Rights*, *supra* note 224, at 327–29 (positing the “coherence theory” of statutory interpretation that “supposes that a statute should be interpreted to advance the policies or principals that furnish the best political justification for the statute”).

<sup>259</sup> See Dworkin, *supra* note 28, at 348–50.

<sup>260</sup> See Dworkin, *Civil Rights*, *supra* note 224, at 327–30 (discussing *United Steelworkers v. Weber*, 443 U.S. 193 (1979)); Dworkin, *supra* note 28, at 337–54 (discussing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)).

<sup>261</sup> See 2 Ovid’s *Metamorphoses*, bk. VIII, at 347 (Brookes More trans., 1941) (“Proud of his success, / The foolish Icarus forsook his guide, / And, in bold vanity, began to soar, / Rising upon his wings to touch the skies.”).

modest, but coherence also plays a strong role in his argument for courts to modify or decline to apply obsolete statutes. The targets for updating are statutes “sufficiently out of phase with the whole legal framework.”<sup>262</sup> The courts can fairly demand “consistency” among “policies” and “principles” in the legislative regime by depriving such “inconsistent” statutes of their presumptive validity.<sup>263</sup> Similarly, Peter Strauss endorses Justice Stone’s claim that a common law judge ought to pursue “the ideal of a unified system of judge-made and statute law woven into a seamless whole.”<sup>264</sup>

Strong versions of legal-process purposivism also promote broader coherence over formal adherence to text or original intent. Hart and Sacks explain that the most important task in interpretation is identifying what “purpose ought to be attributed to the statute.”<sup>265</sup> The interpreter ought to “harmonize” legislation with “more general principles and policies.”<sup>266</sup> It is “invariable in the law and of immense importance” to treat a statute’s purpose “as including not only an immediate purpose or group of related purposes but a larger and subtler purpose as to how the particular statute is to be fitted into the legal system as a whole.”<sup>267</sup> Overall, the interpreter should “strive to develop a coherent and reasoned pattern of applications related to the general purpose”<sup>268</sup> of the statute and even demand clear legislative statements before identifying a departure “from a generally prevailing principle or policy of the law.”<sup>269</sup> In so doing, the purposive approach “will be well calculated to serve the *ultimate* purposes of law.”<sup>270</sup>

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<sup>262</sup> Calabresi, *supra* note 1, at 164; see also *id.* at 107–08 (stating that a court may modify both common law or statutory rules when “they do not fit the landscape” or when other legal rules “move in the opposite direction”).

<sup>263</sup> *Id.* at 165.

<sup>264</sup> Strauss, *The Common Law*, *supra* note 7, at 238 (quoting Harlan Fiske Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4, 12 (1936)). Eskridge is more skeptical of broad coherence, at least as adopted by Dworkin and the Legal Process. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 148 (1994).

<sup>265</sup> Hart & Sacks, *supra* note 65, at 1169.

<sup>266</sup> *Id.* at 148; see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 *N.Y.U. L. Rev.* 921, 937 (1992) (situating the interpretive task “in a world where common law and statutory law are woven together in a complex fabric defining a wide range of rights and duties”).

<sup>267</sup> Hart & Sacks, *supra* note 65, at 1377.

<sup>268</sup> *Id.* at 1380.

<sup>269</sup> *Id.* at 1377.

<sup>270</sup> *Id.* at 1169 (emphasis added); see Duxbury, *supra* note 70, at 261 (identifying Hart and Sacks’s focus on broad coherence).

Consequently, when formal elements of a statute, like its semantic meaning in context or the underlying intent of the enacting legislature, do not cohere with the more general background purpose of the statute or clash with the pattern of the broader legal regime, a purposive interpreter will prefer the coherent interpretation even if, as a formal matter, the reading is one of substantial “verbal difficulty.”<sup>271</sup> Hart and Sacks thus wrote approvingly of the decision *Riggs v. Palmer*, which, over a dissent relying on “plain meaning,”<sup>272</sup> invoked background general law principles to smooth the awkward textual corners of legislation.<sup>273</sup>

The role that coherence plays in statutory interpretation is a key difference between formalists and nonformalists today. As textualist Professor John Manning has argued, purposivists presume that legislation is a product of “relatively coherent policy objectives” even if Congress does not always express them clearly.<sup>274</sup> Coherence also plays a central role for dynamic interpreters like Dworkin and Calabresi, though they are also interested in having the statute cohere with moral philosophy and contemporary public values.<sup>275</sup> These nonformalist approaches share a greater willingness to ascend from the particulars of legal formality and to promote more general coherence.

The formalist, by contrast, does not presume that the policy aspirations underpinning any one statute are transparently coherent.<sup>276</sup> This is because, as discussed above, a law that can gain the assent of two large assemblies plus the President is likely to be the product of compromise, which is often “complex, awkward, and even incoherent.”<sup>277</sup> Textualists are more inclined to take reasonably clear but inelegant statutes as they find them, rather than redirect them toward a reconstructed background purpose; more formal intentionalists, in turn, will seek to understand

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<sup>271</sup> Hart & Sacks, *supra* note 65, at 1244.

<sup>272</sup> 22 N.E. 188, 191–92 (N.Y. 1889) (Gray, J., dissenting).

<sup>273</sup> See *id.* at 189–91 (rejecting “plain meaning”); Hart & Sacks, *supra* note 65, at 89–91, 1376 (invoking favorably the *Riggs* majority).

<sup>274</sup> Manning, *supra* note 217, at 2012.

<sup>275</sup> See Calabresi, *supra* note 1, at 164 (courts should reconstruct statutes that are “out of phase with the whole legal framework” or “do not conform with the fabric of the law” and lack “current and clear majoritarian support”); Levenbook, *supra* note 181, at 366 (emphasizing the role coherence and morality play in Dworkin’s approach to interpretation).

<sup>276</sup> Manning, *supra* note 217, at 2010 (“Justice Scalia’s vision of Congress thus presumes that it is quite deliberate in statutory expression, but (understandably) quite messy in the substantive policies it adopts.”).

<sup>277</sup> *Id.*



original intent at low levels of abstraction.<sup>278</sup> What a formalist would say about individual statutes applies a fortiori to the demand for coherence across the legal system as a whole, which consists of numerous statutes passed over many years, an elaborate corpus of constitutional law, and manifold maxims and principles of general law.

This is not to say that formalists reject coherence out of hand. Many will seek broader coherence when statutes are vague or ambiguous.<sup>279</sup> Of prominent academic formalists, only Adrian Vermeule rejects even a modest search for interpretive coherence—and he does not purport to describe the work of formalist jurists.<sup>280</sup> The difference between most formalists and their opponents, then, concerns how far and wide courts should search for coherence, and whether coherence should override a meaning or intention that is reasonably clear in local context. Statutory formalists, more than their rivals, resemble classical common lawyers who regarded broad legal coherence as salutary when feasible or helpful, but too costly to pursue with regularity as an overriding aim. Formalists may or may not be wise to allow legislation to remain more “a muddle than a system,” but in doing so they are not obviously unfaithful to the common law tradition.<sup>281</sup> Rather, they appear to be extending it to legislation.

