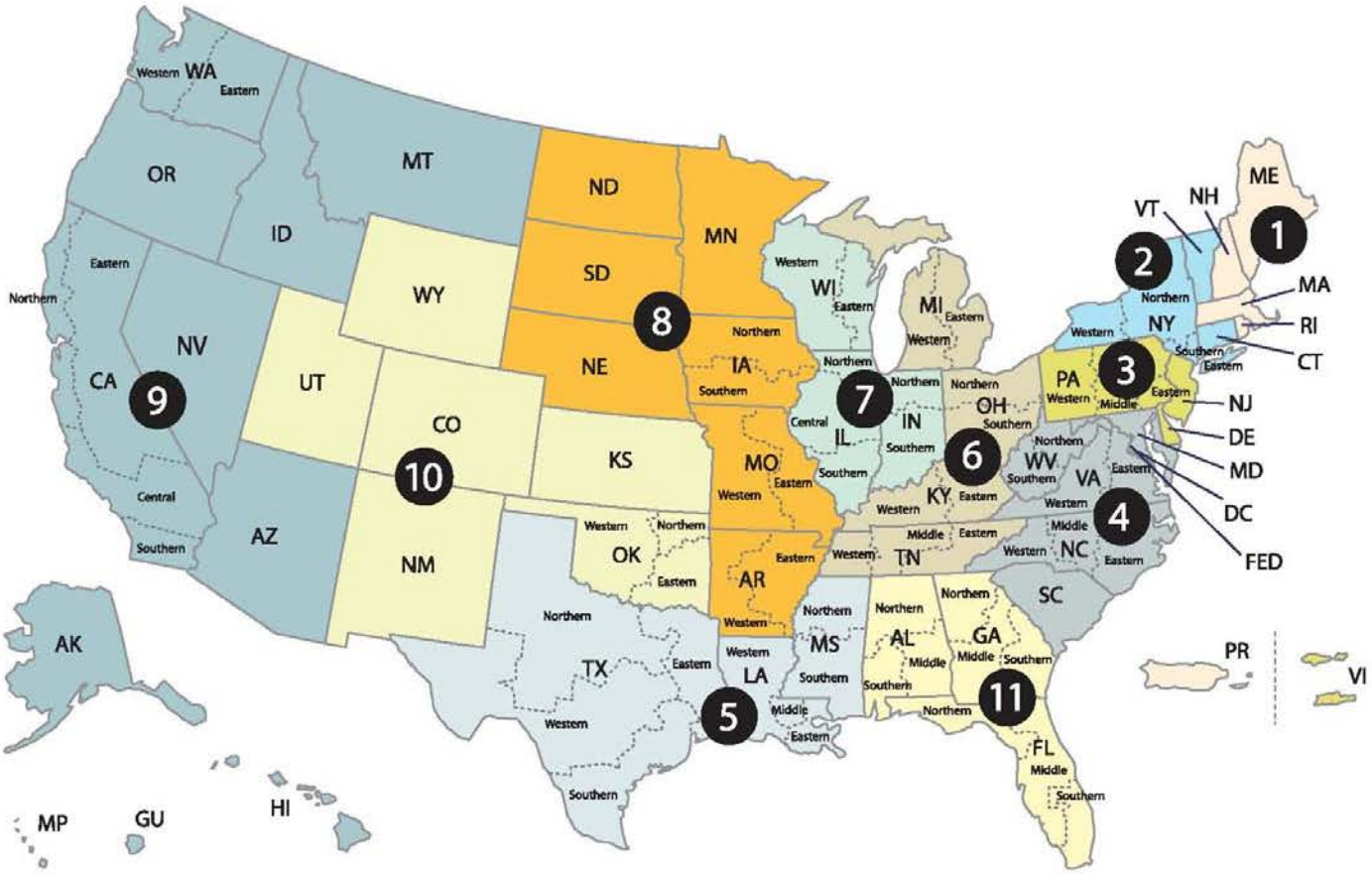
Supplementary Materials

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



United States District Court,
M.D. Florida.
AVISTA MANAGEMENT, INC., d/b/a Avista Plex, Inc., Plaintiff,
v.
WAUSAU UNDERWRITERS INSURANCE COMPANY, Defendant.
No. 6:05-CV1430ORL31JGG.
June 6, 2006.

Slip Copy, 2006 WL 1562246 (M.D.Fla.)

ORDER

PRESNELL, J.

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion--the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts--it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

DONE and ORDERED.

Introduction to Joinder

Temple v. Synthes Corp. is the first case in the Chapter to explore the advantages and disadvantages of including more than one party on each side of a lawsuit. Common law procedure typically embraced two-party litigation. Although devices for collective action existed, common law joinder turned on the forms of action and so, in practice, was quite uncommon. By contrast, the Federal Rules of Civil Procedure routinely allow for the joinder of multiple parties and multiple claims in a single lawsuit. The federal approach achieves economies of scale, but in some situations joinder may lead to confusion or delay. A majority of states model their procedural rules on those of the federal system, but keep in mind that some states do not and so continue to take a more limited approach to joinder.

Federal joinder rules, like joinder rules in general, distinguish between permissive and mandatory rules. Permissive joinder rules give litigants the option of combining multiple parties and multiple claims in a single lawsuit. Mandatory joinder rules require the litigants to do so. Temple v. Synthes involves Rule 19, a mandatory joinder Rule.

It is important to remember that the question of whether a litigant can join a claim or party in a lawsuit is separate from the question of whether the court may exercise jurisdiction over the claim or party. See Federal Rule 82.

Start with some basic definitions.

A claim is an assertion of right by the plaintiff against the defendant (the defending party).

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P v. D

A counterclaim is a claim asserted by the defending party against an opposing party, typically the plaintiff.

P v. D

A third-party claim is a claim asserted by a defending party against a nonparty on the theory that the nonparty (now joined as a third-party defendant) will be liable to the defending party (now called the third-party plaintiff) if the latter is found to be liable to the plaintiff. Third-party claims are called impleader claims.

A crossclaim is a claim asserted by a party against a coparty.

Now consider the basic rules governing claim and party joinder.

Federal Rule 18(a) allows a party "asserting a claim, counterclaim, crossclaim, or third-party claim" to join "as many claims as it has against an opposing party."

- This means plaintiff can choose to join a claim for negligence with a claim for divorce with a claim for slander with a claim for contract breach and on and on against defendant.

Federal Rule 20 authorizes the permissive joinder of plaintiffs if their claims are transactionally related and share common questions of law or fact. A similar rule applies to permissive joinder of defendants.

- This means A and B can choose to join as plaintiffs in a lawsuit against C and D if their claims arise out of "the same transaction, occurrence, or series of transactions" AND "any question of law or fact common to all" will arise in the action. See Federal Rule 20(a)(1) and (2).

