

Towards a Common Law Originalism

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ARTICLES

TOWARDS A COMMON LAW ORIGINALISM

Bernadette Meyler\*

*Originalists' emphasis on William Blackstone's Commentaries tends to suggest that the common law of the founding era consisted of a set of determinate rules that can be mined for the purposes of constitutional interpretation. This Article argues instead that disparate strands of the common law, some emanating from the colonies and others from England, some more archaic and others more innovative, coexisted at the time of the Founding. Furthermore, jurists and politicians of the founding generation were not unaware that the common law constituted a disunified field; indeed, the jurisprudence of the common law suggested a conception of its identity as much more flexible and susceptible to change than originalists posit.*

*The alternative that this Article proposes—"common law originalism"—treats the strands of eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as supplying the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively. It likewise suggests that the interpretation of common law phrases should be responsive to certain alterations in external conditions, rather than static and inflexible. Situated between living constitutionalism and originalism as currently practiced, common law originalism attempts to square fidelity to the founding era with fidelity to its common law jurisprudence—a jurisprudence that retained continuity yet emphasized flexibility and was inclusive enough to hold disparate legal conceptions in its embrace.*

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## INTRODUCTION

The specter of constitutional originalism, an approach once characterized as dead, continues to govern the federal judiciary from beyond the grave.<sup>1</sup> Critics, particularly those arguing for an unwritten constitution or an interpretation of the Constitution as a living document, have hardly been successful in persuading originalists that their vantage point, or cluster of vantage points, is flawed.<sup>2</sup> While the proponents of originalism are far from monolithic in their methods, this Article claims that a central feature of originalist approaches—the resort to a Blackstonian vision of eighteenth-century common law as a backdrop to constitutional interpretation<sup>3</sup>—faces several significant problems. These may not, however, prove fatal to originalism, but rather encourage its metamorphosis into a more dynamic creature, one with appeal both to originalists and living constitutionalists.<sup>4</sup>

In a number of constitutional contexts, originalists urge that particular terms and phrases—including “law of nations,” “habeas corpus,” “privileges and immunities,” “otherwise re-examined,” and “assistance of counsel”—should be interpreted in light of their connotations under the common law.<sup>5</sup>

1. For the suggestion that “Judge Alito seemed to endorse originalism” during his confirmation hearing, see Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, § 4, at 1. For the potential demise of originalism in the late twentieth century, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611 (1999) (“The received wisdom among law professors is that originalism is dead, having been defeated in intellectual combat sometime in the eighties.”).

2. For arguments against originalism by advocates of an unwritten or living constitution, see Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211 (1988); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1974); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). Randy Barnett has recently claimed Powell’s work for the side of originalism—or at least his own brand of “original meaning originalism”—itself. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 113 (2004) (“[T]he same historical evidence offered by Powell in opposition to original intent supports original meaning based on ‘the public meaning or intent of a state paper.’”).

3. See *infra* Part I.

4. See *infra* Part IV.

5. See U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739-51 (2004) (Scalia, J., concurring) (interpreting the “law of nations” in the Alien Tort Statute as “part of the so-called general common law” at the time of the Founding); U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

They also contend that the common law provides a key to understanding the meaning of certain constitutional provisions, such as the Eleventh Amendment, beyond their literal language.<sup>6</sup> Originalists' invocations of the common law

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Invasion the public Safety may require it.”); *INS v. St. Cyr*, 533 U.S. 289, 336-45 (2001) (Scalia, J., dissenting) (examining the common law conception of habeas corpus to give content to the Suspension Clause); U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *Saenz v. Roe*, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting) (“The colonists’ repeated assertions that they maintained the rights, privileges, and immunities of persons ‘born within the realm of England’ and ‘natural born’ persons suggests that, at the time of the Founding, the terms ‘privileges’ and ‘immunities’ (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons.”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2566-68 (2006) (Alito, J., dissenting) (interpreting the Assistance of Counsel Clause against the backdrop of the common law rule limiting such assistance in felony cases); U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 450-54 (1996) (Scalia, J., dissenting) (maintaining that the Reexamination Clause of the Seventh Amendment should be interpreted in light of common law practice regarding judges sitting in an appellate capacity).

6. The literal language of the Eleventh Amendment does not bar suits by a State’s citizens against that State, but the Amendment has generally been interpreted as doing so since *Hans v. Louisiana*, 134 U.S. 1 (1890). See generally U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). As John Manning has explained, the Supreme Court’s understanding of the Eleventh Amendment since *Hans v. Louisiana*, as instantiated most recently and dramatically by the Rehnquist Court’s decisions on the subject, has been strongly purposivist, rather than adhering to the precise specifications of the constitutional text. See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1666-71 (2004). In its purposivism, the Rehnquist Court insisted that the Eleventh Amendment was designed simply to restore the Constitution’s original protection of state sovereign immunity, or the “presupposition” that “it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,” which the Supreme Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), had called into question. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 69-70 (1996). Although sometimes framing this presupposition about sovereignty as part of the “jurisprudence [of] all civilized nations,” the majority’s analyses as well as the dissenters’ critiques in these cases demonstrate that it derived in large part from the common law. See *Alden v. Maine*, 527 U.S. 706, 733 (1999) (“Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.”); see also *Seminole Tribe*, 517 U.S. at 131-42 (Souter, J., dissenting) (arguing that *Hans* and the *Seminole Tribe* majority rest their views about sovereign immunity upon the common law and that such reliance is inapposite). But cf. *Seminole Tribe*, 517 U.S. at 69 (claiming that the decision in *Hans*, and, by extrapolation, that in *Seminole Tribe* itself, “found its roots not solely in the common law of England, but in the much more fundamental ‘jurisprudence in all civilized nations’”). Indeed, dissenting in one sovereign immunity case, Justice Breyer even compared the Rehnquist Court’s version of the doctrine to the “thought of [seventeenth-century King] James I . . . .” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary*

posit a fixed, stable, and unified eighteenth-century content, largely encapsulated in William Blackstone's *Commentaries on the Laws of England*.<sup>7</sup>

Originalists resort to the common law in part to constrain judges' interpretive discretion.<sup>8</sup> Under this rationale, the accuracy of judges' historical account matters little; the discovery of a definitive, externally supplied answer to a constitutional question constitutes the crucial component of the method. Yet this kind of formalism cannot provide a complete justification for an originalist stance; taken on its own, such reasoning would support reference to *Robinson Crusoe* as much as to Blackstone.<sup>9</sup> Other—and, in today's parlance, more democratically legitimate—limitations could be imposed upon judges' reasoning. Judges could, for example, be forced to look in every case to congressional statutes or state legislation and adopt the majority approach.<sup>10</sup>

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Educ. Expense Bd., 527 U.S. 666, 704 (1999) (Breyer, J., dissenting). In the sovereign immunity context, originalist invocation of the common law has thus not relied on the common law meaning of particular terms, but has instead appealed to the structure of a particular political concept within the context of the common law. See generally Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289 (2001) (arguing that the Supreme Court's recent Eleventh Amendment jurisprudence represents a new recourse to unwritten law); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) ("Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to 'address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision.' As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." (internal citations omitted)).

7. See *infra* Part I.

8. 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, 9-12 (Amy Gutmann ed., 1997) (arguing that judges apply the common law method outside of its appropriate province by employing it in the interpretation of statutes and the Constitution, a practice that constitutes judicial law-making and is therefore undemocratic).

9. The narrator of Wilkie Collins's novel *The Moonstone*, butler Gabriel Betteridge, has recourse to random pages of Daniel Defoe's *Robinson Crusoe* in order to resolve various quandaries. See WILKIE COLLINS, *THE MOONSTONE* 9 (John Sutherland ed., Oxford Univ. Press 2000) (1871) ("When my spirits are bad—*Robinson Crusoe*. When I want advice—*Robinson Crusoe*. . . . I have worn out six stout *Robinson Crusoes* with hard work in my service."). In the attempt to seek such solutions, Betteridge simply opens *Robinson Crusoe* to a random page, the lessons of which he then applies to the current situation. *Id.* at 12, 172.

10. Keith Whittington and Jed Rubenfeld both make similar points. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 39 (1999) (observing that the aim of "prevent[ing] judges from engaging in willful or arbitrary behavior" is insufficient to justify recourse to originalism because "the adoption of any interpretive method constrains judges from engaging in arbitrary or willful behavior"); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1135-36 (1995) (positing a situation "in which current popular will (accepting arguendo this figure of speech) is judicially known or knowable—through polls, countrywide legislation, and so on—as well as, if not better than, the will of the 'Framers,' particularly given the notorious difficulties in defining that term").

Some additional reason must be supplied for selecting the common law of the eighteenth century as a relevant constraint upon constitutional interpretation.<sup>11</sup> The most plausible is the idea that the clauses of the Constitution possess meaning and that that meaning derives from the public understanding of the constitutional text at the moment of ratification. To the extent that originalists' recourse to a Blackstonian account of the common law is premised upon this assumption as well as the formalist argument, their approach is susceptible to historical critique.

Several problems plague originalists' approach to the common law as it stood at the time of the Founding. The manner in which originalists frame their appeal to the common law itself misrepresents the object of inquiry. They envision the common law as a set of doctrines that can be mined in constitutionally relevant ways. What Justice Scalia, for example, finds to praise in the common law tradition is a body of rules presumed to be clear in the eighteenth century, whereas what he disparages is a particular method of approach, that of the common law judge.<sup>12</sup> Yet it is not entirely possible to disaggregate these aspects of the common law. In order to understand the nature and limits of the "rules" attributable to the eighteenth-century American common law, it is essential to examine the internal orderings of the concept of common law at the time.

Defining the scope of the common law is exceedingly difficult; indeed, its parameters often emerge only out of shifting and often permeable sets of contrasts—between common and statutory law, between common and civil law, between common law and equity, and between common and local custom. At the same time, certain eighteenth-century usages of the phrase "common law" occur frequently enough to warrant describing it as comprehending at

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In the substantive due process context, some Justices already survey the states in evaluating whether history and tradition support a particular right or a restriction on that alleged right. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 710-11 (1997). This practice may be most common in the Eighth Amendment context, where the inquiry into society's evolving standards of decency often involves examining the viewpoint of the states. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (weighing heavily the fact that "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach"); *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002) (considering as extremely significant the fact that many states had, in the relatively recent past, decided to cease permitting execution of the mentally retarded).

11. For the point that appeal to the Founders' intentions is not self-authorizing and, hence, that originalism cannot simply refrain from justifying itself by invoking the democratic legitimacy conferred by a prior moment, that of the Founding, see WHITTINGTON, *supra* note 10, at 49, 218; Rubinfeld, *supra* note 10, at 1127-30, 1134-39.

12. *See* Scalia, *supra* note 8, at 10 (referring to the common law of the founding generation as "a preexisting body of rules"); *id.* at 6-9 (criticizing what he designates as the common law approach, consisting of the attempt to discern the best legal rule and then apply it to the particular case by sedulously distinguishing other potentially controlling precedents).

least four general aspects. The common law implied a particular arrangement of institutional authority—including a distribution of power between judge and jury and between common law courts and those of equity.<sup>13</sup> It also denoted a certain set of procedures and their relation to a number of what we would designate substantive principles.<sup>14</sup> Furthermore, it described a particular—although not our—relation to judicial precedent.<sup>15</sup> Finally, it provided a justification for legal authority in the form of appeals to the “ancient constitution.”<sup>16</sup> To the extent that originalists’ invocation of eighteenth-century common law represents an attempt to discern the meaning of particular provisions to the audience contemporaneous with the Constitution’s ratification, ignoring the larger framework within which the particular doctrines of the common law functioned imperils the success of the enterprise.

Even when viewed with the originalist’s spotlight on specific doctrines, the common law was far from a unified field at the time of the Founding, nor was it so conceived, as both the writings of the Founders themselves and contemporaneous legal commentary demonstrate.<sup>17</sup> Rather, the common law of the founding era partook of a number of disparate strands, with the colonies, and subsequently the several states, diverging from the British heritage. This

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13. Recent cases reviewing the Federal Sentencing Guidelines have acknowledged the distinctive contours of one of those institutions—the jury—under the common law. *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

14. *See* Daniel J. Hulsebosch, *Writs to Rights: “Navigability” and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049 (2002); Daniel J. Hulsebosch, *Writs to Rights: The “Common Law” in the Age of Revolution* (August 2005) (unpublished manuscript, on file with the author) (describing the transformation of the common law from an eighteenth-century context in which it “offer[ed] a limited number of causes of action, embodied in formulaic writs, that gave specific remedies for specific injuries” to a nineteenth-century “system of rights in which remedies followed automatically upon proof of infringement of those rights”).

Duncan Kennedy’s magisterial work, *The Structure of Blackstone’s Commentaries*, illuminates Blackstone’s intermediate place in the transition from a writ-based to a substantively organized system of jurisprudence. Neither accepting the traditional arrangement of law into the forms of action nor fully adopting the organization based upon rights and duties that would become dominant in the nineteenth century, the *Commentaries* were structured, in part, to reconcile the seeming disorder of the system of common law writs with a liberal conception of rights. *See* Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 221-64 (1979).

15. The precise contours of the eighteenth-century American notion of precedent continue to be debated. *See* Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 823 (2004) (noting the increasing “ambiguities regarding the role of precedent in judicial decision-making” as “one moves farther back in time from the Framing”).

16. For a discussion of the impact and importance of the English notion of the “ancient constitution” upon eighteenth-century American law and culture, especially in connection with the forensic deployment of history, see generally JOHN REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* (2005).

17. *See infra* Part II.

situation resulted, in part, from the principle that only such parts of the common law were adopted as suited the condition of the colonies, but it also derived from the temporal disjunction between the moment of direct importation of the common law into the colonies at the time of their settlement and Blackstone's systematic formulation of the British common law in the middle of the eighteenth century. As a consequence, a single common law answer to a constitutional question often remains unavailable; instead, several distinct positions may present themselves.

Returning to the broader view of eighteenth-century common law, the jurisprudence of the common law suggested a conception of its identity as much more flexible and susceptible to change than originalists posit.<sup>18</sup> A certain self-consciousness, furthermore, characterized common law jurisprudence of the seventeenth and eighteenth centuries, a self-consciousness that undermines the view—expressed by Justice Scalia, among others—that we became aware only with the legal realists that judges made rather than discovered law.<sup>19</sup> Although insisting that the common law stemmed from a time beyond memory, jurists such as Sir Edward Coke and Sir Matthew Hale, whose work was received in America and lauded by members of the founding era, implicitly developed the theory that the common law was open to alteration through suggesting that, in law, history could be strategically deployed rather than only factually invoked.<sup>20</sup>

There are three reasons why the place of history in these early jurisprudences of the common law should inform an originalist interpretation of the Constitution. The first, which has been most eloquently articulated by Thomas Grey and does not appeal to most originalists, insists that the original understanding of a canonical text, like that of the Constitution, comprehends particular “expectations about the future process of interpretation itself.”<sup>21</sup> In this case, it would include the common law's self-understanding of the dynamics of historical co-optation. A second rationale, which may be more palatable to the originalist, suggests that the jurisprudential context of the Constitution's invocation of the common law represents a necessary backdrop to an attempt at discerning the original understanding of the Constitution's

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18. See *infra* Part III.

19. Justice Scalia also contrasts what he views as the eighteenth-century common law method with the post-realist mode. Scalia, *supra* note 8, at 10. As argued below, this distinction may not entirely hold up; early common lawyers were hardly less disingenuous than their contemporary counterparts. See *infra* Part III.

