

THE DEMOCRATIC COMMON LAW

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This article explores the democratic features of common-law judicial law-making. It begins by examining the so-called “classical” account of the common law, associated with English jurists Edward Coke and Matthew Hale. These jurists describe the common law as a kind of “reasonable custom” that emerges out of a public process in which lawyers exchange reasons with the court about how to resolve a dispute. The article then turns to modern common-law adjudication, and, drawing on the work of Fred Schauer, Edward Levi, Martin Golding, and others, shows how public deliberation prominently features in the modern adjudicative process as well. The core idea is that modern common-law adjudication requires the court to engage the arguments of the parties in determining how the law ought to apply to their case. This makes the court responsive to the concerns of those it governs. The article then draws a comparison between common-law adjudication, so described, and the legislative process. To do so, the article summarizes the key ideas behind the “deliberative” theory of democracy, which argues that democratic law is legitimate because it arises out of a collective process of public deliberation over the wisdom of a proposed policy. Legislation under the deliberative theory of democracy is similar to common-law adjudication, in that in both cases, legitimacy depends on a process of exchanging reasons about the appropriate collective course of action.

I. INTRODUCTION

This article is about a leading criticism of the common law. In rough outline, the criticism is that the common law is undemocratic because it is *judge-made law*.¹ In a democracy, the people or their representatives are responsible for making the law; judges are meant to apply it. The common law would seem to be an exception. Judges make the common law *and* apply it, giving them a large measure of control over the resolution of common-law disputes. Placing this kind of authority in the hands of unelected officers is undemocratic.

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¹ See, e.g., Antonin Scalia, *A Matter of Interpretation* 9 (1997).

The argument of this article is that the common law actually shares the characteristics that make democratic law legitimate. In defending this position, the article sets aside what is arguably the common law's strongest claim to democratic legitimacy: the jury. The focus here is on *motion practice* and on *appeals*. The reason for this focus is the nature of the criticism sketched above, which is centered on the judge, not the jury. The view taken of motion practice and appeal is normative and largely conventional. The article does not aim to deny what are obvious truths about the common-law judge's role in these practices. It does not deny that the judge alone makes the final determination of what the law is and how it applies to the case before her. Nor does the article deny that a significant number of common-law judges are unelected, and thus not answerable through the vote to the people they govern. (Of course, the article does not deny that a significant number of common-law judges are *elected*, either.) Such distinctions between common-law adjudication and the legislative process are indeed significant.²

The idea developed here is that, despite these differences, common-law adjudication mimics the deliberative process that gives enacted law its legitimacy. As Cass Sunstein has put it, "democracy is no mere statistical affair."³ What gives enacted law its special legitimacy is that it arises from the collective decisions of those subject to the law.⁴ In a heterogeneous society of free and equal persons, the collective decision-making process is characterized by an exchange of reasons that reasonable people can regard as justifying the policy in question.⁵ This exchange of reasons bears a strong resemblance to the exchange of reasons in common-law adjudication. The litigants in a dispute offer the court their interpretations of precedent and their views of how it ought to apply to their case. They have the opportunity to tell the court why the policy of precedent is appropriate or inappropriate, given the facts at hand. The court's opinion responds to the arguments made by the litigants, and it justifies the outcome by showing how precedent is best understood to apply. That

² Similarly, the article does not deny, or even address, the fact that a large number of disputes fail to even make it before a judge, but are resolved in mediation, arbitration, or other forms of dispute resolution.

³ Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 25 (1999).

⁴ Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY & DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 95 (Seyla Benhabib, ed., 1996) [hereinafter *Procedure and Substance*].

⁵ See John Rawls, *The Idea of Public Reason Revisited*, in *THE LAW OF PEOPLES* 137 (1999). This, of course, is a normative claim.

justification should be one reasonable litigants would regard as compelling, even if they happen to disagree with the outcome.⁶

In short, if the deliberative process makes enacted law legitimate, then its kissing cousin, the common-law process, makes judge-made law legitimate as well. But the common law's claim to what I will call "democratic legitimacy" does not end there. In contrast to the legislative process, common-law adjudication is highly participatory. Litigants in common-law disputes typically appear on their own behalf (with the assistance of counsel), present arguments to the court as to how the law should apply to their case, and appeal where they disagree with the outcome. These practices help make the court responsive to the concerns of those bound by its decisions—the hallmark of democratic legitimacy. In a similar fashion, the process of constant revision typical of the common law—often maligned by its critics as undemocratic⁷—ensures that the law remains responsive to the circumstances of those it binds. In contrast, statutory law is a "dead hand" from the moment of enactment, and continues to bind those whose circumstances lie far outside the scope imagined for the law by its authors.⁸ Judge-made law must constantly live up to its own purported justification, or risk alteration to fit the circumstances.⁹

Together, these observations support what is a new and significant argument about the common law.¹⁰ Even some of the common law's staunchest

⁶ See MARTIN P. GOLDING, *LEGAL REASONING* 9 (1984) ("Ideally, a judge's reasons should be reasons that the losing litigant will recognize as good reasons; but in any event the judge will want his or her reasons to be reasons that independent observers, especially other judges and lawyers, will find acceptable."). Many of the characteristics described in this and the following paragraph were the subject of study in Tom Tyler's book, *Why People Obey the Law*. Tyler showed that procedural justice was a more powerful determinant than outcomes of individuals' judgments that the law was legitimate. See TOM TYLER, *WHY PEOPLE OBEY THE LAW* 96, 100 (1990), and part III(A), *infra*.

⁷ See, e.g., SCALIA, *supra* note 1, at 10 (discussing Robert Rantoul).

⁸ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 127 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) ("The one thing that is certain, however, is that the enacting authority can never foresee all the questions.").

⁹ O.W. HOLMES, JR., *THE COMMON LAW* 37 (1881) ("[T]he process which I have described has involved the attempt to follow precedents, as well as to give a good reason for them. When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory.").

¹⁰ For a similar thesis about adjudication as a whole, pointed out to me by Jim Gardner after this paper was drafted, see Christopher J. Peters's excellent article, *Adjudication as Representation*, 97 *COLUM. L. REV.* 312 (1997). Peters argues that, under certain ideal conditions, adjudication enables the "representation" of litigants' interests, and therefore has democratic legitimacy

defenders appear to blanch at the practice of judicial law-making. For example, in a recent defense of common-law constitutionalism, David Strauss attempts to preserve the common law against the criticism that it is undemocratic by separating it from judicial review.¹¹ The common law, he says, is not intrinsically a *judicial* method; “[o]ther institutions, besides courts, can use a common law approach to making decisions.”¹² If a democratic institution like the legislature can use a common-law approach, then it follows that the common law itself is neither democratic nor undemocratic. Of course, this is an unusual view of the common law; it is at odds with classical common law theory, which understood the common law as a judicial practice.¹³ More importantly, it is at odds with most contemporary accounts of the common law, which define common-law adjudication as a kind of judicial decision-making.¹⁴ In any case, Strauss’s “defense” of the common law has the effect of abandoning what is unquestionably the leading forum for its practice—the court—which is a Pyrrhic victory by any measure. Even if the common law as practiced in the legislative branch is democratic, it evidently lacks this quality as practiced by the courts. In contrast, the argument of this article is that the common law as practiced by the courts enjoys the same legitimacy as enacted law.

This thesis is important because many of this century’s most significant developments in private law occurred in common-law adjudication. Strauss’s view leaves these decisions open to the criticism above, which frames them largely as judicial usurpation of the legislative power. For example, then-Justice Traynor of the California Supreme Court began his concurrence in *Escola v. Coca Cola Bottling Co. of Fresno* by announcing,

I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one

under both “proceduralist” and “functionalist” theories of democracy. *See id.* at 346-47. The present paper aims at a slimmer target. The idea here is that the *argumentative* process of common-law decision-making—not the interest-aggregating or interest-representing features of adjudication in general—confers a special kind of political legitimacy on judge-made law. In short, it is the legitimacy of the better argument. Whether the adjudicative process can be said to represent litigants’ interests is not taken up here.

¹¹ David A. Strauss, *The Living Constitution* 47 (2010).

¹² *Id.*

¹³ GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 9, 14-17 (1986) (contrasting *lex scripta* and *lex non scripta*).

¹⁴ *See, e.g.*, BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 146 (4th ed. 2006) (“Common law reasoning involves the (1) incremental development of the law, (2) by judges, (3) through deciding particular cases, with (4) each decision being shown to be consistent with earlier decisions by a higher or co-equal court.”).

[i.e., products liability cases]. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.¹⁵

This view proved highly influential and eventually garnered a majority of the supreme court in *Greenman v. Yuba Power Products, Inc.*¹⁶ What is noteworthy about the *Escola* concurrence is Justice Traynor's naked invocation, at the very outset of the opinion, of what he "believe[s]" "public policy demands." As he sees it, a rule making manufacturers strictly liable will "most effectively reduce the hazards to life and health inherent in defective products," because manufacturers can best anticipate hazardous defects, consumers lack the resources to pay the costs of injury, and such a rule will discourage the manufacture and distribution of defective products.¹⁷ The reasoning has the look and feel of a policy argument. Notably, that argument has garnered significant criticism from professional economists.¹⁸ Moreover, Justice Traynor's judgment of where California ought to place the significant social cost imposed by defective-product injuries appears, at the outset, to be untethered from legal authority. In the eyes of the common law's critics, the Justice is simply "playing king."¹⁹

¹⁵ *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440 (1944); see also *id.* at 443-44 ("The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. Certainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.").

¹⁶ See 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963) (citing *Escola*, 150 P.2d at 440).

¹⁷ *Escola*, 150 P.2d at 441.

¹⁸ See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1478-79 (2010) (criticizing Justice Traynor's analysis and observing that market forces give manufacturers reason to ensure the safety of their products).

¹⁹ SCALIA, *supra* note 1, at 7. There will be occasion to defend the great Chief Justice Traynor below. Initially, one should keep in mind that (1) the opinion is a concurrence, and it is not unusual for a concurring judge to announce how he "believe[s]" a case should be resolved, even if the law does not presently support such a resolution; and (2) immediately following the policy discussion is a legal analysis, including an analysis of the doctrine of *res ipsa loquitur*, showing that, in effect, California already made manufacturers strictly liable for injuries caused by defective products. *Escola*, 150 P.2d at 441.

The criticism that the common law is undemocratic is not confined to state courts and state law. It plays a pivotal role in theories of judicial decision-making and in debates about the proper role of federal courts in a democracy. Theoretical accounts of judicial decision-making that are “legislative” in tenor expand the apparent scope of judicial discretion and thereby strengthen the charge that the common law is undemocratic.²⁰ Such accounts have generated enough anxiety that leading theories of judicial review are often built around concerns of democratic legitimacy.²¹ The criticism also has direct implications for discussions of the proper role of federal courts in our political system. Although there has been little federal common law since *Erie*, significant pockets of it remain, and constitutional litigation has a strong common-law feel to it.²² Progressives made democracy a central theme of their attacks on the use of the common law by federal courts to strike down labor laws in the early twentieth century,²³ and of their subsequent effort during the New Deal to

²⁰ See SCALIA, *supra* note 1, at 10 (“[James 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 . . . 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.”). Whether this was the “prevailing image” of the common law or not, Madison was certainly aware of the criticism that judges made, rather than “discovered,” the law—Jeremy Bentham, the great critic of the common law, wrote Madison about the very issue. See Jeremy Bentham, *Papers Relative to Codification and Public Instruction*, in 4 THE WORKS OF JEREMY BENTHAM 459-60 (John Bowring, ed., 1962) (1811) (in a letter written to James Madison).

²¹ See, e.g., SUNSTEIN, *supra* note 3, at xiv, 259-60; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 67-69, 73 (1980); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959) (responding to Judge Learned Hand).

²² A significant branch of federal common law that survived *Erie* is federal maritime law; in some circuits, maritime disputes are common. Even areas of law where statutes predominate may have a common-law character to them, if those statutes specify only general standards of conduct. See FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 16-17 & n.7 (2009) (contrasting sections 16(b) and 10(b) of the Securities Exchange Act of 1934). Regarding the common-law character of constitutional law, see STRAUSS, *supra* note 11, at 33-49; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 928, 930-32 (1996).

²³ See Tom Grey, *Modern American Legal Thought*, 106 YALE L.J. 496, 498-99 (1996) (“Scientific legislative reform, guided by experts pursuing shared public values, had to replace analogical judicial reasoning from precedents at the center of the legal process. Judicial resistance to democratic reforms was retrograde, whether it took the aggressive form of laissez-faire constitutionalism or stemmed from Langdellian inattention to legislation and obsessive focus on the details of private law doctrine. . . . Courts should defer to legislatures in constitutional cases, should ascertain and promote legislative purpose in interpreting statutes, and should draw on the policies reflected in statute law to sublegislate the fields left by legislatures to common law development.”); Roscoe Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17, 19-20 (1906).

establish administrative agencies and insulate them from judicial interference.²⁴ Justiciability doctrines, which emerged from the latter effort, are usually explained as preventing judicial politicking in matters properly reserved for “politically accountable branches of government.”²⁵ More generally, it is commonplace today to hear that constitutional rulings by federal courts are undemocratic, although the political valence of the critics has largely changed.

In what follows, I will develop the argument, outlined above, that the common law is “democratically legitimate.” The article proceeds in five parts. Part II examines the criticism that the common law is undemocratic. As I view that criticism, it is concerned with the practice of judicial law-making, rather than the indeterminacy of legal reasoning, which is a distinct (although related) issue. Part III develops a normative account of common-law adjudication. It is divided into three sections. Sections one and two examine classical and modern theories of the common law, respectively. The key idea that emerges is that common-law adjudication involves a public practice of exchanging reasons in support of or against the requested relief. Section three of Part III offers a brief theoretical treatment of this practice, by focusing on the *kinds* of reasons exchanged in common-law adjudication—i.e., “objective,” or “neutral” reasons. This theory provides a framework both for understanding the common law and for explaining its similarities to democratic deliberation. Part IV of the paper fills in the formal account by examining Justice Traynor’s concurrence in *Escola*. Contrary to the usual view of *Escola*, I argue that the concurrence is not entirely driven by public policy, but is the product of a careful examination of the structure of products liability doctrine in California. In the last part of the article, Part V, I draw the comparison between the common law and democracy. I begin with an outline of the deliberative theory of democracy, and compare this account to the article’s account of the common law. To capture the similarity between democracy and the common law, I describe them as two forms of “deliberative law-making,” and I argue that the deliberative characteristics of common-law adjudication function to legitimate judge-made law.