### *C. The Character and Place of Artificial Reason*

This discussion of coherence focuses on one aspect of a larger issue: the relationship between the artificial reason of the courts and the artificial reason of legislatures. A classical common law critique of the dynamic interpreter’s quest for broad statutory coherence is twofold. First, nonformalism departs from the style of reasoning that common law *courts* used when adjudicating disputes. Second, it does not respect the

<sup>278</sup> See Manning, *supra* note 79, at 1288 (textualism); Ekins, *supra* note 99, at 250–51 (intentionalism). See generally John David Ohlendorff, *Against Coherence in Statutory Interpretation*, 90 *Notre Dame L. Rev.* 735, 738 (2014) (“[T]he coherence ideal fails to justify the courts’ departure from their presumptive duty to faithfully carry out Congress’s will.”).

<sup>279</sup> See *W. Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 101 (1991) (Scalia, J.) (“[I]t is our role to make sense rather than nonsense out of the *corpus juris*.”); Ekins, *supra* note 99, at 259–60.

<sup>280</sup> See Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 4 (2006) (“[J]udges should sharply limit their interpretive ambitions, in part by limiting themselves to a small set of interpretive sources and a restricted range of relatively wooden decision-rules.”).

<sup>281</sup> Simpson, *supra* note 160, at 24 (describing judicial common law in these terms).

distinct reasoning of the legislatures that develop statutes in common law fashion. Both arguments complicate the neat story linking nonformal statutory interpretation *with* the common law *against* statutory formalism. This Subsection elaborates these common law critiques of nonformal interpretation.

### 1. *The Character of Artificial Reason*

Classical common lawyers frequently distinguished between the “artificial reason” of the law and the untutored natural reason of kings and philosophers. Many antiformalists, while claiming the mantle of the common law, depart from this distinction when describing the judicial creativity involved in statutory interpretation. Dworkin viewed judges as the princes of law’s empire, “but not its seers and prophets.”<sup>282</sup> That task fell to moral “philosophers, if they are willing, to work out law’s ambitions for itself, the purer form of law within and beyond the law we have.”<sup>283</sup> Classical common lawyers, however, saw “Casuists, Schoolmen, [and] Morall Philosophers” as the *worst* candidates for expositors of the common law.<sup>284</sup> One of the greatest challenges to classical common law thought was “conceptual,” coming from those who “took an academic perspective on law” and thus had a “low view of national custom and high expectations for reframing it within academic generalizations.”<sup>285</sup>

For traditional common lawyers, the natural law—or “political morality” in Dworkin’s argot—may have justified the institution of law on a systemic level, but was too indeterminate on particulars to offer reliable guidance in individual cases and doctrines.<sup>286</sup> Accordingly, classical common lawyers facing a hard case were more likely to go back and dig *down* to the cases to find the “common reason” of the dispute rather than appeal *upward* to the moral law.<sup>287</sup> To the common law mind, reworking the law today in the image of Rawlsian equality is no more useful or

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<sup>282</sup> Dworkin, *supra* note 28, at 407.

<sup>283</sup> *Id.*

<sup>284</sup> Holdsworth, *supra* note 157, at 503.

<sup>285</sup> Hamburger, *supra* note 160, at 116.

<sup>286</sup> See Postema I, *supra* note 111, at 177 (stating that natural law played a “deeply subterranean” role in classical common law theory).

<sup>287</sup> See *id.* at 178–79 (noting that, in hard cases, “the tendency of the common lawyer was not to consult universal moral sources . . . but rather to look longer, harder, and deeper into the accumulated fund of experience and example provided by the common law”).

prudent than invoking Aquinas in 1600 to resolve the details of property law.<sup>288</sup>

The more realist dynamic theories would also be alien to classical common lawyers. Judge Calabresi, for example, stipulates that judges “make law in a democracy,” citing the work of California Supreme Court Judge Roger Traynor, whose work in common law and statutory interpretation understands utilitarian policy balancing as central to judicial decision making.<sup>289</sup> Chief Judge Kaye, who invokes her state court’s common law heritage to reject statutory formalism, takes a similarly realist tack.<sup>290</sup> Earlier, seminal essays by Justice Stone and James Landis that draw on the common law to support dynamic interpretation are also skeptical of the classical account of artificial reason.<sup>291</sup>

For classical common lawyers, appealing to the judge’s understanding of natural law or justice to fill gaps in the common law or redirect its course does not capture the practice of artificial reason. Ironically, the natural law of a Dworkin and the realism of a Traynor both draw pictures of legal reasoning similar to the common law’s early archrivals. For critics like Hobbes and Bentham, once you dig beneath the encrustation of doctrine and precedents, the common law’s core is simply the judge’s natural reasoning about justice and right, including moral reasons to sometimes follow morally imperfect doctrine and precedent.

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<sup>288</sup> On this point, Aquinas would agree with the common lawyer, for he saw that on many questions the natural law permitted a range of judgment and local variation. See Finnis, *supra* note 242, at 202–03.

<sup>289</sup> Calabresi, *supra* note 1, at 92 n.1 (citing Roger Traynor, *Statutes Revolving in Common Law Orbits*, 17 *Cath. U. L. Rev.* 401 (1968)). Professor Strauss also states that common law courts, like Congress, “make law,” though he puts scare quotes around the phrase and hedges skepticism about the classical account. See Strauss, *The Common Law*, *supra* note 7, at 253; see also Roger Traynor, *Reasoning in a Circle of Law*, 56 *Va. L. Rev.* 739, 751 (1970) (characterizing judging as “the recurring choice of one policy over another”).

<sup>290</sup> Kaye, *supra* note 3, at 11 (“[S]tate courts effectively ‘make law,’ and do so by reference to social policy, not only when deciding traditionally common-law cases but also when faced with cases that involve difficult questions of constitutional and statutory interpretation.”).

<sup>291</sup> See James McCauley Landis, *Statutes and the Sources of Law*, in *Harvard Legal Essays* 213, 217 (Roscoe Pound ed., 1934) (dismissing as “abstract rationalism” the notion that common law courts “merely ‘find’ law”); Stone, *supra* note 264, at 10 (noting that a common law judge is “often engaged not so much in extracting a rule of law from the precedents, as we were once accustomed to believe, as in making an appraisal and comparison of social values” and “weigh[ing] competing demands of social advantage, not unmindful that continuity and symmetry of the law are themselves such advantages”).