20. See *infra* Part III.

21. Grey, *The Uses of an Unwritten Constitution*, *supra* note 2, at 232. Grey contends that “the politicians who frame a constitution intend it ‘to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.’ Writers projecting words into an indefinite future in this way foresee and expect that they will be read, and reasonably read, in ways that fit neither the words’ plain meaning at the moment of utterance, nor the writers’ own immediate concrete intentions.” *Id.* (internal footnote omitted); see also Powell, *supra* note 2.



common law terms. Third, the “pre-post-realism” of early common law jurisprudence, and the extent to which the “objective” legal use of history that originalists seek to implement was more rhetoric than reality even in the jurisprudence of eighteenth-century common lawyers, might force originalists to recharacterize the nature of their project.

In light of these critiques, this Article outlines an alternative, “common law originalism,” and, through several examples from the Seventh Amendment, sketches its differences from, on the one hand, originalism as currently practiced and, on the other, living constitutionalism.<sup>22</sup> Common law originalism regards the strands of eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as supplying the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively. It suggests further that the interpretation of common law phrases should be responsive to certain alterations in external conditions, rather than static and inflexible. This alternative originalism thus attends primarily to the questions presented by juxtaposing disparate versions of eighteenth-century common law and to the potential for reconciling assertions of historicity with the possibility of change.

Taking Justice Scalia’s theories and their implementation as its primary point of reference,<sup>23</sup> Part I details the originalist approach to the common law, one grounded in a fundamental paradox—rejection of the jurisprudence of the common law combined with endorsement of Blackstone’s summation of particular precepts of eighteenth-century common law. Part II then demonstrates the falsity of the claim that, at the time of the Founding, the common law was “uniform throughout the nation (rather than different from state to state).”<sup>24</sup> The import of Part III is that common law jurists of the seventeenth and eighteenth centuries—although perhaps purporting to “discover” rather than “create” law—in fact engaged in fairly self-conscious processes of law making when participating in common law adjudication.

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22. See *infra* Part IV. For a valuable and somewhat different use of the phrase “common law originalism” in the context of statutory interpretation, see generally Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998).

23. Although a broad range of thinkers, including Akhil Reed Amar, Randy Barnett, and Judge Michael McConnell, all identify themselves as originalists of one variety or another, this Article will focus primarily on the writings of Justice Scalia, which both provide an extremely prominent theoretical model and demonstrate its implementation. The difficulties in reconciling theory with practice are, of course, legion, yet the common law tradition is replete with theories generated out of practice, such as those of Sir Edward Coke, Sir Matthew Hale, and Justice Oliver Wendell Holmes, Jr. Indeed, one notable characteristic of the common law is the extent to which some of the most powerful theories of its operation emanate out of and function in relation to practical legal application. Despite eschewing certain aspects of the common law, Justice Scalia stands within this particular line of theorists and practitioners.

24. Scalia, *supra* note 8, at 10.

These two critiques, which represent novel and perhaps fundamental challenges to the coherence of constitutional originalism as currently practiced, may even, as Part IV preliminarily suggests, point the way towards a principled compromise between the extremes of unbridled living constitutionalism and originalist ad hockery.

### I. ORIGINALISTS' TAKE ON THE COMMON LAW

In his most comprehensive account of originalist constitutional interpretation, *Common Law Courts in a Civil Law System*, Justice Scalia insists that the emphasis upon the common law in American law schools inculcates a predilection for a type of reasoning that leads to the view that the Constitution should be interpreted in a flexible manner as a "living" document.<sup>25</sup> This common law model, Scalia maintains, is "not the way of construing a democratically adopted text."<sup>26</sup> Permitting judges, rather than democratically chosen officials or democratically ratified amendments, to alter the meaning of the Constitution lacks legitimacy.<sup>27</sup> Instead, the Constitution should be interpreted textually, in a manner similar to statutes.<sup>28</sup> Textual interpretation does not simply rely on the language of the Constitution, but places emphasis on "context" as well.<sup>29</sup> The most relevant context is not the actual intentions of the Founders, but evidence of the "original meaning" of the document's words.<sup>30</sup> Furthermore, following Ronald Dworkin's distinction,

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25. See *id.* at 38 ("The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. . . . [I]t is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.").

26. *Id.* at 40.

27. *Id.* at 9-14.

28. *Id.* at 23-25, 40-41.

29. *Id.* at 38.

30. *Id.* Here Scalia's view diverges from that of some other prominent originalists, including Keith Whittington, who, in *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, *supra* note 10, defends a vision of originalism directed at discerning the Framers' intent in crafting particular constitutional provisions.

According to Randy Barnett's gloss on the relationship between "original meaning" and "original intent," "[w]hereas 'original intent' originalism seeks the intentions or will of the lawmakers or ratifiers, 'original meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment." BARNETT, *supra* note 2, at 92. Jack Rakove further distinguished between the search for intentions and understandings in the pursuit of original meaning: "Meaning must be derived from usage . . . and it is at this point that the alternative formulations of original intention and understanding become pertinent. *Intention* connotes purpose and forethought, and it is accordingly best applied to those actors whose decisions produced the constitutional language whose meaning is at issue . . . . *Understanding*, by contrast, may be used more broadly to cover the impressions and interpretations of the

although applying it quite differently, Scalia insists that we should consider “semantic” rather than “expectation” meanings, or “what the text would reasonably be understood to mean, rather than . . . what it was intended to mean.”<sup>31</sup>

One of the primary sources for discerning this meaning is, of course, eighteenth-century English common law and, most prominently, William Blackstone’s *Commentaries on the Laws of England*.<sup>32</sup> In attempting to discover original meanings, Scalia examines a more comprehensive selection of writings from the period surrounding ratification than simply documents by the Framers, looking, for example, at texts by Thomas Jefferson and John Jay.<sup>33</sup> He places particular priority, however, on the vision of the common law that Blackstone expressed. Responding to Gordon Wood’s critique of his account of judicial review based upon Sir Edward Coke’s decision to review a statute with reference to the common law in *Bonham’s Case*, Scalia writes, “The genuine orthodoxy is set forth in Blackstone . . . . The record does not, I think, support Professor Wood’s belief that Blackstone was setting forth a new, eighteenth-century doctrine, spawned by ‘the emergence . . . of the idea of parliamentary sovereignty and the positivist conception of law.’ Blackstone was not new; Dr. Bonham’s case was eccentric.”<sup>34</sup> Although expressing an

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Constitution formed by its original readers . . . .” JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 8 (1996).

Ronald Dworkin introduced the contrast between “semantic” and “expectation” originalism into debates about the subject. He identified “two forms of originalism: ‘semantic’ originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say, and ‘expectation’ originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have.” Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 8, at 115, 119. Jack Balkin has modified Dworkin’s distinction, insisting instead upon differentiating “expected application” from “original meaning” forms of originalism and claiming priority for the latter, which involves examining constitutional text and underlying principle rather than the specific application of constitutional provisions envisioned by those of the founding era. See Jack M. Balkin, *Abortion and Original Meaning* 5 (Yale Law School, Public Law & Legal Theory Working Paper No. 119, 2006), available at <http://www.ssrn.com/abstract=925558>.

31. Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION*, *supra* note 8, at 129, 144; see also BARNETT, *supra* note 2, at 93 (approving of Dworkin’s distinction between semantic and expectation originalism and advocating the former over the latter).

32. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*.

33. Scalia, *supra* note 8, at 38 (“I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton’s and Madison’s writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay’s pieces in *The Federalist*, and to Jefferson’s writings, even though neither of them was a Framers. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

34. Scalia, *supra* note 31, at 130.

interpretation of the respective places of legislative and judicial power at the time of the Founding, this passage indicates the weight that Scalia generally accords to Blackstone as well as the potential temporal discontinuities between particular instantiations of the common law.

In applying his method to deciding—or dissenting in—specific constitutional cases, Scalia consistently emphasizes eighteenth-century English common law and the work of Blackstone, only secondarily alluding to any developments in the colonies or the states, and then only generally for the purpose of confirming or substantiating the applicability of Blackstone's statements.<sup>35</sup> Referring in one case to Blackstone's *Commentaries* as "widely read and 'accepted [by the framing generation] as the most satisfactory exposition of the common law of England,'"<sup>36</sup> Scalia usually looks first to Blackstone and then only subsequently and minimally elsewhere.<sup>37</sup> Other Justices and judges who do not explicitly adopt an originalist method likewise tend to rely heavily on Blackstone's statements about the state of eighteenth-century common law.<sup>38</sup> This emphasis is not irrational, and scholars have frequently reinforced Blackstone's pre-eminence in the America of the founding generation: "First published in America in 1771, with subsequent republication in 1790 and 1799, Blackstone's *Commentaries* soon became the most widely read legal text in late-eighteenth-century America—essential reading for any aspiring lawyer."<sup>39</sup>

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35. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 452 (1996) (relying on Blackstone, among others, in interpreting the Seventh Amendment for the proposition that "[a]t common law, review of judgments was had only on writ of error, limited to questions of law").

36. *Rogers v. Tennessee*, 532 U.S. 451, 472 (2001) (Scalia, J., dissenting) (alteration in original).

37. See, e.g., *Deck v. Missouri*, 544 U.S. 622, 638 (2005) (Thomas, J., dissenting) (relying on Blackstone and Coke for the proposition that "English common law in the 17th and 18th centuries recognized a rule against bringing the defendant in irons to the bar for trial"); *Crawford v. Washington*, 541 U.S. 36, 42-50 (2004) (interpreting the meaning of the Confrontation Clause against the backdrop of the common law as expressed by Blackstone and insisting that deviations from "live testimony in court subject to adversarial testing" in England and the colonies did not call into question the clear import of the common law principle).

38. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997) (Rehnquist, C.J.) (referring to "Sir William Blackstone, whose *Commentaries on the Laws of England* not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers"). For scholarship insisting on the primacy of Blackstone for the founding generation, see EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 84-85 (1955); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 143 (1988); and Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

39. Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1112-13 (2006).

Although sanctified by the Supreme Court and comprehensive in scope, Blackstone's writings were hardly sophisticated accounts of English common law, as David Lieberman and others have artfully demonstrated.<sup>40</sup> Indeed, at least two pragmatic purposes underlay the *Commentaries*, rendering them a strategic intervention into the common law rather than simply a synopsis of existing doctrine: on the one hand, Blackstone initially delivered them as the first English lectures on law for non-law students, and, on the other, he aimed through them to show legislators the problems with the state of the common law so that they might be inclined to exercise their statutory authority in amending it.<sup>41</sup> As Blackstone's attempt to affect legislation suggests, he wrote at a point when the common law itself was on the wane, and parliamentary supremacy had been definitively established.<sup>42</sup> This was not, however, the state of affairs in the seventeenth century, when the original colonies were established; as a result, Blackstone's vision of the relationship between statutory and common law may not accurately represent the indigenous American tradition.<sup>43</sup>

Nor is it solely in this respect that Blackstone's authority—or the eighteenth-century English vision of the common law more generally—has proved incomplete or misleading in constitutional adjudication. Originalism's insistence on an original meaning has often translated into the attempt to extract *an* original meaning from potentially divergent strands of common law. This tendency manifests itself within particular cases when originalists maintain the univocality of the common law against other Justices' protestations that the record is hardly monolithic.

For instance, in construing a statute prohibiting the knowing transportation in interstate commerce of "falsely made, forged, altered, or counterfeited securities," Justice Marshall maintained that the phrase "falsely made" could not simply be thought to ventriloquize the common law because the "plurality of definitions of 'falsely made' substantially undermines . . . reliance on the 'common-law meaning' principle."<sup>44</sup> As Marshall interpreted it:

That rule of construction, after all, presumes simply that Congress accepted the *one* meaning for an undefined statutory term that prevailed at common law. Where, however, no fixed usage existed at common law, we think it more

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40. See generally DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* (2002).

41. *Id.* at 31-32, 56.

42. See Gordon Wood, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 8, at 49, 50-53.

43. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30 (1967) ("Just as the colonists cited with enthusiasm the theorists of universal reason, so too did they associate themselves, with offhand familiarity, with the tradition of the English common law. The great figures of England's legal history, especially the seventeenth-century common lawyers, were referred to repeatedly—by the colonial lawyers above all, but by others as well."); see also *infra* note 116.

44. *Moskal v. United States*, 498 U.S. 103, 116 (1990).

appropriate to inquire which of the common-law readings of the term best accords with the overall purpose of the statute rather than to simply assume, for example, that Congress adopted the reading that was followed by the largest number of common-law courts.<sup>45</sup>

Dissenting, Justice Scalia instead endeavored to establish that a particular common law meaning could, in fact, be discerned.<sup>46</sup> In doing so, he established a fairly strong presumption of common law unity, suggesting that litigants must argue strenuously for the proposition that a single common law meaning did not inhere in a term or phrase because of divergent or conflicting strands. According to Scalia:

The Court acknowledges the principle that common-law terms ought to be given their established common-law meanings, but asserts that the principle is inapplicable here because the meaning of “falsely made” I have described above “was not universal.” . . . If such minimal “divergence”—by States with statutes that did not include the term “falsely made”—is sufficient to eliminate a common-law meaning long accepted by virtually all the courts and by apparently all the commentators, the principle of common-law meaning might as well be frankly abandoned.<sup>47</sup>

Although Justice Marshall’s and Justice Scalia’s conflicting visions of the role of disparities within the common law tradition arose in the context of determining whether a statutory phrase should be interpreted as encapsulating a particular common law meaning, the debate could easily be transferred to the constitutional arena. Scalia has, indeed, similarly discounted minority views of the common law at the time of the Founding in deriving the original meaning of particular constitutional clauses.<sup>48</sup>

This emphasis on a singular original meaning is correlated with an account of the common law at the time of the Founding as a monolithic body unaffected by statutory developments and also as much more static than our current conception would suggest. In *Crawford v. Washington*, a case determining that the Confrontation Clause of the Sixth Amendment generally bars the admission of out-of-court testimonial statements by witnesses whom the defendants have not had prior opportunity to cross-examine, Justice Scalia assessed the scope of the common law’s rule on this subject by carving out the influence that several sixteenth-century statutes had had upon it.<sup>49</sup> Whereas these laws passed under

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45. *Id.* at 116-17.

46. *Id.* at 122 (Scalia, J., dissenting) (“‘Falsely made’ is, in other words, a term laden with meaning in the common law, because it describes an essential element of the crime of forgery.”).

47. *Id.* at 128-29 (Scalia, J., dissenting) (internal citations omitted).

48. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 54 n.5, 73 (2004) (Scalia, J.) (dismissing Chief Justice Rehnquist’s claim that “English law’s treatment of testimonial statements was inconsistent at the time of the framing” and his argument that the admissibility of testimonial statements in the United States during the eighteenth century was not fully settled); *Rogers v. Tennessee*, 532 U.S. 451, 473 (2001) (Scalia, J., dissenting) (discounting “stray statements and doctrines found in the historical record”).

49. *Crawford*, 541 U.S. at 43-47.