II. THE CRITICISM

The criticism that the common law is undemocratic has a long and rich history. I am going to focus on two prominent critics in this line: Justice Scalia and Jeremy Bentham. Their criticisms of the common law are different, and it is

²⁴ See Harlan F. Stone, *The Common Law in the United States* 50 HARV. L. REV. 4, 23-25 (1936).

²⁵ ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 35 (5th ed. 2007); accord SUNSTEIN, *supra* note 3, at 39. The extent to which administrative agencies are politically accountable is debatable.

important to understand this difference. Scalia's concern is indeterminacy, while Bentham's concerns are notice and the public character of law.

Scalia's attack on the common law in *A Matter of Interpretation* is directed at its use in resolving questions of statutory interpretation and constitutional law.²⁶ He begins with the idea that the common law is based on *custom*.²⁷ As we will explore below, the customary character of the common law was a central part of the classical common law theory dominant in the seventeenth and eighteenth centuries.²⁸ In Scalia's view, however, "from an early time, as early as the Year Books, which record English judicial decisions from the end of the thirteenth century to the beginning of the sixteenth—any equivalence between custom and common law had ceased to exist."²⁹ But if the common law is *not* based on the custom of the people, then it must be based on judicial decisions—that is, on precedent. As Scalia observes of Oliver Wendell Holmes's *The Common Law*, "[Justice Holmes] talks a little bit about Germanic and early English custom. But mostly [he] talks about individual court decisions, and the judges, famous and obscure, who wrote them."³⁰

The problem with a system of law based on court decisions is that decisions do not constrain later judges. The task of applying and distinguishing precedent is, Scalia says, "an art or a game, rather than a science, because what constitutes the holding of an earlier case is not well defined and can be adjusted to suit the occasion."³¹ By "squinting narrowly," and incorporating the facts of a prior decision into the holding, a court can give narrow scope to the precedent. Conversely, when a court wants precedent to apply, it can broadly characterize the holding by deemphasizing or overlooking factual differences between the prior case and the instant one. In short, the system of judicial precedent on which modern common-law adjudication is based leaves the court free to take

²⁶ SCALIA, *supra* note 1, at 12-13. Although Scalia distinguishes constitutional common law from the private common law of tort, contract, and property, it is not because he believes there are no democratic concerns about the application of common law methods to private law. Rather, Scalia concedes that private common law is undemocratic, but suggests that this may be a good thing. *Id.* at 12. Since I am concerned to defend the democratic credentials of private law, I will set aside Scalia's distinction, and focus on how his criticisms reflect on the common law generally.

²⁷ *Id.* at 3-4.

²⁸ See *infra* section III.A.1.

²⁹ SCALIA, *supra* note 1, at 3. This puts Scalia at odds with the leading proponents of the classical common law theory, notably Edward Coke, Matthew Hale, and William Blackstone, all of whom took the position that the common law was customary in some sense. See POSTEMA, *supra* note 13, at 4-7.

³⁰ SCALIA, *supra* note 1, at 3.

³¹ *Id.* at 8.

any action it thinks best. As Scalia memorably puts it, “playing common-law judge . . . consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting!”³² Permitting judges to do this, he says, is inconsistent with democracy and with the principle of separation of powers.³³ Our constitutional system preserves liberty by separating the power of the legislator and the power of the judge.³⁴

In contrast to Scalia, Jeremy Bentham’s attack was not rooted in apparent defects with the system of precedent—in fact, *stare decisis* was just emerging at the time. Bentham’s criticisms of the common law are especially voluminous, but he was centrally concerned with “legal fictions,” which were constructs used by lawyers and judges to fit claims for relief into the “writs” recognized by English common law at the time.³⁵ The concept of “legal fictions” is of course one with which modern lawyers are also familiar, but in Bentham’s day fictions had real teeth. The system of writs and legal fictions was so complex, argued Bentham, the actual content of the law was accessible only to lawyers and judges. Others were unaware of their rights and therefore could not seek to protect them, which largely frustrated the purpose of the law. In Bentham’s memorable formulation,

[W]e are told that we have *rights* given to us, and we are bid to be grateful for those rights: we are told that we have *duties* prescribed to us, and we are bid to be punctual in the fulfillment of all those duties Hearing this, we would *really* be grateful for these same *rights*, if we knew *what* they were, and were able to avail ourselves of them: but, to avail ourselves of rights, of which we have no knowledge, being in the

³² *Id.* at 7.

³³ Scalia is not entirely clear as to whether he regards these as two separate defects, or one. *See id.* at 10.

³⁴ *Id.* Notably, Scalia is content to let the common-law judge continue making *private* law—a practice he thought might be a beneficial limit on popular democracy—but is not content to apply common-law methods where *statutory* law now governs. *Id.* at 12-13.

³⁵ *See* POSTEMA, *supra* note 13, at 271-75; Jeremy Bentham, *supra* note 20, at 498. A “writ” is an order obtained in the Court of Chancery compelling the defendant to appear before a common-law court to defend the charge against him. The jurisdiction of the various common-law courts in England (the Court of Common Pleas, the King’s Bench, and the Court of Exchequer) was limited to certain writs. Each court struggled to increase its jurisdiction at the expense of the others, and began to recognize claims for relief previously confined to the other courts. The primary means of doing so were fictions, by which the court enabled a party to bring a claim for relief nominally presented in a form over which the court had jurisdiction.

nature of things impossible, we are utterly unable to learn—for what, as well as to whom, to pay the so-called-for tribute of our gratitude.³⁶

In short, the undue *complexity* of the common law prevented the public from having *notice* of its content. The lack of notice in turn had a further consequence that concerned Bentham. Because the common law was highly complex and its content largely unknown to the public, the application of the law was essentially unpredictable. Individuals were unable to predict how the common law might apply to their own situation. Moreover, judges could use this uncertainty to abuse those whose conduct was in question before the court. Because only lawyers understood what the law was, and no one was able to challenge that understanding, judges could make their decisions on *private* grounds, and conceal these grounds by dressing them in complex legal reasoning.³⁷ This freed judges to make law, usurping the proper authority of the legislature.³⁸ It also made the public totally dependent on the expertise of lawyers, who, Bentham argued, used their advantage to extract rent from their own clients.

Jeremy Bentham was something of an intellectual star in his time and his criticisms of the common law were known to Americans.³⁹ Indeed, the American codifiers of the nineteenth century picked up on Bentham's themes of complexity, access, the public character of the law, and judicial usurpation, appropriating the arguments for their own efforts to reform the legal system.⁴⁰ American codifiers believed that the complexity of the law placed barriers between individuals and legal relief to which they might otherwise be entitled.⁴¹ Some argued that appropriate reforms would do away with the bar entirely, by making the services of a lawyer unnecessary.⁴² (Bentham shied away from so stark a conclusion.⁴³) Short of this utopian goal, codifiers also argued that

³⁶ Jeremy Bentham, *Petition for Codification*, in 5 THE WORKS OF JEREMY BENTHAM 546 (John Bowring, ed. 1962) (1829).

³⁷ POSTEMA, *supra* note 13, at 272-73; *see* Bentham, *supra* note 20, at 488.

³⁸ POSTEMA, *supra* note 13, at 273; *id.* at 274 (“If we wash the history of Common Law with the acid of reality we will see that it could not exist except for the constant creative, though absolutely unauthorized, actions of the judiciary. Quite literally, Common Law is *nothing* if it is not *Judge-made*.”). The other criticism of the common law with which Bentham is closely associated is that it retroactive law. *See* Bentham, *supra* note 36, at 546. This is an important criticism, but it is tangential to my focus here.

³⁹ *See supra* note 20.

⁴⁰ Norman W. Spaulding, *The Luxury of the Law*, 73 FORDHAM L. REV. 983, 990 (2004) (reviewing DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004)).

⁴¹ *See* Spaulding, *supra* note 40, at 985.

⁴² *Id.*

⁴³ *See* Bentham, *supra* note 20, at 490 (“*Every man his own lawyer!* — Behold in this the point to aim at.”). Bentham goes on to support this idea in principle, but to argue that it was impossible to do away with the lawyer and the judge entirely. *See id.* Nevertheless, it seems likely that

reform was necessary to give the law democratic legitimacy.⁴⁴ “Simplicity and accessibility” were essential to maintaining the public’s confidence in the law, because they enabled the public to understand the basis on which relief was provided or denied.⁴⁵ Replacing the arcane common-law jurisprudence with clear codes would also ensure that the legislature, not the judiciary, exercised the legislative power, in keeping with the constitutional system.⁴⁶ The latter point became a recurrent theme of American legal reformers. At the beginning of the twentieth century, Progressives emphasized the democratic authority of the legislature to implement popular social changes,⁴⁷ and this remains an important criticism today.⁴⁸

As should now be apparent, the criticism that the common law is undemocratic is broadly related to a number of traditional complaints against the common law. Some of these complaints are more specifically directed at political values associated with democracy, such as the separation of powers or the rule of law, while others are directed at issues of jurisprudence and judicial decision-making. While the complaints are conceptually distinct, they are interrelated; thus, it is natural to think of them as a kind of “cluster,” with democracy being the overarching theme. Drawing on the discussion above, we can identify the following five criticisms:

1. The common law is determined entirely by the will of the judge, who is not constrained by precedent.⁴⁹
2. The common law violates the separation of powers, since it combines the legislative and judicial powers of government.⁵⁰
3. The common law is so complex and unpredictable, judges can use it to conceal the real basis of their decisions.⁵¹

Bentham’s inflammatory attacks on lawyers and judges as a kind of rent-seeking, corrupt cabal influenced the “utopian” reformers in the United States. *See* POSTEMA, *supra* note 13, at 273-74.

⁴⁴ Spaulding, *supra* note 40, at 986.

⁴⁵ *See id.*; *cf.* POSTEMA, *supra* note 13, at 272-73 (“[Judicial] [m]endacity is objectionable precisely because it takes the process of judicial decision-making entirely out of the public arena.”).

⁴⁶ *See* Spaulding, *supra* note 40, at 987.

⁴⁷ *See, e.g.*, Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 406 (1908) (“Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed. Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of law-making.” (internal footnote omitted)).

⁴⁸ *See* Thomas C. Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703, 703-06 (1974).

⁴⁹ *See, e.g.*, SCALIA, *supra* note 1, at 7-9.

⁵⁰ *See, e.g.*, *id.* at 10.

4. The common law is unconnected to popular sentiment or the will of the people.⁵²
5. The common law is form of elitism or aristocracy.⁵³

The idea that connects these criticisms to each other and to democracy is *political legitimacy*. Democratic law enjoys a special legitimacy. It legitimately binds our conduct, and when we violate democratic law, state action undertaken to enforce the law against us is also legitimate. We will explore why this is so in greater depth below, but the basic idea is that democratic law is legitimate because *we* decided on the law, and we can hardly complain about being bound by law we decided on.⁵⁴ If this is the idea behind democratic legitimacy, then it is relatively easy to see how the various complaints identified above concern democracy, in a broad sense. Each of the criticisms touches on the idea that in common-law adjudication, it is the *judge* who decides on the content of the law, not the *people* bound by that law. While we cannot complain about being bound by our law, we can certainly complain about being bound by judge-made law. For this reason, judge-made law lacks the special legitimacy that distinguishes democratic law.

This concern is present, to some extent, in all adjudication, but it is heightened in common-law adjudication. Whatever constraints are imposed by the language of a statute, those constraints are missing in the “unwritten” common law, whose doctrines are entirely judge-made on a case-by-case basis. At the same time, this concern is conceptually distinct from the argument that legal reasoning is indeterminate, which we saw above expressed by Justice Scalia. In other words, the criticism that the common law is undemocratic does not simply reduce to the criticism that legal reasoning is indeterminate, giving the common-law judge a large measure of discretion in resolving a case. Even if legal reasoning were fully determinate, we might object to *judges* extending the law by applying it to a fundamentally new situation. In any case, I will not address the larger issue of indeterminacy here, which obviously merits its own consideration. Rather, my focus will be on the idea that *judge-made* law is ipso facto politically illegitimate, because in a democracy judges are not supposed to make the law. My response to this argument will be that judge-made law is just as legitimate as enacted law—that is, as law enacted by representatives

⁵¹ See Bentham, *supra* note 20, at 488.

⁵² See, e.g., Strauss, *supra* note 22, at 928, 930; Pound, *supra* note 23, at 19 (arguing that the common law had been on “the national and popular side,” but now was “against the people”); Pound, *supra* note 47, at 406 (similar).

⁵³ See, e.g., POSTEMA, *supra* note 13, at 273-74 (discussing Bentham).

⁵⁴ See *Procedure and Substance*, *supra* note 4, at 95; see *infra* section IV.A.

according to a majority decision rule—because the norms of common-law adjudication mimic the norms of democratic deliberation, and democratic deliberation is what gives enacted law its legitimacy. In short, the central idea is that *deliberation legitimates*.

III. A NORMATIVE ACCOUNT OF COMMON-LAW ADJUDICATION

A. Classical Common Law Theory

Classical common law theory is built around two related ideas.⁵⁵ The first idea is *custom*. The common law is customary law. Its doctrines express, or are based on, “immemorial” customs, handed down by tradition, and applied by common-law judges to resolve the disputes before them.⁵⁶ Some jurists maintained that common-law rules could be traced, unchanged, to “ancient” times, where they originated in the practices and “usage of the people.”⁵⁷ The majority of jurists acknowledged that the rules of the common law evolved over time to meet the demands of changing circumstances.⁵⁸ Despite such changes, they argued, the long-standing recognition and application of common-law rules was a source of their *validity*, both in the sense of their “wisdom” and their political legitimacy.⁵⁹ The idea of political legitimacy here is

⁵⁵ “Classical common law theory” is the account of the common law developed by English jurists in the seventeenth and eighteenth centuries. See POSTEMA, *supra* note 13, at 3 n.1. The classical theory remains influential in contemporary discussions of the common law. See, e.g., STRAUSS, *supra* note 11, at 40-42 (discussing Edmund Burke). What follows draws largely on the work of Gerald Postema, whose scholarship in this area is invaluable. See, e.g., *id.* (especially chapters 1 and 2); Gerald Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMW. L.J. 1 (2003) [hereinafter *CCJ II*]; Gerald Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMW. L.J. 155 (2002) [hereinafter *CCJ I*]; see also A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE, SECOND SERIES 77-80, 91-99 (A.W.B. Simpson, ed., 1973).

⁵⁶ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND IN FOUR BOOKS 15 (1893 ed.) (1753) (“That ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom . . .”).