There is nothing more to see besides philosophy or policy once you “pluck[] off the mask of mystery.”<sup>292</sup>

Whether or not antiformalists are correct to doubt the classical common lawyer’s belief in the relative autonomy of legal reason, their skepticism complicates any straightforward argument that the common law justifies dynamic statutory interpretation. Recall the antiformalist’s claim that the common law empowers judicial interpreters to depart from the prescriptions embodied in historical legislative text or intent. A reinterpretation of common law adjudication as a form of coherentist natural law, in the style of Ronald Dworkin, requires a trust in judicial wisdom to discover moral consensus as romantic as the classical common lawyer’s belief in the autonomy and reliability of artificial reason. A more realist understanding of common law as policy balancing, when invoked to modify legislative norms, creates separation-of-powers worries more pressing than if artificial reason were a medium that could channel general customary consensus. This is not to say that deploying a newly theorized common law in the old ways is impossible, though I have doubts about whether one can do so without anachronism. It is to emphasize, however, that notwithstanding any rhetoric of continuity, statutory antiformalism’s relationship with the inherited common law tradition is marked by as much change as constancy.

## 2. *The Place of Artificial Reason*

Nevertheless, modern antiformalist understandings of the common law’s artificial reason are not always sharp departures from the tradition. Judge Calabresi also appeals to craft traits like developing the common law in incremental fashion, reasoning by analogy and from principles implicit in precedent, and treating like cases alike.<sup>293</sup> His placement of statutes in the center of a common law system also reflects Matthew Hale’s approach. He, too, rejects the notion that “*only* judges could discern” the legal fabric “and that changes in it could happen only through

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<sup>292</sup> Postema, Bentham, *supra* note 130, at 263. Antiformalists are not alone in this skepticism. See *James B. Beam Distillery Corp. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law. But they make it *as judges make it*, which is to say *as though* they were ‘finding’ it—discerning what the law *is* . . . .”); Nelson, Legitimacy, *supra* note 77, at 57.

<sup>293</sup> Calabresi, *supra* note 1, at 96–97, 101, 108–09.

accretion of judicial reaction to changed conditions.”<sup>294</sup> Most importantly, Calabresi sees the common law as channeling and reflecting “underlying popular attitudes.”<sup>295</sup> To him, the common law seeks to reflect the ways and norms of people subject to it, *and* he also understands legislation by assembly as operating in a similar fashion. He explains that, with legislation, “*as with common lawmaking*, the assumption that the result reflects an underlying majoritarianism and hence is legitimate in a democracy seems a sensible one.”<sup>296</sup> Legislation and judicial decisions are both integral to a common law system of ascending customary law; they are two different “modes of existence” of the same legal substance.<sup>297</sup>

For Calabresi, the judge has the dynamic and necessary role of integrating these sources of law, which may include extending the reach of a statute to modify background common law *or* refusing to apply a statute perceived to be out of phase with the broader fabric of the law and popular values (of which the broader fabric of law is important evidence). In this respect, his theory meshes with the broader understanding of a common law system discussed above; it is formalism’s refusal to dynamically integrate legislation with the broader fabric of the law and popular values that seems out of phase with the tradition.

The objection to this argument is that it fails to grasp the implications of the legislative process as a form of artificial reason. The structured, compromise-forcing nature of the legislative process draws on the wisdom and views of a wide array of the polity *and* forces their representatives to forge the closest approximation to consensus that a complex society can muster. Such reasoning is beyond the capacity of any individual alone, including the common law judge. From this perspective, the common law jurists’ attempts to capture and synthesize the custom of the realm through disciplined legal argument is an inferior version of the artificial, common reason of the legislative process. Just as the classical common lawyer understood the untutored reason of the king and the philosopher to lack the capacity of the artificial reason of the law, now it is common law judges who must understand that their capacities to identify shared, fitting legal solutions to practical problems are outstripped by the superior artificial reason of the legislative process.

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<sup>294</sup> *Id.* at 98.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 109 (emphasis added).

<sup>297</sup> Postema II, *supra* note 8, at 19.

The implications of this insight can point toward formalism. The dynamic theorist updating an obsolete or awkwardly drafted statute, or extending the formal scope of a statute to capture the spirit of the age, puts herself in the position of not only a legislator, but a *legislature*, whose translation of public views and practices into concrete norms she cannot replicate. The same holds for a strong purposivist who overrides legislative formality in favor of an imaginative reconstruction of a legislature's treatment of a dispute. Finally, the antiformalist's impatience with the slow pace, multiple veto-gates, and scarce agenda time of the legislative process appears not so much as interbranch cooperation, but rather a rejection of the common law tradition's demand for broad consensus behind legal rules.

The formalist—who adheres to reasonably clear text even if it is substantively awkward, or who respects historical legislative intent understood at a low level of generality—is more faithful to the artificial reason of the legislative process in its actions and inaction. The formalist's assumption that “the precise contours of legislative policy may reflect the procedural sequence of legislative events rather than a frictionless implementation of coherent policy impulses,” is neither alien to the common law tradition nor a commitment to the irrationality of apparently awkward legislation.<sup>298</sup> Just as Henry Sumner Maine observed how the “substantive law” of early common law appeared to be “gradually secreted in the interstices of procedure,” the substantive law of common law statutes is shaped by *legislative* procedures that channel collective wisdom and disagreement into a rough, pragmatic consensus from the ground up.<sup>299</sup> To defer to the output, when readily discernible, is to respect the irreplicable process that legitimizes statutes in ascending governance.<sup>300</sup> By the same token, deference to the legislature's conclusions

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<sup>298</sup> Manning, *supra* note 217, at 2031; see also Manning, *supra* note 208, at 424 (“[The legislative process] conditions [Congress's] ability to translate raw policy impulses or intentions into finished legislation. For them, intended meaning never emerges unfiltered; it must survive a process that includes committee approval, logrolling, the need for floor time, threatened filibusters, conference committees, veto threats, and the like.”).

<sup>299</sup> Henry Sumner Maine, *Dissertations on the Early Law and Custom* 389 (Henry Holt & Co., New York 1883) (“[Early English] substantive law has at first the look of being gradually secreted in the interstices of procedure.”); cf. S.F.C. Milsom, *Historical Foundations of the Common Law* 59 (2d ed. 1981) (“There was no substantive law to which pleading was adjective. These were the terms in which the law existed and in which lawyers thought.”).

<sup>300</sup> See Easterbrook, *Original Intent*, *supra* note 85, at 63 (“To use an algebraic metaphor, law is like a vector. It has length as well as direction . . . . To find length we must take account of objectives, of means chosen, and of stopping points identified.”); Manning, *supra*

echoes the early common law practice of leaving the determination of “substantive norms of behaviour and liability” to the jury as the voice of the community, while leaving to judges questions of “formal law,” which were primarily procedural.<sup>301</sup> The common law was a “joint creation of the ‘reasonable men’ of the sworn neighborhood assembly and the professional judges”<sup>302</sup> and then, as now, it is reasonable to assign the broader community primary input on substantive norms.