Queen Mary had permitted “justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court,” the outcomes of which examinations “came to be used as evidence in some cases,”<sup>50</sup> Scalia maintained that they should not be considered part of the common law, but rather statutes in derogation thereof.<sup>51</sup> This rigid distinction between statutory and common law was not entirely consistent with the views of seventeenth- and eighteenth-century common lawyers, including none other than Sir Matthew Hale and Blackstone himself.<sup>52</sup> The Magna Carta, although sometimes included within the understanding of the common law, was considered similar to a statute; conversely, other legislation, such as the series of Habeas Corpus Acts in the seventeenth and eighteenth centuries, entered into the protections that the common law itself provided for the liberty of the subject.<sup>53</sup> Justice Scalia’s tendency to separate common from statutory law at the time of the Founding and prioritize the former over the latter is all the more strange in light of his frequently reiterated claim that legislatures, not judges, should make law.<sup>54</sup>

Nor, for Scalia, was the common law at the time of the Founding an evolving body, at least not according to his account of the apperceptions of eighteenth-century thinkers. As Scalia claimed in *Common-Law Courts in a Civil-Law System*:

[Madison] wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely “discovered” rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact “make” the common law, and that each state has its own.<sup>55</sup>

Scalia further elaborated on the static understanding of the common law that he attributed to Madison and the other Founders in his dissent in *Rogers v. Tennessee*.<sup>56</sup> There he explained that Blackstone permitted the abrogation of “bad law,” but not the abandonment of a rule the reason for which had altered.<sup>57</sup> He likewise maintained that the “original” understanding of the common law did not comport with “modern ‘common law decisionmaking,’” which involves “[bringing] the law into conformity with reason and common sense . . . by laying to rest an archaic and outdated rule . . . .”<sup>58</sup> Instead, “[a]t

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50. *Id.* at 43-44.

51. *Id.* at 54 n.5.

52. *See infra* note 171 and accompanying text.

53. *See infra* note 171 and accompanying text.

54. *See* Scalia, *supra* note 8, at 9-14 (arguing for the greater legitimacy of lawmaking by statute than by judicial decision).

55. Scalia, *supra* note 8, at 10.

56. 532 U.S. 451 (2001).

57. *Id.* at 473 (Scalia, J., dissenting).

58. *Id.* at 467.

the time of the framing, common-law jurists believed (in the words of Sir Francis Bacon) that the judge's 'office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.'"<sup>59</sup>

It is worth noting, however, that Justice Scalia himself sometimes endorses a use of common law history that partakes of the same traits that he disparages of "bringing the law into conformity with reason and common sense." Justice Scalia joined Justice Thomas's reasoning in his dissent in *Deck v. Missouri*, a case holding that shackling a defendant at trial violated his due process rights absent an essential state interest specific to the defendant.<sup>60</sup> In rejecting the majority's attempt to derive a prohibition against shackling from the common law, Thomas insisted that, although "English common law in the 17th and 18th centuries recognized a rule against bringing the defendant in irons to the bar for trial,"<sup>61</sup> this rule was not determinative because it was grounded in a concern that irons would cause defendants excessive pain, rather than the kinds of rationales adduced by the majority in support of its due process analysis.<sup>62</sup> Thomas and Scalia thus acknowledged that the reasons underlying a common law practice might alter over time, but they simultaneously required that those advocating interpretation of a constitutional provision against the backdrop of a particular common law rule demonstrate that the basis for the principle remain the same today as it was in the eighteenth century. In this opinion, Thomas and Scalia approached a more Holmesian account of the evolution of the common law than Scalia's theoretical writings would suggest he was willing to adopt, allowing for judicial abrogation of those rules that decisionmakers deem no longer applicable to the contemporary situation.<sup>63</sup>

It is, perhaps, the prospect of a bleak alternative for originalists that deters Scalia and other originalists from recognizing the multifaceted and shifting quality of the American common law tradition. Acknowledging that "the principal defect" of originalism consists in the fact that "historical research is always difficult and sometimes inconclusive," Scalia at the same time insists that it remains a more democratically legitimate and less arbitrary approach to

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59. *Id.* at 472.

60. *Deck v. Missouri*, 544 U.S. 622 (2005).

61. *Id.* at 638 (Thomas, J., dissenting).

62. *Id.*

63. According to Holmes:

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Dover Publ'ns, Inc. 1991) (1881).



constitutional decision making, and, therefore, judges must at least attempt to figure out a singular original meaning.<sup>64</sup>

The difficulties that ensue from relying on a unified common law, however, come to the fore in a series of cases treating the history of sentencing, including both the separation of powers challenge to the U.S. Sentencing Commission in *United States v. Mistretta* and the more recent line of cases, culminating in *United States v. Booker* and *United States v. Fanfan*, that insisted in various contexts that facts enhancing an offender's sentence be tried to a jury rather than simply before a judge.<sup>65</sup> In *Apprendi v. New Jersey*, Justice Stevens's opinion for the majority recited a number of authorities suggesting that judges possessed little discretion over sentencing in the late eighteenth century.<sup>66</sup> According to Stevens: "As Blackstone, among many others, has made clear, 'the judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law.'"<sup>67</sup> These claims contradicted the historical account provided in *Mistretta*—admittedly derived from the post- rather than pre-constitutional moment—affirming judges' substantial independence in sentencing in the early Republic.<sup>68</sup> As Justice O'Connor observed in her dissent, they also contrasted with the Court's description of the relevant state of affairs in *Williams v. New York*,<sup>69</sup> a case that had proclaimed:

[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.<sup>70</sup>

Each of the cases within this specific line simultaneously attempts to construct a univocal originalist interpretation of the historical sources and contradicts the account provided by other cases treating the same subject.<sup>71</sup> While the

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64. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Some might contend that Scalia's jurisprudence is more formalist than originalist, in that it places priority on discerning a single rule for decision over discovering an actual "original meaning." Under this view, originalism simply serves the function of constraining judicial discretion particularly well. This does not, however, as Keith Whittington has elaborated, explain why one would choose originalism over other approaches to ensuring judicial minimalism (by, for example, insisting that judges examine all recent democratic decisions related to a particular case and arrive at the determination most consistent with these outcomes). See *supra* note 10.

65. *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Fanfan*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Mistretta v. United States*, 488 U.S. 361 (1989).

66. *Apprendi*, 530 U.S. at 479-80.

67. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*396).

68. *Mistretta*, 488 U.S. at 364-65.

69. 337 U.S. 241 (1949).

70. *Id.* at 246.

71. Cf. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The*

difficulty of deriving a singular history of the common law approach to sentencing around the time of the Founding does not automatically render such an endeavor valueless, the contradictions pervading the history set forth in a single line of cases do suggest the potential value of acknowledging the discrepancies within the historical record and proceeding from there.

## II. THE COMMON LAW: A DISUNIFIED FIELD

In contrast to Justice Scalia's impressions of the state of the common law at the time of the Framing, writings from the founding era and materials from the states in the period following ratification demonstrate that the common law occupied a disunified field in the late eighteenth century. Some members of the founding generation expressed extensive criticism of the common law, and they argued about the degree to which it remained in force in the newly forged United States. The very definition and scope of the common law—including its permeability to statutory innovation, its longevity, its potential for local variations, and its relation to the “ancient constitution” securing the rights of the people—were subject to serious contestation. These controversies about the nature of the common law in America undermine any attempt to represent it as a fixed and unified entity neatly encapsulated by Blackstone's vision.

Thomas Jefferson's critiques of Blackstone and the common law have been widely noted,<sup>72</sup> along with his scathing assertion that:

In truth, Blackstone and Hume have made Tories of all England, and are making Tories of those young Americans whose native feelings of independence do not place them above the wily sophistries of a Hume or a Blackstone. These two books, but especially the former, have done more towards the suppression of the liberties of man, than all the million of men in arms of Bonaparte, and the millions of human lives with the sacrifice of which he will stand loaded before the judgment seat of his Maker.<sup>73</sup>

What has been less thoroughly discussed is the pervasive nature of criticism of and debates about the common law. John Adams and James Madison were two of the other figures prominently engaged in such writings. Both Jefferson's and Madison's stances upon the common law became more critical during the

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*Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 201-03 (2005) (arguing that formalism, not originalism, was the driving force in the *Apprendi-Blakely* line of cases, precisely because the historical evidence as to judicial discretion in sentencing is inconclusive).

72. See, e.g., David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, in *THE MANY LEGALITIES OF EARLY AMERICA* 97 (Christopher L. Tomlins & Bruce H. Mann eds., 2001); Julius S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 451 (David H. Flaherty ed., 1969).

73. Letter from Thomas Jefferson to Horatio G. Spafford (March 17, 1814), in 6 *THE WRITINGS OF THOMAS JEFFERSON* 334, 335 (H.A. Washington ed., New York, Derby & Jackson 1859).

course of their careers. Whereas Jefferson in 1790 included Blackstone's *Commentaries* in his list of readings for law students, and its influence is apparent in the Declaration of Independence, by 1810 he began to disparage the text, preferring Coke's *Institutes* and *Reports* and maintaining that Blackstone provided "nothing more than an elegant digest of what [students] will then have acquired from the real fountains of the law."<sup>74</sup> He similarly expressed political reservations about Blackstone's conservatism, as well as the distinguished jurist Mansfield's influence upon him.<sup>75</sup> Madison likewise refrained from voicing significantly negative views on the common law until later in his career. The Alien and Sedition Acts and prosecutions under them constituted an intervening incident that may have affected both Jefferson's and Madison's views about Blackstone and the common law.<sup>76</sup>

One of the most striking varieties of disagreement concerned how far back one had to investigate to discover what could truly be called common law. Jefferson himself insisted on a very specific temporality for the common law, dating it back before the Magna Carta and describing it as "that part of the English law which was anterior to the date of the oldest statutes extant."<sup>77</sup> He also posited in several contexts that later legal writers had introduced inaccuracies into their accounts of the immemorial common law. In arguing against the maxim that Christianity is part of the common law, Jefferson insisted upon the necessity of exploring the authority by which common law judges propounded various points and maintained that, "in latter times, we take no judge's word for what the law is, further than he is warranted by the authorities he appeals to. His decision may bind the unfortunate individual who

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74. Letter from Thomas Jefferson to Judge Tyler (May 26, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON 277 n.1 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1898). See generally Waterman, *supra* note 72, at 460-65, 478 (discussing the apparent alteration in Jefferson's estimation of Blackstone). For the variety of legal and political sources available to the founding generation, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967).

75. Waterman, *supra* note 72, at 462-72.

76. For discussion of the impact of these events on Jefferson, see Waterman, *supra* note 72, at 482-85, and Powell, *supra* note 2, at 924-35.

77. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 144 (Frank Shuffelton ed., Penguin Books 1999) (1785); see also Letter from Thomas Jefferson to Thomas Cooper (Feb. 10, 1814), in 6 THE WRITINGS OF THOMAS JEFFERSON 315 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1895) ("[W]e know that the common law is that system of law which was introduced by the Saxons on their settlement in England, and altered from time to time by proper legislative authority from that time to the date of Magna Charta, which terminates the period of the common law, or *lex non scripta*, and commences that of the statute law, or *Lex Scripta*."); Waterman, *supra* note 72, at 465-67 ("It was Jefferson's view that the common law ended with the Magna Carta, that subsequent development came by way of statute law, and that the common law, the rights of Englishmen, and the English constitution were Saxon in origin . . . and that the American colonists had assumed the long lost rights of the Saxons and had won a victory in the war against the English king and his lawyers.").

happens to be the particular subject of it; but it cannot alter the law.”<sup>78</sup> According to Jefferson’s argument, the belief that Christianity was incorporated into the common law derived from one fundamental misreading, so that “this string of authorities, when examined to the beginning, all hang[] on the same hook, a perverted expression of Prisot’s, or on one another, or nobody.”<sup>79</sup>

In treating the American acceptance of the common law, Jefferson also argued that only earlier English judicial decisions should be cited. As he explained,

[T]he state of the English law at the date of our emigration, constituted the system adopted here. We may doubt, therefore, the propriety of quoting in our courts English authorities subsequent to that adoption; still more, the admission of authorities posterior to the Declaration of Independence, or rather to the accession of that King, whose reign, *ab initio*, was that very tissue of wrongs which rendered the Declaration at length necessary.<sup>80</sup>

Such a strategy would “get[] us rid of all Mansfield’s innovations, or civilisations [i.e., making into civil law] of the common law.”<sup>81</sup> Discussing “the case of the interrogatories in Pennsylvania,” Jefferson maintained in a 1788 letter:

I hold it essential, in America, to forbid that any English decision which has happened since the accession of Lord Mansfield to the bench, should ever be cited in a court: because, though there have come many good ones from him, yet there is so much sly poison instilled into a great part of them, that it is better to proscribe the whole.<sup>82</sup>

Jefferson’s stance on the temporality of the common law was thus twofold: he at once insisted that the common law derived from the ancient, pre-Magna Carta past, and at the same time attempted to persuade American jurists that it would be inappropriate to consider the opinions of recent British judges as relevant authority on the dictates of the common law—not exactly because the American experience had diverged from the British but rather because recent English interpreters had introduced corruptions into the common law itself.

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78. Letter from Thomas Jefferson to Thomas Cooper, *supra* note 77, at 314; *see also* Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 393, 397 (Thomas Jefferson Randolph ed., Charlottesville, F. Carr & Co. 1829) [hereinafter MEMOIR, CORRESPONDENCE, AND MISCELLANIES] (reciting a similar argument against the claim that “Christianity is parcel of the laws of England”).

79. Letter from Thomas Jefferson to Thomas Cooper, *supra* note 77, at 314.

80. Letter from Thomas Jefferson to Judge Tyler (June 17, 1812), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, *supra* note 78, at 178.

81. *Id.*

82. Letter from Thomas Jefferson to Mr. Cutting (Oct. 2, 1788), in 2 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, *supra* note 78, at 370. This letter provides an earlier example of Jefferson’s negative views on Mansfield than the evidence that Waterman cites and suggests that Jefferson’s anti-Blackstonian opinions may have solidified even earlier than Waterman’s account represents.

Jefferson seems to suggest, furthermore, that any moral or political authority England had previously possessed over the colonies vanished with the accession in 1760 of King George III, the "King, whose reign . . . was that very tissue of wrongs which rendered the Declaration at length necessary."<sup>83</sup>

John Adams similarly dated the true common law back into the distant past and in places adopted the rhetoric of the "ancient constitution"—or, alternatively, the "British constitution"—to which he often referred in conjunction with the common law.<sup>84</sup> Just as Jefferson had argued that Christianity had only been incorporated into the common law at a late date by a series of misreadings of authority, Adams argued, against recent claims to the contrary, that, "by the common law of England, the judges of the king's bench and common bench [did not have] estates for life in their offices, determinable on misbehavior, and determinable also on the demise of the crown."<sup>85</sup> In doing so, he described the common law as "used time out of mind, or for a time whereof the memory of man runneth not to the contrary."<sup>86</sup> This immemorial common law dated back to a period preceding the reign of King Richard I.<sup>87</sup> Although Adams's investigation into the tenure of English judges commenced

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83. Letter from Thomas Jefferson to Judge Tyler (June 17, 1812), *supra* note 80.

84. For the theory of the "ancient constitution," see J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1987). John Reid has analyzed in detail the uses to which the rhetoric of the ancient constitution were put in eighteenth-century America. See JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* (2005). The extent to which Adams viewed the British or ancient constitution as isomorphic with the common law is not entirely clear from his writings. One passage from his writings on the scope of English judges' independence suggests that he deemed at least the contemporary British constitution—if not the ancient constitution—distinguishable from the common law. See John Adams, Letter to the Printers, *BOSTON GAZETTE*, Feb. 8, 1773, reprinted in 3 *THE WORKS OF JOHN ADAMS* 551, 556 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851) ("Many people receive different ideas from the words *legally and constitutionally*. The law has certainly established in the crown many prerogatives, by the bare exertion of which, in their utmost extent, the nation might be undone. The prerogatives of war and peace, and of pardon, for examples, among many others. Yet it would be absurd to say that the crown can constitutionally ruin the nation, and overturn the constitution. The British constitution is a fine, a nice, a delicate machine; and the perfection of it depends upon such complicated movements, that it is as easily disordered as the human body; and in order to act constitutionally, every one must do his duty."). For a general discussion of the evolving understanding of the relation between the legal and constitutional orders, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 259-68 (1969).