⁵⁷ *CCJ I*, *supra* note 55, at 168-76 (Coke was the best known proponent of the view that one could trace common-law rules to Saxon or Roman times). This was likely a minority view, and is, in any case, an implausible account of the contemporary common law. *Id.*; see Simpson, *supra* note 55, at 93-94.

⁵⁸ *CCJ I*, *supra* note 55, at 173-74 (Hale’s favorite image to describe this process was the Argonaut’s ship, which maintained its identity through the successive replacement of each of its parts).

⁵⁹ See POSTEMA, *supra* note 13, at 5 (in contrast, Postema uses ‘validity’ to refer only to political legitimacy); BLACKSTONE, *supra* note 59, at 67 (“[T]he authority of these maxims rests entirely upon general reception and usage . . .”); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND: DIVIDED INTO TWELVE CHAPTERS WRITTEN BY A LEARNED HAND 24 (2011) J. JURIS 449

somewhat complex. According to the argument, customary law is legitimate because it rests on norms *already in effect in the community*.⁶⁰ This applies even to law that has evolved, since what counts as the “reasonable” resolution of an unforeseen dispute (and thus a reasonable extension of the law) is informed by community customs.⁶¹ In short, customary law is law the community can *recognize as its own*, because it expresses or reasonably extends the community’s own norms.⁶² This explains why, in the view of classical common law theory, the judge did not *make* common law rules, but only used his training to identify and articulate them—much like a kind of expert witness.⁶³

The second key idea in classical common law theory is *reason*. In the classical view, common-law rules are reasonable rules.⁶⁴ Thus, the customs expressed in the common law were “never merely predictable patterns of behavior in a community, but [were] always seen as ‘reasonable usage’.”⁶⁵ This reasonableness was a result of a public practice of examining customary law to determine whether it adequately addressed the issue at hand.⁶⁶ Formally, lawyers reasoned in a familiar analogical way: they “argu[ed] *a similibus ad similia*, from one case to the next on the basis of perceived likenesses and differences.”⁶⁷ By drawing such comparisons, lawyers and jurists were lead to evaluate customary practices in light of changed circumstances. It was in this regard that they drew on what

(1713 ed.) (“I therefore stile those Parts of the Law, *Leges non Scriptae*, because their Authoritative and Original Institutions are not set down in Writing . . . but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom.”).

⁶⁰ See POSTEMA, *supra* note 13, at 16 (“[J]udicial decisions . . . are not exercises of power but merely reports of discoveries of an already existing prescriptive order.”).

⁶¹ *CCJ I*, *supra* note 55, at 175 (“[F]ollowing the rules and practices shapes the dispositions, beliefs, and expectations of the people. Thus, what they take to be reasonable and practicable solutions to the problems of social interaction depends on a certain sense of continuity with the past . . . [and] what [is] regarded by participants as [a] reasonable projection[] from the arrangements and practices of the past to present conditions and problems.”).

⁶² Blackstone notably contrasted the common law in this respect with legislative enactment, which was the imposition of a rule onto the community by an outside power. See POSTEMA, *supra* note 13, at 16.

⁶³ See *id.* at 9.

⁶⁴ See Simpson, *supra* note 55, at 79 (“In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution.”).

⁶⁵ *CCJ I*, *supra* note 55, at 167 (quoting Thomas Hedley, *Speech in Parliament on Royal Impositions*, in PROCEEDINGS IN PARLIAMENT, 1610, at 175 (E.R. Foster, ed., 1966)) (emphasis added); see also HALE, *supra* note 59, at 26 (“The Common Law does determine what of those Customs are good and reasonable, and what are unreasonable and void.”)

⁶⁶ *CCJ I*, *supra* note 55, at 167; see also POSTEMA, *supra* note 13, at 7-8; *CCJ II*, *supra* note 55, at 10; Simpson, *supra* note 55, at 98.

⁶⁷ *CCJ II*, *supra* note 55, at 5; POSTEMA, *supra* note 13, at 11.

Coke famously called “artificial reason.”⁶⁸ Artificial reason contrasted with “natural reason”—a faculty possessed by each individual at birth—and was acquired by the long study of human affairs and the legal resolution of disputes, as crystallized in the rules of the common law. The content of this reason developed from public deliberation over how a dispute ought to be resolved. As Postema has described this idea, “the artificial reason of the common law was thought of as essentially *discursive*, that is, as a matter of deliberative reasoning and argument in interlocutory, indeed *forensic*, context.”⁶⁹ This “forensic context” was the courtroom, and the exercise of artificial reason occurred solely within its walls. “[N]o individual alone, outside a court of justice, could ever discover the right reason of a rule of common law.”⁷⁰

The public character of common-law reason is perhaps unfamiliar, but it is an essential aspect of the classical theory. Proponents of the classical theory were largely “skeptics” about natural reason.⁷¹ Under pressure from a variety of directions, they conceded that the individual capacity of natural reason was often indeterminate when applied to concrete practical disputes. Its exercise produced no determinate solutions—or worse, was used to cover up what was simply the preference of the decision-maker.⁷² The response of common law jurists was to argue that the artificial reason of the common law was a *social capacity*, not an individual one.⁷³ It was exercised in the course of public deliberation between litigants and the judge. Public deliberation bridles the individual exercise of reason, because it forces a deliberant to openly respond to the concerns and interests of his opponents, who naturally take a view different than his own.⁷⁴ This deliberative setting thus makes artificial reason a form of *common*, or shared, reasoning. As Postema has summarized the view:

The use and acceptance of the law rested on a shared sense of its reasonableness and historical appropriateness. It was thought insufficient that each member of the law community believes the rules reasonable, or wise; they acted from the conviction that this sense was shared, a *sensus communis*. This learned capacity for reflective judgment . .

⁶⁸ *CCJ II*, *supra* note 55, at 1 (quoting Edward Coke, *Prohibitions del Roy*, in *THE REPORTS OF SIR EDWARD COKE*, in *THIRTEEN PARTS* 63, 65 (1793)).

⁶⁹ *Id.* at 7 (internal footnote omitted) (emphasis in original).

⁷⁰ *Id.* (citing Edward Coke, *First Part of the Institutes of the Laws of England* 97b (1979 ed.) (1628)).

⁷¹ POSTEMA, *supra* note 13, at 60-63.

⁷² *See id.* at 269.

⁷³ *CCJ II*, *supra* note 55, at 8-9.

⁷⁴ *Id.* at 8 (“Artificial reason disciplined individual reason, secondly, by subjecting every judgment and argument to cross-examination in a public forum according to public standards of success and failure.”).

. is a social capacity: the ability to reason from a body of shared experiences with normative significance to solutions for new practical problems. *It is to judge what one has good reason to believe others in the community would regard as reasonable and fitting.*⁷⁵

It is apparent, then, that for the classical jurists, custom and reason were interrelated ideas: custom affected the content of “artificial reason,” which was, in turn, used to evaluate custom.

In this way, reason and custom formed the basis of the classical theory of the common law. To be sure, some parts of the classical theory no longer remain intact, and the contemporary common law has grown to include practices unknown to the classical jurists. Contemporary commentators concede, as they surely must, that today’s common law does not rest on the common customs of the people.⁷⁶ The assertion that judges merely recognize or discover the law—as “experts” of our common custom—is also typically discarded, although there may be less reason for this.⁷⁷ I take it that both concessions can be captured by referring to common law as “judge-made law,” and I follow that use here. Relatedly, the doctrine of *stare decisis* developed only in the nineteenth century.⁷⁸ While before this time, common-law judges consulted prior decisions as evidence of the law, those decisions did not of themselves have a binding effect, and their persuasive value was largely determined by the persuasiveness

⁷⁵ *Id.* at 9 (second emphasis added).

⁷⁶ *E.g.*, STRAUSS, *supra* note 11, at 37 (“Legal systems are now too complex and esoteric to be regarded as society-wide customs.”). It is not clear to me that the *complexity* of today’s common law is responsible for its disconnect with custom. The common law in the seventeenth and eighteenth centuries was highly complex and esoteric—indeed, this was a complaint of its critics—and much of the complexity of today’s “legal systems” is a feature of statutory and administrative law.

⁷⁷ *See, e.g.*, SCALIA, *supra* note 1, at 10. There may be less reason to discard this assertion, depending on what we think it means. If it means that controlling precedent can be mistaken, in the sense of erroneously stating the law, then it still may be true that judges “discover” the law. We probably want to say that even controlling precedents can frame, or state, the law incorrectly.

⁷⁸ SCHAUER, *supra* note 22, at 42 n.9 (“[T]he constraints of *stare decisis* did not become accepted until the nineteenth century.” (citations omitted)); *see CCJ II*, *supra* note 55, at 12 (*stare decisis* was not a doctrine of the common law before the eighteenth century). This thesis should be distinguished from the thesis that common-law judges did not have to, and did not tend to, offer reasons for their decisions prior to the 19th or 20th centuries. *See* David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in *COMMON LAW THEORY* 137-46 (2007). The Year Books would seem to pose a problem for this thesis. Although aware of this source, Dyzenhaus and Taggart do not discuss the practice of reasoning evidenced by the Year Books. *Id.* at 133-39.

of their reasoning.⁷⁹ Today, precedent is a central part of the common law, and the nature of precedential constraint is an important question in common-law scholarship.⁸⁰

However, this cluster of ideas—judge-made law and binding precedent—did little to change reason’s role in common-law adjudication, which has remained largely the same. Reasoning by analogy or by example continues to play a large role in the modern common law.⁸¹ More importantly, as I will now argue, identifying and applying precedent continues to require litigants and the court to engage in a process of public reasoning very similar to that described by classical common law theory. Whether the rule announced in a precedent should govern a new factual situation depends on assessing the similarities and differences between the two cases, and whether the reasons given in support of the prior holding apply with equal force to the present case.⁸² This assessment is carried out in a public setting in which the reasons offered should be *common*—i.e., reasons that the judge and the litigants reasonably believe will be persuasive to others.

B. Modern Common-law Adjudication

Modern accounts of common-law adjudication begin from the premise that the application of judicial precedent to a case must be *justified* in a certain way.⁸³

⁷⁹ *CCJ II*, *supra* note 55, at 12. The idea that the judge merely recognized, not made, law is connected to the absence of a doctrine of stare decisis; if a judge only recognizes the law, then his decision is evidence of that law, and does not itself constitute it. For an interesting suggestion about why a doctrine of precedent developed, see Simpson, *supra* note 55, at 98-99. In Simpson’s view, the explanation lies in the breakdown of social cohesion precipitated by institutional developments in the nineteenth century.

⁸⁰ See, e.g., Larry Alexander, *Precedent*, in LEGAL RULES AND LEGAL REASONING (2000); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Stephen Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 221-23 (1987) (developing weak and strong Burkean models of precedential constraint).

⁸¹ See, e.g., Edward Levi, *An Introduction to Legal Reasoning* 1-2 (1949).

⁸² I am not equating the doctrine of precedent with argument by analogy. As evidenced by the fact that the latter predated the former by many centuries, the two are distinct. Nevertheless, whatever one’s “theory” of precedent, it seems apparent that the identity and authority of precedent in any particular case will depend, in some sense, on a measure of the similarities between the instant case and previous cases. See, e.g., *id.*

⁸³ See, e.g., Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 926-27 (1996) (“[T]he analogical arguments that are this Article’s subject are *justificatory arguments*, and the context of justification also significantly shapes their structure.”); Larry Alexander, *The Banality of Legal Reasoning*, in LEGAL RULES AND LEGAL REASONING 218 (2000) (describing, as a starting point, a rough account of precedential constraint on which “The present court looks at the facts and the results of various precedent

This is a fundamental idea about adjudication, and it applies even in cases where there is no written opinion or stated justification for a decision. For example, although a trial judge ruling on a motion from the bench may not give a reason for her order,⁸⁴ it should be possible to justify that order.⁸⁵ Moreover, the *process* by which a judicial decision is reached involves procedures and norms that require parties and the court to actually engage in legal argument.⁸⁶ These procedures are familiar. Substantive motions are typically accompanied by briefing in which the parties challenge each other's positions. The court typically examines counsel regarding the basis for a request. When the court does this, it will challenge the litigants' reasoning and may "try out" its own view to solicit responses. In at least some cases, the court will set out a justification for its decision in a written memorandum or opinion. Although this does not always occur, it is likely to occur when an issue is complex and the court anticipates an appeal. Litigants disappointed with a decision may move the court to "reconsider," or, if judgment is final, take an appeal or seek collateral review where such relief is available. Each of these procedures gives rise to legal argument and functions to ensure that the trial court's decision is appropriately justified.

The idea of justification inherent in adjudication excludes strategic and merely rational conduct like bargaining. Thus, a ruling will not be preserved on appeal simply because it advances interests important to the court, to a powerful litigant, or to a particular interest group. Even rationally optimal decisions that advance the interests of both litigants or disadvantage neither are not, by that fact alone, "good" decisions in the relevant sense. Of course, a common-law

cases and then asks which of the cases is most 'like'—analogous to—the case at hand. The court 'grasps' the proper analogy—"This case is more like case x than case y"—and then tries to draft a norm that would cover and 'justify' the past and present outcomes."); Perry, *supra* note 80, at 236 ("The pervasiveness of this tendency on the part of common law judges to appeal both explicitly and implicitly to justifying principles is significant, because it demonstrates that propositions of the common law do not possess 'the relative independence . . . from . . . their justifying reasons' which Raz says is typical of rules [I]t is a direct appeal to the principles underlying those propositions which ultimately seems to lie at the foundations of common law reasoning. ").

⁸⁴ See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 637 (1995) [hereinafter *Giving Reasons*] (citing these examples, and others, where "legal decisionmakers facing specific controversies simply announce results without giving reasons to support them").

⁸⁵ See HART & SACKS, *supra* note 8, at 143 (explaining that 'reasoned elaboration' means, in part, that the judge "is obliged to relate his decision in some reasoned fashion to the . . . statute out of which the question arises").