As with coherence, statutory formalists do not reject any repair to legislative purpose or principle, but rather treat it as a tool to resolve ambiguity and vagueness, not to override what they see as reasonably clear, formal manifestations of Congress’s expressed meaning or intent.<sup>303</sup> A similar story follows for the use of legislative history, though some formalists continue to resist its use even in unclear interpretive questions cases.<sup>304</sup>

#### *D. Publicity and Formality*

A final aspect for comparison is the publicity of the common law. As Postema explains, the common law sought to offer a “theoretically untidy, but practically accessible and widely and publicly intelligible, framework for legal reasoning.”<sup>305</sup> The twin demands that rules must not only “make practical sense,” but also be matters of “*public accessibility* and with it effective public accountability”<sup>306</sup> raise the familiar tradeoff between rules and standards. The more an interpreter adjusts a rule to ensure individual applications make sense, the less publicly accessible the rule is as a practical matter. This dilemma between clear guidance

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note 79, at 1310 (“[S]tatutes reflect choices about means as well as ends, and the chosen means reflect the price that the legislature was willing to pay in order to achieve the desired ends.”).

<sup>301</sup> Postema I, *supra* note 111, at 163.

<sup>302</sup> Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition*, 166 (1990).

<sup>303</sup> See Pojanowski, *supra* note 7, at 484–85.

<sup>304</sup> See Manning, *supra* note 79, at 1308–09 (noting the diminishing importance of the legislative history debate and a settled “equilibrium” where the center of the Court is willing to consider legislative history in cases of ambiguity or vagueness); Elliott M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 *Harv. J.L. & Pub. Pol’y* 983, 985–987 (2007) (comparing Justice Alito’s openness to legislative history with Justice Scalia’s opposition).

<sup>305</sup> Postema, *Law’s System*, *supra* note 179, at 28.

<sup>306</sup> *Id.* at 27–28.

and substantive rationality is a central problem of law generally, so it is unsurprising to find the common law grappling with it in particular.<sup>307</sup>

Much common law theory favors a standard-like approach to law. Brian Simpson noted the emergence of a “school-rules concept” of common law that reconceives the corpus juris as a binding code laid down by judges, but he saw that development as a sign of the tradition’s deterioration.<sup>308</sup> In the received tradition, he maintains, no form of words can capture the common law in rule-like fashion, and there is no bright line between saying something is the law and saying that it is just and rational.<sup>309</sup> Statutory nonformalists emphasize this aspiration for substantive rationality in the common law. Dynamically updating obsolete statutes pursues this goal, as does broadening or narrowing the scope of a statute to promote its purpose. Public accessibility, from this perspective, is intertwined with law’s substantive rationality, for legislation and interpretations that jar common sensibilities do not offer reliable guidance; people will either not understand the law or not take it seriously.

But, again, this is only one side of the story. While Hale found it crucial that the common law be congruent with the practices and views of the polity, his defense of the common law against Hobbes also explained that it is better “to preferre a Law by which a Kingdome hath [long] been happily governed” than to risk that peace by preferring “[s]ome new Theory” grounded in his own sense of reasonableness.<sup>310</sup> Therefore, though “a certaine and determinate Law may have some mischiefes,” especially in individual cases, they are “preferable before that Arbitrary and uncertaine rule which Men miscall the Law of reason.”<sup>311</sup> Unaided

<sup>307</sup> Cf. Larry Alexander, *The Gap*, 14 *Harv. J.L. & Pub. Pol’y* 695, 695 (1991) (describing this “problem of rules” as “the heart of the problem of law”); Lon Fuller, *Reason and Fiat in Case Law*, 59 *Harv. L. Rev.* 376, 377 (1946); see also Postema, *Bentham*, *supra* note 130, at 7 (“Coke seems to be saying, it is in the nature of the law be reasonable, but at the same time the law . . . constitutes the standards by which the community judges the reasonableness or unreasonableness of actions.”).

<sup>308</sup> Simpson, *supra* note 160, at 12, 23.

<sup>309</sup> *Id.* at 16 (“[T]he general position in the common law is that it lacks an authoritative authentic text.”); *id.* at 10 (“[N]o very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution.”).

<sup>310</sup> Holdsworth, *supra* note 157, at 504; see also Coke, *I Institutes of the laws of England* § 138, at 98 (London, William Rawlins, et al. 1629) (“No man (out of his private reason) ought to be wiser than the law, which is the perfection of reason.”).

<sup>311</sup> Holdsworth, *supra* note 157, at 503.



natural reason risks “instability, uncertainty, and arbitrariness”<sup>312</sup> and it lacks the legitimacy of common law rules and principles, which “are Institutions introduced by the will and Consent of others implicitly by Custome and usage, or Explicitely by written Laws or Acts of Parliament.”<sup>313</sup> This preference for existing rules is more than the recognition that it is sometimes more important for the law to be settled than settled right.<sup>314</sup> It also stems from belief that the incremental development of the law by many experienced minds engaged in the discipline of artificial reason will be a more reliable guide than an individual who perceives a rule to be irrational and sets to fix it on her own.

The statutory formalist, who chooses the objective meaning or particular historical intention over statutory purpose or contemporary public values, follows the lead of Hale who, responding to Hobbes’s critique of the obscurantism of common law doctrine, argued that “there is good reason to accept the requirements of law as fully binding, even when the rules cannot commend themselves to our reason.”<sup>315</sup> The statutory formalist would also applaud the common law theory of David Hume who, building off Hale’s work, thought the “most important thing for society is that lines of authority be absolutely clear, settled, and matters of common knowledge.”<sup>316</sup>

Classical common lawyers, not just nineteenth-century positivists, valued public accessibility and accountability in legal development. This dovetails with their preferences for “salience” over broad “moral vision” in selecting the common law’s norms.<sup>317</sup> Shifting to statutes, this orientation chimes with Waldron’s argument that, absent focus on a canonical text, reasoned deliberation by large groups is not possible.<sup>318</sup> Formality is essential for bottom-up, customary legislation. Adherence to a statute’s reasonably clear semantic meaning or publicly discernible original intention takes common law legislation on its own terms, even when do-

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<sup>312</sup> Berman, *Origins*, supra note 153, at 1716.

<sup>313</sup> Holdsworth, supra note 157, at 505.

<sup>314</sup> See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 *Tex. L. Rev.* 1843, 1855–63 (2013) (discussing the costs and benefits of legal continuity).

<sup>315</sup> Postema, *Bentham*, supra note 130, at 77 (characterizing Hale’s response to Hobbes).

<sup>316</sup> *Id.* at 90 (characterizing Hume’s theory and linking it to Hale’s); see *id.* at 110–43 (describing Hume’s formalist, ascending, and conventionalist theory of common law while distinguishing it from Hobbes’s legal theory emphasizing rules dictated by a sovereign).

<sup>317</sup> See Postema II, supra note 8, at 10.