85. John Adams, Letter to the Printers, *BOSTON GAZETTE*, Feb. 1, 1773, reprinted in 3 *THE WORKS OF JOHN ADAMS*, *supra* note 84, at 540, 540.

86. *Id.*

87. John Adams, Letter to the Printers, *BOSTON GAZETTE*, Feb. 15, 1773, reprinted in 3 *THE WORKS OF JOHN ADAMS*, *supra* note 84, at 558, 564 ("I think it has been determined by all the judges in England that time of memory should be limited to the reign of King Richard I.; and every rule of common law must be beyond the time of memory, that is, as ancient as the reign of that king, and continued down generally until it is altered by authority of parliament.").

from the vantage point of Blackstone, he rapidly examined the views of other writers to check Blackstone against them.<sup>88</sup> Through this historical research, Adams arrived at the conclusion that the tenure of judges during good behavior originated not with the common law itself but only during the reign of King Charles I during the first half of the seventeenth century.<sup>89</sup> In denying that more recent approaches to judicial appointments and removal should be construed as part of the common law, Adams implicitly insisted on the return to an early seventeenth-century version of the common law that was in place before the accession of Charles I.

The extent to which the common law had been imported into and bound the colonies was also the subject of significant debate. The standard account provided by Justice Story indicated that “[o]ur ancestors brought with them . . . [the] general principles [of the common law], and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their condition.”<sup>90</sup> John Adams, in particular, resisted the notions that the common law had been introduced wholesale into America, as part of the British Empire, and that it, as a result, both restricted the colonists and granted them the liberties accorded all Englishmen. As he contended, the common law, and the rights conferred by the English Constitution, adhered to the individual discoverer, who could adapt them to the American context to the extent that he desired.<sup>91</sup> Furthermore, the several charters granted by the King as well as his commissions to colonial governors had constituted compacts guaranteeing the colonists the same rights as British subjects.<sup>92</sup> Adams therefore rejected Daniel

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88. Adams, *supra* note 85, at 541.

89. Adams, *supra* note 84, at 551.

90. Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829).

91. Novanglus [John Adams], *Addressed to the Inhabitants of the Colony of Massachusetts Bay* (Feb. 6, 1775) (newspaper essay), reprinted in JOHN ADAMS & JONATHAN SEWALL, NOVANGLUS AND MASSACHUSETTENSIS 23, 30 (Boston, Hews & Goss 1819) [hereinafter NOVANGLUS AND MASSACHUSETTENSIS] (“[T]he common law, and the authority of parliament founded on it, never extended beyond the four seas.”); Novanglus [John Adams], *Addressed to the Inhabitants of the Colony of Massachusetts Bay* (Mar. 13, 1775) (newspaper essay), reprinted in NOVANGLUS AND MASSACHUSETTENSIS, *supra*, at 94, 95 (“How then do we, New Englandmen, derive our laws? I say, not from parliament, not from common law, but from the law of nature, and the compact made with the king in our charters. Our ancestors were entitled to the common law of England, when they emigrated, that is, to just so much of it as they pleased to adopt, and no more.”); Novanglus [John Adams], *Addressed to the Inhabitants of the Colony of Massachusetts Bay* (Mar. 27, 1775) (newspaper essay), reprinted in NOVANGLUS AND MASSACHUSETTENSIS, *supra*, at 110, 116 (“[T]he court, when they said that all laws in *force* in England, are in *force* in the discovered country, meant no more than that the discoverers had a right to all such laws, if they chose to adopt them.”).

92. Novanglus [John Adams], *Addressed to the Inhabitants of the Colony of Massachusetts Bay* (Mar. 13, 1775), *supra* note 91, at 98. (“[A]dmitting these notions of the common and feudal law to have been in full force, and that the king was absolute in America, when it was settled; yet he had a right to enter into a contract with his subjects, and stipulate that they should enjoy all the rights and liberties of Englishmen forever, in

Leonard's claim in *Massachusettsensis* "that in denying that the colonies are annexed to the realm, and subject to the authority of parliament, individuals and bodies of men subvert the fundamentals of government, deprive us of British liberties, and build up absolute monarchy in the colonies."<sup>93</sup> The mere fact that the entirety of the common law had not emigrated to America along with the colonists did not mean that the privileges accorded by the "ancient constitution" or "British constitution" were abandoned. Parts of the common law, along with these liberties, were instead provided contractually, through compact between the King and his American subjects.<sup>94</sup>

After ratification of the U.S. Constitution, debates about the continued relevance of British common law became reformulated, focusing on whether a federal common law had ever existed, or still continued to supplement those versions of the common law in force in the several states. The Alien and Sedition Acts supplied the focal point of the controversy because their proponents claimed for them the virtue of being consistent with English common law.<sup>95</sup> One commentator lauded President Jefferson for "seek[ing] no

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consideration of their undertaking to clear the wilderness, propagate christianity, pay a fifth part of ore, &c. Such a contract as this has been made with all the colonies; royal governments, as well as charter ones. For the commissions to the governors contain the plan of the government, and the contract between the king and subject, in the former, as much as the charters in the latter.").

93. *Id.* at 96.

94. A 1774 debate recorded in Adams's diary on the sources of Americans' rights may have provided the backdrop for his subsequent writings on the subject, although Adams himself did not participate in the discussions. John Jay claimed, in that context, that "[i]t is necessary to recur to the law of nature, and the British constitution, to ascertain our rights," John Adams, *Diary*, in 2 THE WORKS OF JOHN ADAMS 370 (New York, AMS Press, Inc. 1971) (1850), and Sherman maintained that "[t]he Colonies adopt the common law, not as the common law, but as the highest reason," *id.* at 371. The statement perhaps closest to Adams's later position was that of Duane, who spoke in favor of:

grounding our rights on the laws and constitution of the country from whence we sprung, and charters, without recurring to the law of nature; because this will be a feeble support. Charters are compacts between the Crown and the people, and I think on this foundation the charter governments stand firm.

England is governed by a limited monarchy and free constitution. Privileges of Englishmen were inherent, their birthright and inheritance, and cannot be deprived of them without their consent.

*Id.* at 371-72.

Jefferson's 1812 comments on the subject were similar to Adams's. As he wrote in his letter to Judge Tyler,

On the other subject of your letter, the application of the common law to our present situation, I deride with you the ordinary doctrine, that we brought with us from England the *common law rights*. This narrow notion was a favorite in the first moment of rallying to our rights against Great Britain. But it was that of men, who felt their rights before they had thought of their explanation. The truth is, that we brought with us the *rights of men*; or expatriated men. On our arrival here, the question would at once arise, by what law will we govern ourselves? The resolution seems to have been, by that system with which we are familiar, to be altered by ourselves occasionally, and adapted to our new situation.

Letter from Thomas Jefferson to Judge Tyler (June 17, 1812), *supra* note 80, at 178.

95. For a summary of this argument, see James Madison, Report on the Resolutions, *in*

asylum within a sedition law, [nor] . . . screen[ing] himself under the tyrannical construction of the Common Law of England.”<sup>96</sup> Jefferson’s own writings confirmed this suggestion. As Jefferson wrote to Edmund Randolph in 1799, “Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force and cognizable as an existing law in their courts, is to me the most formidable.”<sup>97</sup> For the common law to be in force federally, the government would have been obliged to adopt it positively, which it, unlike states such as Virginia, did not do as a general matter.<sup>98</sup>

The most comprehensive arguments against justifying the Alien and Sedition Acts on the basis of the common law are perhaps those contained in James Madison’s *Report on the Virginia and Kentucky Resolutions* resisting these statutes.<sup>99</sup> Explaining first that the common law formed a part of the colonial codes, Madison at the same time observed that “[t]he common law was not the same in any two of the Colonies” and that “in some the modifications were materially and extensively different.”<sup>100</sup> No general, national common law could, therefore, be extracted from the particular versions implemented in the colonies.<sup>101</sup> Nor did the American Revolution suddenly alter the situation by “imply[ing] or introduc[ing] the common law as a law of the Union”;<sup>102</sup> such a result would, Madison deemed, be “repugnant to the fundamental principle of the Revolution.”<sup>103</sup> Finally, the jurisdiction of the federal courts granted by Article III of the U.S. Constitution stopped short of integrating the common law into the federal system.<sup>104</sup> At none of these moments, the report opined, was the common law transferred *in toto* to the American context on the national level.

In a set of statements particularly relevant to the claims made by contemporary originalists, however, Madison did acknowledge that:

[P]articular parts of the common law may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which the powers delegated to the Government; and so far also as such other parts may be adopted by Congress as necessary and proper for carrying into execution the powers expressly delegated.<sup>105</sup>

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6 THE WRITINGS OF JAMES MADISON 341, 372 (Gaillard Hunt ed., 1906).

96. BENJAMIN AUSTIN, JR., *CONSTITUTIONAL REPUBLICANISM* 147 (Boston, Adams & Rhoades 1803).

97. Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), in 3 *MEMOIR, CORRESPONDENCE, AND MISCELLANIES*, *supra* note 78, at 425.

98. *Id.* at 427.

99. For discussion of the genesis of this report, see Powell, *supra* note 2, at 924-27.

100. Madison, *supra* note 95, at 373.

101. *Id.*

102. *Id.*

103. *Id.* at 374.

104. *Id.* at 376.

105. *Id.* at 375-76.



Even if English common law had not supplied the United States with a comprehensive federal system of jurisprudence, it could, according to the report, be employed in interpreting specific constitutional clauses.

The caveats that the report expressed with respect to discerning what the federal common law would be, however, apply equally to any attempt to identify the common law underpinnings of particular phrases in the Constitution. Alluding to "the difficulties and confusion inseparable from a constructive introduction of the common law," Madison enumerated several specific questions that would have to be answered about the nature and identity of this common law before it could be used.<sup>106</sup> As the report asked:

Is it to be the common law with or without the British statutes? . . . Is it to be the date of the eldest or the youngest of the Colonies? Or are the dates to be thrown together and a medium deduced? Or is our independence to be taken for the date? Is, again, regard to be had to the various changes in the common law made by the local codes of America? Is regard to be had to such changes, subsequent as well as prior to the establishment of the Constitution? Is regard to be had to future as well as to past changes?<sup>107</sup>

Between the difficulty of determining the relevant date of the common law to be examined and the problem of discerning the extent to which English or American statutes should be considered as modifying the common law, the report suggests that, even on the constitutional level, it may not be possible to obtain a coherent, singular exposition of a common law principle.

Madison provided several examples of this difficulty, first treating the relationship between freedom of the press as guaranteed by the First Amendment and as addressed by English common law, and indicating that "[t]he practice in America must be entitled to much more respect" than that in England in understanding the meaning of the constitutional clause.<sup>108</sup> Then turning to the First Amendment's Free Exercise Clause, Madison asserted that "[i]t will never be admitted that the meaning of [freedom of conscience and religion], in the common law of England, is to limit their meaning in the United States."<sup>109</sup> Common law constitutional interpretation would thus succumb to all the difficulties of ascertaining which common law might be at issue.

Madison echoed many of these points in an 1824 letter, where he simultaneously rejected the notion of a federal common law and endorsed the idea that "the Constitution is predicated on the existence of the Common law . . . because it borrows therefrom terms which must be explained by Com: Law authorities . . . ."<sup>110</sup> At the end of the letter, Madison explained the usefulness of this common law backdrop, which it appeared to him to be

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106. *Id.* at 379.

107. *Id.*

108. *Id.* at 388.

109. *Id.* at 389.

110. Letter from James Madison to Peter S. Duponceau, *in* 9 THE WRITINGS OF JAMES MADISON 199, 200 (Gaillard Hunt ed., 1910).

“impossible to digest . . . into a text that would be a compleat substitute.”<sup>111</sup>  
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[a] Justinian or Napoleon Code may ascertain, may elucidate, and even improve the existing law, . . . the meaning of its complex technical terms, in their application to particular cases, must be sought in like sources as before; and the smaller the compass of the text the more general must be its terms & the more necessary the resort to the usual guides in its particular applications.<sup>112</sup>

The common law could, on this account, provide a set of background principles crucial to understanding the general terms of the Constitution, a text certainly of small compass if wide scope.

These background principles, however, did not speak with the same voice Madison suggested even during the debates on the Constitution. The language proposed for Article I, Section 8, Clause 10 initially granted Congress the power “[t]o declare the law and punishment of piracies and felonies . . . .”<sup>113</sup> According to James Wilson, the term “felonies” could be appropriately and definitively elaborated in accordance with common law. Madison, by contrast, insisted that the language of declaration be replaced with that of definition, so that the clause would endow Congress with the capacity “[t]o *define* and punish piracies and felonies committed on the high Seas, . . . and offenses against the law of Nations.”<sup>114</sup> Congress should, Madison believed, be charged with constructing such a definition because:

[F]elony at common law is vague. It is also defective. One defect is supplied by Stat: of Anne as to running away with vessels which at common law was a breach of trust only. Besides no foreign law should be a standard farther than is expressly adopted. If the laws of the States were to prevail on this subject, the Citizens of different States would be subject to different punishments for the same offence at Sea. There would be neither uniformity nor stability in the law—The proper remedy for all these difficulties was to vest the power proposed by the term “define” in the Nat legislature.<sup>115</sup>

Although the common law might supply an interpretive tool for understanding constitutional phrases, it could not, Madison believed, entirely dictate the meaning of many of the Constitution’s clauses.

The treatment of the common law—and divergences therefrom—in the early states further substantiates the founding generation’s recognition that regional common law in America deviated in parts significantly from its English model. The common law of the colonies and that of Britain had already displayed differences before the Revolution, and these did not disappear

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111. *Id.* at 202.

112. *Id.*

113. James Madison, Journal of the Constitutional Convention, in 4 THE WRITINGS OF JAMES MADISON 1, 223 (Gaillard Hunt ed., 1903).

114. *Id.* at 225 (emphasis added).

115. *Id.* at 224.

following ratification of the Constitution.<sup>116</sup> Soon after St. George Tucker's "republicanized" 1803 edition of Blackstone, which attempted to bring the *Commentaries* into conformity with the situation of Virginia,<sup>117</sup> Hugh Henry Brackenridge, a judge of the Pennsylvania Supreme Court, emulated this endeavor with his 1814 *Law Miscellanies*, subtitled in part "An Introduction to the Study of the Law, Notes on Blackstone's *Commentaries*, Shewing the Variations of the Law of Pennsylvania from the Law of England."<sup>118</sup> In Massachusetts, somewhat similar developments were afoot, and the justices of the Supreme Judicial Court lamented, in an 1804 letter to the Governor, that "[t]he law of the Commonwealth consists, principally, of common law; but this has been materially altered, not only by statute, but by various customs," and that, therefore, "[o]f the whole, as a connected and consistent system, there exists, at present, no written exposition, to which a citizen, a student or a lawyer can have recourse."<sup>119</sup> This dismal state of affairs was the target of William Charles White's subsequent 1808 *Proposals for Publishing a Compendium and Digest, of the Laws of Massachusetts*.<sup>120</sup> Explaining that "[t]he laws of this State are so embarrassed by perplexity, and entangled by confusion, that not only the researches of the student are thereby rendered slow, lingering, and almost disgusting; but even the practitioner in the haste of

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116. See MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 3 (2004) ("As an *English* colony, Rhode Island's laws and governmental structures were to reflect those of England. As a far-off *English colony*, however, these laws and structures were expected to be in some ways divergent. . . . Uniformities in law and custom demarcated Englishness; divergences designated the advantages and diversities of empire."); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 10 (1975) ("[O]ne cannot explain developments in Massachusetts law, either in individual cases or in broad areas, as a consequence of adherence to English law. Massachusetts judges often did follow English law, probably for a variety of reasons, such as the convenience of citing precedent to dispose of the many cases in which they lacked time to consider fully the merits of competing policies. But they did not follow English law when it was inconsistent with the needs and conditions of their new state."). See generally PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* (Lawbook Exchange, Ltd. 2004) (1899) (treating the deviations from British common law approaches in each of the colonies).

117. ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* (Augustus M. Kelley 1963) (1803). For discussion of the "republican" quality of St. George Tucker's Blackstone, see Waterman, *supra* note 72, at 480.

118. HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES* (Lawbook Exchange, Ltd. 2001) (1814).

119. LETTER OF THE JUSTICES OF THE SUPREME JUDICIAL COURT TO HIS EXCELLENCY THE GOVERNOR, WITH TWO JUDICIARY BILLS DRAWN BY THEM, WHICH WERE COMMUNICATED TO THE HON. GENERAL COURT 11-12 (Boston, Young & Minns 1804).

120. WILLIAM CHARLES WHITE, *PROPOSALS FOR PUBLISHING A COMPENDIUM AND DIGEST, OF THE LAWS OF MASSACHUSETTS* (Boston, 1808), *microformed* on Early Am. Imprints, 2d Series, 1801-1810, Shaw-Shoemaker No. 16732 (Readex Microprint).

business, sometimes feels the want of a system, to guide and facilitate his references,” White attempted to reconcile statutory with common law in his compendium, and British with local precedents.<sup>121</sup>

The tribulations facing the common law in Pennsylvania provide a particularly interesting example of the debates about the scope of its continuing relevance in the early states. Controversy appears to have raged about whether Pennsylvania should, in fact, entirely abandon adherence to common law principles.<sup>122</sup> As one commentator subsequently described the dispute:

Some years ago, in this state, a current set strongly against the common law of England; and it was within a point of being abolished by the legislature. This was owing to a total ignorance of what it was. Editors of papers, who had been prosecuted for libels, raised this hue and cry, as it may be called, against the common law.<sup>123</sup>

Opponents of “the continuance of the Common Law of England in the United States” adduced six reasons in favor of its abrogation.<sup>124</sup> The justifications were as follows: legislative changes in both England and America would subvert the unity of the common law and gradually bring about its extinction anyway; the common law could not, by its nature, apply to the situation of the United States, presumably because of the latter’s republican form of government; the common law did not boast uniformity even in England, where there were also many local customs; a disparity had arisen between American and English versions of the common law, to the extent that, “in some parts of the United States an American Common Law has grown into existence. In some the Common Law of England has been formally abolished[,] and thus it becomes more and more difficult to ascertain what is the Common Law”; the statutory alterations of the common law in England had to some extent been adopted in America, but not entirely; and the most valuable parts of the common law had already been incorporated into written instruments of government in the United States.<sup>125</sup> These arguments range from the normative to the pragmatic. On the one hand, opponents of the common law envisioned it as incompatible with the United States’s new form of government, except to the extent that domestic politics decided to adopt it in a democratically legitimate manner through statute or constitution. On the other, they despaired that the common law *was* a common law at all, or at least that its commonality

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121. *Id.* at 1, 3–4.

122. See ANONYMOUS [JOSEPH HOPKINSON], *CONSIDERATIONS ON THE ABOLITION OF THE COMMON LAW IN THE UNITED STATES* 7 (Philadelphia, William P. Farrand & Co. 1809) (“Men, acquainted with the origin, the nature, and the usefulness of the Common Law, view, with astonishment and serious apprehension, the hostility manifested against it, for some years past, in Pennsylvania, and gradually ripening into a fatal action. The moment seems to be approaching when the axe will be laid to its root, and its spreading honours prostrated in death.”).

123. BRACKENRIDGE, *supra* note 118, at 33–34.

124. HOPKINSON, *supra* note 122, at 12–14.

125. *Id.*

could be discerned across local boundaries and transnationally, especially given the complex interaction between unwritten and statutory law on both sides of the Atlantic.

At the same time, the common law boasted some vigorous defenders, even in Pennsylvania. Joseph Hopkinson, the author of *Considerations on the Abolition of the Common Law in the United States*, and an attorney for Samuel Chase during his impeachment trial, mounted a comprehensive response to the attackers.<sup>126</sup> This rejoinder did not adopt a Scalia-like position on the uniformity and immutability of the common law, but rather lauded it as a compilation of the wisdom of centuries and a body of principles capable of adaptation. As he maintained:

Common Law is but another name for common sense, tested and systematically arranged by long experience. What governs the manners of men towards each other? It is the common law of social intercourse. What constitutes the habits and customs of a country, but a common law, gradually growing with civilization, and always accommodating itself to the situation of the people? Nor is the Common Law of jurisprudence less pliable. It is one of its excellencies that it is capable of change, of modification, of adapting itself to new situations and varying times, without losing its original character, its vital principles, its most useful institutions.<sup>127</sup>

Hopkinson's vision of the common law thus entailed adaptation within a framework of fundamental stability. As a result, the common law in the United States might, as its opponents contended, be altered, but that process of alteration should, he believed, occur in a manner consistent with the common law's own mode of evolution.<sup>128</sup> The mere fact that the common law of England and America had already diverged and might do so increasingly thus did not mean that the common law should be abandoned, but was a result consistent with the principles underlying the nature of common law reasoning itself.

Nor did he deem insurmountable the difficulties with discerning what, in fact, constituted common law. One of the virtues of the common law was, for Hopkinson, its very intricacy—and its ability to comprehend a variety of exceptions to a general rule.<sup>129</sup> At the same time, he considered the rules of

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126. *Id.*

127. *Id.* at 21-22.

128. Hopkinson explains:

[I]s it not wiser and safer to reject *only* such parts [of the common law] as are thus unsuitable, as experience shall, from time to time, discover them, than to demolish the whole system on this account. . . . I see no inconvenience in the prediction that the Common Law "will become different in the two countries," if we retain so much of it as is useful and applicable to our state of society; and I see no difficulty in doing this. The writer, I have alluded to, himself asserts, that the Common Law will "*gradually* be lost here." Then surely if it must be lost, this is the best way of losing it.

*Id.* at 63-64.

129. *Id.* at 56-57. This argument is somewhat similar to that which Madison made with reference to the intricacies of the common law and the difficulty of replacing it with

common law clearer in nature than statutes or written constitutions, because they were not plagued with the linguistic difficulties that result from the attempt to interpret particular terms.<sup>130</sup> Nevertheless, all law, including both written and unwritten, could succumb to “the unavoidable imperfections of language by which [it] must be promulgated.”<sup>131</sup>

Finally, Hopkinson responded to the normative objections that critics had levied against the common law by insisting that the federal government and the several states were not bound to follow the common law as the law of England, but rather through their own voluntary adoption, as the “law of common sense.” As he explained, making reference to the earlier argument that the common law could preserve the liberties of English subjects, even in America,

[t]he advocates of the Common Law, in the United States, do not pretend that it can claim any authority here, from the country whence we immediately derive it. It is not because it is English law that we would have it received and obeyed, but because it is the law of reason and justice. . . . Our ancestors brought it with them; not as a badge of dependence and slavery, but as an invaluable right . . . .<sup>132</sup>

Five years later, Brackenridge’s *Law Miscellanies*—which he had initially intended to dub *The Pennsylvania Blackstone*<sup>133</sup>—resumed some of the same themes, providing similar responses to critics of the common law. Aimed at instructing both students and lawyers, *Law Miscellanies* compiled English decisions connected with or differing from points in Blackstone’s *Commentaries* as well as variations in the common law specific to Pennsylvania.<sup>134</sup> As the impetus for his labors, Brackenridge cited the necessity for a Blackstone edition specific to each state, writing:

Tucker has given an edition, in which he has taken a view of the outline of the constitution and government of the United States which has taken [the] place of that of England; and at the same time of the constitution of Virginia, and the laws under it. *Might not the same thing be necessary as to the constitution and laws of each state in the union*; shewing what principles of the common law have been introduced as applicable to our situation; what statutes, or constructions of statutes; or, in what particulars, the common law has been changed by our acts of Assembly; or by the decisions of our courts?<sup>135</sup>

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comprehensive statutes.

130. *Id.* at 24-29, 32-34.

131. *Id.* at 15.

132. *Id.* at 19-20.

133. BRACKENRIDGE, *supra* note 118, at iv. As Brackenridge described his initial plan, he intended to emulate St. George Tucker, and create “an edition of Blackstone’s *Commentaries*, with notes in the manner of Tucker, referring to *the variations* in the law as it is in the state of Pennsylvania from that of England: the variations in the *introduction of the common law*, and in the statute law as it has been changed, or superseded, by our acts of assembly.” *Id.*

134. *Id.* at v, 36.

135. *Id.* at xxvi.

According to Brackenridge's view, divergences not only characterized the respective common laws of England and America but also that of the various states. These variations were not, however, Brackenridge agreed, inimical to the common law's continuation.

Instead, discussing Sir Matthew Hale's *Observations Touching the Amendment or Alteration of Laws* as well as other sources, Brackenridge argued for the mutability of the common law and insisted that courts should not rigidly apply principles of *stare decisis* in adjudication.<sup>136</sup> Rather, "*adaptation* must have had a beginning, and this could only be in the breaking off from precedent."<sup>137</sup> Citing a number of English cases, Brackenridge observed that "judges will test a decision *by the reason of it*, and *overrule* what has been ruled before."<sup>138</sup> Hence, he concluded, judges in America should not adhere so firmly to *stare decisis* and therefore not "pay[] more deference to English decisions than the most technical of the English judges themselves."<sup>139</sup> At the same time, Brackenridge criticized those who—like some contemporary members of Congress and others—supported an 1810 law requiring that judges refrain from citing foreign precedents, or, in other words, British decisions issued subsequent to July 4, 1776.<sup>140</sup> Explaining that Pennsylvania judges could look to such cases not as binding authority but rather as providing persuasive reasoning, Brackenridge maintained that, "so far as the common law or statute law of England remained common to both countries, decisions on the same law remained equally guides to both."<sup>141</sup> As Hopkinson had previously, Brackenridge defended a flexible and ecumenical view of the common law, according to which it was both susceptible of alteration and diversely implemented in the various states.

### III. THE HISTORY OF THE COMMON LAW AS THE THEORY OF THE COMMON LAW

For the founding generation, the source of law's legitimacy was not simply understood to be its democratic derivation. Rather, debates within the colonial context about what characteristics endowed law with binding authority or with a compulsory quality raised several alternative hypotheses about the sources of legal obligation. Three, in particular, stood foremost among these: contractarian or compact-based accounts of the relationship between the colonial subjects and their British colonizers; theoretical writings establishing the legitimacy of

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136. *Id.* at 54-74.

137. *Id.* at 55.

138. *Id.* at 60.

139. *Id.* at 64.

140. *Id.* at 49-50. For a contemporary approach to the question of citing foreign authorities, see Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

141. *Id.* at 50.

the English common law itself; and conceptions of rights grounded in natural law. These visions were exemplified respectively by three pre-constitutional sources: colonial charters were often identified as compacts binding the colonists to certain principles in exchange for a grant of either textually specified privileges or the rights conferred by the ancient constitution more generally;<sup>142</sup> the common law and the ancient constitution associated with it were thought to provide a set of liberties and institutions that had become binding through acceptance over time;<sup>143</sup> and the Declaration of Independence insisted vociferously upon the natural rights of the colonists.<sup>144</sup> The three conceptions of legal legitimacy were not, however, simply opposed, but combined in a variety of permutations. Natural and common law rights had for some time been intertwined in the English context. Even in *Calvin's Case*, Sir Edward Coke invoked the common law and natural law in equal measure to establish the principle of subjecthood or citizenship by birth.<sup>145</sup> Likewise, compact-based accounts of obligation, following in the tradition established by Thomas Hobbes, often included escape clauses for the articulation of natural rights, principally the right of resistance or revolution. Finally, some theorized that the privileges ensured by the common law to English subjects had been transferred to the colonists precisely through the operations of the social compact.<sup>146</sup>

The theory of obligation produced by English thinkers of the common law, from Sir Edward Coke through Blackstone himself, had emphasized historicity as the source of the authority of the common law. This insistence on historicity bears some resemblance to originalism's own project, although most originalists purport to examine the meaning of the Constitution in light of the Framing because such an approach respects the democratic origins of the document rather than because a history of acceptance itself creates legitimacy.

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142. See WHITTINGTON, *supra* note 10, at 52 ("The Americans' own experience with colonial charters indicated a mechanism for eradicating the ambiguity and the instability of the larger British system. The example of the contract recommended itself, as the Americans had long relied on their own colonial charters as equivalents to written constitutions.").

143. See REID, *supra* note 84, at 34 ("[T]he issue is why the authority of law to command obedience could be established by appealing to the past. It is not quite accurate to say that English law, being customary, relied for authority on the presumption of its own continuity. It was not continuity but consent that vested authority, and the legal doctrine dominating seventeenth- and eighteenth-century customary law was not presumption but prescription." (internal quotation and citations omitted)).

144. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 86-87 (1997); Thomas G. West, *The Political Theory of the Declaration of Independence*, in *THE AMERICAN FOUNDING AND THE SOCIAL COMPACT* 95 (Ronald J. Pestritto & Thomas G. West eds., 2003).

145. See *Calvin's Case*, (1608) 77 Eng. Rep. 377, 382 (K.B.), *reprinted* in 1 *SELECTED WRITINGS OF SIR EDWARD COKE* 166, 174 (Steve Sheppard ed., 2003) ("That ligeance, or obedience of the subject to the Sovereign, is due by the Law of nature: 2. That this Law of nature is part of the Laws of England.").

146. See *supra* note 94 and accompanying text.



At the same time, these theorists insisted that, despite deriving its force from history, the common law was also preeminently susceptible to change. Each espoused a somewhat different notion of how the common law opened itself to alteration, and presented a metaphor for its dynamic operations encapsulating his particular vision. They nevertheless all consistently invoked the Janus-faced quality of the common law, pointing backwards to an immemorial past and forward towards a mutable future. It is this flexibility in the common law inheritance—of which the founding generation was aware—that originalism neglects with its insistence on a unitary substance of common law, fixed forever at the moment of constitutional ratification. This Part aims, therefore, to describe the range of accounts of change within the common law that was accessible to the founding generation and suggest that what Scalia designates the post-realist vision of the common law was already familiar to earlier thinkers within the common law tradition, dating back at least to the seventeenth century. Not only Dworkin, but Coke as well, was aware of the mutability of common law. To achieve a thoroughgoing originalism, it is thus necessary to acknowledge that the flexibility of the common law method was not unknown to the founding generation and instead provided the backdrop for the U.S. Constitution itself.