⁸⁶ See LEVI, *supra* note 81, at 5 ("The forum protects the parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged.").

court may undertake to justify its decision by *appealing* to considerations of instrumental rationality, especially when deciding to overrule a precedent.⁸⁷ But it must *justify* its decision nonetheless.⁸⁸ The court is not merely a market, and neither the litigants nor the judge treat it as such.⁸⁹

A second fundamental idea is that the legal justifications offered in adjudication have a specific audience or “target.” As Martin Golding observed:

A justification is offered in order to justify to someone the decision or conclusion; a justification is directed to an audience. Perhaps the first person to whom the justification is directed is the losing litigant; and to this may be added all other people whose interests might be adversely affected by the result.⁹⁰

Golding’s description captures one direction of what is, in effect, a kind of dialogue. In the context of common-law adjudication, a court typically does not act *sua sponte*, but in response to the parties’ requests for relief.⁹¹ As a result, the court’s justification for its decision is often largely responsive to the litigants’ own arguments in support of and against the requested relief, and should aim

⁸⁷ A court order may be justified by the parties’ interests in other, more common situations as well. Scheduling orders and issues relating to docket management are good examples. The federal discovery rules refer expressly to the parties’ convenience. *See, e.g.*, Fed. R. Civ. P. 26(b)(2)(C)(i) (requiring the limitation of discovery when it “can be obtained from some other source that is more convenient”); *id.* 26(d)(2) (permitting the court to issue discovery sequencing orders “for the parties’ and witnesses’ convenience and in the interests of justice”).

⁸⁸ *Cf.* GOLDING, *supra* note 6, at 8 (“Reasoned decisions, therefore, can be viewed as attempts at *rational persuasion*, and by means of such decisions, losing parties may be brought to accept the result as a legitimate exercise of authority. If this acceptance is achieved, the cause of social peace is also promoted.”). Even in cases where a court appeals to considerations of efficiency to justify its decision, it will likely consider moral principles or principles of justice as well.

⁸⁹ *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (distinguishing contractual order from adjudication on the basis that the latter “confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor”). The common recognition that judges have preferences or predilections does not defeat this point. The parties appeal to those preferences by making certain arguments, a process which, on its face, is very different from bargaining with the court.

⁹⁰ GOLDING, *supra* note 6, at 8; *accord* Dyzenhaus & Taggart, *supra* note 78, at 148 (“The statement of factual findings and reasons reassures the litigants that the case has been thoroughly considered by the judge and satisfies the basic human demand of those affected by judicial action to be told why. In this way the losing litigant may be able to accept the decision.”).

⁹¹ Indeed, it is significant that the most prominent examples of *sua sponte* decisions in the federal system are those relating to subject-matter jurisdiction. Subject-matter jurisdiction is not an issue of whether relief can be granted under the law—i.e., the court’s “remedial powers.” *See* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89-98 (1998).

to “squarely meet the proofs and reasoned arguments addressed to [the court] by the parties.”⁹² Furthermore, although the parties address their arguments to the court, the justificatory target of their arguments is broader than the judge. If a litigant’s arguments are well conceived, they will be those the judge can comfortably adopt when setting out reasons for deciding the motion in that litigant’s favor. In other words, the litigant’s arguments will be aimed at his *opponent*, and others who may be affected by the court’s ruling, just as Goldberg says of the court.⁹³

The nature of the audience at whom these justifications are directed has an important consequence. Both the litigants and the court argue to an *adverse* audience: in the case of each litigant, to the opposing litigant; and in the case of the court, to the losing litigant and others similarly affected by the ruling. In most cases, this adverse audience will take a contradictory view of whether the requested relief should be granted under the law. This is almost always true of opposing or losing litigants.⁹⁴ If we expand audience membership beyond the litigants to include all those affected by the court’s ruling, there will be a variety of beliefs about the content of the law in question, and about whether it provides for the relief requested. A justification for ruling that the law supports, or does not support, granting relief must be acceptable to this heterogeneous group.

The diversity of this audience constrains the reasons to which a litigant or judge can advert in justifying a decision. As Golding describes it,

[T]he judges’ reasons will have an *objective* status in a significant degree. Ideally, a judge’s reasons should be reasons that the losing litigant will recognize as good reasons; but in any event the judge will want his or

⁹² George C. Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1330 (1969).

⁹³ This suggests—and I think rightly so—that we should be seriously concerned when a court purports to justify its decision on the basis of considerations not introduced and examined by the litigants. Among other things, these justifications are deprived of the examination institutionalized by the adversarial method. See Fuller, *supra* note 86, at 388 (discussing this question and concluding that it is generally preferable for the court to rest its decision “wholly on the proofs and argument actually presented to [it] by the parties.”)

⁹⁴ There are situations in which one party does not oppose the relief requested by the other party. This may occur for a number of reasons, including strategic assessments about the effect an opposition will have of the parties’ other requests, as well as the likelihood an opposition will succeed. I will not consider those situations here.

her reasons to be reasons that independent observers, especially other judges and lawyers, will find acceptable.⁹⁵

Because the litigants and the court must direct their justifications toward parties who take a different view of the law, the reasons they offer in support of a decision must appeal to those with different views. Reasons that successfully appeal to all members of this diverse audience will be, as we often say, “broad,” or “objective,” or “neutral.” This, of course, is a simple point; but it is not a facile one. I will have more to say about “breadth” in section III.C, below. For now, the key point is that this breadth, or objectivity, or neutrality *is a result of the norms governing the adjudicatory process*, which require a court to justify its decisions, and which institutionalize and encourage an exchange of reasoned arguments directed at those with contradictory views of how the law applies to the case at hand.⁹⁶ In light of these norms, a court that wishes to preserve its rulings in a

⁹⁵ GOLDING, *supra* note 6, at 9; cf. Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 468 (1989) (reviewing MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988)) (“As Eisenberg notes, judges are constantly interacting with lawyers on both sides of a case, and their opinions are incessantly evaluated by lawyers, by other judges, in treatises, and on the pages of law reviews.” (internal citations omitted)).

⁹⁶ The term ‘neutral’ evokes Herbert Wechsler’s approach to constitutional jurisprudence, and that of the broader legal process school as well. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); see also HART & SACKS, *supra* note 8, at 143-48 (developing the concept of “reasoned elaboration”); see generally Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 999 (1978). Although it is not a central aim of this paper to advance an interpretative claim about Wechsler’s work, I do think that Kent Greenawalt’s influential interpretation of Wechsler may be wrong on a point relevant here. Greenawalt appears to take a view of Wechsler’s jurisprudence that conflates the concept of “neutrality” with that of “generality.” Greenawalt writes, “A person gives a neutral reason, in Wechsler’s sense, if he states a basis for a decision that he would be willing to follow in other situations to which it applies.” Greenawalt, *supra*, at 985. First, this is not the usual idea we associate with “neutrality”; neutrality is usually understood to mean that one is not aligned with one side in a dispute. A basis for decision that one is willing to follow in other situations seems more naturally described as “general.” And, in fact, Wechsler says that “genuinely principled” decisions rest on “on grounds of adequate neutrality *and generality*.” Wechsler, *supra*, at 15 (emphasis added). Since Wechsler distinguishes these ideas, one should prefer an interpretation of his work that does so as well. Greenawalt does give a separate definition of general principles—those that “reach out beyond the narrow circumstances of the case”—but the definition seems suspiciously close to neutral principles—those one is “willing to follow in other situations to which it applies.” Greenawalt, *supra*, at 987. Moreover, Wechsler says a variety of things that suggest he is thinking of neutrality in its normal sense. For example, he writes, “The man who simply lets his judgment turn on the immediate result . . . acquiesces in the proposition that *a man of different sympathy but equal information* may no less properly conclude that he approves.” Wechsler, *supra*, at 12 (emphasis added); accord *id.* at 19 (without recourse to neutral principles, the constitution would, in Holmes’s words, “become the partisan of a particular set of ethical or economical opinions”). Greenawalt may have avoided emphasizing these passages in order to blunt a criticism of Wechsler common at the time: that finding

case—and, in the longer run, its institutional legitimacy—cannot take this requirement lightly.⁹⁷

While these considerations are perhaps common to a number of adjudicatory frameworks, they are considerably amplified in common-law adjudication by the process of deciding cases by precedent. This is because, in characterizing, applying, and distinguishing prior cases, common-law adjudication requires an ongoing evaluation of whether the reasons justifying a previously announced legal rule also apply to the case at hand. This is not a point about privileging “standards” or “principles” over legal rules;⁹⁸ nor is it a point about “core” versus peripheral applications of legal rules or legal concepts.⁹⁹ This is a point about the simple mechanics of applying precedent, as we normally think of this practice. The rule of a prior case applies to the present case only if the two cases are similar in relevant respects. But to determine whether shared facts are relevant, one must have a grasp of why and how a fact matters in justifying the court’s decision. For this reason, the common law is constantly engaged in determining whether a persuasive justification can be offered for binding the litigants before the court by rules generated in different contexts.¹⁰⁰

“neutral” principles (in the normal sense) was “hopeless,” and that, by definition, it was impossible to remain “neutral” in adjudication. Christie, *supra* note 92, at 1312; *see also* Greenawalt, *supra*, at 991-92. Regardless of this dispute, however, perhaps the best thing to say is that neutrality—as it is commonly understood—and generality—are closely related concepts, and that Wechsler requires of judges only as much neutrality as is necessary to make the basis of their decisions applicable in other cases. I will discuss the ideas of objectivity and neutrality in greater depth in Part III.B, *infra*.

⁹⁷ *See* TYLER, *supra* note 6, at 172, 175 (“procedural justice” influences judgments of legitimacy, and the decision-making process itself is of central importance to judgments of procedural justice). In particular, the existence of a justification persuasive to the court’s heterogeneous audience is not a trivial matter. *See, e.g.*, Greenawalt, *supra* note 96, at 999 (“The litigants in a legal case, especially the losing one, have an important stake in reasoned justification. So also do the participants in other branches of government and the community at large. The disquiet that accompanies a widespread sense that power is not being legitimately exercised is itself an unfortunate social consequence; it may be followed by active steps to curb that power. Thus, it is vital that courts assure not only litigants but all those concerned with the integrity of the judicial process that decisions are grounded on sound bases.”).

⁹⁸ For an example of the former point, *see* Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 850-60 (1987) (situating Dworkin’s “law as integrity” in a broader tradition). Similarly, the point is not about the “rational” assessment of traditions embodied in the common law. *See* Strauss, *supra* note 22, at 894-95.

⁹⁹ *See, e.g.*, SCHAUER, *supra* note 22, at 19 (discussing H.L.A. Hart).

¹⁰⁰ T. R. S. Allan, *Text, Context, and Constitution: The Common Law as Public Reason*, in COMMON LAW THEORY 187-88 (Douglas E. Edlin, ed., 2007). For a critical account of the common law’s successes and failures to carry out this process, *see* Pound, *supra* note 23, at 22-24 (arguing that (2011) J. JURIS 458

Nearly every theory of precedent bears out this observation. To pick one example, Melvin Eisenberg argues that an “adopted-rule approach” to precedent—the view that a precedent is the *rule* explicitly announced by previous courts—is, generally speaking, both descriptively and normatively superior to the view that precedent is the *result* reached by previous courts, regardless of the rule announced.¹⁰¹ Nevertheless, Eisenberg says, in some instances courts will describe precedent as the result of previous cases, and then recharacterize the facts of those cases in order to “transform” the applicable legal rule.¹⁰² When the court does so, what it is doing, and what it should be doing, is examining the broader “social propositions”—common moral standards, policies, and empirical beliefs—that purport to justify a legal rule, in order to recast the rule in a superior way for the instant case.¹⁰³ Thus, as Eisenberg understands the process of deciding cases by precedent, the court is constantly engaged in assessing precedent by determining whether the reasons justifying it (the “social propositions”) apply in the instant case.¹⁰⁴

The common law carries out this process of reasoned self-assessment through the dialogue, outlined above, between litigants and the court. This gives common-law adjudication a highly participatory dimension. Edward Levi’s discussion of this point is worth quoting at length:

What does the law forum require? It requires the presentation of competing examples. The forum protects the parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged. In this sense the parties as well as the court participate in

the courts ought to weaken common-law economic liberties to account for changes in modern society).

¹⁰¹ See Melvin A. Eisenberg, *The Principles of Legal Reasoning in the Common Law*, in COMMON LAW THEORY 87-93 (Douglas E. Edlin, ed., 2007).

¹⁰² *Id.* at 89.

¹⁰³ *Id.* at 92; *see id.* at 83 (defining “social proposition”).

¹⁰⁴ *See id.* at 92. Eisenberg offers a similar account of how courts do, and should, distinguish precedent *See id.* at 93-96. Other prominent accounts of decision by precedent and reasoning by analogy incorporate a similar process of examining the reasons for a legal rule to determine whether and how the rule should be applied in any instance. *See, e.g.*, RONALD DWORKIN, LAW’S EMPIRE 227-28, 229-32 (1986) (describing “law as integrity” and the “chain novel” view of decision by precedent); GOLDING, *supra* note 6, at 106-08 (reasoning by analogy incorporates a determination that a case is relevantly analogous and no “countervailing considerations” exist for applying the earlier rule in the instant case); *see also* RONALD DWORKIN, JUSTICE IN ROBES 52-53 (2006) [hereinafter JUSTICE IN ROBES] (describing “justificatory ascent”).

the law-making. In this sense, also, lawyers represent more than the litigants.

Reasoning by example in the law is the key to many things. It indicates in part the hold which the law process has over the litigants. They have participated in the law-making. They are bound by something they helped to make. Moreover, examples or analogies urged by the parties bring into the law the common ideas of society. The ideas have their day in court, and the will have their day again. This is what makes the hearing fair [T]he hearing in a sense compels at least vicarious participation by all citizens, for the rule which is made, even though ambiguous, will be law as to them.¹⁰⁵

In short, says Levi, common-law adjudication allows those bound by the law to participate in its making by appearing before the court to argue why precedent ought, or ought not, to apply to their particular case.

Levi identifies several important implications of this practice. First, it ensures that the rules of the substantive common law will be thoroughly tested by an ongoing examination of how the rule applies to particular cases. The audience to whom the application of a legal rule must be persuasively justified is thus quite large, consisting not only of the diverse views of any one moment, but through time, as views evolve in response to changing conditions. Second, the participatory nature of the common law gives it a kind of political legitimacy, since those bound by its decisions are permitted to appear before the court and urge their view of the law. Crucially, since urging one's view of the law consists merely in offering reasons, an appearance before this forum is something that everyone is capable of using to their advantage. This contrasts with law-making forums in which influence depends on bargaining or strategic considerations, where one's influence is directly limited by resources.

Participation in a fair adjudicative process is not a trivial matter, but is critical to the institutional legitimacy of the court. Leading social science accounts show that individuals care deeply about legal procedures and the decision-making processes they incorporate.¹⁰⁶ The "instrumentalist" assumption that concern for fair procedures is borne out of an interest in controlling the outcome of a legal process appears for the most part unfounded; there is a strong interest in procedural justice independent of "outcome control," and this interest does not

¹⁰⁵ LEVI, *supra* note 81, at 5; *accord* Fuller, *supra* note 89, at 364.