<sup>318</sup> See Waldron, *Law and Disagreement*, supra note 133, at 80–82.

ing so is in tension with background purpose, policy, or contemporary values.<sup>319</sup> Not only does formalism respect the work of publicly accountable lawmakers,<sup>320</sup> it focuses on indicia that are publicly salient and accessible in a way that abstract purposes, imaginative reconstructions, strands of legislative history, or judicial interpretation of contemporary public values are often not.

Accordingly, the common law tradition not only embraces *Riggs v. Palmer*, which Dworkin celebrated in 1986 for its use of legal principles to trump the plain text of a wills statute, but also Lord Camden's 1765 opinion in *Doe v. Kersey*. There, Lord Camden counseled adherence to the Statute of Frauds' explicit requirement of three witnesses for a valid will, even when the rule creates an injustice in an individual case.<sup>321</sup> Lord Camden recognized that the rules of "positive law" can be blunt, but that is nevertheless preferable "to leave the Rule inflexible than permit it to be bent by the Discretion of the Judge."<sup>322</sup> Such modification of statutory formality, Camden asserted, is for "the Judgment of the Legislature."<sup>323</sup> The opinion in *Doe*, fittingly, is a rebuke of Lord Mansfield, the dynamic jurist Dworkin echoes in his vision of the common law working itself (and inferior statutes) pure.<sup>324</sup> Although Lord Camden's opinion was a dissent, his opinion does not occupy a fringe of the common law tradition.<sup>325</sup>

<sup>319</sup> Cf. Manning, *supra* note 278, at 1290.

<sup>320</sup> The final draft of the statutory text was accessible to all legislative actors, the focus of their debate, and the object they chose to enact together. Even if (when) members of legislature fail to read the final text, the legislature and the legislators are answerable for its content. See Ekins, *supra* note 99, at 234, 271–72.

<sup>321</sup> See Hamburger, *supra* note 160, at 145 (discussing *Doe*).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Compare Dworkin, *supra* note 28, at 400 (invoking "the impure, present law gradually transforming itself into its own purer ambition"), with *Omychund v. Barker*, 26 Eng. Rep. 15 (Ch.) 23 (1744) (Mansfield, L.J.) ("[A] statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament."); see James Oldham, *English Common Law in the Age of Mansfield* 359 (2004) (describing Camden's *Doe* opinion as an "attack on Mansfield's" expansive views of judicial discretion).

<sup>325</sup> Professor Schauer has scoured the law reports for cases in which, like *Riggs v. Palmer*, the letter of the law allows wrongdoers to profit from a will. He found that, "pace Dworkin," *Riggs* appears to be an exception to a general rule of undesirable actors inheriting pursuant to the letter of wills statutes. See Frederick Schauer, *The Limited Domain of Law*, 90 Va. L. Rev. 1909, 1937–38 (2004) (citing cases).

This is not to say that the common law tradition *only* points toward formality. There was a “deep ambiguity in Common Law theory” about whether the common law *set* public standards of reason and justice or was instead the “working out of reason” itself into the law.<sup>326</sup> This ambiguity indicates that those who invoke the common law to justify non-formal interpretation draw on a selective view of the tradition. The formalist’s solicitude toward publicly accessible, procedurally settled norms would not be mysterious to classical common lawyers. The Supreme Court’s current tendency to prefer formality, to rarely invoke the absurdity doctrine, but to not categorically foreswear such substantive overrides *in extremis*, represents a rough and, predictably, messy accommodation of those competing values.<sup>327</sup>

In this respect, disagreement between formalists and antiformalists in statutory interpretation concerns this unresolved tension at the heart of the common law itself. A claim that this longstanding dilemma is simply a choice between an antiformalist “common law model of statutory interpretation”<sup>328</sup> and a formalist approach where judges are “mere servants of a positivistic sovereign”<sup>329</sup> does not grasp the complexity of the common law tradition or all the interpretive implications of bottom-up, customary legislation.

#### V. REALIGNMENT WITHIN A COMMON LAW SYSTEM

A common law system consists not only of precedent, but also legislation developed in a manner analogous to the artificial reason of judicial decision making. Precedential and statutory common law both aim to capture, or forge, bottom-up consensus on particular public problems. In the common law tradition, equating the process for developing these legal norms with any one decision-maker’s view on natural law, policy, or popular opinion is not only misleading, but corrosive of the practice and its benefits.

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<sup>326</sup> Postema, Bentham, *supra* note 130, at 37.

<sup>327</sup> See Pojanowski, *supra* note 7, at 485–86 (describing the Court’s formalist turn in recent decades); cf. *Bond v. United States*, 134 S. Ct. 2077, 2090–91 (2014) (giving, “in this curious case,” legislation a narrower interpretation when an otherwise-ordinary reading would conflict with background principles of federalism).

<sup>328</sup> Pildes, *supra* note 73, at 913.

<sup>329</sup> *Id.* at 898.

So far, a dynamic interpreter could agree with much in the paragraph above (though not each one would<sup>330</sup>). What divides formalism and dynamic rivals is the common law court's role when a statute's reasonably clear formal indicia point against background purpose, the broader fabric of the law, sound justice or policy, or contemporary values. The dynamic interpreter, relying on the common law character of adjudication and legislation, treats interpretation as a dialogue in which the court may imprint *its* artificial reason on the legal materials at hand. Just as courts refine precedent over time, they can also develop statutes, with the caveat that the legislature may override such judicial refinement in response.

The standard formalist response grounds faithful agency on a sharp distinction between common law adjudication and statutory interpretation. The common law tradition is relevant, if at all, in the absence of legislation or as a tool for interpreting unclear statutes. One payoff of the discussion so far is recognizing how an interpreter can be a formalist without, in the words of dynamic critics, "resegregat[ing] the worlds of statute and common law"<sup>331</sup> at the level of theory. Interpretive formalism can be understood as an extension of the common law tradition in its respect for compromise, modest aspirations for coherence, and its preference for normative salience over abstract moral vision. At the root of these features is a willingness to defer without further elaboration to the legislature's artificial reason when formal indicia are reasonably clear. Such effacement of the judicial role in these cases is not necessarily grounded in a rejection of the common law tradition, but an interpretation of that tradition in which primacy—though not exclusivity—in developing common law shifts from courts to legislatures. This final Part explores some implications of a common law theory of faithful agency.

#### *A. What Interpretive Formalism Offers the Common Law Tradition*

The common law, like any living tradition, must develop as it seeks to resolve problems that confront it.<sup>332</sup> The understanding of the legislative process articulated above, however stylized, suggests that the common law tradition continues even as the center of gravity of legal develop-

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<sup>330</sup> See *supra* Subsection IV.C.1. (describing nonformalists' breaks with the classical common law tradition's understanding of artificial reason).

<sup>331</sup> Strauss, *Resegregating*, *supra* note 54, at 528.