The Rule on counterclaims is somewhat more complicated. Federal Rule 13 distinguishes between compulsory and permissive counterclaims.

- Defendant must raise a compulsory counterclaim if it is transactionally related to the opposing party's claim and does not require the joinder of a nonparty over whom the court cannot acquire jurisdiction. See Federal Rule 13(a), which also sets out two exceptions to this rule.

- Defendant may choose to plead a counterclaim "that is not compulsory," i.e., that does not arise out of the transaction or occurrence that is the subject mater of the opposing party's claim. See Federal Rule 13(b).

Impleader claims require the joinder of both a claim and a party.

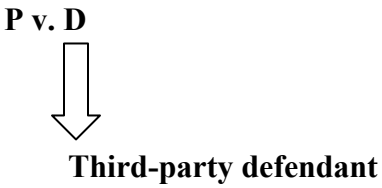
- Federal Rule 14(a)(1) allows a "defending party" to join "a nonparty who is or may be liable to it for all or part of the claim against it," but must obtain the court's permission "if it files the third-party complaint more than 10 days after serving its original answer."

The rule on crossclaims relies on the transactional relation test.

- Federal Rule 13(g) allows the pleading of a crossclaim, i.e., "any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim."

- A crossclaim also "may include a claim that the coparty is or may be liable to the cross-claimant" i.e., the party asserting the crossclaim, "for all or part of a claim asserted in the action against the cross-claimant."

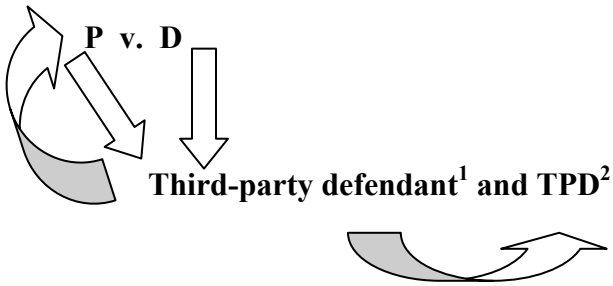
The joinder of claims and parties can quickly complicate a lawsuit and make it "complex." Assume Plaintiff sues Defendant, and Defendant impleads a Third-Party Defendant.



Federal Rule 14(a)(2) allows the Third-Party Defendant to assert a Rule 13(b) counterclaim against the Third-Party Plaintiff.

Federal Rule 14(a)(2) requires the Third-Party Defendant to assert a Rule 13(a) counterclaim against the third-party plaintiff.

In addition, Federal Rule 14(a)(3) allows the plaintiff to assert against the Third-Party Defendant "any claim arising out of the transaction or occurrence that is the subject mater of the plaintiff's claim against the third-party plaintiff." In this situation, the Third-Party Defendant must then assert "any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b)." In addition, if another Third-Party Defendant has been joined, TPD[1] can assert a cross claim under Rule 13(g) against TPD[2].



Some additional joinder terms:

Interpleader

Suppose a bus collides with a truck. The bus driver is insured up to $200,000 "per incident." The truck driver and all of the bus passengers sue the bus driver in individual actions alleging damages of $50,000 per person. The insurance company wants to avoid conflicting or multiple liability. In this situation, interpleader, authorized by Federal Rule 22, allows a party to join as defendants "[p]ersons with claims that may expose" such party "to double or multiple liability, even if the claims "lack a common origin or are adverse and independent rather than identical" OR the plaintiff or defendant "denies liability in whole or in part to any or all of the claimants."

Intervention

Suppose the residents of Coney Island sue LaGuardia Airport for scheduling late-night flights on the ground that it constitutes a nuisance. A manufacturer in California claims that halting the flights will deprive it of essential transportation service. Intervention, authorized by Federal Rule 24, allows a nonparty to join a pending lawsuit, even over the objection of the original parties. The Rule distinguishes between mandatory intervention, where the court must grant to request to join, from permissive intervention, where the court may decide to grant the request. The distinction turns, in part, on the nature of the nonparty's interest.

Class action

The class action device permits a lawsuit to be brought by or against a large number of individuals who share a common interest and are considered to be similarly situated. Unlike other joinder devices in which the joined party appears in the action and represents his or her interests individually, the class action proceeds on the theory of representation: the class action resolves the interests of class members who are "absent" from the proceedings but whose interests are represented by a named party subject to approval by the court. Federal Rule 23 governs the certification of class actions in the federal courts and sets forth many conditions for their use.

TENNESSEE LAW REVIEW

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OUR UNCOMMON COMMON LAW*

HARRY W. JONES**

I. INTRODUCTION

What is the "common law"? What meanings would the term call up if I asked you now to define it? Perhaps you encountered it in stages, as I did. When I was fourteen or so, it had for me a spicy and somewhat disreputable connotation, common law as in "common-law marriage."[1] Missouri newspapers were always reporting that someone was suing her common-law husband for child support, or was suspected of having murdered his common-law wife. "Common law," I concluded, had something to do with what used to be called living in sin. I came across the term next in a freshman history course: England, I learned, was a common-law country, and France was not. My first impression was at once corrected. If common law meant living in sin, it would hardly appeal to proper Englishmen more than to the dashing citizens of France.

By the time I had finished law school, my idea of the common law was less hazy, though still not good enough. I had learned to distinguish common law from legislation, common law meaning

* Presented as the Alumni Distinguished Lecture in Jurisprudence at the University of Tennessee College of Law, April 2, 1975.

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1. Although common-law marriages are no longer recognized in most states of the United States, newspapers like the *New York Times* regularly employ the terms "common-law husband" and "common-law wife" as a tactful, if legally inexact, way of describing the status of persons who are living together, on a more or less continuing basis, without benefit of marriage license or authorized ceremony. There are still some states, however, in which a man and woman who have lived together publicly in a husband-wife relation may be held to have entered into a legally effective common-law marriage, even though the formalities set out in the state's marriage statutes were never complied with. *See* M. PAULSEN, W. WADLINGTON & J. GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 85-104 (2d ed. 1974). "Common-law marriage" is essentially a misnomer in any event; until relatively modern times the question whether a valid marriage had been contracted between the parties was determined in England not by a common-law court but by an ecclesiastical court.

the aggregate of the legal rules set out in judicial opinions, legislation meaning the rules enacted by legislatures. This, I have come to know since, is only a piece of the truth. The common law is not merely, or even essentially, a body of rules of more or less ancient judicial origin. It must be thought of also as a mode of reasoning, a way of using legal sources to analyze problems and to reach and justify decisions in disputed cases.[2] The common law, we might say, is both product and process, the rules courts have laid down in past decisions and the ways in which courts draw on this past recorded experience as a source of guidance for future action. The precedents, the rules and concepts embodied in them, the traditional techniques governing the use of precedents in the analysis and disposition of new problems, these, in sum, constitute the common law.