¹⁰⁶ TYLER, *supra* note 6, at 94-104; *see id.* at 172 ("The Chicago study supports the widespread view that the evaluation of authorities and institutions is shared by concerns about procedural justice.").

disappear as the outcomes increase in importance.¹⁰⁷ Rather, judgments about procedural justice are strongly influenced by opportunities to present one's views to the authorities, as well as the authorities' lack of bias, honesty, "ethicality," and motivation, and the ultimate quality of their decisions.¹⁰⁸ Moreover, not only is the opportunity to speak significant, but other aspects of adjudicatory participation are meaningful as well; individuals report concern with whether the authority listens, responds to their concerns, and tries to be fair.¹⁰⁹ In short, judgments about the legitimacy of procedure appear to depend in large part on their opportunities to participate in the ideal practice described above, in which individuals exchange objective or neutral reasons in support of their desired outcome.

Nevertheless, one reaction to the normative account offered above is to regard it as unrealistic. Both lawyers and judges have incentives to act in ways contradictory to the practices described above. Lawyers, it has been said, "sow confusion and delay." They may have little incentive to help the court uncover the truth, because doing so would not promote the interests of their clients.¹¹⁰ Judges may not have the opportunity to uncover the strategic conduct of counsel, and may be more concerned themselves about quickly and efficiently resolving a case.¹¹¹ While the account above need not incorporate the full range of strategic and instrumental conduct common in adjudication, it cannot be Pollyannaish; it must describe a recognizable ideal of the actual common-law process. There are two answers to these concerns. The first is that the strategic conduct of attorneys (and even judges) is not inconsistent with the norms described above. Both sets of incentives may be present; they simply conflict. In some cases, the incentive for strategic conduct may outweigh the incentives generated by the public exchange of reasons in adjudication. In other cases, the balance may tilt in the opposite direction. The second answer is that, to some extent, the adjudicatory norms described above function to circumscribe the strategic conduct of counsel, by subjecting them to the test of public argument.

¹⁰⁷ *Id.* at 105-06, 115-30, 146-47.

¹⁰⁸ *Id.* at 137; *see also id.* at 126-30 (finding that (1) judgments that one has control over the legal process effect the experience of legitimacy much more than judgments that one has control over the outcome, and (2) the consideration of people's views and efforts to be fair are key to judgments about control over process).

¹⁰⁹ *Id.* at 137 ("People believe that decisions should be made by neutral, unbiased decision makers, and they expect the decision makers to be honest and to make their decisions based on objective information about the issues. People also feel that procedures are fairer when they believe they have had some control in the decision-making procedure. Such control includes having the opportunity to present one's arguments, being listened to, and having one's views considered."); *id.* at 138, 149, 151.

¹¹⁰ *See* Robert Kagan, *Adversarial Legalism* 243-44 (2001).

¹¹¹ TYLER, *supra* note 6, at 156.

While the judge may not have the resources to uncover strategic action, opposing counsel often does, and counsel has a strong incentive to enforce the rules of litigation against opponents. Much strategic action cannot survive the light of day, and thus the public process of exchanging reasons has the natural effect of limiting it.

C. An “Epistemic Theory” of Common-law Adjudication

I want to return to a point made above about the necessary breadth of legal justifications. The point was that because legal justifications are directed to a heterogeneous audience, they must appeal to broad, objective, or neutral reasons—reasons that individuals with diverse views of the law could find compelling. The idea that judges should give “objective” or “neutral” reasons in support of their decisions has been roundly criticized as unrealistic or impossible. Can we give substance to the idea of objective reasons in a way that doesn’t suffer from these defects?

Consider that there is a lot of doubt about whether our judgments of the law are what they purport to be. By “judgments of the law,” I mean our thoughts and statements about the content of the law, and about whether the law permits or requires particular relief requested by litigants, as in the discussion above. The doubt about these judgments is that while they may appear to reflect the determinate application of preexisting legal rules, they do not.¹¹² This doubt is usually put in terms of “constraint” or the absence of constraint imposed by precedent, but it can be framed in other ways as well. For instance, we can doubt that our legal judgments answer to the facts, and suspect that their appearance of doing so is simply an error.¹¹³ Our judgments “answer to the facts” in the relevant sense if what makes them true or not is the world, and not our own preferences, dispositions, or values.

Yet legal judgments at least *purport* to answer to the facts, namely, to the facts about the law. The world contains legal institutions, practices, statutes and judicial opinions. Our legal judgments purport to answer to the facts about these things, and in particular, to the facts about what might be called their content. In this respect, our legal judgments present themselves as an ordinary species of *knowledge* about the world. For it is also a fundamental idea about

¹¹² See, e.g., LEVI, *supra* note 81, at 1 (discussing the “pretense” of legal reasoning).

¹¹³ See JUSTICE IN ROBES, *supra* note 104, at 50 (“So what in the world makes a claim, about what the law is on some matter, true or false?”). This way of framing the issue seems to suggest that legal reasoning is a species of theoretical reasoning, not practical reasoning. In other words, legal reasoning on this view is concerned primarily with the truth of a claim about the law, as opposed to the desirability of a certain course of action.

knowledge that it purports to answer to the facts in this sense. As Bernard Williams observed, “if knowledge is what it claims to be, then it is knowledge of a reality which exists independently of that knowledge. Knowledge is of what there is *anyway*.”¹¹⁴

Recognizing this point helps to make sense of the idea of “objectivity” above. As a species of knowledge, legal judgments exhibit a number of distinctive features. When I assert that the law supports granting the relief a party requests, we might say that I purport to “represent” the content of the law. Yet as Williams has shown, if I am doing any such thing, it must be possible to show how the facts about the law make my judgment true.¹¹⁵ It must be possible to “stand back,” to form a “conception” which contains my previous judgment, and to articulate why the facts make that judgment true. The reasons I give in support of my judgment will be “broader” than the judgment itself in the sense that they are from a broader *point of view*—the “standpoint” from which I can articulate why one, situated as I am, should have made precisely the legal judgment I made in light of the facts.¹¹⁶ The reasons *must* be broader, because only a broader point of view will enable me to show how the facts made my judgment true. In other words, only broader reasons will enable me to make good on my claims to legal knowledge.¹¹⁷

We employ this technique in attempting to justify a legal judgment to a heterogeneous audience with diverse views of the law. Where persons A and B differ in their view of whether the defendant is liable, for example, on a theory

¹¹⁴ Bernard Williams, *Descartes: The Project of Pure Enquiry* 48 (2005 ed.) [hereinafter *Descartes*]; see also Bernard Williams, *Ethics and the Limits of Philosophy* 138-39 (1985); cf. Thomas Nagel, *The View from Nowhere* 4-12 (1986). For a sophisticated treatment of Williams’s argument, see Adrian Moore, *Points of View* 2-77 (1997).

¹¹⁵ DESCARTES, *supra* note 114, at 49.

¹¹⁶ See MOORE, *supra* note 114, at 6 (defining “point of view”); NAGEL, *supra* note 114, at 4. The idea of breadth here appears to differ from Schauer’s account of “generality” in *Giving Reasons* and elsewhere. See *Giving Reasons*, *supra* note 84, at 638-42. According to Schauer, “That principle *p* is less general than principle *q* says nothing about subsumption, instantiation, or individuation, nothing about induction or deduction, and nothing about how, if at all, one gets from *p* to *q*, or from *q* to *p*.” *Id.* at 639. If that is the case, however, I do not see how generality can explain anything about our practice of giving reasons in justification of our legal judgments, since that practice aims precisely at the inferences mentioned by Schauer, in order to show others why they ought to accept our conclusion.

¹¹⁷ This process bears some similarity to what Dworkin has described as “justificatory ascent.” See *JUSTICE IN ROBES*, *supra* note 104, at 53-54, 81. However, justificatory ascent appears to capture the *challenge* to our legal judgments that “ascending” to higher levels of generality can create. See also SUNSTEIN, *supra* note 21, at 13. In contrast, the idea here is that we often *support* our legal judgments by adducing reasons of greater generality or breadth than the judgments they justify.

of *res ipsa loquitur*, and A wishes to persuade B that the defendant's conduct does, in fact, give rise to liability, he does so by beginning from common ground. A "stands back," in Williams's words, from his particular view of *res ipsa*, and rests his argument in favor of liability on shared beliefs about the doctrine.¹¹⁸ In other words, A takes a broader point of view on the law. By engaging B from this point of view, A aims to earn B's unforced agreement by showing B how the facts about the defendant's conduct and the law justify a determination of liability.¹¹⁹ In settings where obtaining B's unforced agreement is highly significant, such as adjudication, A can demonstrate the legitimacy of his request by invoking our techniques for assessing claims to knowledge.¹²⁰

The common law institutionalizes exchanges such as these, and in so doing incorporates one of our most familiar epistemic practices. This insight is the basis of what we might call an "epistemic theory of the common law." According to that theory, the norms of common-law adjudication encourage an exchange of reasons between litigants and the court, offered in justification for the court's decision, which characterizes our normal practice of making and assessing judgments about the world. An implication of this theory is that to the extent our normal practices enable us to demonstrate an entitlement to our claims about the world, the common law enables us to demonstrate an entitlement to our claims about the law, and about whether the law supports the relief a litigant requests. Where the common law succeeds in justifying the court's decision to those affected by it, the decision enjoys the concomitant legitimacy that our judgments enjoy when we can articulate to others how they are made true by the facts—that is, when we can show why they deserve the title "knowledge." Invested with this legitimacy, they provide a natural basis for social cooperation.

¹¹⁸ See Fred D'Agostino, *Transcendence and Conversation: Two Conceptions of Objectivity*, 30 AM. PHIL. QUARTERLY 87, 99-100 (1993) ("How . . . are we to guard against (inappropriately) parochial judgments? . . . We are to do so, I believe, 'conversationally'—that is, by a process in which each of the individuals involved articulates h/er grounds for judgment, listens to the others articulate their ground for judgment, offers and responds to objections to these considerations, and so on; the process ending, at least sometimes, in an agreement in judgments which suffices to resolve the dispute or to facilitate the coordination of social action.").

¹¹⁹ Another possibility, of course, is that like A and B in Williams's example, standing back will reveal that *both* of us are entitled to our legal judgments.

¹²⁰ *Id.* at 100 ("How are we to find an authoritative basis for the resolution of disputes and the coordination of social activities? We will try to do so . . . by trying, conversationally, to find points of agreement which are adequate to the task at hand (whatever that might be). . . . [A]ny result that is achieved in this way carries authority, for those who've participated in its achievement, [because] compliance or assent [was achieved] on grounds distinct from coercive power." (internal quotation marks and citation omitted)).

IV. *ESCOLA V. COCA COLA BOTTLING CO. OF FRESNO*

To better appreciate how these considerations play out in the common-law context, consider Justice Traynor's concurrence in *Escola*. Plaintiff in *Escola* was injured when a Coke bottle exploded in her hand as she moved it from its delivery case to a refrigerator.¹²¹ She alleged negligence on a theory of *res ipsa loquitur* because, as she conceded, she "ha[d] no way of showing any specific act of negligence."¹²² By itself, of course, this did not pose an insurmountable problem; *res ipsa* had been accepted in California for some time.¹²³ The problem was that *res ipsa* required the plaintiff to prove by a preponderance that the accident was one that did not normally occur absent negligence.¹²⁴ This requirement, which was well entrenched in the doctrine, had been fatal to a similar exploding-bottle case heard in the supreme court only a year before.¹²⁵ In that case, *Honea v. City Dairy*, the court had reversed judgment for the plaintiff on the grounds that there was no evidence that a reasonable inspection would have discovered the defect in the glass that caused the accident.¹²⁶

Writing for the *Escola* majority, Chief Justice Gibson affirmed judgment for the plaintiff by distinguishing *Honea*.¹²⁷ The opinion pointed to expert testimony that the Coke bottle manufacturer, who supplied bottles to the defendant bottler, tested for flaws in the glass by subjecting one out of every 600 bottles to pressure and thermal shock tests—tests that were, according to the witness, "pretty near infallible."¹²⁸ No such evidence had been introduced in *Honea*.¹²⁹ Because the manufacturer in *Escola* subjected its Coke bottles to "near infallible" tests for hidden defects, the majority reasoned, a jury could reasonably conclude that it was unlikely the bottles contained such defects

¹²¹ ("Escola II"), 150 P.2d at 438.

¹²² *Escola v. Coca Cola Bottling Co. of Fresno* ("Escola I"), 140 P.2d 107, 108 (Cal. Dist. Ct. App. 1943).

¹²³ See, e.g., *Judson v. Giant Powder Co.*, 107 Cal. 549, 556, 40 P. 1020, 1021 (1895); *Hill v. Pacific Gas & Elec. Co.*, 22 Cal. App. 788, 790, 136 P. 492, 494 (Dist. Ct. App. 1913); William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 188 (1949) (tracing the doctrine back to *Judson* and earlier cases).

¹²⁴ E.g., *Hill*, 136 P. at 494; see also Prosser, *supra* note 123, at 194 ("It is the plaintiff's task to make out a case to make out a case from which, on the basis of experience, the jury may draw the conclusion that negligence is the most likely explanation of the accident.").

¹²⁵ See *Honea v. City Dairy*, 22 Cal. 2d 614, 617-21, 140 P.2d 369, 370-73 (1943).

¹²⁶ *Id.* at 371 ("While the dairy may have had a duty to make an examination of all bottles, whether newly purchased or returned by prior customers, it is not responsible for defects that cannot be found by a reasonable, practicable inspection.").

¹²⁷ *Escola II*, 150 P.2d at 439-40.

¹²⁸ *Id.* at 440 (internal quotation marks omitted).