<sup>332</sup> Cf. Alasdair MacIntyre, *Whose Justice? Which Rationality?* 349–69 (1988) (describing the rationality and development of traditions of thought).

ment shifts initiative to legislatures. It is possible to understand the shift of primacy from courts to legislatures—and the concomitant judicial deference to reasonably clear statutory formality—as a natural development in the common law tradition, not a rupture.

This emphasis on the work of the people's representatives for the development of the law continues the arc of increasing populism in the common law tradition's conception of law as bottom-up custom suited to the complexion and ways of a polity.<sup>333</sup> Rather than channeling that populism through direct referenda or pure majoritarian politics, the tradition disciplines that deliberation through formal structures encouraging compromise, if not widespread consensus.

Relatedly, this development mitigates the persistent dilemma about how to connect the arcana of common law doctrine with the lived ways of the people. Put another way, it responds to the question of how the custom of the bar corresponds with the custom of the people.<sup>334</sup> Classical common lawyers bridged this gap by arguing that the technical doctrine had “substantial congruence . . . with the ways of the people” or was incorporated and accommodated “to the ‘frame’ and ‘disposition’ of the people.”<sup>335</sup> The classical position primarily assigned the task of such incorporation and accommodation to an experienced and prudent judiciary.<sup>336</sup> In line with the increasing populism of common law as ascending custom, however, the “artificial reason” of the legislative process can better narrow the gap between positive law and the people on whose behalf it speaks. In fact, it was Hale's recognition that the common law had to be “accommodated to the Conditions, Exigencies and Conveniencies of the People” that led him to underline the importance of statutes in the legal system.<sup>337</sup>

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<sup>333</sup> See Cromartie, *supra* note 150, at 206–14 (describing the increasing populism of common law theory).

<sup>334</sup> See David J. Bederman, *Custom as a Source of Law* 30 (2010) (contrasting common law understood as “custom of the courts” with the vision of the common law as “populist and deeply rooted in practices of the English people-at-large”); Cromartie, *supra* note 150, at 211 (observing the problem of connecting custom of the courts to popular practice and beliefs); Postema I, *supra* note 111, at 168–69 (same).

<sup>335</sup> Postema I, *supra* note 111, at 175 (quoting Hale, *supra* note 116, at 51); see also *id.* (discussing St. Germain's approach).

<sup>336</sup> *Id.* at 175.

<sup>337</sup> Hale, *supra* note 116, at 39; see Berman, *Origins*, *supra* note 153, at 1712 (drawing this connection); cf. Bederman, *supra* note 334, at 30 (describing Hale as a common-law populist who also accepted “parliamentary supremacy” over “judge-made common law and customary regimes”).

The shift of emphasis toward statutes also mitigates the problems of complexity that bedevil a common law system limited to adjudication. It is one thing for courts to resolve disputes over contracts or slip-and-falls, and quite another for them to tackle larger, polycentric tasks like access to health care, utility regulation, or interstate pollution.<sup>338</sup> Appreciating legislatures' potential for systemic reform is no modern revelation. Hale saw legislation as crucial to legal development, chaired a law reform commission, and called for incremental legislative alteration of the common law (while cautioning against departing from basic constitutional norms).<sup>339</sup> As with increasingly popular responsibility for artificial reason in the common law style, a greater emphasis on statutory initiative to resolve complex problems (in admittedly incremental fashion) extends and develops the common law tradition, rather than abandoning it. In this light, the major differences between legislating and adjudication noted at the end of Part III point toward judicial deference.<sup>340</sup> The wider range of considerations for compromise available to a legislature, as well as the broader array of solutions—including deferring decision or even delegation—are commensurate to the complexity of modern governance. Courts' more limited tools to respond to that complexity further show the superiority of legislatures as "artificial reasoners."

Finally, a common law system's increased turn toward legislation may be a result of, or response to, the erosion of the social consensus and cohesion that characterized the more juriscentric common law of the classical period. Even forty years ago, legal historian Brian Simpson saw such fragmentation afoot as the scope of the legal system broadened beyond "twelve men in scarlet" cultivating the common law.<sup>341</sup> Other ex-

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<sup>338</sup> See Lon Fuller, *The Forms and Limits of Adjudication*, in *The Principles of Social Order*, Selected Essays of Lon L. Fuller 86, 111–21 (Kenneth I. Winston ed., 1981) (discussing the limits of adjudication to resolve such polycentric problems); see generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. Chi. L. Rev.* 883, 883–85 (2006) (exploring the limits of case-by-case litigation for law development).

<sup>339</sup> Berman, *Origins*, supra note 153, at 1712 (stating that Hale appreciated "the importance of legislation under Edward I . . . who was in many ways the hero of Hale's History and, more generally, to stress the great role played by legislation throughout English legal history"); Gray, supra note 116, at xxix ("But for Hale the basic changes of the crucial medieval centuries pointed to conscious general legislation."); id. at xxix–xxx (discussing Hale's work as a reformer and Hale's essay "The Amendment of the Laws").

<sup>340</sup> See supra Section III.C.

<sup>341</sup> Simpson, supra note 160, at 24; see id. (surmising that the "breakdown in the cohesion of the common law" system is connected to "the institutional changes of the nineteenth century, and the progressive increase in [its] scale of operations").

planations, such as increased pluralism in society and the bar, also come to mind. One manifestation of this breakdown in consensus, which Simpson saw occurring in America well before England, was a tendency to identify common law doctrine with canonical rules that satisfy external tests of validity, rather than internal shared agreement among practitioners.<sup>342</sup> Simpson, who focused on the judiciary and attempted to render its practice more rule-like, saw in these developments a “breakdown of a system of customary or traditional law.”<sup>343</sup>

A focus on legislation sheds new, and perhaps more optimistic light, on the challenge social fragmentation poses to the common law system. Unlike common law adjudication, which appears to require a judiciary reliably in touch with widespread social consensus, the structured, deliberative reasoning of large assemblies has greater potential to identify preexisting agreement and to forge agreement through compromise where there was none before. An increasing reliance on legislation in common law fashion represents (optimistically) a successful adaptation of the tradition to new social contexts or (resignedly) a second-best approximation of the tradition in an age of diminished expectations about social agreement.

#### *B. What the Common Law Tradition Offers Interpretive Formalism*

It is fair to ask why interpretive formalists should claim the common law tradition, especially if doing so will not change much about their approach to statutory interpretation. This Section identifies some of the benefits of retheorizing formalism within the common law tradition.

First, classical common law theory grounds interpretive formalism in arguments that are continuous with the broader legal tradition from which our legal system originated. This point is rhetorical, but rhetoric in law is more than puffery. Law is an inherently conservative practice that favors continuity over rupture and the familiar over the novel. Formalists begin arguments on the back foot when they concede or celebrate their break from those traditions. Such a disadvantage is unnecessary, as formalists can situate their practice within the inherited tradition and can use that tradition to criticize rival approaches.