Not only Blackstone's *Commentaries* but also Coke's *Reports* and Hale's *History of the Common Law* were texts frequently found in eighteenth-century American law libraries. According to one measurement, the *History of the Common Law*, first published posthumously in 1713, was the fourth most frequently used commentary, after Blackstone, Wood's *Institutes of the Laws of England*, and Saint-Germain's *Doctor and Student*.<sup>147</sup> Figures like Thomas Jefferson and St. George Tucker, creator of the Virginia version of Blackstone, owned copies of the work.<sup>148</sup> Nor did this text go unmentioned in the writings of the Framers. James Wilson's *Lectures on Law* from 1790-91 relied heavily—and, in parts, nearly verbatim—on Hale's *History*.<sup>149</sup> The two most important debts the *Lectures* owed the *History* consisted in its vision of change—adopting Hale's analogy between the common law and the Ship of the Argonauts—and its understanding of the grounds for the authority of the common law, derived not solely from its immemoriality, but instead from the popular acceptance of its precepts.<sup>150</sup> The entries on legal study in John

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147. HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700-1799, at 59 (1978) (listing Blackstone's *Commentaries* as appearing in ten of the libraries surveyed and Hale's *History of the Common Law* as available in six).

148. *Id.* at 27-28 (listing the libraries in which various editions of Hale's treatise could be found).

149. JAMES WILSON, *Lectures on Law*, in 1 WORKS OF JAMES WILSON 423, 423, 425, 453-54, 456-58 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

150. Wilson's language is extremely close to Hale's at various points, and his use of the analogy of the Ship of the Argonauts substantially reinforces the evidence that Wilson's remarks derived from Hale's *History of the Common Law*. Hale appears to have conflated

the Ship of the Argonauts with that of Theseus, hence his work is the first and one of the few places where the former appears. See *infra* notes 190-94 and accompanying text.

For the resemblance between the two authors' descriptions of change in the common law, compare WILSON, *supra* note 149, at 425 ("[I]t is extremely difficult . . . to trace the common law of England to the era of its commencement, or to the several springs, from which it has originally flowed. For this difficulty or impossibility, several reasons may be assigned. One may be drawn from the very nature of a system of common law. As it is accommodated to the situation and circumstances of the people, by whom it is appointed; and as that situation and those circumstances insensibly change; so, especially in a long series of time, a proportioned variation of the laws insensibly takes place; and it is often impossible to ascertain the precise period, when the change began, or to mark the different steps of its progress."), *id.* at 453-54 ("It is the characteristic of a system of common law that it be accommodated to the circumstances, the exigencies, and the conveniences of the people, by whom it is appointed. Now, as these circumstances and exigencies, and conveniences insensibly change; a proportioned change, in time and in degree, must take place in the accommodated system. But though the system suffer these partial and successive alterations, yet it continues materially and substantially the same. The ship of the Argonauts became not another vessel, though almost every part of her materials had been altered during the course of her voyage."), and *id.* at 457 ("In the natural body diseases will happen; but a due temperament and a sound constitution will, by degrees, work out those adventitious and accidental diseases, and will restore the body to its just state and situation. So it is in the body politic, whose constitution is animated and invigorated by the common law. When, through the errors, or distempers, or iniquities of men or times, the peace of the nation, or the right order of government have received interruption; the common law has wrought out those errors, distempers, and iniquities; and has reinstated the nation in its natural and peaceful state and temperament."), with SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 39-40 (Charles M. Gray ed., Univ. of Chi. Press 1971) (3d ed. 1739) ("[H]ence arises the Difficulty, and indeed Moral Impossibility, of giving any satisfactory or so much as probable Conjecture, touching the Original of the [common] Laws, for the following Reasons, *viz.* First, From the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniences of the People, for or by whom they are appointed, as those Exigencies and Conveniences do insensibly grow upon the People, so many Times there grows insensibly a Variation of Laws, especially in a long Tract of Time . . . . So that Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho' not now extant, might introduce some *New* Laws, and alter some *Old*, which we now take to be the very Common Law itself, tho' the Times and precise Periods of such Alterations are not explicitey or clearly known: But tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials . . . ."), and *id.* at 30 ("Insomuch, that even as in the natural Body the due Temperament and Constitution does by Degrees work out those accidental Diseases which sometimes happen, and do reduce the Body to its just State and Constitution; so when at any Time through the Errors, Distempers or Iniquities of Men or Times, the Peace of the Kingdom, and right Order of Government, have received Interruption, the Common Law has wasted and wrought out those Distempers, and reduced the Kingdom to its just State and Temperament, as our present (and former) Times can easily witness.").

For the relation between their accounts of the authority of the common law, compare WILSON, *supra*, at 426 ("If this investigation is difficult, there is one consolation, that it is not of essential importance. For at whatever will the laws of England were introduced, from whatever, person or country they were derived; their obligatory force arises not from any consideration of that kind, but from their free and voluntary reception in the kingdom."); *id.*

Adams's diary also attest to the influence that Hale's *History* had upon him, although they are accompanied by Adams's self-excoriations for lack of studiousness.<sup>151</sup> Brackenridge likewise cited Hale's *Observations Touching the Amendment or Alteration of Laws* in *Law Miscellanies*.<sup>152</sup>

Coke's *Institutes and Reports* were also widely disseminated and endorsed during the founding period. Jefferson included Coke's *Institutes* in his 1814 list of books for law students as the first work to be studied, and praised Coke at Blackstone's expense, writing that "Coke's institutes and reports are the first, and Blackstone their last book, after an intermediate course of two or three years. It is nothing more than an elegant digest of what they will then have acquired from the real fountains of the law."<sup>153</sup> Adams also referred extensively to Coke throughout his writings. The accounts that Coke, Hale, and Blackstone provided of the history of the common law underlay their theories about the sources of its authority and its identity, including its capacity for various forms of change. Whereas Blackstone emphasized a legislative supremacy according to which statutory enactments would and should supersede the common law, the early thinkers possessed a more nuanced notion of the relationship between written and unwritten law. They also, and even more centrally, insisted on a vision of the common law as at the same time retaining a coherent identity through time and yet as flexible and susceptible to change.

In his classic study *The Ancient Constitution and the Feudal Law*, J.G.A. Pocock elaborated the fundamental paradox inherent in the common law vision of custom in the early years of the seventeenth century; legal thinkers of this period, particularly Coke, valued custom because it was "immemorial," or rather spanned back before the time of the Norman Conquest of 1066, but at the same time because it was open to alteration.<sup>154</sup> Assertions of the

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at 445 ("In every period of [the common law's] existence, we find imprinted on it the most distinct and legible characters of a customary law—a law produced, extended, translated, adopted, and moulded by practice and consent."), with HALE, *supra*, at 43-44 ("[W]henever the Laws of England, or the several *Capita* thereof began, or from whence or whomsoever derived, or what Laws of other Countries contributed to the Matter of our Laws; yet most certainly their Obligation arises not from their Matter, but from their Admission and Reception, and Authorization in this Kingdom; and those Laws, if convenient and useful for the Kingdom, were never the worse, tho' they were desumed and taken from the Laws of other Countries, so as they had their Stamp of Obligation and Authority from the Reception and Approbation of this Kingdom by Virtue of the Common Law . . .").

151. John Adams, Diary, in 2 WORKS OF JOHN ADAMS, *supra* note 94, at 3, 100-01, 103.

152. BRACKENRIDGE, *supra* note 118, at 70 (referring to "Hale's observations, 'touching the amendment or alteration of laws'").

153. Letter from Thomas Jefferson to Judge Tyler, *supra* note 74; see also Letter from Thomas Jefferson to Bernard Moore, in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 74, at 480-85 n.1 (prescribing necessary foundational reading for a study in law); see also Waterman, *supra* note 72, at 460-62.

154. POCKOCK, *supra* note 84, at 36.

immemoriality of common law drew upon a nativist strand of thought that wished to “turn[] inward, upon the past of its own nation which it saw as making its own laws, untouched by foreign influences, in a process without a beginning” as well as a desire not to ground the common law in prior legislation but instead “make a case for an ‘ancient constitution’ against the king.”<sup>155</sup> The concept of the “ancient constitution” thus served the political purpose of restraining the extensive power—allegedly grounded in divine right—claimed by King James I.<sup>156</sup> At the same time, common lawyers exalted custom as embodying the results of judicial efforts to improve the law over a long period of time, resulting in what Coke dubbed the common law’s “artificial reason.”<sup>157</sup> Pocock suggests that the seeming incompatibility between the conception of custom as flexible and the conception of custom as immemorial can be resolved by appealing to the basic ambiguity of common lawyers’ vision of custom.<sup>158</sup>

Whereas Pocock takes Coke as the paradigmatic example of a “deep-seated and unconscious habit[] of mind,” maintaining that “[i]t is hard to believe that the common-law interpretation of history was consciously and polemically constructed,”<sup>159</sup> chronological analysis of the successive prefaces to Coke’s *Reports*, where he articulated his own account of the history of the common law, suggests otherwise. Indeed, even Coke may maintain a closer affiliation with what Scalia deems post-realist visions of the common law than has been generally acknowledged. First, in one of the earlier prefaces, Coke disparaged the work of non-legally trained historians, such as the annalists, in order to present his own, alternative history of the common law and a genealogy for English law that reached back to ancient Greece.<sup>160</sup> Seeming to forget this previous self-justification once he had fully articulated his own account, Coke, in a subsequent preface, attempted to claim that other historians generally agreed with it.<sup>161</sup> Coke also went to great lengths to explain to the reader, whom he explicitly addressed at various points, why his own *Reports* were necessary despite the immemoriality of the common law, an effort that illuminates his understanding of how change occurs within the tradition.

Given the immemoriality that Coke posited for the common law, one might imagine that his *Reports* would be rendered superfluous by the availability of other records of decisions under the common law. In the preface “To the

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155. *Id.* at 41, 46.

156. See JAMES I, *The Trew Law of Free Monarchies*, in KING JAMES VI AND I: POLITICAL WRITINGS 62 (Johann P. Sommerville ed., 1994).

157. POCKOCK, *supra* note 84, at 35.

158. *Id.* at 36-37.

159. *Id.* at 32.

160. COKE, *supra* note 145, at 59-78.

161. *Id.* at 245 (answering yes to the question of “whether Historiographers do concurre with that [history] which there so constantly [in his prior *Reports*] hathe beene affirmed”).

Reader" to Part Three of the *Reports*, Coke explained that similar reports had been composed before, and he even enumerated pre-existing sources.<sup>162</sup> As a result of this wealth of materials, Coke imagined that "it may seeme both unnecessarie and unprofitable to have any more Reports of the Law," especially because "about the end of the raigne of *Henry the 7.* it was thought by the Sages of the Law, that at that time the Reports of the Law were sufficient."<sup>163</sup> Coke defended his project of reporting against this criticism by insisting that the same reasons that underlay the earlier reports also made his own activity essential. Statutory innovation may have altered the state of the law since the earlier period, and, even if such change did not take place, uncertainty and conflicts might arise out of previous reports.<sup>164</sup>

This situation demands an effort by the reader—and by Coke himself—to generate a coherent account of the common law based on a "better understanding of the true sense and reason of the Judgements and resolutions formerly reported" or upon resolving "such doubts as therein remain undecided."<sup>165</sup> Coke thus described his own *Reports* as being "but in the nature of Commentaries."<sup>166</sup> Although he urged that legal readers not "wrest[] or rack[], or [by] inference of wit . . . draw [his own *Reports*] . . . from their proper and naturall sense,"<sup>167</sup> Coke's own practice in certain instances

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162. *Id.* at 59 ("How profitable and necessarie the Reports of the Judgements and Cases in Law published in former ages have beene, may unto the learned Reader by these two considerations amongst others evidently appeare. First, that the Kings of this Realme, that is to say, Edward the third, Henry the fourth . . . and Henry the seventh did select and appoint foure discreet and learned professors of Law, to report the judgements and opinions of the Reverend Judges, as well for resolving of such doubts and questions wherein there was (as in all other Arts and Sciences there often fall out) diversitie of opinions, as also for the true and genuine sense and construction of such Statutes and Actes of Parliament, as were from time to time made and enacted."); *id.* at 60 (speaking of "the judicciall records of the Kings Courts"); *id.* at 61 (enumerating "the auncient bookes of the Common Lawes yet extant," including *Glanvill*, *Bracton*, and *Britton*).

163. *Id.* at 72.

164. *Id.* at 72-73. These comments might seem to weigh the effect of statutes heavily, but Coke largely viewed parliamentary enactments as innovating in less than desirable ways and as being, in general, eventually superseded by a return to the pre-existing common law:

Out of all these Bookes and Reports of the Common Law, I have observed, that albeit sometime by actes of Parliament, and sometime by invention and wit of man, some points of the auncient Common Law have been altered or diverted from his due course; yet in revolution of time, the same (as a most skilfull and faithfull supporter of the common wealth) have bin with great applause for avoyding of many inconveniences restored againe . . .

*Id.* at 73.

165. *Id.* at 73.

166. *Id.* at 72.

167. *Id.* at 73. Coke employed similar language in the tenth preface. See *id.* at 337 ("This only I will add as a Caveat to all the Professors of the Law, that seeing their arguments should tend for the finding out of the true Judgment of Law, for the better execution of Justice, that therein they commit not manifest Injustice; for I am of Opinion that he that wresteth or misapplieth any Text, Book or Authority of the Law against his proper and genuine Sense, yea though it be to confirm a Truth, doth against distributive Justice, which is to give to every one his own.").

demonstrates a looser approach to prior cases, one that appears self-consciously to revise their import. As Plucknett has demonstrated with respect to *Bonham's Case*, often taken to provide the first justification for judicial review, Coke significantly added to the language of the cases he cited to bolster his conclusion that "the common law doth control acts of Parliament, and sometimes shall adjudge them to be void," thereby substantially altering the meaning of the quoted passages.<sup>168</sup> In reconciling doubts, Coke did not perform an absolute fidelity to the text of earlier sources but instead provided innovative and transformative readings of judicial precedents.

At the same time as he renewed the understanding of the common law extracted from earlier cases, Coke insisted to the reader on the paramount value of examining prior reports and other books of common law.<sup>169</sup> What is at stake in this position appears to be the very identity of the common law itself. In response to the question of "what the body or text of the common lawe is"<sup>170</sup>—an equation between body and text that, in its formulation, might already seem to dictate part of the answer—he explained that the common law consisted in the early statutes, such as the Magna Carta, which "for the most part are but declarations of the Common law," in addition to "the original writs contained in the *Register* concerning comon pleas, and the exact & true formes of Inditements & Judgements thereupon in criminall causes . . ."<sup>171</sup> Under this view, the *Yearbooks* and reports of cases constitute commentaries upon the common law rather than the object of study itself.<sup>172</sup> Yet their status as commentaries did not render such texts any less significant; on the contrary, Coke continually urged his readers to read and reread these materials.<sup>173</sup>

Through the third, sixth, eighth, and tenth prefaces, Coke created an early canon of sources for understanding the common law, providing a litany of

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168. See generally Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

169. COKE, *supra* note 145, at 103 ("The reading of the severall Reports & records of these Lawes, doth not only yeeld immence profit, as elsewhere I have noted; but doth containe the faithfull and true Histories of all successive times . . ."); *id.* at 72 (stating as the aim of his own reports the idea that they "will be a meane (for so I intended them) to cause the studious to peruse and peruse againe with greater diligence, those former excellent and most fruitfull Reports").

170. *Id.* at 245.

171. *Id.* at 256. Coke's view of the relationship between the common law and Magna Carta suggests the complicated connection between statutes and the common law, discussed above. See *supra* notes 52-53 and accompanying text. For a similar point, see HALE, *supra* note 150, at 8 ("Expositions and Decisions, together also with those old Statutes themselves, are as it were incorporated into the very Common Law, and become a Part of it."). Blackstone also spoke of some statutes as aimed at restoring the common law, which had been undermined by the Norman Conquest. 4 WILLIAM BLACKSTONE, COMMENTARIES \*411, \*431-32.