¹²⁹ *Honea*, 140 P.2d at 371 (refusing to take judicial notice of testing methods).

when delivered to the defendant bottler.¹³⁰ From this it followed that the explosion likely would not have occurred absent the bottler's failure either to perform reasonable inspections for visible defects or to appropriately charge the bottle with soda—both of which would constitute negligence.¹³¹

The reasoning of the majority is certainly plausible on its face. However, a closer look at the case shows that the majority's opinion fails to justify its conclusion. Even if the bottles left the manufacturer free from hidden defects, there is no reasonable basis for inferring that the *bottler* was at fault for hidden defects that existed in the bottle by the time it reached the plaintiff.¹³² To bridge the gap, the majority suggested that “it may be inferred that defects not discoverable by visual inspection do not develop in bottles after they are manufactured.”¹³³ This, of course, is a tendentious assumption when applying a theory of liability premised on the *defendant's* responsibility for the condition of the object that caused the injury.¹³⁴ But even if the assumption were justified and true, the jury could still only speculate that the defective bottle reached the plaintiff due to the defendant's failure to exercise due care. There was no evidence tending to show that *any* flaw undetectable by the manufacturer would be visible.¹³⁵ The defect that caused the bottle to explode may have been undetectable by both the manufacturer and the bottler's reasonable inspections. In short—just as the court below had concluded—the explosion may not have evidenced negligence.¹³⁶

¹³⁰ *Escola II*, 150 P.2d at 440.

¹³¹ *Id*

¹³² Cf. William L. Prosser, *The Assault Upon the Citadel: Strict Liability for the Consumer*, 69 YALE L.J. 1099, 1116 (1960) (“The cracked Coca Cola Bottle may have been cracked long after it left the plant.”) (citing cases).

¹³³ *Escola II*, 150 P.2d at 440.

¹³⁴ See *id.* at 438 (discussing the first element of *res ipsa loquitur*).

¹³⁵ The California District Court of Appeal, which had reversed the plaintiff's judgment, was inclined towards this view. See *Escola I*, 140 P.2d at 108 (“The difficulty in attempting to affirm the present judgment is that the reviewing court is not presented with any evidence of negligence on defendant's part . . .”).

¹³⁶ *Id.* The expert's testimony does not show that the bottle's explosion evidenced negligence. See *Escola II*, 150 P.2d at 440. The expert testified that the bottles were tested using pressure and thermal shock tests, which were nearly infallible. The majority implies that these tests detected *all hidden flaws in the glass*. *Id.* (“Since Coca Cola bottles are subjected to these tests by the manufacturer, it is not likely that they contain defects when delivered to the bottler which are not discoverable by visual inspection.”). But there is no evidentiary basis for this inference. The only reasonable understanding of the expert's testimony, as reported by the court, is that the manufacturer tested for flaws in glass bottles by using pressure and thermal shock tests, and that those tests were highly effective in detecting flaws. Yet other sorts of hidden flaws may not have been detectable by reasonable tests at that time, or may have been detectable by reasonable tests, but not the pressure and thermal shock tests employed by the manufacturer.

As this analysis suggests, applying *res ipsa* in cases like *Escola* faced two significant challenges. First, where the product causing the injury passed through the control of several parties, each of which modified it, establishing any one defendant's responsibility for the condition of the product was difficult.¹³⁷ Second, even where the product caused injury by grossly malfunctioning, the complexity of the manufacturing process meant that inferring probable negligence could be highly questionable. These were not cases of a barrel rolling out a second-story window and falling onto the street, or the discovery of severed toes in a can of chewing tobacco.¹³⁸ Even under theories of inferred negligence, the modern manufacturing process made recovery difficult.¹³⁹

Justice Traynor was aware of these challenges and the unpersuasive use of *res ipsa* that resulted. As he described the situation years later, a concern for product safety had "led to the invocation of *res ipsa loquitur* to permit an inference of negligence from the presence of a defect in cases where there was hardly a basis in common experience for concluding that a defect was probably caused by negligence."¹⁴⁰ His strategy in *Escola* was to acknowledge these

¹³⁷ Rules of joint liability might be invoked, except where other defendants are able to obtain dismissal on the pleadings. In *Escola*, where this occurred, the majority opinion took up the issue of control even though the bottling company did not raise it on cross-appeal. Although *res ipsa* had been traditionally formulated as requiring the defendant's exclusive control over the instrumentality of injury, "the more logical view," thought the court, required the plaintiff only to "prove[] that the condition of the instrumentality had not been changed after it left the defendant's possession." *Escola II*, 150 P.2d at 438. This modification, of course, was almost always necessary for recovery in the product liability context.

¹³⁸ *Byrne v. Boadle*, 159 Eng. Rep. 299 (1863) (falling barrel); *Pillars v. R.J. Reynolds Tobacco Co.*, 117 Miss. 490, 500, 78 So. 365, 366 (1918) (toes in tobacco), cited in Prosser, *supra* note 123, at 220.

¹³⁹ See Prosser, *supra* note 132, at 1116-17 (arguing that *res ipsa* could fail to permit recovery because, among other things, the product causing the injury "will pass through the hands of a whole line of other dealers, and the plaintiff may have good reason to sue any or all of them. The manufacturer is often beyond the jurisdiction. He may even, in some cases, be unknown. If he is identified and can be sued, it is very often impossible to pin the liability upon him. Even where there is a proved defect which speaks of obvious negligence on the part of some one, it may still not be possible to prove that it was on the part of the maker." (internal footnotes omitted)). I am going to bypass the larger historical questions about social, economic and intellectual causes of the development of a strict liability standard in products liability cases, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462-65 (1985) (identifying several scholarly approaches to the development of products liability), as well as the question of whether there is a good case for strict liability today, see generally Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993).

¹⁴⁰ Roger J. Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 364 (1965).

difficulties, and to use them to build a case for strict liability. In the second paragraph of the concurrence, Traynor wrote:

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection, or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. . . . An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is.¹⁴¹

The limits of *res ipsa* would be of little concern, had the state no interest in preventing non-negligent product injuries. But, reasoned Traynor, the state *does* have an interest in preventing such injuries. Injury from a defective product “does not become a matter of indifference” because the manufacturer used due care.

Crucially, Traynor’s principal support for this claim is in the material that *follows* it—a lengthy discussion of existing products liability doctrine in California—and not the brief public policy discussion that precedes it. In other words, Traynor’s primary argument is that California has an interest in preventing and redressing injury caused by defective products *as expressed in existing law*. He cites four examples: (1) the doctrine of *res ipsa*, which, although limited, can function as strict liability by entitling the plaintiff to go to the jury on a presumption of negligence; (2) the strict liability criminal statute that prohibits the manufacture and distribution of adulterated food; (3) the doctrine of implied warranty of safety, which is a form of absolute liability of manufacturer to merchant, and merchant to consumer; (4) and the judge-made law implying a warranty of safety for food products between manufacturer and consumer, despite an absence of contract between them.¹⁴²

In effect, California already had a policy of strict liability to the consumer for injuries caused by defective products. But as things stood when *Escola* was decided in 1944, the law implementing this policy had the look of a patchwork

¹⁴¹ *Escola II*, 150 P.2d at 441 (internal citations omitted); *cf. id.* at 443 (“Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible or beyond the ken of the general public.”).

¹⁴² *Id.* at 441-42.

quilt. The exceptions and intricacies of the applicable doctrine, including *res ipsa*, generated distinctions where there should be none.¹⁴³ In light of existing California law, it made little sense for Gladys Escola's recovery to turn on whether she was able to prove, by a preponderance, those particular defects a bottling company's reasonable inspection and testing processes should discover. Instead of continuing to force judgment into theories like *res ipsa*, where the fit was less than comfortable, Traynor wanted to "fix that responsibility openly."¹⁴⁴ In short, the situation called not for distinguishing *Honea v. City Dairy*, as the majority had done, but for *overruling* it.

To be sure, this is not the only argument of the *Escola* concurrence. Undoubtedly, Traynor's larger aim was to unsettle the assumption that a liability standard of due care appropriately balanced losses caused by defective products between the injured party and society.¹⁴⁵ The discussion of existing California law does this. But the public policy arguments that open the concurrence also promote this aim, as do the observations at the opinion's close about the altered relationship between manufacturer and consumer in modern systems of manufacturing and distribution.¹⁴⁶ By introducing the policy arguments in a non-binding opinion, Traynor ensured that a public discussion of the wisdom of strict liability would take place before the California Supreme Court put any such rule into effect.

This view of *Escola* is consistent with themes in Justice Traynor's own reflections on judicial decision-making. Traynor acknowledged on many occasions that judges have a creative role in lawmaking.¹⁴⁷ Yet Traynor's vision of this role was limited in an important sense. Traynor's judicial ideal—the "reasoning judge"—exercised creativity primarily in keeping "the inevitable

¹⁴³ Traynor's discussion of the California criminal statute making manufacturers strictly liable for injuries caused by adulterated foodstuffs is another example of this point. The statute prohibited the "manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food." *Id.* at 441 (citing Cal. Health & Safety Code § 26470). There was at least a colorable argument that this statute applied to an exploding Coke bottle. *Id.* Yet there is something strange about hinging liability on this determination, given that the statute appears to evidence a much broader public policy. *See id.*

¹⁴⁴ *Id.* at 441.

¹⁴⁵ *See* Traynor, *supra* note 140, at 366-67 (listing the reasons justifying strict liability).

¹⁴⁶ *See Escola II*, 150 P.2d at 443-44.

¹⁴⁷ Edmund Ursin, How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking, 57 BUFF. L. REV. 1267, 1308 (2009); *see, e.g.*, Roger J. Traynor, The Limits of Judicial Creativity, 63 IOWA L. REV. 1, 2 (1977) [hereinafter *Judicial Creativity*] (the judge is necessarily an "active analyst"); Roger J. Traynor, Law and Social Change in a Democratic Society, 1956 U. ILL. L.F. 230, 232 [hereinafter *Law and Social Change*].

evolution of the law on a rational course.”¹⁴⁸ This task included overruling precedents when they became “riddled with exceptions,”¹⁴⁹ just as Traynor wanted to do in *Escola*. But in laying out new rules, and in shaping existing rules, the judge was limited by the burden of justifying the law’s direction to the litigants and to society at large.¹⁵⁰ In proceeding slowly and carefully, and in attending primarily to whether judge-made legal rules could be appropriately justified in light of the contemporary conditions to which they were applied, the judge’s creative law-making role was distinguished from that of the legislator.¹⁵¹

Justice Traynor largely carried out this judicial role in *Escola*. There, his primary argument was that it made little sense to tie liability for injuries caused by defective products to the doctrine of *res ipsa*, when California already made manufacturers strictly liable, in large part, for such injuries. In light of the changed relationship between consumers and manufactures, the law had already developed to impose obligations on the manufacturer more stringent than those traditionally imposed at common law. Recognizing a uniform rule of strict liability to the consumer would put these developments “on a rational course,” and enable courts to dispense with the artful practice of maneuvering a case into a recognized pocket of liability. This practice simply made little sense in light of the strong policy arguments, in Traynor’s view, for imposing a

¹⁴⁸ *Judicial Creativity*, *supra* note 147, at 7.

¹⁴⁹ *Id.* at 5; *Law and Social Change*, *supra* note 147, at 236 (“We do a great disservice to the law when we neglect that careful pruning on which its vigorous growth depends and let it become sickled over with nice rules that fail to meet the problems of real people.”).

¹⁵⁰ *Judicial Creativity*, *supra* note 147, at 5-6; Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615, 621 (1961) (“A judge needs no more than forthrightness to make an overdue statement of the obvious. He may be deterred, however, by the prospect of also having to explain why it was not always so obvious, or if it was why it failed of earlier recognition. Never forget that his explanation must persuade his colleagues, make sense to the bar, pass muster with the scholars, and if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it.” (quotation marks and footnote omitted)).

¹⁵¹ See *Law and Social Change*, *supra* note 147, at 239 (“A judge who mediates law and social change in a democratic society is bound to be preoccupied with the role of the courts. Nevertheless he is bound also to recognize that the task of law reform is that of the legislators, which is to say primarily that of the people. . . . However sensitive judges become to the need for law reform to match our spectacular growth, they must necessarily keep their dispassionate distance from that ball of fire that is the living law, and hope for wisdom to give it coherent direction when it spins their way.”); see also *Judicial Creativity*, *supra* note 147, at 11. *But see* Ursin, *supra* note 147, at 1308 (suggesting that Traynor took a broader view of judicial creativity that “emphasized not democratic theory but the practical necessity of judicial innovation to meet constantly changing conditions and values”). In my view, Ursin overstates this aspect of Traynor’s account of judicial decision-making. Ursin inexplicably injects passages from Judge Posner’s work into his analysis of Traynor, projecting Posner’s view of judicial decision-making onto Traynor and thereby amplifying certain themes in Traynor’s work. See *id.* at 1314-29.

regime of strict liability, and in light of the fundamental changes that had occurred in the manufacturing and distribution of products. This was, in effect, Traynor's "trial" justification, aimed at prospective litigants, and at the California public at large, for the judicial recognition of a new standard of liability.

V. DELIBERATIVE DEMOCRACY AND THE COMMON LAW

The normative features of common-law adjudication described above are also present in the process of collective decision-making that legitimates enacted law. In both cases, legitimacy turns on participation in a specialized kind of deliberation. To some extent, the legitimating effects of this process are more obvious in the context of judicial proceedings than legislative proceedings or broader public discussions over the merits and demerits of a course of collective action. The deliberative theory of democracy is significant because it shows how processes of enactment—which we typically identify with democracy—actually depend on public deliberation in order to fully legitimate the enacted law that results.

A. A Deliberative Theory of Democracy

"The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decisions of the members of society who are governed by that power."¹⁵² The deliberative theory of democracy naturally explains why collective decisions have this effect.¹⁵³ According to the deliberative theory, collective decisions legitimate the exercise of state power when they arise out of an *ideal deliberative procedure*, described as "free public reasoning among equals."¹⁵⁴ The envisioned procedure is "deliberative" insofar as it is characterized by an exchange of reasons for and against proposed policies.¹⁵⁵ But that does not exhaust its content. In what

¹⁵² *Procedure and Substance*, *supra* note 4, at 95; accord Joshua Cohen, *Reflections on Deliberative Democracy*, in PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS 329 (2009) [hereinafter *Reflections*] ("Democracy is a way of making collective decisions that connects decisions to the interests and the judgments of those whose conduct is to be regulated by the decisions.").

¹⁵³ See *Procedure and Substance*, *supra* note 4, at 95-96.

¹⁵⁴ *Id.* at 99; Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 73 (James Bohman & William Rehg, eds., 1997) [hereinafter *Deliberation and Democratic Legitimacy*]; James Bohman & William Rehg, *Introduction*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS ix (James Bohman & William Rehg, eds., 1997) ("Broadly defined, *deliberative democracy* refers to the idea that legitimate lawmaking issues from the public deliberation of citizens.").