Second, interpretive formalism is a more complete theory of interpretation when integrated with the common law tradition. The primary divi-

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<sup>342</sup> See *id.* at 23–24.

<sup>343</sup> *Id.* at 23.

sion between formalists and their opponents is whether to follow reasonably clear text (or original intent) when it conflicts with background purpose, the broader fabric of the law, or contemporary values. Yet formalists interpret unclear statutory provisions in light of uncodified purpose, other legislation, and background, unwritten legal principles and policies in common law fashion. This has led critics to claim that formalist approaches like textualism are incomplete as theories of statutory interpretation.<sup>344</sup> Textualism tells courts what to do with clear text, but says little about the many cases in which legislation is not clear. A common law theory that includes formalism, however, can gather front-line faithful agency *and* the second-line integrative, contextual approaches under the same tent. It is not “Austin first, open Blackstone in case of emergency,” but the common law tradition all the way down.

Relatedly, common law formalism more readily reconciles faithful agency in statutory interpretation with the persistence of background, unwritten law.<sup>345</sup> Federal court decisions, including those written by formalist judges, will find implied common law defenses to statutory crimes, read terms in light of common law meanings, and resolve conflicts of law questions without appeal to statutory text. Federal courts in a textualist era have begun to act as if the statute somehow “contained” or incorporated these rules of unwritten law.<sup>346</sup> As Professor Caleb Nelson has argued, these practices could just as well be explained by interstitial general law that persists notwithstanding dicta doubting the “brooding omnipresence” in *Erie Railroad Co. v. Tompkins*.<sup>347</sup> Formalist resistance to this solution, moreover, flows from a Hobbesian and Benthamite belief that common law is merely a judicial form of law as command.<sup>348</sup>

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<sup>344</sup> See Merrill, *supra* note 105, at 1596.

<sup>345</sup> Cf. Nelson, *Persistence*, *supra* note 77, at 503 (defending “the continuing relevance of rules of general law—rules whose content is not dictated entirely by any single decisionmaker (state or federal), but instead emerges from patterns followed in many different jurisdictions”).

<sup>346</sup> See Nelson, *State and Federal Models*, *supra* note 77, at 661–63.

<sup>347</sup> *Id.* at 661–63, 724–28; *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J.) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.”); see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (adopting Holmes’s rejection of general federal law because there is no “transcendental body of law outside any particular State but obligatory within it”).

<sup>348</sup> See Nelson, *Legitimacy*, *supra* note 77, at 17 (“Bentham’s views certainly have modern adherents. Textualists, in particular, have embraced various aspects of his critique of unwritten law.”).



Once we reject this top-down understanding of precedent *and* statute within a common law system, background unwritten law can more comfortably have a place alongside legislation in formalist statutory interpretation. Authoritative legislation is a superior form of customary law, for sure, and trumps conflicting, uncodified doctrine. But if courts understand common law adjudication as less judicial fiat than a principled and disciplined attempt to forge and channel customary norms, the separation-of-powers worries of judicial recognition of background law in the “gaps” of statutes are less fraught.<sup>349</sup> Adjudication and legislation aspire to the same end of ascending law; that statutes are superior evidence of our *common* law does not necessarily extinguish background doctrine consistent with the legislation. Nor does the courts’ justified use of this background law require a belief—or a fiction—that Congress silently commands that this doctrine to be somehow “within” the statute.

In a similar vein, situating formalism in the common law tradition also sheds light on the order of sources formalists prefer when interpreting unclear statutes. Many will look to inferences from statutory structure, other legislation, and interpretive canons before using legislative history, abstract purpose, or sound policy to resolve statutory uncertainty.<sup>350</sup> The formalist’s preference for coherence with the enacted corpus of legislation and well-established background legal norms, which critics decry as willful resistance to the legislature, is more understandable if statutory formalism is an extension of the common law tradition.

Reading a statutory provision in light of other enacted materials looks to other authentic examples of the legislature’s “artificial reason.” Looking to established, uncodified background law draws on the legislatively defeasible artificial reason of the courts. Given common lawyers’ distrust of “natural reason,” both resources are superior to filling a statutory gap based on a judge’s views on justice or policy. Given the inaccessibility of the legislature’s reasoning to the judicial outsider, other existing, authentic results of the legislature’s reasoning process may be more reliable sources than inference of legislative purpose, history, or contemporary values. Similarly, to the common lawyer the disciplined, artificial reason of the courts evident in interpretive canons or uncodified

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<sup>349</sup> See Pojanowski, *supra* note 22, at 1748–50.

<sup>350</sup> See Abbe R. Gluck, *The States as Laboratories for Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *Yale L.J.* 1750, 1763, 1829–33 (2010) (identifying this feature of federal textualism and comparing it to state court “modified textualists” who prefer legislative history over non-linguistic canons).

general law may be more effective in channeling custom than reading the raw material of legislative debates. Thus, the formalist's preference for canons, presumptions, and uncodified background law over inferences of purpose, legislative history, or general sense of the spirit of the age may be best explained by their continuing, if unacknowledged, adherence to the common law tradition.

Finally, the common law tradition bolsters, or at least contextualizes, constitutional arguments many formalists use to justify their approach to statutory interpretation. A leading strain of textualism, for example, aims to derive formalist rules of interpretation from the Constitution.<sup>351</sup> Importantly, and unsurprisingly, these constitutional arguments have more traction with judicial formalists than non-doctrinal rationales for formalist interpretation.<sup>352</sup> But such arguments are, by formalist standards, more suggestive than conclusive.<sup>353</sup> Extracting principles that demand textualism from the Constitution's Vesting Clauses and the requirements of bicameralism and presentment seems hardly more determinate than deriving general "separation of powers" or "federalism" principles. Textualists like Manning have been hesitant to endorse the latter exercises, which raise questions about such arguments in service of statutory formalism.<sup>354</sup>

<sup>351</sup> Compare Manning, *supra* note 96 (grounding formalism in constitutional structure), with Larry Alexander, *All or Nothing At All? The Intentions of Authorities and the Authority of Intentions*, in *Law and Interpretation* 357 (Andrei Marmor ed., 1995) (grounding formalism in the nature of interpreting legal texts), and Vermeule, *supra* note 280 (grounding formalism in consequentialism).

<sup>352</sup> See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (Thomas, J.) (reasoning that allowing legislative purpose to trump enacted text would undermine the Constitution's legislative process of bicameralism and presentment); *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) (objecting to judicial use of legislative history on constitutional grounds).

<sup>353</sup> See Vermeule, *supra* note 280, at 30–33 (attacking the determinacy of Manning's arguments); *id.* at 33 ("But the best reading of the Constitution is that interpretive formalism and interpretive antiformalism are constitutionally optional for judges.")