If that is the common law, what, you may ask, is so *uncommon* about it? I suggest that it is uncommon, first, in the remarkable continuity of its method or, to put it more exactly, its style. It is difficult to trace the line of descent in English poetry from, say, Spenser's *Faerie Queene* to Auden or Wallace Stevens, or even to Eliot or Yeats. But you can trace that line without much strain from the great common-law lawyer, Sir Edward Coke,[3] who was probably born the same year as Edmund Spenser, to an English or American judge of today. Spelling, rhetoric and substantive legal rules have changed since the reign of James I, but in mode of thought and argument Coke might be a judge, a gifted and somewhat cantankerous one, of the Supreme Court of the United States or the Supreme Court of Tennessee.

The common law, we are bound to conclude, is the most durable cultural form in Anglo-American history. How else could it have survived five centuries of turbulent English political con-

2. R. POUND, THE SPIRIT OF THE COMMON LAW 1 (1963). K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960) is a classic of American jurisprudential scholarship and indispensable reading for any serious student of common-law decisional styles.

3. Coke, 1552-1634, was elected to Parliament early in his career and became Speaker of the House of Commons. In 1593, Elizabeth I appointed him Attorney General, choosing him over his arch rival, Francis Bacon, the later (and discredited) Lord Chancellor. Coke was Chief Justice of the Court of Common Pleas from 1606 to 1616, when he was dismissed by James I largely because of Coke's assertions of the supremacy of the common law over the royal prerogative. The great legal historian, Sir William Holdsworth, wrote of Coke that "[h]e did more than any other single man to shape the professional tradition of the common law . . . ." W. HOLDSWORTH, THE HISTORIANS OF ANGLO-AMERICAN LAW 14 (1928).

flict and transplantation then from Stuart England to Virginia, Massachusetts Bay and the other colonies of British North America? Even the political separation wrought by the American Revolution did not interrupt the continuity of the common-law tradition. We denounced the English sovereign, tarred and feathered English tax collectors, and cried a sturdy colonial pox on English manners and nobilities, but we received the English common law.

This common law of ours is uncommon, second, in its takeover propensity, the way its essential methods have been extended to, and come to dominate, new areas of legal and political action. Thus, for example, the old common-law courts had an historic rival, the English courts of Chancery or equity. Roman law and canon law were the sources of early equity jurisprudence; the first Lord Chancellors were churchmen unfamiliar with, even disdainful towards, common-law habits of thought. Yet well before the time of Lord Eldon,[4] the courts of Chancery, though using different substantive concepts, were employing them in an essentially common-law way, with references to precedent, the distinction of cases on their facts, and many other elements of common-law decisional style.

Similarly, common-law modes of analysis and argument were carried over, their appropriateness taken for granted, when the courts of the United States had to undertake an unprecedented task, the authoritative interpretation of written constitutions. Marshall and Story, the great early Justices of the Supreme Court of the United States, were steeped in the common-law tradition. They brought that tradition to bear in interpreting the Constitution of the United States, as I shall describe later on. No one unfamiliar with the common-law judicial process has ever really understood the dynamics of American constitutional law.

The common law is uncommon, third, in the remarkable richness of the cultural marks it has left in the path of its development. A few great authors, among them Chaucer[5] and

4. Eldon, 1751-1838, became Lord Chancellor in 1801. His opinions exhibit the extent to which judicial styles in the Court of Chancery had changed since the days when early chancellors considered themselves under no obligation to follow precedent. "The doctrines of this Court [of Chancery] ought to be as well settled and made as uniform almost as those of the common law . . . . I cannot agree that the doctrines of this court are to be changed with every succeeding judge." Gee v. Pritchard, 36 Eng. Rep. 670, 674 (Ch. 1818).

5. Chaucer's sketch of the "Sergeant of Lawe" furnishes a unique glimpse at the

Dickens,[6] have mined this lode of recorded social experience, but it has not yet been fully seen as the source it could be for historians, social scientists, and philosophers, even students of language or literature. Are you an historian interested in how people lived and what they owned and what they feared or aspired to in the England of Edward III or Henry IV? Where but in the Year Books[7] of the common law is a record to be found of the claims people made in those days and the reception their claims received from public authority? Are you a philosopher studying the modes and fashions of practical reasoning in medieval or Renaissance times? Is there data more accessible to study, and more worthy of it, than the written summaries of how judges and lawyers reasoned and argued and justified their decisions in the reign of Henry VII or of Elizabeth I? My point applies equally well to American studies and sources. If someone were writing an economic or social history of Tennessee from 1796, when it became a state, to 1824, could he do better than begin his research with a careful reading of the first seven volumes of the Tennessee Reports?[8]

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conditions of law practice in medieval England. G. CHAUCER, *Prologue*, CANTERBURY TALES 157, ll. 309-30 (J. Manley ed. 1928). The Sergeant, a pillar of the late fourteenth-century law establishment, often sat as a justice at the assize and was a resourceful practitioner who knew well how to bar an entail ("Al was fee symple to hym in effect"), was a precise draftsman ("Ther koude no wight pynchen at his writyng") and had an encyclopedic knowledge of legal sources ("every statut koude he pleyn by rote"). *Id.* at ll. 319, 326, 327. In manner, too, the Sergeant might be senior partner of a major Wall Street law firm:

> Nowher so bisy a man as he ther nas;
> And yet he semed bisier than he was.

Id. at ll. 321-22.

6. *See* C. DICKENS, BLEAK HOUSE (1853); W. HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN (1928).

7. This series of old English court reports begins in 1282, or perhaps a few years later, and ends in 1537. They were probably not official reports but, in their inception at least, seem to have been written and compiled by lawyers and law students for educational or reference purposes.

> From the reign of Edward I to the reign of Richard III they [Year Books] stretch in a series which is almost continuous. . . . During the terms and years of these centuries they give us an account of the doings of the king's courts which are either compiled by eye-witnesses or from the narratives of eye-witnesses. . . . No other nation has any historical material in any way like them.

Holdsworth, *The Year Books*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 96 (1908).

8. These reports cover the period from 1791 through 1824. Like many other early court reports, they are also known by the names of their reporters: Overton (1 Tenn. to 2 Tenn.), Cooke (3 Tenn.), Haywood (4 Tenn. to 6 Tenn.), and Peck (7 Tenn.).

Think what the discerning eye might see there: crimes and punishments as they were then, disputes over farms and elections and business deals, quarrels about inheritance and family affairs, concern about banks and mortgages and streams and the hazards of early nineteenth-century transportation.