¹⁵⁵ Rawls, *supra* note 5, at 138 ("The definitive idea for deliberative democracy is the idea of deliberation itself. When citizens deliberate, they exchange views and debate their supporting reasons concerning public political questions."); see also *Reflections*, *supra* note 152, at 329

follows, I will lay out the features of the ideal deliberative procedure that explain how collective decisions can have a legitimating effect on state action. These features should be familiar from the discussion of the common law.

First, the ideal deliberative procedure aims at *political justification*.¹⁵⁶ This is distinct from the idea of legitimacy mentioned above. Showing how collective decisions produce legitimate law is, of course, a desideratum of any normative democratic theory. Any democratic theory will need to explain how and why the institutions, rights and norms typical of democratic constitutional regimes produce legitimate state action.¹⁵⁷ What distinguishes the deliberative theory is that it draws a natural connection between the problem of legitimacy and the more familiar task of justifying one's beliefs or actions to others.¹⁵⁸ In response to the citizen's question, *Why ought I abide by the state's command to do A?*, the deliberative theorist imagines the task of adducing *reasons* that the citizen would reasonably regard as justifying the collective policy.¹⁵⁹ State action will be legitimate if it is reasonably justified to all those affected. This basic principle has several important implications. First, it implies that the ideal deliberative procedure must amount to more than the political argle-bargle familiar from television; while vigorous public discussion has an obvious value to democracy, it may not (and often does not) involve an exchange of reasons aimed at justifying a policy.¹⁶⁰ Second, the idea of political justification excludes "social choice" accounts of the political process, based on bargaining or strategic

("Deliberation, generically understood, is about weighing the reasons relevant to a decision with a view to making a decision on the basis of that weighing."). In another paper, Cohen suggested that agenda setting and solution proposal were also part of the deliberative process. *Deliberation and Democratic Legitimacy*, *supra* note 154, at 73.

¹⁵⁶ *Procedure and Substance*, *supra* note 4, at 99-100 (arguing that the ideal procedure of political deliberation is a conception of political justification).

¹⁵⁷ This is not a trivial task for purely procedural theories of democracy, which may tolerate unjust and immoral state action where that action arises out of a democratic procedure.

¹⁵⁸ See *Procedure and Substance*, *supra* note 4, at 101 (suggesting that, because it focuses on political justification, the deliberative view of democracy presents a compelling account of why democratic law is legitimate); cf. *Rawls*, *supra* note 5, at 137 ("Thus when . . . all appropriate government officials act from and follow public reason, all when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law."); JOHN RAWLS, *POLITICAL LIBERALISM* 217 (expanded ed. 2005) (similar).

¹⁵⁹ Notice that the task here is not the task of deriving particular laws from the principles of justice describing the fair terms of social cooperation. Rather, the deliberative procedure *begins* with the proposed policy, and seeks to justify the policy by adducing reasons shared by the deliberants. As I understand it, this largely blunts the problem of indeterminacy of norms.

¹⁶⁰ E.g., *Reflections*, *supra* note 152, at 330 ("[N]or does [deliberative democracy] aim to subject power to the discipline—such as it is—of talking, because talking is not the same as reasoning . . .").

action between mutually opposed interest groups whose conduct is best understood as an effort to realize their particular preferences.¹⁶¹

Second, deliberation will legitimate state action only if it is carried out under appropriate *conditions*.¹⁶² Deliberation can and does occur in many different settings. Forms of government other than democracy may employ deliberation to test the wisdom of public policies. As Josh Cohen has pointed out, “a committee of oligarchs can deliberate.”¹⁶³ Obviously, the deliberation of oligarchs does not invest the laws with democratic legitimacy. What is missing from the example is a particular institutional and normative framework.

Unlike oligarchy and its relative, aristocracy, democracy is a form of government in which individuals are treated as political *equals*. This requirement applies to the conditions of deliberation, and, in ways I will shortly explain, is necessary if deliberation is to have a legitimating force. Generally speaking, deliberative participants are treated as equals when deliberation is conducted in accordance with procedures and under substantive conditions that effect an equal distribution of power.¹⁶⁴ As Cohen has usefully summarized the idea, individuals must be equals in *the process of making decisions*.¹⁶⁵ This means that the institutional framework in which deliberation is conducted must be structured to ensure that individuals have an equal opportunity to participate, that resource inequities do not undermine this opportunity for some and, *eo ipso*, dramatically inflate it for others, and that the interests and reasons of each participant are equally taken into consideration.

Deliberation must also be *free* to legitimate state action. Generally speaking, free deliberation is deliberation bound only by the norms of argument, and which gives rise, in the usual ways, to changes in belief and to action. This means, principally, that free deliberation is “not constrained by the authority of prior norms or requirements.”¹⁶⁶ For example, a participant’s political status cannot depend on his ascribing to certain fundamental beliefs or values, which in turn

¹⁶¹ See Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 11-12 (James Bohman & William Rehg, eds., 1997) (contrasting social choice theory with Habermas’s discourse theory).

¹⁶² See *Deliberation and Democratic Legitimacy*, *supra* note 154, at 74 (arguing that ideal deliberation is free and the parties are formally and substantive equal).

¹⁶³ *Reflections*, *supra* note 152, at 329. Of course, I will consider below whether a panel of judges is a “committee of oligarchs” in Cohen’s sense.

¹⁶⁴ *Deliberation and Democratic Legitimacy*, *supra* note 154, at 74.

¹⁶⁵ *Reflections*, *supra* note 152, at 329.

¹⁶⁶ *Deliberation and Democratic Legitimacy*, *supra* note 154, at 74.

provide an unrevisable starting point for political deliberation.¹⁶⁷ Rather, participants in free deliberation regard themselves as being independently capable of evaluating practical and theoretical arguments according to whatever reasonable assumptions they find best. They are free to draw reasonable conclusions, and they are free to act where the conclusions supply a sufficient reason to act.¹⁶⁸

When deliberation is free and the participants treated as equals—when it is carried out under the conditions described above—then each participant must *direct* his argument to affected parties, by adducing reasons that those parties will regard as justifying the policy in question.¹⁶⁹ As Rawls has observed, “Public reasoning aims for public justification. . . . Public justification is not simply valid reasoning, but *argument addressed to others*: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.”¹⁷⁰ This result follows closely from the conditions discussed above. If we regard our deliberative partners as our equals, not only must we afford them an equal opportunity to speak, but we must treat them as being *equally deserving of persuasion*. Equals in deliberation are equally entitled to the reasonable assumptions they bring to the argument. When two equals engage each other in argument, they recognize this mutual entitlement by searching out common ground, instead of asking each other to give up their assumptions. Moreover, given that deliberants are *free* to reject arguments that they reasonably judge unpersuasive, we cannot simply wall off some deliberants and ignore their concerns.¹⁷¹ This means that political deliberation must consist in an exchange of reasons that each of us can reasonably regard as being compelling.¹⁷² Otherwise, deliberation cannot legitimate state action.

¹⁶⁷ See RAWLS, *supra* note 5, at 21-22. Rawls speaks of *individuals* as free, but I understand the idea to be very close to Cohen’s concept of free *deliberation*.

¹⁶⁸ *Deliberation and Democratic Legitimacy*, *supra* note 154, at 74.

¹⁶⁹ *Reflections*, *supra* note 152, at 330 (“Deliberative democracy is about reasoning together among equals, and that means not simply advancing considerations that one judges to be reasons but also finding considerations that others can reasonably be expected to acknowledge as reasons.”).

¹⁷⁰ Rawls, *supra* note 5, at 155 (emphasis added).

¹⁷¹ There are certain obvious exceptions to this generalization. We need not persuade those who do not accept, for example, the validity of a democratic constitutional government. See *id.* at 132.

¹⁷² E.g., *Reflections*, *supra* note 152, at 330 (“Deliberative democracy is about reasoning together among equals, and that means not simply advancing considerations that one judges to be reasons but also finding considerations that others can reasonably be expected to acknowledge as reasons.”). As Rawls and Cohen use the term, this makes political argument concerned with the *common good*, as opposed to narrow considerations of self-interest. See *id.*

The last feature of the ideal deliberative procedure is the *diversity* of its participants. Deliberation in a democracy takes place under conditions of fundamental diversity. This diversity—what Rawls has famously called the “fact of reasonable pluralism”—is endemic to democratic constitutional regimes, which enjoy a “culture of free institutions” that fosters diverse fundamental commitments.¹⁷³ Strong traditions of political liberty also associated with democratic regimes—principally, rights of free speech, free association, and religious liberty—predictably strengthen and protect this pluralism.¹⁷⁴ Nor are there philosophical reasons to think that the application of “practical reason” ought to eliminate it.¹⁷⁵ In short, fundamental diversity is here to stay. But because an individual’s fundamental beliefs and values naturally influence her evaluation of political argument, fundamental diversity limits the pool of reasons we can draw on in attempting to justify collective decisions to others. What remains is “public reason”: the body of reasons we can reasonably regard as being compelling to all citizens.¹⁷⁶

In this way, a process of free public reasoning among equals produces a political justification that each person affected can reasonably regard as being compelling. So justified, state action is legitimate. This does not mean, of course, that deliberative democracy requires *consensus* to legitimate state action.¹⁷⁷ Consensus on disputed matters of sufficient complexity is likely impossible, even under ideal deliberative conditions. Reasonable deliberants may be required to draw on general considerations in favor of a deliberative process to justify those policies whose precise terms they do not accept.¹⁷⁸ And in any case, the process of deliberation will need to be capped by a vote that determines, definitively, whether the state will adopt the policy in question.

Even though it must be capped in this way, the ideal deliberative procedure gives collective decision-making an *epistemic* character that ought to be familiar. In requiring participants to direct their political justifications to a heterogeneous audience, deliberation forces the participants to adduce broad reasons, since only such reasons will provide a common ground from which political

¹⁷³ Rawls, *supra* note 5, at 131.

¹⁷⁴ Notably, the “common schools”—the precursor to today’s primary public schools—were conceived to homogenize the American population by inculcating broadly Protestant values. See Matthew Steilen, *Parental Rights and the State Regulation of Religious Schools*, 2009 B.Y.U. EDUC. & L.J. 269, 307-30. The founders’ unrealized plans for state education were also based in large part on a concern for homogeneity, which they believed would generate the shared interests and a sense of loyalty necessary for the federal government to survive. *Id.* at 293-94.

¹⁷⁵ *Procedure and Substance*, *supra* note 4, at 96.

¹⁷⁶ Rawls, *supra* note 5, at 136-37.

¹⁷⁷ *E.g.*, *Reflections*, *supra* note 152, at 331.

¹⁷⁸ *Procedure and Substance*, *supra* note 4, at 100.

argument can proceed in a fundamentally diverse society. As above, broad reasons have a force over our deliberative opponents because they show how our own views answer to the facts. In this sense, ideal political deliberation is a kind of *epistemic process*, by incorporating our techniques for assessing claims to knowledge into the model of political deliberation.¹⁷⁹

B. Comparing Common-Law Adjudication and the Ideal Deliberative Procedure

As a starting point, it will be useful to summarize the features of common-law adjudication and the ideal deliberative procedure identified above. In the following table, the rows represent the characteristics ascribed to common-law adjudication and the ideal deliberative procedure. The grey boxes represent points of possible contrast.

¹⁷⁹ See Bohman & Rehg, *supra* note 154, at xv-xvi (“[A]n ideal procedural model provides the basis for an ‘epistemic’ interpretation of democratic outcomes. This interpretation presupposes that deliberation involves a cognitive process of assessing arguments and forming judgments about the common good, and that there is some standard, independent of the actual process, according to which the outcome of deliberation is either correct or incorrect. Because the relevant standard is an ideal procedure, correctness does not imply a realist or metaphysical conception of political truth or the common good. Rather, the ideal procedure specifies the counterfactual conditions for public debate and practical reasoning that would allow for the best possible discussion of a political issue on the merits . . .”); cf. Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 34 (1986).

Fig. 1. The Common law and Deliberative Democracy Compared

	(A) Common-Law Adjudication	(B) The Ideal Deliberative Procedure
1	Requires that a judicial decision be <i>justified</i> , and includes procedures that require legal argument by the litigants and the court.	Aims at <i>political justification</i> , as opposed to vigorous discussion or bargaining.
2	(A-2) Free deliberation among equals?	Requires certain conditions for deliberation, namely, that deliberation be <i>free</i> and the participants treated as <i>equals</i> .
3	Requires the justification to be directed at the litigants, principally the losing litigant and all those potentially affected by the ruling.	Requires that political justification be directed at those bound by the collective decision.
4	Requires broad reasons to justify a decision to those with an adverse view of the law.	Requires reasons in support of state action that diverse citizens can reasonably regard as compelling.

5	Requires an ongoing assessment of whether the rule announced in precedent ought to bind the litigants in the present case.	(B-5) Ongoing assessment?
6	Enables litigants to directly participate in determining the content of the law applied to their case.	(B-6) Participation?

In what follows, I will examine both putative points of comparison and contrast suggested by the table. I argue that, in light of their similarities, common-law adjudication and the ideal deliberative procedure are two forms of *deliberative lawmaking*. The points of contrast are relevant to determining whether a form of deliberative lawmaking is properly regarded as democratically legitimate.

1. Points of Comparison

Deliberative lawmaking is a method of lawmaking that (1) aims to justify the law decided on, and involves a process of decision-making that requires the production of such a justification; (2) requires this justification to be directed at those bound by the law; and (3) requires the justification to comprise broad reasons—reasons that will be persuasive to a diverse audience. Such methods of lawmaking are fairly called “deliberative” because they incorporate the exchange of reasons into the lawmaking process itself.

As rows 1, 3, and 4 in the table above suggest, both common-law adjudication and the ideal deliberative procedure are forms of deliberative lawmaking. This is perhaps not a significant claim for the ideal deliberative procedure. But it is a significant claim for the common law. Despite a rough consensus about its content, common-law adjudication is not typically regarded as a fundamentally deliberative procedure. But it is such a procedure. Common-law adjudication requires the court and litigants to engage in an exchange of reasons directed at justifying the application of precedent to the instant case. The nature of this

exchange leads the litigants and the court to examine the underlying justification of the law, in order to determine whether it should apply, and if so, what content it should have. In this way, the common law utilizes deliberation to shape the content of the legal rules that bind the parties and others similarly situated. This makes it a form of deliberative lawmaking.