172. *Id.*

173. See *id.* at 73-78.

particular works and describing where they were to be found.<sup>174</sup> These materials derived from “record,” which he contrasted with those of “storie,” the previously conventional register of the historian.<sup>175</sup> In particular, Coke extolled the use of cases as precedent and example. For Coke, citing precedent assisted in the task of persuading the reader of the validity of the propositions that a case put forth. As Coke wrote in the third preface:

[M]ine advise is, that whensoever a man is enforced to yeeld a reason of his opinion or judgement, that then hee set downe all authorities, presidents, reasons, arguments, and inferences whatsoever that may bee probably applied to the case in question; For some will be perswaded, or drawne by one, and some by another, according as the capacitie or understanding of the hearer or reader is.<sup>176</sup>

In the sixth preface, Coke provided even more explicit instruction about citation practices. Responding to a religious individual’s criticism of *Caudries Case*, Coke explained that the case simply repeated established law, and that he, unlike his devout interlocutor, “quoted the Year, the Leaf, the Chapter and other certain References for the ready finding [of the ‘Judgments and Resolutions of the Reverend Judges and Sages of the Common Laws’].”<sup>177</sup> According to Coke, cases also furnish informative examples of particular legal principles. In describing this function, Coke foreshadowed the case method of instruction: “The reporting of particular Cases or Examples is the most perspicuous course of teaching, the right rule and reason of the law; for so did Almighty God himself, when he delivered by *Moses* his Judicial Laws, *Exemplis docuit pro Legibus* . . . .”<sup>178</sup> Far from dispensing with previous reports, Coke instead viewed them as providing valuable instantiations of the principles of common law and undergirding the authority of his own decisions. One of the goals of his reports, therefore, was to furnish “a meane (for so I intended them) to cause the studious to peruse and peruse againe with greater diligence, those former excellent and most fruitfull Reports.”<sup>179</sup>

According to Coke’s understanding, reliance on precedents furnished a certain kind of authority, yet prior case reports themselves might not provide satisfactory reasons for particular outcomes and might even seem to dictate disparate results. Because of this situation, reading, re-reading, and interpretation were essential. Examining precedents thereby assisted the lawyer or judge in contemplating and evaluating particular legal problems, but did not necessarily provide the answer to a specific question; it was in this way that Coke reconciled the immemoriality of the common law with the simultaneous assertion of the need for his own reports.

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174. See *id.* at 59-78, 150-57, 245-60, 327-47.

175. See *id.* at 245.

176. *Id.* at 60.

177. *Id.* at 155.

178. *Id.* at 156.

179. *Id.* at 72.

Later in the seventeenth century, following the legal and political disruptions occasioned by the English Revolution, Sir Matthew Hale expressed an even more explicit vision of the common law's susceptibility to change. A figure of continuity within the rapid transitions from royal to parliamentary regime and back again, Hale had presided over an Interregnum law reform commission and had been appointed during that period to a judicial office which he managed to retain upon the Restoration of Charles II to the throne.<sup>180</sup> In this respect, he resembled the bureaucratic personnel of contemporary transitional governments, retained by new regimes that wish to benefit from their acquired expertise and establish stability.<sup>181</sup>

The effects of the period are evident in Hale's posthumously published *History of the Common Law*. The illusion of an immemoriality that bespoke permanence upon which Coke and his contemporaries could insist no longer represented a plausible fiction. Thus Hale viewed the Norman Conquest not, like Coke, as a point to be elided, but rather in light of other moments of colonization or revolution, including alterations in the forms of sovereignty within England and the country's efforts to export its laws to Ireland and elsewhere overseas. To be sure, Hale suggested at one point that any resemblances between Norman and English law may have traveled not in the direction of conquest but rather back to Normandy from England,<sup>182</sup> and posited that William I did not conquer the English people as a whole, but only won a contest with the King over title to the crown, and hence did not have the power to alter the common law.<sup>183</sup> Nevertheless, Hale generally wrote not, like Coke, of the indigenous purity of the common law, but rather of its hybridity.

In his *History*, Hale elaborated the fundamentally multicultural formation of the common law and the consequent impossibility of definitively tracing a single origin:

[H]ence grew those several Denominations of the Saxon, Merician, and Danish Laws, out of which . . . [Edward] the Confessor extracted his Body of the Common Law, and therefore among all those various Ingredients and Mixtures of Laws, it is almost an impossible Piece of Chymistry to reduce every Caput Legis to its true Original, as to say, This is a Piece of the Danish, this of the Norman, or this of the Saxon or British Law.<sup>184</sup>

In addressing both this varied state of the law prior to the Norman Conquest, and the effects of the conquest itself, Hale insisted that the continued

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180. See generally ALAN CROMARTIE, *SIR MATTHEW HALE 1609-1676: LAW, RELIGION AND NATURAL PHILOSOPHY* (1995).

181. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

182. See HALE, *supra* note 150, at 81 ("[T]he Laws of Normandy were in the greater Part thereof borrowed from ours, rather than ours from them, and the Similitude of the Laws of both Countries did in greater Measure arise from their Imitation of our Laws, rather than from our Imitation of theirs, though there can't be denied a Reciprocal Imitation of each others Laws was, in some Measure at least, had in both Dominions.").

183. *Id.* at 52-55.

184. *Id.* at 42-43.



acceptance rather than the origin of the common law was essential in endowing it with authority. Thus “the Strength and Obligation, and the formal Nature of a Law, is not upon Account that the Danes, or the Saxons, or the Normans, brought it in with them, but they became Laws, and binding in this Kingdom, by Virtue only of their being received and approved here.”<sup>185</sup> Likewise, even if the Norman Conquest had resulted in the introduction of foreign laws into England,

their obligatory Power, and their formal Nature or Reason of becoming Laws here, were not at all due to those Countries, whose Laws they were, but to the proper and intrinsical Authority of this Kingdom by which they were received as, or enacted into, Laws: And therefore, [] no Law that is Foreign, binds here in England, till it be received and authoritatively engrafted into the Law of England . . . .<sup>186</sup>

The authority of law, for Hale, thus results not from the source of its origin but rather from its acceptance into and engrafting onto domestic law.

This release from grounding the authority of the common law in its immemoriality enabled Hale to explicitly acknowledge legal change and to write the first account of the common law that openly presented itself as a history and spoke of the common law’s extraordinary capacity to accommodate itself to particular emergencies.<sup>187</sup> He simultaneously, however, emphasized the identity of the common law over time. Reconciling these two positions led Hale to elaborate a more detailed theory than Coke of the ontology of law, one expressed largely in the form of metaphors.

Profoundly influenced by seventeenth-century scientific thought, and himself an author of several such treatises—the sole works he published during his lifetime—Hale expressed his views on the nature of the common law in terms that were both somewhat neo-Epicurean and indebted to his rival, Thomas Hobbes. Hale and Hobbes disagreed in several respects about the grounds for law. In describing how the common law could be envisioned as retaining unity in the face of alteration, Hale implicitly responded to various examples Hobbes had mustered when discussing the basis for identity. For Hale:

Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho’ not now extant, might introduce some New Laws, and alter some Old, which we now take to be the very Common Law itself, tho’ the Times and precise Periods of such Alterations are not explicitey or clearly known: But tho’ those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho’ in that long Voyage it had successive

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185. *Id.* at 43.

186. *Id.* at 72.

187. *Id.* at 41.

Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho' Physicians tells us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before.<sup>188</sup>

Both the comparison with the Ship of the Argonauts and with the mutability of man's body derive from the first part of Hobbes's 1655 *Elements of Philosophy*, although Hale inexplicably substituted the Ship of the Argonauts for that of Theseus, the classical topos that Hobbes had followed.<sup>189</sup>

The analogies appear in Hobbes's work in the context of the philosopher's attempt to establish the grounds for identity. Hobbes explained the conventional methods for individuating entities as relying on form, matter, or accident. Those maintaining that identity consisted in form would insist that:

when a Man is grown from an Infant to be an Old Man, though his Matter be changed, yet he is still the same Numerical Man [or that] that Ship of Theseus (concerning the Difference whereof, made by continual reparation, in taking out the old Planks, and putting in new, the Sophisters of Athens were wont to dispute) were, after all the Planks were changed, the same Numerical Ship it was at the beginning . . . .<sup>190</sup>

Hobbes's objection to this group of thinkers was that they would have to acknowledge a ship compiled from all the discarded planks of Theseus's ship into the same form as the original ship as identical to the other, gradually transformed Ship of Theseus. On the other hand, he criticized those who believed that identity subsisted solely in matter by insisting on the impracticability of this view: "He that sins, and he that is punished should not be the same Man, by reason of the perpetual flux and change of Man's Body; nor should the City which makes Lawes in one Age, and abrogates them in another, be the same City; which were to confound all Civil Rights."<sup>191</sup>

A better way to discern identity and difference is, Hobbes claimed, to consider the scope of the name for which sameness is asserted—whether that of man or body—and assign as the meaning for the name "such Form as is the beginning of Motion."<sup>192</sup> This would result in designating a man with reference to his birth, or a city with reference to its initial "institution."<sup>193</sup> Hobbes's fiction of the social contract thus provides the underlying unity for the political order he treated in the *Leviathan*. In criticizing this vision—which he reduced to a thoroughgoing nominalism—Thomas Tenison urged instead, through the

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188. *Id.* at 40.

189. The set of images Hale employed also connected his *History* with Thomas Tenison's critical 1670 dialogue *The Creed of Mr. Hobbes Examined in a Feigned Conference Between Him and a Student in Divinity*. See *infra* note 194.

190. THOMAS HOBBS, *ELEMENTS OF PHILOSOPHY, THE FIRST SECTION, CONCERNING BODY* 99-100 (London, R. & W. Leybourn 1656).

191. *Id.* at 100.

192. *Id.* at 101.

193. *Id.*

dialogic persona of a student of divinity, that identity cannot derive simply from physical motion but must connect with an underlying soul.<sup>194</sup>

By contrast, Hale disassociated identity from origin and instead connected it with the perception of the common law's continuity despite change, and with the polity's acceptance of a body of common law—and various alterations to it—as law. The common law thus served, for Hale, as “the Complection and Constitution of the English Commonwealth,” a constitution that could smooth over any political disruptions, including that of the English Revolution.<sup>195</sup> Whether a particular transformation was effected through judicial decision or statute seemed to make little difference for Hale;<sup>196</sup> the only relevant point to be established consisted in whether the change was accepted as part of the common law. Hale's *History of the Common Law* thereby reveals his theory of the common law as one through which identity is created by reception and within which changes should be accepted and thereby integrated into the overarching fabric of the law.

Although relying on history as a source for the common law's authority, Coke and Hale both provided accounts of its mutability that were influential for the founding generation. Whereas Coke demonstrated the ways in which judicial interpretation of prior cases could both focus attention on the questions raised by those precedents and generate new solutions, Hale elucidated how the common law could retain a singular designation despite accommodating the emergencies of the times. Taken together, these views suggest an alternative to envisioning the late eighteenth-century common law as an immutable set of rules.

As the next Part shows, this historically enriched version of early American understandings of the nature and practice of the common law avoids fixing contemporary originalist interpretive practice on a static, selective, and oddly reified snapshot of eighteenth-century English common law.

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194. THOMAS TENISON, *THE CREED OF MR. HOBBS EXAMINED IN A FEIGNED CONFERENCE BETWEEN HIM AND A STUDENT IN DIVINITY* 92-93 (London, Francis Tyton 1670) (“In Children the Organs are changed by accession of Parts; and in all, in the space perhaps of less than seven years, the whole Sentient, whatsoever it is, is, for the main vanished, ’though the Texture be alike, as was the form of Structure in the Ship of *Theseus*. How then . . . [c]an any person . . . , after seventy years, . . . be individually the same, if he be not endued with a Spiritual and Incorruptible Soul, which remaineth the same intirely throughout that space; but consisteth only of a Body in Motion, with perpetual flux of Parts?”).

195. HALE, *supra* note 150, at 30 (“Insomuch, that even as in the natural Body the due Temperament and Constitution does by Degrees work out those accidental Diseases which sometimes happen, and do reduce the Body to its just State and Constitution; so when at any Time through the Errors, Distempers or Iniquities of Men or Times, the Peace of the Kingdom, and right Order of Government, have received Interruption, the Common Law has wasted and wrought out those Distempers, and reduced the Kingdom to its just State and Temperament, as our present (and former) Times can easily witness.”).

196. *Id.* at 44-45.

## IV. A COMMON LAW ORIGINALISM

The options for originalists are not, I would contend, quite as stark as Justice Scalia imagines. Accepting the crosscutting strands of the common law as part of an originalist perspective would permit an originalism attentive to the questions raised by the common law and its mode of reasoning rather than one fixated upon particular, decontextualized answers. The disparities within eighteenth-century common law—between that of Blackstone and the colonies, and even within the colonies themselves—help to tease out the kinds of arguments that were waged over the common law and point backwards and forwards to common law principles that had in the past been or would in the future become dominant. Attention to the emergence of common law rules out of these debates leads to an understanding of particular constitutional clauses as interventions within a contested common law backdrop, interventions that were informed by contemporaneous arguments but not necessarily determined by a majority position.<sup>197</sup>

Furthermore, the availability to the founding generation of a vision of the common law strikingly similar to a post-realist account suggests the possibility that, rather than attempting to conjure up answers to the questions posed by disparate eighteenth-century versions of the common law within a past-oriented framework, jurists instead should take up the challenge of responding to these questions from the vantage point of today. Common law judges of earlier eras themselves reinterpreted received precedents with an eye toward their own situations; this method should also characterize our approach to the common law components of the Constitution.

Living constitutionalists might then ask why originalism should be retained at all. The answer, I believe, is provided by the story of the common law itself, which succeeded in retaining relevance over a number of centuries despite its adaptation. Rather than disregarding its own history, as dispensing with originalism entirely might do in the constitutional arena, the common law method instead considers historical materials and adopts a critical stance towards them. It is precisely this attitude that would inform a common law originalism.

The common law approach proposed in this Article also bears a resemblance to two recent accounts of originalism, but it arrives at different

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197. While this approach is indebted to what Bob Gordon has termed “critical historicism,” in that it attempts to undercut the monistic aspects of lawyers’ history, it places more emphasis on the historical construction of debates and how they may serve to illuminate contemporary understanding of the Constitution. See Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1024-25 (1997); see also Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMAN. 323 (2004). For one example of a constitutional analysis informed by the kinds of questions raised in debates about the common law, see Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 States’ Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519 (2001).

conclusions on certain crucial points. Keith Whittington's eloquent and innovative defense of originalism in *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* posits a division between constitutional interpretation and constitutional construction; whereas the former "is a fairly familiar process of discovering the meaning of the constitutional text," and represents an activity appropriate to the judicial branch, the latter, treated in more detail in Whittington's companion volume, *Constitutional Construction: Divided Powers and Constitutional Meaning*, should occur within the political branches, because it involves "the 'imaginative vision' of political rather than the 'discerning wit' of judicial judgment," and is "essentially creative," charged with bringing the text into being.<sup>198</sup> Not only does Whittington strictly separate creation from construction, but he also insists that the meaning of the Constitution can be identified with the intentions of the Founders and that, "[i]f we were to discover fundamental disagreement among the founders over meaning, then we must admit that this undercuts the determinacy of the text."<sup>199</sup> Once indeterminacy is located, the task of constitutional construction begins, a task that should be allocated to the political branches rather than the judiciary.<sup>200</sup> Common law originalism instead posits that indeterminacy is more deeply rooted in the constitutional text than Whittington's account would suggest, and that this indeterminacy should neither stop the judiciary in its tracks nor occasion immediate resort to living constitutionalism. Rather, the conflict between different common law strands suggests the very questions through which judges frame their consideration of constitutional meaning.