The documented story of the common law, embodied in court records and reported judicial decisions, is a storehouse of recorded social experience. To keep this treasury for lawyers only is like restricting the Louvre to professional painters and sculptors or limiting access to the Aquarium to card-carrying ichthyologists and fishmongers. Yet a man or woman can graduate from any great university in this country without ever having gathered the slightest idea as to what the common law is or how it came about. Today's liberal arts curriculum finds time for all sorts of societal byways and ephemera but not for this enduring phenomenon of our culture. I cannot make common-law lawyers of you in one easy lesson, but I will do my best to give you a key, at least a clue, to the common-law treasury.

II. Civil Law and Common Law

The story of law in the Western World is a tale of two cities, Rome, where the continental European legal tradition had its rise, and London, to which our own legal system traces its pedigree. The nations of Europe and the Americas, and such Asian and African nations as have followed European legal patterns,[9] are divided into two great law families: the civil-law countries and the common-law countries.[10] A civil-law country is one whose legal system reflects, however remotely, the structural concepts, principles and decisional methods of classical Roman law, the law of the Roman Empire as compiled and promulgated at Constantinople in the sixth century as the *Corpus Juris Civilis* of the Em-

9. Turkey, for example, is a member of the civil-law family, as is Japan, both having employed European models of law codification. India is in the common-law camp; in the twenty-eight years since independence, there have been strikingly few legislative innovations in Indian private law.

10. Comparativists differ as to how Sweden, Norway and Denmark are to be classified. Scandinavian legal systems display some civil-law attributes and some common-law attributes. I have found over the years that Scandinavian legal scholars and graduate law students catch on at once to common-law ways and work easily and effectively with Anglo-American case-law materials, and this persuades me that the Scandinavian legal tradition has greater affinities with common-law than with civil-law method.

peror Justinian.[11] This is not to suggest for a moment that present-day French, German or Dutch law corresponds on all or most substantive law points with what the Roman law was in the time of Justinian, or even of Hadrian. For complex historical reasons, Roman law was received differently and at vastly different times in various regions of Europe, and in the nineteenth century each European country made a new start and adopted its own set of national private-law codes, for which the *Code Napoleon* of 1804 was the prototype. But the new national codes drew largely on Roman law in conceptual structure and substantive content and, far more importantly, had the effect of preserving and even strengthening the ingrained attitudes and habits of thought that characterize civil-law method.

A lawyer, judge or legal scholar schooled in the civil-law tradition approaches legal problems and legal sources with certain philosophical presuppositions quite different from those of the common-law lawyer. We must be wary about exaggerating these differences,[12] but they make the civil-law and common-law traditions as distinguishable as, say, the tradition of French poetry is from English, or Gothic architecture from the style of Romanesque. Thus, for example, in the civil-law universe of discourse, nothing is *law*, in the full sense, that has not been written down in exclusive textual form and enacted by the state's sovereign power. In civil-law countries, the codes in which private law is cast are formulated in broad general terms and are thought of as completely comprehensive, that is, as the all-inclusive source of authority to which every disputed case must be referred for decision. The civil-law lawyer or judge, faced with a particular problem or controversy, must locate his answer somewhere within the four corners of the authoritative code. Learned commentary on the code may help him discover the code's true meaning for the case at hand, but his decision must ultimately be justified, at least in form, by deduction from some principle in the code itself—and most certainly not by reliance on the authority of past

11. Although the *Corpus Juris* was compiled and promulgated in sixth-century Constantinople, its massive *Digest* of juristic law embodies concepts and principles that had reached full development centuries earlier at Rome in the classical period of Roman law. The *Digest* is chiefly taken from the works of four jurists, Papinian, Ulpian, Paulus and Gaius, no one of whom was living as late as 230 A.D.

12. *See* W. FRIEDMANN, LEGAL THEORY 515-55 (5th ed. 1967) for a masterful discussion of Anglo-American and continental approaches to law.

judicial decisions.[13]

The common-law lawyer works in quite another *metier* and brings different jurisprudential presuppositions to his tasks. Although a great deal of contemporary American and English law is legislative in origin, the law inferred from judicial precedents is fully as important with us as the law set down by statutory enactments. We have approached codification in certain selected areas of our law—the Judicial Code of the United States, for example, or the Uniform Commercial Code—but our codes are not the all-inclusive, systematic statements found in civil-law countries. In any event, our modes of thought are less deductive, far less confident that the final answer to every contemporary problem can be found within the confines of any enactment, however comprehensive. An eminent Italian jurist, impatient with my incorrigibly common-law habits of reasoning, once put the difference to me in these terms:

> Give the same problem to a civil lawyer and a common lawyer. What do we do? We find the governing principle in the text of the code. What do you do? You look for a *case*. We reason from principle. You stumble along by analogy. I wonder how you ever get anything decided at all.

My friend's charge is overstated, but he is quite right in a way. We common-law lawyers—and most of us become incurably common-law minded about midway in the first semester of law school—do exhibit a Pavlovian stimulus and response effect: give us a problem, we try to think of a case, a judicial precedent, and if we cannot think of one, we go off to the library and start looking for it. We are uneasy with doctrinal generalizations, more comfortable with the facts of cases than with general concepts, and we never feel quite secure about our professional predictions until we have located a "case in point," that is, a past court adjudication in a controversy that was factually like, or something like, the problem now presented to us. Sensitivity to the factual similarities, and dissimilarities, in cases is, I suppose, the most striking characteristic of the common-law mind. How did this come to be?

13. *See generally* A. GOODHART, PRECEDENT IN ENGLISH AND CONTINENTAL LAW (1934). There is an admirable collection of materials in R. SCHLESINGER, *The Force of Precedent in a Code System*, in COMPARATIVE LAW 410-47 (3d ed. 1970).

III. The Origins and Development of the Common Law

Law, like any other cultural form, is a product of its history, and the story of the common law has to begin in London, and specifically with the royal courts at Westminster. In the pre-Conquest England of Edward the Confessor and Harold Godwin, there was no centralized judicial system and no law of nationwide application. A very few great nobles might have access to the King and his council, the Anglo-Saxon Witan, but claims and disputes involving lesser people were decided in local tribunals and in accordance with traditional *customary* law, which might differ greatly from locality to locality. This crazyquilt of decentralized judicial administration was doomed after 1066. From the time of the Norman Conquest, and particularly from the reign of Henry II, the steady development in England was one of increasing dominance of the royal courts of justice over the local, customary-law courts.