Despite these characteristics, it can be tempting to conclude that common-law adjudication *cannot* be deliberative, because it involves the application of precedent, and appeal to *precedent* is not normally part of political deliberation. Participants in political deliberation *may* appeal to precedent, but such appeals must stand on their own, in the sense that they are evaluated just as other reasons in favor of, or against, a proposed collective decision. While participants in political deliberation may simply reject precedent, participants in common-law adjudication may not, since their dispute will be governed by precedent. Of course, this is an important distinction between adjudication and political decision-making. But it does not imply that adjudication is non-deliberative. Rather, the right way to capture the distinction is as relating to the *subject* of deliberation. The subject of deliberation in common-law adjudication is how and why precedent applies to the case at hand. In other words, common-law adjudication requires the parties to justify their formulation, application, and distinction of precedent—and, on occasion, their request that the court fashion a new rule. That this is the subject of deliberation in common-law adjudication is irrelevant to whether the process itself is deliberative. The process is deliberative because it possesses the features identified above in section III.B—features shared in common with the ideal deliberative procedure. It is virtue of possessing those features that the process legitimates the decision that arises out of it.¹⁸⁰

The thesis that common-law adjudication is deliberative is significant for a second reason as well. Opposed parties in litigation naturally take different views of the content of the law. The party requesting the court to grant it relief takes a view of whether the law supports that relief that differs from the opposing party. As we have seen, this opposition injects a kind of “diversity” into the deliberative procedure at the heart of the common law. Because the parties have diverse interests, the court’s justification for its decision will need

¹⁸⁰ Another way to frame the criticism is this: political deliberation is about *making* the law, while common-law adjudication is about *applying* it. Given that the law already exists in common-law adjudication, how could the process be deliberative in the same sense as political deliberation? The obvious answer is that there is not a clear distinction, at common law, between making the law and applying it. In common-law adjudication, the law is made through successive applications. The adjudicatory process thus gives litigants who reject the authority of a precedent the opportunity to challenge it.

to appeal to broad reasons to be reasonably compelling to both parties, as well as others affected by the ruling. In the context of political deliberation, “reasonable pluralism” has much the same effect. Thus, the reasons that we can reasonably expect others to regard as compelling in political deliberation will also need to be “broad,” in the sense that they will need to appeal to individuals with a variety of points of view. The idea of “breadth” operative here was important because it was part of a normal way of thinking about knowledge, and, in particular, of how we demonstrate to others that we are entitled to our judgments about the world. It makes sense that procedures for resolving disputes and for coordinating social conduct would make use of this familiar procedure. The idea that judicial decisions and collective decisions are simply judgments justified in light of the facts provides a neutral framework for resolving our most important conflicts.

2. Points of Contrast

The crucial question is whether the deliberative procedure at the heart of common-law adjudication provides judicial decisions with *democratic* legitimacy. The thought that it does is based on the following inference: if the ideal deliberative procedure gives enacted law its legitimacy, then the deliberative procedure in common-law adjudication should give the common law a similar kind of legitimacy.

a. Equality and participation

Only free public reasoning among equals legitimates a collective decision. This is because, under the deliberative theory of democracy, a collective decision is legitimated if and only if it is justified to all those bound by it. A decision is justified to all those bound by it when reasons are produced in support of the decision that each person should reasonably regard as compelling. But persuading each person by seeking out reasonable common ground is treating each person as an equally deserving of persuasion, and acknowledging their freedom to make their mind up as they see fit. Thus, equality and freedom are internal to the idea of deliberation as a justificatory device. Without these conditions, deliberation cannot constitute political justification and, therefore, cannot legitimate state action.¹⁸¹

¹⁸¹ This is a significant point. In places, Josh Cohen suggests that the theory of deliberative democracy has two separable aspects to it: deliberation and democracy. *See, e.g., Reflections, supra* note 152, at 329. As I see it, there must be an “internal” relationship between deliberation and democracy for deliberation to be a theory of what makes democratic law legitimate. The relationship I see is that deliberation, under certain conditions, *generates* democratic legitimacy.

On its face, the common law appears to lack the conditions of freedom and equality. The court is the decision-maker. While the court may aim to justify its decision to the litigants, it need not do so; and even if a losing litigant remains unpersuaded of the court's view (a state of affairs that is not uncommon), the court's view will control the allocation of rights and obligations between the parties. Thus, the court and the litigants are not treated as equals in the deliberation between them. Nor are the litigants free to act on their own conclusions about the content of the law. For the adjudicatory process to serve its most basic function, the parties must be compelled to abide by the court's order, regardless of their own conclusions. Indeed, this principle is expressly manifested in aspects of procedural law.¹⁸²

The appearance of contrast here is somewhat misleading. The institutional framework in which political deliberation takes place is in fact similar to that of the common law in the relevant respects. Deliberation between citizens can only go so far in a representative democracy. Eventually matters must come to a vote, and they typically do so within one or more legislative bodies. With respect to the views of those bound by a collective decision, legislators in these bodies operate much like judges on a panel; while they may aim to demonstrate to constituents that a collective decision is wise, the validity of the decision does not in any way turn on their successfully doing so. Nor are citizens entitled under positive law to simply go about their business and ignore a collective decision they regard as wrong-headed or unjust, if collective decisions are to serve their most basic function. As noted above, nothing in this process need undermine a deliberative theory of democratic legitimacy. Similarly, nothing about the court's role as decision-maker in common-law adjudication need undermine the claim that common-law adjudication can be democratically legitimate.

Moreover, unlike the legislative process, the common law permits litigants to directly participate in the deliberative process that will determine the content of the law applied to them. A litigant who believes that a rule of law does not apply is given an opportunity to present that argument to the decision-making body itself—the court. Although this advocacy is carried out under the specialized norms of legal reasoning, as opposed to those of workaday political

In other words, the idea of deliberation captures the legitimating force in democratic decision-making. If it does not, and if there is a stable notion of democratic decision-making independent of deliberation, then there must be a more fundamental norm for explaining democratic legitimacy.

¹⁸² E.g., the collateral bar rule: an injunction must be obeyed by the parties in order to challenge the merits of the injunction. See *Walker v. Birmingham*, 388 U.S. 307, 313-14 (1967) (citing *Howat v. Kansas*, 258 U.S. 181 (1922)).

discussion, this does not divest the deliberation of its legitimating force.¹⁸³ Legitimacy depends rather on whether the process that terminates in a judicial decision involves the court and the litigations in deliberation, and whether the judicial decision that results is reasonably justified to all those bound by it.¹⁸⁴ Moreover, this deliberation is subsequently carried out on any occasion where a party is willing to argue before the court that the rule should not apply to it, or should be altered in some way. This gives judicial decision-making a participatory aspect to it that legislative decision-making simply lacks.

b. The accountability of decision-makers

Of course, even under an ideal democratic theory, there are several significant differences between legislative decision-making and judicial decision-making. A principal difference concerns the office of the decision-maker itself: the legislator is usually elected, and the judge often is not. Moreover, this distinction is often thought to directly affect the quality of judicial reasoning, on the supposition that by insulating judges from political forces, we free them to make unpopular decisions that are nonetheless right. This is at least part of the idea of “judicial independence,” but its obvious price would seem to be democratic legitimacy.

“Judicial independence” is an important point, and, I think, any fair view of this issue must regard it as impacting the democratic character of judicial decisions. But, again, this point must be handled with care, and it is easy to make too much of it. First, the state court judges who create much of the substantive common law in this country are, in most cases, subject to some form of popular vote, either because they must seek election to obtain or retain their office.¹⁸⁵ Second, even the need to seek reelection does not, in all circumstances, require a legislator to justify collective decisions to all those bound by those decisions. This is obviously the case for citizens who are not constituents of a legislator. Among constituents, “discrete and insular” minorities may exercise little voting power, and the failure to justify a collective

¹⁸³ *But see Strauss, supra* note 22, at 933 (arguing that the method of common-law constitutionalism is not democratic, but that its substance may be).

¹⁸⁴ In this sense, the greatest threat to the democratic legitimacy of judicial decisions is the temptation of the court to make a decision without giving the parties an opportunity to examine the court’s basis for decision. The *process* of coming to a judicial decision must be deliberative.

¹⁸⁵ *See, e.g., CAL. CONST.* art. 6, § 16. According to the ABA, state supreme court justices must seek election in twenty-one states, and election after appointment in seventeen other states. Judges in the remaining states enjoy life tenure or may be reappointed. ABA Standing Committee on Judicial Independence, Fact Sheet, *available at*: <http://www.abanet.org/judind/jeopardy/fact.html>.

decision to such minorities may have little consequence at the ballot box.¹⁸⁶ Even diffuse *majorities* may be unable to impact the re-election of a legislator who has failed to justify her votes, if she can obtain the support of an organized and motivated minority.¹⁸⁷ These are familiar ideas.

In contrast, the norms of common-law adjudication require judges to reasonably justify their decisions to all those bound by them. As described above, this is internal to the process of deciding cases by precedent, which requires the common-law judge to determine whether the instant case is similar in relevant respects to precedent. It is also part of the larger adjudicatory framework, which requires the court to demonstrate to the losing litigant, and to others similarly situated, why the law supports the court's decision. These are not nominal requirements. They are supported by layers of review, some of which are performed by judges who may be inclined to take a different view of the law. Beyond this, the ability of the court to effectively adjudicate the dispute before it and to maintain its institutional authority over the long run depends in part on whether it can reasonably justify its rulings to litigants. Apart from the unusual exercise of its contempt power, a court largely depends on its reasoning to persuade hostile parties to cooperate with each other, pursuant to its orders.

None of this is meant to deny that the popular election of legislators is central to a democracy. A decision-making body directed solely by unelected officers cannot be described as "democratic," because this term connotes, in part, the political institutions and individual rights characteristic of democracies. Nonetheless, the decisions of such a body can be legitimate. The basic idea of democratic legitimacy is that the "authorization to exercise public power . . . arises from collective decisions by citizens over whom that power is exercised."¹⁸⁸ Elections make political representations consistent with this basic idea of legitimacy, by keeping representatives accountable to citizens.¹⁸⁹ Yet other practices may serve the same end. My argument has been that common-law adjudication is such a practice. The norms of common-law adjudication, articulated above, require the court to remain responsive to the concerns of

¹⁸⁶ Cf. Ely, *supra* note 21, at 135-36, 152.

¹⁸⁷ See William N. Eskridge, Jr., et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 51 (2001).

¹⁸⁸ Joshua Cohen, *Directly Deliberative Polyarchy*, in *PHILOSOPHY, POLITICS, DEMOCRACY* 187 (2009); accord ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 107-08 (1989) (identifying the assumptions of a democratic order).

¹⁸⁹ Although representative democracy seems straightforward to us now, the idea of political representation and democratic government are far from natural partners. See DAHL, *supra* note 188, at 27-30.

litigants and others affected by its ruling. The result is a process of adjudicating disputes that is, in many ways, a kind of “collective decision-making.”

c. Ongoing assessment

The rules of the substantive common law are undergoing constant change. This is a product both of the power of common-law judges to fashion new rules and, less dramatically, to apply precedent or distinguish it from the case before them. Most forms of statutory law do not undergo this kind of change. This is not true of all “written” law; in some cases, statutes are expressed in terms of basic values or ideals, and therefore require the development of common-law-like principles that show how to apply the values and ideals to concrete settings. The best example is probably the Constitution, including the Bill of Rights and the Fourteenth Amendment. There are other examples as well. Yet setting aside these cases, statutory law does not develop and change in response to changing circumstances in the same way that the substantive common law does.

The stasis of statutory law gives rise to the well-known problem of the government by the “dead hand.” It is not obvious why the decisions of representatives long dead legitimately bind our conduct. We did not vote for these individuals, and they often have little in common with us. David Strauss has argued that the common law faces much less of this problem.¹⁹⁰ This derives from the ongoing control we retain over the content of the common law, and from the very process, described above, of applying that law to the situations that we now face. This directly impacts the democratic legitimacy of the common law. Even if it is unelected officers who decide on how a common-law rule ought to apply, those officers are our rough contemporaries, and therefore can have some understanding of the conditions giving rise to the legal question. Given that state judges are elected in most states, the democratic advantage of the common law is, in fact, significant.

CONCLUSION

The common law is democratically legitimate to the extent that it incorporates a deliberative procedure carried out under the conditions of freedom and equality that characterize the ideal deliberative procedure of deliberative democracy. I have suggested several reasons why we should think that this is the case. Principally, the intuitive picture of common-law adjudication developed in Part III—a process of justifying a decision to those affected—is one with obvious similarities to the ideal deliberative procedure. Beyond this point, the obvious

¹⁹⁰ See STRAUSS, *supra* note 11, at 24-25, 99-114.

rejoinders about the role of the court and the election of the judges are easily overstated, if real distinctions. Legislators exercise a similar authority over the so-called “collective decisions” enacted into statutory law, and the influence of election on the conditions of deliberation are far from apparent.

Yet it can still seem a bit dumbfounding to suggest that common-law decisions may be democratically legitimate. How could they be? And if they were, wouldn't it simply be a *reductio ad absurdum* of the theory of democracy that supported this conclusion? The right response, I think, is to concede that common-law decisions are not democratic—in the sense of being a result of vote by elected officers—but to insist that they do not lack the legitimacy of democratic decisions. The legitimacy that common-law decisions enjoy is the legitimacy that derives from subjecting a decision to the scrutiny of those bound by it. This is the same legitimacy that democratic law enjoys under the ideal deliberative procedure. The primary differences between the common law and deliberative democracy are in the ways the respective institutions apportion final control over the act of decision-making, and ensure that the decision-maker remains accountable to those bound by his decisions. These differences affect the *extent* of democratic legitimacy, not its very existence.

Another doubt which is likely to persist is that we have not addressed the root problem affecting the legitimacy of common-law adjudication: the nature of judicial decision-making. Despite the protests of the parties, common-law judges remain able to resolve cases as they want to by manipulating precedent—a topic conveniently passed over. This, in essence, was Justice Scalia's concern, wasn't it?

Much remains to be said about judicial decision-making and whether common-law precedent does constrain it. But putting this issue aside, I think the comparison to deliberative democracy above shows that the doubter's view of judicial decision-making is seriously impoverished. Several points should make this clear. First, the doubt conflates the initial development of an argument with the process of deliberating with another about it. In imagining arguments one could use to support one's request for relief from the court, creativity is indeed the rule. However, the latter idea—deliberation—is very different; deliberation is the process of subjecting one's creative arguments to the scrutiny of independent minds. And while it is “easy” to come up with a request for relief (or an order granting relief), it is often extremely difficult to persuade others that the request (or order) is persuasive. This leads to a second point, which is that the doubt belies the tremendous confidence we have in the deliberative process. Deliberation lies at the center of several of our most important decision-making institutions. If it were merely a sham, then we should have a