Randy Barnett's *Restoring the Lost Constitution: The Presumption of Liberty* presents a more explicitly evolutionary account of originalism as practiced within the judicial branch than Whittington's theory.<sup>201</sup> Relying implicitly on the Ninth Amendment, Barnett contends that the application of vague terms or phrases in the Constitution should be resolved in favor of liberty, rather than otherwise.<sup>202</sup> Barnett is more concerned with what he

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198. WHITTINGTON, *supra* note 10, at 5, 204-05; *see also* KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

199. *Id.* at 194.

200. *Id.* at 205 ("Such indeterminacies need not be resolved by the judiciary in order to update constitutional meaning but can be constructed by the political branches themselves.").

201. Lawrence Lessig's account of "fidelity in translation" similarly emphasizes evolution, insisting that originalist interpretation must allow for alteration in accordance with historical changes in context as well as modifications of the actual constitutional text. *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

202. *See* Randy Barnett, *Why You Should Read My Book Anyway: A Response to Trevor Morrison*, 90 CORNELL L. REV. 873, 884 (2005) ("Because of the vagueness of language, original meaning must be supplemented by constitutional construction that is not inconsistent with that meaning."); *see also* BARNETT, *supra* note 2, at 118-30 (treating the question of when and how original meaning should be supplemented); Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 646 (1999) ("Because lawmakers

designates vagueness than with ambiguity, where vagueness involves not the problem of a term with multiple meanings but rather that of “applying a term to a marginal object.”<sup>203</sup> Addressing the question of the connection between the generality or specificity of a constitutional term and its vagueness, Barnett maintains that, “[a]fter a level of generality is established historically, whether an object falls within or outside the ambit of a vague term is a matter of ‘construction’ rather than of interpretation.”<sup>204</sup> Common law originalism is less preoccupied than Barnett with the dynamic of core and periphery and instead more focused upon the process of generating in the first place the core questions that are posed by particular constitutional terms or phrases.

The method of common law originalism thus involves posing a sequence of questions to the judge: Do common law conceptions inform a constitutional term or phrase? If so, how did disparate strands of the common law concern the legal principle in question? What kinds of questions emerge out of the different common law visions presented? How might one answer these questions from the standpoint of the present without exceeding the frame provided by the questions posed? One implication of this method is that it would take substantial research and analysis to answer the sequence of questions for even one particular term or phrase; the aspiration of the remainder of this Part is, thus, not to furnish such answers but to sketch the approach that a common law originalist would take.

Adjudication under the Seventh Amendment provides several examples of the ways in which common law originalism would lead to reasoning different from both that of living constitutionalists and Scalia-type originalists. The Seventh Amendment explicitly refers to preserving a particular part of the common law: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”<sup>205</sup> Because the Seventh Amendment represents a constitutional anomaly in that it actually refers to the common law, it might seem inapposite as an example of the application of

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acting pursuant to their constitutional powers govern those who did not consent, to be legitimate, the lawmaking processes must provide assurances that both the enumerated and unenumerated rights of those who are governed will not be violated. To enhance legitimacy, then, ambiguous terms should be given the meaning that is most respectful of the rights of all who are affected and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect. . . . Enhancing constitutional legitimacy, in the sense I am using the term, might also require construing abstract constitutional rights as broadly as the original meaning of the text permits, while construing narrowly the delegated powers. Or one might adopt a ‘presumption of liberty’ that places the onus of justification on the government to show that any interference with a citizen’s rightful exercise of liberty is both necessary and proper.”).

203. BARNETT, *supra* note 2, at 199.

204. *Id.* at 120.

205. U.S. CONST. amend. VII.

common law originalism. It is, indeed, difficult to discover many interpretations of the Seventh Amendment that are not based in history.<sup>206</sup> At the same time, however, Seventh Amendment cases furnish a valuable resource for assessing the range of possible approaches to the incorporation of the common law into the Constitution precisely because Justices from Brennan and Marshall to Kennedy and Scalia generally concur that, in the Seventh Amendment context, if in no other, history *is* relevant to constitutional adjudication.<sup>207</sup> Furthermore, although other historical approaches can be identified within the Court's Seventh Amendment jurisprudence,<sup>208</sup> most of the

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206. Critiquing this situation, Kenneth Klein writes that "our current practices derive from the obsolete and questionable methodology of comparing modern cases to those prevalent in the common law courts of eighteenth century England, as opposed to a structured analysis of the rights juries are intended to preserve, or the advantages or capabilities of the modern jury." Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1007 (1992). Similarly, arguments for a "complexity exception" to the Seventh Amendment generally adduce pragmatic rather than historical considerations. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 80-83 (2001) (surveying some of the reasons for invoking a complexity exception).

Akhil Amar has also employed originalism against the historical approach currently endorsed by the Supreme Court, and suggested that, in the context of the Seventh Amendment, "preserve" does not have a temporal connotation, meaning that a particular moment of history is retained, but rather a dynamic, federalism-based import; in other words, "the best reading of the [Seventh A]mendment is probably as follows: if a state court entertaining a given common-law case would use a civil jury, a federal court hearing the same case (because, say, it involves diverse citizens or raises a federal question) must follow—must 'preserve'—that state-law jury right." AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 89-90 (2000). Amar's argument has been challenged by Stanton Krauss, who distinguishes between the original meanings of the phrases "[i]n suits at common law" (the Jury Trial Clause) and "according to the rules of the common law" (the Reexamination Clause) within the Seventh Amendment. See Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 450-55 (1999).

207. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 449-69 (1996) (Scalia, J., dissenting) (arguing for fidelity to the original meaning of the Reexamination Clause); *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (Marshall, J.) (explaining that, in Seventh Amendment cases, to determine whether the jury trial guarantee applies, the court first "compare[s] the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and then second "examine[s] the remedy sought and determine[s] whether it is legal or equitable in nature"); *id.* at 584 (Kennedy, J., dissenting) (placing priority on comparing the contemporary cause of action at issue with those of the eighteenth century in deciding whether it is more legal or equitable in nature); *Colgrove v. Battin*, 413 U.S. 149, 155-56 (1973) ("[B]y referring to the 'common law,' the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury.").

208. See *Galloway v. United States*, 319 U.S. 372, 390-92 (1943) (observing that "'the rules of the common law' [were not] crystalized [sic] in a fixed and immutable system," and that "widely divergent common-law rules on procedural matters [existed] among the states, and between them and England").

Justices examine primarily the British rather than the American contexts,<sup>209</sup> and most tend at least implicitly to regard the common law as a determinate body of rules from which to glean constitutional insight.<sup>210</sup> Where they diverge is simply in their view of how eighteenth-century English common law should be deployed.

The Seventh Amendment's background itself also suggests the salience of a common law originalist approach. When the subject of the right to a jury trial in civil cases—one of the principal concerns of the Seventh Amendment—arose late in the Constitutional Convention, several delegates objected to incorporating any reference to the civil jury on grounds similar to those articulated by James Wilson when the question came up during the Pennsylvania ratification process: "The want of uniformity would have rendered any reference to the practice of the states idle and useless: and it could not, with any propriety, be said, that 'the trial by jury shall be as heretofore:' since there has never existed any foederal system of jurisprudence, to which the declaration could relate."<sup>211</sup> Ratification of the Seventh Amendment in the face of these concerns has led commentators to conclude that the "common law"

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209. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) ("The right of trial by jury . . . is the right which existed under the English common law when the Amendment was adopted." (quoting *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935))). The dominance of English common law within Seventh Amendment interpretation generally is traced to Justice Story's decision in *United States v. Wonson*, 28 F. Cas. 745 (1812). See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (elaborating upon the history of the Seventh Amendment and its ratification and the development of the current historical test out of Justice Story's opinion in *Wonson*). This genealogy is called into question by Krauss, who argues that Justice Story's opinion actually "endorses[d] a fairly dynamic interpretation of the Jury Trial Clause and a completely static interpretation of the Reexamination Clause." Krauss, *supra* note 206, at 477.

More broadly, Kenneth Klein has criticized the assumption that the language of the Seventh Amendment "contains the kernel of a black-letter rule of law," and that this black-letter rule of law "derives from jury practices prevalent under English common law during the eighteenth century." Klein, *supra* note 206, at 1005-06, 1020-22.

210. See, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935) ("[W]e are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution."). To be sure, the Court has long recognized that modern procedural mechanisms may stand in the face of a Seventh Amendment challenge so long as analogues to the mechanisms, rather than exact antecedents, exist within nineteenth-century English common law. See, e.g., *Markman*, 517 U.S. at 378 (1996). In *Markman*, the Court also acknowledged that its "formulations of the historical test do not deal with the possibility of conflict between actual English common-law practice and American assumptions about what that practice was, or between English and American practices at the relevant time." *Id.* at 376 n.3. Even this moment of candor, however, did not go so far as to admit the possibility of conflicts *within* late nineteenth-century English practice.

211. 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 101 (1911); see also 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 587 (1911); *Colgrove*, 413 U.S. at 156.



referred to therein must be the common law of eighteenth-century England, which is assumed to have offered a more fixed and determinate template than colonial practices. An alternative assumption, more consistent with the findings and argument of this Article, is that the language of the Seventh Amendment, in referring to the “common law,” comprehends the shifting and contested versions in place on either side of the Atlantic.

Three principal issues to which a common law originalist perspective might prove valuable arise in interpreting the Seventh Amendment. First, the Seventh Amendment’s invocation of “fact” has required the Supreme Court to opine about what constitutes fact or law. Second, the Reexamination Clause, specifying that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law,” raises questions about the status of a trial court’s or appellate tribunal’s review of jury determinations at common law. Third, the jury trial guarantee for “suits at common law” generates controversy about the relative scope of common law and equity and how that should be determined.

The distinction between fact and law has been invoked sporadically by the Supreme Court in both the context of the initial right to a jury trial in civil cases and in that of review of jury verdicts. In assessing the extent to which a particular claim arising within a case should be decided by a jury rather than a judge, the Court has often explained that it “depend[s] on whether the jury must shoulder this responsibility *as necessary to preserve the ‘substance of the common-law right of trial by jury.’*”<sup>212</sup> One way in which the Court has determined this question is by referring to a “line . . . between issues of fact and law.”<sup>213</sup> Hence, in *City of Monterey v. Del Monte Dunes*, Justice Kennedy, writing for the majority, explained that, under the Seventh Amendment analysis, predominantly factual issues should be allocated to the jury.<sup>214</sup> In describing the relationship between fact and law, however, these cases refrain from examining the common law conception of what constituted fact as opposed to law. The common law originalist’s first intervention into this area would, thus, be to inquire about that relation and establish the eighteenth-century views about what constituted a determination of fact.<sup>215</sup> This kind of inquiry is currently neglected not only by living constitutionalists but also by conventional originalists; although the latter insist upon the relevance of particular rules from the founding era in constitutional interpretation, they

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212. *Markman*, 517 U.S. at 377 (quoting *Tull v. United States*, 481 U.S. 412 (1987)).

213. *Id.* at 378.

214. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21 (1999).

215. *Cf.* Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687 (2004) (criticizing the Court’s Seventh Amendment jurisprudence for engaging in incomplete historical analysis of English common law practice, particularly with respect to the presumed distinction between law and fact).

largely leave aside the jurisprudential underpinnings of common law terms and phrases within the Constitution.

Turning to the Reexamination Clause, the common law originalist might insist on a more restrictive reading than a living constitutionalist would endorse. The common law and common lawyers eschewed appeal and opponents of the Constitution invoked with horror the possibility that federal appellate courts might overturn jury determinations of fact.<sup>216</sup> The question of whether appellate tribunals can reduce jury awards consistent with the Seventh Amendment's Reexamination Clause has arisen on a number of occasions.<sup>217</sup> The weight of founding era arguments against appeal would affect the common law originalist's decision about whether courts could reduce jury awards on appeal, or the extent to which they would be empowered to do so, whereas it might not influence that of the living constitutionalist.

On the other hand, like the living constitutionalist, the common law originalist would also inquire more than the Scalia-type originalist about the balance between courts of equity and those of common law in the colonies and early states as well as under the British system. She would then ask whether the seventeenth- or eighteenth-century English visions of the relationship between Chancery and common law held more sway at the time of the Founding. From these inquiries, she would determine the range of beliefs about the appropriate balance between common law and equity extant at the time of the Founding. This might affect the contours of the right of trial by jury to be "preserved" by the Seventh Amendment. It would also lead to a more flexible than formulaic attempt to achieve the balance in the contemporary moment.

Currently, the Court applies a two-part test to assess whether a particular cause of action fits within the Seventh Amendment's jury trial guarantee: it first looks to whether a contemporary cause of action possesses eighteenth-century English analogues and whether those analogues are legal or equitable, then examines the type of relief available, and assesses whether it is legal or equitable in nature.<sup>218</sup> The Court's cases appear increasingly to place priority upon the latter rather than the former inquiry.<sup>219</sup> In evaluating this approach, the common law originalist would first ask how the distinction between common law and equity was conceived in the founding era and examine the extent to which the common law was considered to comprise a set of forms of

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216. See generally Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997).

217. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

218. See *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991).

219. The Second Circuit recently demonstrated the extent to which the Supreme Court has placed priority on the second over the first prong. See *Pereira v. Farace*, 413 F.3d 330, 338-39 (2d Cir. 2005). But cf. *City of Monterey*, 526 U.S. at 723-26 (Scalia, J., dissenting) (emphasizing the importance of the first prong).

action or a particular catalogue of remedies. She would then, within the broad framework of the distinction between common law and equity that emerged, allow room for the dynamic growth that, as Justice Ginsburg has noted, always characterized equity.<sup>220</sup> In that manner, like the Ship of Theseus, the right of trial by jury might be “preserved” even as its planks were altered over time.

Of course, these are merely sketches of the kind of thoroughgoing, historically grounded analysis that would be necessary in order to effectuate a common law originalist account of the Seventh Amendment. They are raised here not to prefigure the results in any significant way, but rather to illustrate in a more specific setting the central themes of this Article. For largely unexplained reasons, the Court’s cases interpreting the Seventh Amendment have come to assume that the text pins the common law down at a precise moment, rather than incorporating a more dynamic vision of its continuity; that it crystallizes the rules and practices of England in 1791, rather than, as the *Galloway* Court once put it, the “widely divergent common-law rules on procedural matters among the states, and between them and England”; and that it accesses an English common law that was, and was seen to be, unified and stable, rather than self-consciously plural and flexible. Each of these assumptions deserves reexamination.

#### CONCLUSION

Common law originalism steers a course between living constitutionalism and originalism in its most prevalent current incarnation. It suggests that those involved in constitutional interpretation should examine the common law backdrop of the Constitution, but not as a set of determinate rules to be mined for definitive answers. The common law can instead provide the parameters for debates about particular constitutional concepts, debates whose contours may shift over time, like the common law itself. In this way, common law originalism can supply a rich and complex account of the Constitution, one that is indeed informed by the meaning of its terms at the founding, but that is not controlled by Blackstone’s dead hand.

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220. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 233 (2002) (Ginsburg, J., dissenting) (“[E]quity, characteristically, was and should remain an evolving and dynamic jurisprudence . . . .”); see also Wolfram, *supra* note 209, at 731–47 (arguing for a dynamic construction of the Seventh Amendment). But see Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486 (1976) (contending that adjudication under the Seventh Amendment should exactly replicate the historical right to a jury trial).