This movement towards a national court system was largely a function of the consolidation of nationwide royal power, a centralization accomplished centuries earlier in England than anywhere on the continent of Europe. The Norman-English barons, who had taken over the regional powers of the displaced Anglo-Saxon nobility, contested this consolidation of royal control step by step, but unavailingly. Ordinary people in the Middle Ages had more reason to fear the capricious lawlessness of their local lords than the tyrannical designs of a national monarch and so usually welcomed the continuing expansion of royal power and of royal court jurisdiction. It was better, by and large, to have one's claims and grievances heard by the King's judges than to take one's chances in local tribunals, where raw power and intimidation might control the outcome. And so, in time, three royal courts—the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer—came to have effective jurisdiction over almost all the important legal controversies that were likely to arise in medieval England.[14]

With the widening jurisdiction of the three royal courts, the older, local courts diminished in importance. But they were not

14. *See* A. Scott & S. Simpson, Cases on Judicial Remedies ch. II (1938) (reprinted in abridged form and with additional notes in N. Dowling, E. Patterson & R. Powell, Materials for Legal Method 36-44 (2d ed. H. Jones 1952)).

wholly superseded. There were still manor courts, county courts and the like, in which local customary law, the law of the neighborhood, was applied for the settlement of disputes as it had always been. Have you perhaps been using the term "common law"—as I did for years—without ever asking yourself how our case law came to be known by that designation? It is and always has been a highly professionalized body of doctrines and techniques; why, then, call it "common"? Here is the explanation. The rise of the royal courts in England brought about a division of jurisdiction somewhat comparable to the division of jurisdiction between the federal courts and the state courts in the United States. The English legal system, at the time we are talking about, was increasingly centralized but still partly local. In this situation, the law applied in the courts of King's Bench, Common Pleas and Exchequer came to be known as the "common law," meaning the law that was administered by the King's judges and was, accordingly, *common* to all the realm of England, as contrasted to the customary law of the local courts, which was likely to be quite different from county to county and court to court.

Roman law had not been received in England as in the regions of continental Europe where the Roman Empire had held on far longer. The first common-law judges had the task of hunching-out decisions that would not outrage surviving recollections of how things had been done in England before the Conquest and yet would be suitable for Norman-English society and social organization. With experience and royal support, the judges of the common law gained competence in dispute-settling and labored to make their rulings more evenhanded and rational. An accumulation of ad hoc judgments became, in time, a body of law, something resembling a system of legal doctrine. Thus it was that judge-made law, the regular practice of the King's judges, achieved its status as the principal source of guidance in the by now largely centralized English judicial system.[15]

This centralization of judicial power in the royal courts of England caused, or was accompanied by, the emergence of a distinct legal profession consisting of the royal justices and the advocates who practiced regularly before them. Judicial decisions were not officially or regularly published in early common-law

15. E. JENKS, THE BOOK OF ENGLISH LAW 23-29 (6th ed. 1967).

days; indeed, court reports of even minimum reliability were not available until the sixteenth century.[16] But judges, like other men and women, strive to be or appear to be consistent in what they say and do. The judges of the royal courts, few in number and close-knit in working relations, possessed of their own knowledge a pretty good idea of what they, their colleagues and their predecessors had ruled in past cases. If the recollections of the judges failed, their professional brethren, the advocates, would be ready with a reminder of what the past rulings had been.[17] So, long before the era of reliable court reporting, a rudimentary system of arguing from precedent—and of justifying decisions by reference to precedent—had come to characterize adjudication in the courts of King's Bench, Common Pleas and Exchequer.

As court reporting improved, slowly and unevenly but perceptibly, arguments based on judicial precedent became increasingly persuasive in the royal courts. By the time of Sir Edward Coke, who was Chief Justice of Common Pleas, in the reign of James I, the institution of precedent existed in England in much like its present form.[18] By the time of the American Revolution, a century and a half later, the principle of stare decisis—that past decisions are generally binding for the disposition of factually similar present controversies—was firmly established as a basic policy of English law. Indeed, by this time, the policy of stare decisis had come to be so rigidly applied as to deprive the common law of much of the flexibility and empirical spirit that had been the great sources of its strength during the centuries of its development. The hold of the past was, as it had to be, relaxed by later courts in England and the United States.

IV. The Reception of the Common Law in the United States

We move now, as succinctly as is manageable, to the story of the common law in the states of the United States. Much as

16. Veeder, *The English Reports, 1292-1865*, 15 Harv. L. Rev. 1-25, 109-17 (1901).

17. Chaucer's "Sergeant of the Lawe" had a total recall like the late Roscoe Pound's and could on demand cite all the cases and judgments "from the tyme of King William." G. Chaucer, *Prologue*, Canterbury Tales 157, l. 324 (J. Manley ed. 1928). One gets the impression that the Sergeant would not have been hesitant about refreshing any faulty judicial recollection of long-past cases in point.

18. "I think it is correct to say that ever since the time of Lord Coke, if not before, a precedent has had an authority unknown to any system based on Roman law." A. Goodhart, Precedent in English and Continental Law 53 (1934).

the countries of Europe received the Roman law, the British North American colonies received the common law of England. English settlers in Virginia, Pennsylvania, Massachusetts Bay and the other colonies thought of themselves, originally, as transplanted British subjects and, in a sense, brought the British constitution and the English common law along with them to the New World. English precedents were not always followed in colonial judicial decisions, since—as General Braddock never learned—English rules often required modification in American conditions, but common-law modes of reasoning from precedent seemed as natural to American lawyers as to their cousins of the English bar. Colonial practicing lawyers like John Adams in Massachusetts, George Wythe in Virginia and John Rutledge in South Carolina were common-law lawyers through and through. Many eminent men in the colonies had, in fact, learned their law at the Inns of Court in London,[19] and practically every colonial lawyer read Sir William Blackstone's *Commentaries on the Laws of England*[20] as soon as copies became available on this side of the Atlantic.

As the Revolution came on, the lawyers among the American patriots came to consider themselves as truer custodians of the common-law tradition than were the Englishmen of their time. So, after a brief period in which everything English was out of fashion in the newly independent United States, most of the American states put provisions in their constitutions or state statute books to the effect that the common law of England, as of some stated date, was to be the rule of decision in the state courts until altered or repealed by the state legislature.[21] States subse-

19. Five of the fifty-six signers of the Declaration of Independence were law-trained men who had studied at the Inns of Court.

20. The first volume of the *Commentaries* was published in 1765, at precisely the right time to have profound influence on American law.

> In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law. . . . In view of the scarcity of lawbooks during the earliest years of the Republic, and the limitations of life on the frontier, it is not surprising that Blackstone's convenient work became the bible of American lawyers.

D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3-4 (1941).