<sup>354</sup> See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1944 (2011) ("Viewed in isolation from the constitutionmakers' many discrete choices, the concept of separation of powers as such can tell us little, if anything, about where, how, or to what degree the various powers were, in fact, separated (and blended) in the Philadelphia Convention's countless compromises."); Manning, *supra* note 104, at 2008 ("But to say, as the Court does in its new federalism cases, that the document adopts an unspecified federalism norm ignores the fact that lawmakers—including constitutionmakers—must make hard choices about how to carry out their purposes, judgments about what the

This is not to say constitutional derivations of textualism are inconsistent with formalism; as in statutory interpretation, formalists use arguments from structure and purpose in absence of more determinate indicia.<sup>355</sup> Nor is it to say that these arguments are unpersuasive. It is, however, to identify these arguments as a kind of constitutional common law in the lacunae of authoritative text. When we understand interpretive formalism as an extension of the common law tradition, this should not be at all surprising. Classical English common lawyers understood constitutional law, including parliamentary supremacy, as common law rooted in judicial decision, statutes, and custom. When we see how formalist arguments from constitutional structure resemble classical common lawyers' understanding of unwritten but very real constitutional norms, we have a better understanding of the character of these arguments and their continuity with past practice.

*C. The Common Law Tradition's Challenge to Nonformalist Interpretation*

An immediate takeaway from the arguments above is that the connection between the common law tradition and nonformalist approaches to statutory interpretation is not as straightforward as many putatively "common law" interpreters believe. If the connection between nonformal interpretation is to be more than rhetoric, it must be grounded in careful argument about the character and direction of a contested tradition. A natural response—challenging this Article's interpretation of the tradition—will shift the terms and rhetoric of their debate with formalism. Nonformalists will have to reconcile or justify their departures from traditional understandings of artificial reason and study more closely the heritage they claim. Dynamic interpreters, who are more likely to be found in law schools than on the bench, will have to confront their resemblance to the academic *critics* of the common law who, drawing on civil law learning, urged judges to exercise discretion in order to system-

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attainment of some purposes is worth in particular settings, and tradeoffs against other values.").

<sup>355</sup> See Manning, *supra* note 98, at 2434 n.179 (citing Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 3–32 (1969)) ("The structural approach I advance here parallels the longstanding constitutional tradition of interpreting open-ended grants of power in light of the constitutional structure as a whole.").

ize the middle of the common law and align it with universal tests of reason.<sup>356</sup>

More concretely, the analysis indicates that some nonformal methods are more vulnerable than others. First-order moves that depart from formal indicia based on the statute's content appear more suspect than second-order methods that try to improve the legislative process. For example, an approach that relies on legislative history and selective use of canons to encourage public-regarding legislation and limit rent-seeking statutes<sup>357</sup> arguably respects the centrality of common law legislation more than after-the-fact updating based on the court's impression of public values.<sup>358</sup>

Nonformal interpreters alternatively may be resigned to the possibility that the common law tradition at most underwrites a weak purposivism that attends closely to statutory text and looks to the purpose of a particular statute or provision, rather than the legal fabric as a whole. With the rise of formalism in the Rehnquist and Roberts Courts, this modest purposivism practiced by Justice Breyer is the least formalist approach to statutory interpretation one will usually see garnering a Supreme Court majority.<sup>359</sup> Discriminating use of legislative history, purpose, and appeals to local coherence may lead such an interpreter to override clear formal indicia in legislation. Nevertheless, this approach, while falling short of orthodox formalism, lacks the aspirations to systemic doctrinal elegance of other dynamic approaches and is more likely to take the sometimes-rugged legal topography as it finds it.

Finally, although this Article's analysis focuses on federal law, it should caution jurists (and scholars) who assume that state courts' undisputed "common law powers" justify greater interpretive dynamism than in federal courts of limited jurisdiction.<sup>360</sup> To the extent that state legislatures, too, make statutes in common law fashion, the arguments

<sup>356</sup> See Hamburger, *supra* note 15, at 116–18, 126–41 (contrasting traditional common lawyers' more constrained views of the judicial role, legal change, and discretion, with the ambitions of learned law).

<sup>357</sup> See generally, e.g., Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 *Colum. L. Rev.* 223 (1986); Cass Sunstein, Interpreting Statutes in the Regulatory State, 103 *Harv. L. Rev.* 405 (1989).

<sup>358</sup> Whether second-order structural dynamism is significantly more likely to avoid first-order value judgments is unclear. Cf. Shapiro, *supra* note 266, at 925 (expressing skepticism about use of canons for "correction" of legislative imperfections).

<sup>359</sup> See *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 84, 93, 97–98 (2007) (Breyer, J.); John F. Manning, The New Purposivism, 2011 *Sup. Ct. Rev.* 113, 113–14.

<sup>360</sup> See Kaye, *supra* note 3, at 1; Pojanowski, *supra* note 7, at 479–80.

for faithful agency grounded in the common law tradition would apply. There may be variance among jurisdictions—Nebraska’s unicameral legislature comes to mind—but it is possible that the persistence of the common law tradition in state and federal courts in this respect is not markedly different.<sup>361</sup> In fact, one of the most notable distinctions between state and federal legislative practice—the likelihood that states adopt uniform or comprehensive codes—is a state law departure from the common law tradition. Perhaps it is federal formalists who are today’s “keepers of the common law.”<sup>362</sup>

#### CONCLUSION

The common law, like all living traditions, is a contested one and arguments about its shape and direction obviously do not end with Coke, Selden, and Hale. Directly to that point, this Article offers a reading of that tradition’s patterns of thought to argue that formal approaches to statutory text are both an outgrowth and an adaptation of the common law tradition in a legal system with far more legislation than Coke, Selden, or Hale ever confronted. If so, advocates of dynamic and strongly purposive statutory interpretation do not have sole claim on that part of the American legal heritage. When they invoke the common law tradition, they draw on a complex body of ideas that offers as much challenge to their methods as support. Conversely, interpretive formalists need not jettison the common law tradition or adopt the reductive, Hobbesian framework of the tradition’s critics to press their case.

The argument between formalists and their critics, in this light, is a dispute about which way to develop a tradition, not whether to abandon it. It takes fewer steps to resolve an argument within a tradition than an argument in which disputants are talking past each other, or at least mistakenly think they are. Law, after all, handles evolutionary arguments far easier than revolutionary claims. As this Article hopefully shows, the common law tradition can provide goals, resources, and standards of success for resolving the long-running dispute about formality in statutory interpretation.

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<sup>361</sup> See Nelson, *Legitimacy*, *supra* note 77, at 23–24 (noting that “skeptics of federal common law suggest that state courts have more such authority in areas of state law than federal courts have in areas of federal preemption” and stating that this conclusion is “not obviously correct”).

<sup>362</sup> Cf. Kaye, *supra* note 3, at 6 (describing her state court as a “keeper[] of the common law”).