21. The pattern was probably set by a Virginia ordinance adopted just as the American Revolution got under way: "The common law of England . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony." Ordinances of Virginia Convention, May 1776, ch. V, 9

quently admitted to the Union followed the example of the original thirteen, and, even in the states where no specific reception clause was ever enacted, the common law was received by rule of court or simple judicial declaration.[22]

There were, to be sure, certain limits on this decreed reception in America of the English common law. Reception was always made subject to a cutoff date, such as the commencement of the American Revolution. Doctrines and precedents handed down by the English courts after that date were never authoritative, therefore, as sources of American law. And it is always declared in the reception statutes, or stated by way of judicial interpretation of them, that English decisions are received only insofar as suitable to local conditions in the American state concerned.[23] American case law, even in the first decades of the nineteenth century, was not a carbon copy of the results English courts had reached in factually similar cases. The important thing, however, is that the methods of the common law, and specifically the institution of precedent, were retained and naturalized as American.[24] American state courts were free to build, and in the formative period of American law did build, a distinctively American private-law structure. But they erected that structure with the building blocks and in the decisional style of the English common law.

V. The Uses of Precedent in Common-Law Reasoning

Painters work with pigments, brushes, canvas and fixatives, lawyers with concepts, rules, precedents and statutes. An analytical chemist can give us a good account of the pigments and other materials that were available to artists in sixteenth-century Florence, but that will not catch the essence of Renaissance painting. A legal antiquarian, similarly, might spend his lifetime compiling

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Hening's Statutes at Large 127 (reprinted in J. Goebel, Cases and Materials on the Development of Legal Institutions 298-99 (1946)).

22. *E.g.*, Fitch v. Brainerd, 2 Conn. 163 (1805); First Nat'l Bank v. Kinner, 1 Utah 100 (1873); *see* J. Goebel, Cases and Materials on the Development of Legal Institutions 298-327 (1946).

23. R. Pound, The Formative Era of American Law 96-97 (1938).

24. There is one exception to these generalizations concerning the reception of the common law in the states of the United States. The region now comprising the State of Louisiana had received civil-law institutions before it was acquired from France by the Louisiana Purchase of 1803, and Louisiana, by its continuing legal tradition, is a civil-law, not a common-law, jurisdiction.

an inventory of the specific rules of law recognized by English common-law courts in 1650 or by the courts of an American state in 1820. His inventory would not tell us much about the realities of the judicial process in England or America, even as of 1650 or 1820. The particular sources with which judges and lawyers work are less important than the norms that govern or affect the *use* of these sources for professional counseling, advocacy and decision. That is why I urged you to think of the American reception of the common law not as the borrowing and adoption of a more or less finished body of English-made legal doctrine but as the inheritance of a decisional style, a way of thinking about law—and particularly of that distinctive common-law institution, the principle or policy of stare decisis.

Stare decisis, the rule of precedent, is not a single doctrine but a cluster of doctrines, an aggregate of norms that govern, or are supposed to govern, the authority and persuasiveness of past judicial decisions for present disputed cases. If I should leave you with the impression that common-law decision by reference to precedent is simply a way of staying put, of courts doing over and over again whatever they and other courts have done before, it would be better that you had not read this lecture. You have, by now, a very general idea of what the principle of stare decisis is; let us try to sharpen that general idea by considering what it is *not*.

To begin with, a past judicial decision is a *precedent*, in the full common-law sense, only for courts in the same jurisdiction or judicial system. A Tennessee decision is not a precedent for the courts of New York; a New York decision is not a precedent, but mere *persuasive authority*, in the courts of Tennessee. Even within the same state or court system, a decision is an authoritative precedent only for the court that handed it down and other courts lower in the judicial hierarchy. A decision of the Supreme Court of Tennessee is fully authoritative for all lower Tennessee courts and generally binding, as lawyers say, as a precedent in later cases before the Supreme Court of Tennessee itself, but a decision of a Tennessee circuit court, or of this state's court of appeals, is not a precedent in the Supreme Court of Tennessee. In the federal court system, a Supreme Court decision is a precedent for later Supreme Court cases—and a fortiori for cases in the lower federal courts—but a decision of a federal trial court, a United States district court, is, at most, a precedent in the

particular federal district court that handed it down.

We move now to certain more sophisticated qualifications on the principle of stare decisis. It is the appellate court's decision that is the precedent, not what the court says in the judicial opinion justifying that decision. A past judicial decision is generally binding in future cases involving the same *material facts*, and in such cases only. If a later controversy involves what the court considers materially different facts from those involved in the past case, the earlier adjudication is not controlling; the new case, the court will say, is "distinguishable on its facts." And if the published judicial opinion in the earlier case contains language that was not necessary to the decision of the factual controversy then before the court, that language is not authoritative in a stare decisis sense; it is a mere dictum, something said by the way, and can, if the court now chooses, be disregarded.[25] Political scientists are sometimes infuriated when the United States Supreme Court decides a present-day case in a way that seems quite inconsistent with what some prior Supreme Court opinion had said about the problem now at hand. But if that pronouncement in the prior opinion was not necessary to the decision of the case then before the Court, it could not have been any part of the authoritative *holding* of the prior decision and in common-law theory was not—and should never have been regarded as—anything more than dictum.

Perhaps you begin to see, now, why it is impossible to appraise the importance, as precedent, of a decision of the United States Supreme Court, or of any other court, unless you know the full *material facts* of the specific controversy that occasioned the decision. Judicial opinions in constitutional cases are not abstract essays on political theory, and they are not to be read as if they were. They, like all other judicial opinions, are explanations and justifications of decisions reached in concrete cases. A court in no

25. The best known American statement of the holding-dictum distinction is that of Chief Justice John Marshall:

> The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court in the case of Marbury v. Madison.
>
> It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 82, 97 (1821). *See also* N. DOWLING, E. PATTERSON & R. POWELL, MATERIALS FOR LEGAL METHOD 142-62 (2d ed. H. Jones 1952).

way violates common-law proprieties when it puts aside its own past rulings as factually distinguishable from the case now presented. Nor does a court offend against traditional common-law etiquette when it discounts broad statements in its own past opinions as unnecessary in the case in which they were made and hence not authoritative now. A Supreme Court opinion, any judicial opinion, must be read against the background of the facts of the case then before the court. How else can one separate the wheat of authoritative precedent from the chaff of dictum?

The common-law institution of precedent, I said before, is not a single doctrine but a cluster of doctrines. One more item has to be added to complete the cluster. Perhaps you noticed that I have been using a weasel word in discussing the principle of stare decisis; precedents, I have been saying, are *generally* binding, which is an imprecise but unavoidable way of saying that a common-law court will follow precedent almost all the time, and except when it is persuaded, in unusual and quite undefinable circumstances, that it should *overrule* the precedent and state a new rule for the future. There was a time in England when precedents were taken to be absolutely binding, as distinguished from *generally* binding, but that rigid conception never caught on in American courts and is now on the way out in England, too.[26] How often, then, will a state supreme court overrule clear precedent? The best I can do is take my answer from Gilbert and Sullivan: "Hardly ever."[27]

Courts, by and large, hate to overrule. They prefer, if they can, to put inconvenient old rulings aside as factually distinguishable. But if today's case is not honestly distinguishable from the decision of ten years ago, a contemporary court, if convinced that the old case-law rule is disadvantageous as law for today,

26. During most of the nineteenth century and until 1966, the highest court in England, the Judicial Committee of the House of Lords, considered itself absolutely bound by its own precedents. In 1966, however, the Lord Chancellor announced that he and the other Lords of Appeal "propose to modify their present practice and, while treating former decisions of this House [court] as normally binding, to depart from a previous decision when it appears right to do so." Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234. This change appears to give precedent substantially the same status in the House of Lords as it has in American courts of last resort, including the Supreme Court of the United States.

27. "What, never?"
"Hardly ever!"
H.M.S. PINAFORE, act I, in THE OPERAS OF GILBERT AND SULLIVAN 64 (P. Fitzgerald ed. 1894).

feels somewhat freer to overrule precedent than courts would have felt themselves fifty, even twenty-five, years ago. Precedent maintains much of its old force; the burden of persuasion is still heavily on the party who wants the court to overrule precedent and break a new path. But the possibility of an overruling is always there and is not to be forgotten as an element in the precedent cluster. Stare decisis, in short, is not simple imitation of the past. Courts have great discretion in their use of precedent, frequent occasions for policy judgment. If a court's past decisions seem at first impression to point to an unsound or unjust result in today's case, there are traditional ways and means—factual distinguishing, the paring down of past dicta, even, as a last resort, outright overruling—to clear the way for a new and better rule.

Have the last few paragraphs been heavy going? Perhaps we need a case for review. Let us take a justly famous one. Do you remember Portia's lines in *The Merchant of Venice*:

> There is no power in Venice
> Can alter a decree established
> 'Twill be recorded for a precedent,
> And many an error, by the same example
> Will rush into the state.[28]

Literary hobbyists are fond of citing this passage as evidence that Shakespeare, or whoever wrote the plays attributed to Shakespeare, must have been a lawyer. To me they prove quite the contrary. If the author of *The Merchant of Venice* was a lawyer, he must have been a mighty poor one, and not only because he was unaware that Venice was a civil-law jurisdiction where, Roman law having been received, the institution of precedent would have been anathema.

Even if we move Venice to Elizabethan England and qualify the Duke's court of justice as a common-law tribunal, Portia's conception of the doctrine of precedent is so out of kilter as to confirm the prejudices against women lawyers that are held by the worst of male chauvinist pigs. If the case of *Shylock v. Antonio* is decided for the defendant, Antonio, as Portia's admonition postulates, what errors are certain to "rush into the state"?

28. Act IV, scene 1, in 1 THE LONDON SHAKESPEARE 487, ll. 214-18 (J. Munro ed. 1957).

It is a precedent, yes, but for what? Not for the impairment of contracts generally; the most dull-witted of common-law judges would see at once that pound of flesh cases are distinguishable on their facts from cases involving the enforcement of loans made on other security.

A decision for the defendant in *Shylock v. Antonio* would, to be sure, be a precedent barring the specific enforcement of pound of flesh bargains in the courts of Venice. But what is so erroneous about that? And in the unlikely event that the Duke and his judicial colleagues want profoundly, some day in the future, to have pound of flesh contracts carried out against defendants who really deserve that fate—against producers of television commercials, perhaps, or manufacturers of snowmobiles—they could as a last resort overrule *Shylock v. Antonio* as out of touch with contemporary social needs and establish a new rule appropriate to the occasion. Shakespeare a lawyer? He, and Portia, did not have the least understanding of the cluster of norms that together make up the common-law institution of precedent.

VI. The Persistence of Common-Law Ways

It has always seemed to me a paradox that the common-law tradition, with its spotlight on judges and what they do, originated in England, which is also the birthplace of the political doctrine of legislative supremacy. In a political order in which the legislature is supreme, judge-made law exists at the mercy of the legislature. An act of Parliament can substitute a new rule for any common-law doctrine, can, in its effect for the future, overrule the most firmly established of judicial precedent. Subject only to constitutional limitations, Congress and the American state legislatures have the same overriding power. And legislative innovations, even in private-law fields like contracts, property and torts, are far more frequent than they were a century or half-century ago. Contemporary American law is a mixture composed partly of judge-made rules and partly, at least equally, of rules that had their origin in legislative enactments. Statutes figure in the decisions of American state courts fully as often as, probably more often than, case-law rules, and federal law is wholly legislative in origin, or virtually so. What are the prospects for common-law ways of thought in this era of legislation?

Part of the answer lies in the fact that no common-law coun-

try, no American state,[29] has ever fully codified its law in the manner of the *Code Napoleon* and the later civil-law codes of continental Europe.[30] Legislative interventions like those creating workmen's compensation and no-fault reparation for automobile accidents have greatly changed, even reversed, longstanding case-law policies, and American business law has been ordered and brought together in the Uniform Commercial Code. But this, by comparison with civil-law codification, is piecemeal change, though sometimes a big piece at a time. Many areas of law are left untouched by legislation, and gaps are left that have to be filled by the use of case-law principles and traditional common-law methods.

Even more important, the principle of stare decisis, the institution of precedent, applies as fully to judicial decisions interpreting statutes as to judicial decisions on questions of pure case law. When a statute is new and before a court for the first time, the court's attention is addressed exclusively or largely to the text of the statute and to the purposes the legislature sought to accomplish by enacting it. But the older the statute gets, the more it is likely to become encrusted with authoritative interpretations, with precedents which are, as we have learned, generally binding in later cases involving the same statutory provision and the same material facts.

Many old acts of Parliament—the thirteenth-century statute of Quia Emptores, for example, or the Statute of Frauds of 1677—became so interwoven with the body of English case law as to be inextricable from it and so were received in the United States as having become part of the common law. The Sherman Antitrust Act, enacted by Congress in 1890, has been before the courts so often that judicial exegesis has quite overwhelmed the legislative text. The argument and decision of a present-day antitrust case is characterized by finespun distinction of cases and

29. Louisiana is again excepted as an historically special case. *See* note 24 *supra*.

30. A sustained movement for law codification occurred in the United States in the middle years of the nineteenth century under the leadership of David Dudley Field, the "American Bentham." Some successes were achieved—for example, adoption of codes of civil procedure in many states and enactment of the Field Civil Code in California and four other states—but the force of the codification movement was largely spent by 1900, and the civil codes, in California and elsewhere, count for less than judicial precedents in present-day litigation. On the codification movement generally, see THE LIFE OF THE LAW 100-43 (J. Honnold ed. 1964).

subtle analysis of concepts developed by the courts in past interpretations of the Sherman Act. One almost forgets as he reads the Supreme Court opinions—there are usually several—in an antitrust case that there is a statute down there somewhere at the bottom of this edifice of case-law doctrine.

If it is true that, as an enactment gets older, judicial precedents and common-law techniques tend to take over and control the enactment's original text, we would expect to find our most striking illustration in that greatest and most often litigated of American enactments, the Constitution of the United States. And so we do. The text of the Constitution covers about eight and one-half pages, fifteen pages with its twenty-six amendments. The most widely used law school coursebook on constitutional law[31] runs to 1,462 pages, consisting almost entirely of closely edited Supreme Court decisions and the writer's scholarly comments on those decisions. The rhetoric of contemporary constitutional litigation has its origin far more often in Supreme Court opinions than in the text of the Constitution itself; terms of art like "one-person, one-vote" in legislative districting cases, "suspect classification" in equal protection cases, and "fruit of the poisonous tree" in cases involving the admissibility in criminal prosecutions of evidence uncovered through constitutionally forbidden searches and seizures, are judicial refinements, glosses if you will, on the lean constitutional text. Thus the first amendment speaks only of "an establishment of religion" and the "free exercise thereof"; the more familiar "wall between church and state" was erected, at least given its authoritative formulation, in a 1947 decision of the Supreme Court.[32] There are subtleties about constitutional rhetoric that cannot be understood without long and painstaking study. My present point is simply this: James Madison and his colleagues might well approve what suc-

31. G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW (8th ed. 1970).

32. Everson v. Board of Educ., 330 U.S. 1, 16, 18 (1947). I once took an informal poll of nine quite eminent clergymen and educators interested in church-state matters. Six of them thought that "wall of separation between church and state" was a precise quotation from the text of the first amendment. Actually, the "wall of separation" phrase is from a letter written by Jefferson to the Danbury Baptist Association dated January 1, 1802, which, it will be noted, is eleven years *after* ratification of the first amendment. The Jefferson letter had been quoted once before in a Supreme Court opinion, Reynolds v. United States, 98 U.S. 145, 164 (1878), but without stress on the "wall" metaphor. Hutchins, *The Future of the Wall*, in THE WALL BETWEEN CHURCH AND STATE (Oaks ed. 1963).

cessive Supreme Courts have done with their concise constitutional text in the 188 years since the Philadelphia Convention—I see no reason to believe that they would not approve—but they would have to read a constitutional law *casebook* before they could even begin to follow the course of argument in a present-day constitutional case.

Constitutional adjudication in the United States exhibits every phenomenon of common-law method: the factual distinguishing and reconciliation of cases, the discounting of past overbroad statements as mere dicta,[33] and all the other elements that, taken together, constitute the common-law institution of precedent. To be sure, we have the warning of Justice Brandeis that stare decisis is "not a universal, inexorable command"[34] in constitutional cases, and the Supreme Court, particularly in this century, has not hesitated to overrule constitutional precedents that the Justices, or a majority of them, consider outmoded or socially unsound.[35] But, as we have seen, stare decisis is not, and in the United States never has been, a rule of absolute obligation. Precedents are but *generally* binding, even in private-law cases, and the reservation of an undefined power to overrule is an integral part of the common-law precedent cluster.

The circumstance that the incidence of explicit overruling is higher in constitutional cases than in other cases does not make constitutional adjudication any less a precedent system. What counts is that judicial precedents—and the matching, analysis and distinguishing away of precedents—are as central in the universe of constitutional law as anywhere else in the American legal order. The constitutional text does no more, perhaps can do no more, than fix the outer bounds on Supreme Court interpretation and reinterpretation of the Constitution. In constitutional cases as in other cases, precedents guide and structure judicial decisions but do not control them.[36] The institution of precedent,

33. [W]hen, finally, a constitutional decision is rendered, not the language in explanation of it but the terms of the controversy which called it forth, alone determine the extent of its sway. This is merely the common-law lawyer's general disrespect for dicta; but in constitutional adjudications dicta are peculiarly pernicious usurpers.

Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 85 (1931).

34. Washington v. Dawson & Co., 264 U.S. 219, 238 (1924) (dissent).

35. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).

36. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1039-41 (1974).

properly understood, is more than the remembrance of things past; it permits and sets the ground rules for responsible legal change through the agency of the courts. So do not mourn for the common-law tradition. It is alive and well and living, among other places, in American constitutional law.

Eight Minutes of Reading on Eight Hundred Years of Procedure to Help You Understand the Next Eight Months[1]

This handout, elaborating on the discussion at the beginning of Chapter 6 of the casebook, discusses certain procedural rules as they existed at common law,[2] and is designed to give you a framework that may be helpful as you attempt to dissect the positions taken by the parties to the cases you will be reading.

I. The Pleadings

The written statements of claims and defenses filed by parties are known as "pleadings." Common examples are complaints and answers. (See FRCP 7(a)). We will discuss the modern rules of pleading later in the course.

The common law recognized three possible responses to a complaint, and, in contrast to modern procedure, required the defendant to pick one and only one.[3]

1. The first possible response was "so what?", or, a bit more fully: "Even if what you say is true, which at this stage I

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[1]Most effective if read eight times between now and the end of the course.

[2]Here, "at common law" is used in distinction to "in equity." The chancery courts (CB 282)employed entirely different procedures before deciding to grant or deny a remedy.

[3]A summary of these three options in diagram form appears on the last page of this handout.

will admit for the purposes of argument, it fails to state a claim on which the court can grant you relief." At common law, this was called a "demurrer." You are expected to recognize one when you see one.

Many states (e.g. California) still have demurrers, and, in any event, lawyers everywhere commonly say, "I'm going to demur to that," or "That's demurrable." Under the Federal Rules, however, the formal name is a motion to dismiss for failure to state a claim (FRCP 12(b)(6)).

At common law, the demurrer was usually a challenge to the writ that the plaintiff had selected. In other words, it was usually a way of saying that plaintiff's trespass action should really be an action of detinue, let's say, and thus the writ did not lie.

In modern procedure, the challenge is a bit broader: it tests not only whether plaintiff has called her action the right thing, but whether she has any action at all. For example, if a student were to sue me for slander for calling her a blockhead, I would move to dismiss, and thereby raise the legal issue of whether calling someone a blockhead -- which I will admit, for the purposes of the motion only, that I did -- is slanderous. In deciding the motion, the court would normally rule not only on whether the remark supports an action for slander, but whether it supports any kind of action -- in short, whether the facts give

rise to a situation in which the court can grant relief.

In any event, both at common law and today, this type of response raises a pure issue of law, and will be decided by the judge (which is what we mean by saying "decided by the court.") Both the judge and any appeals court will assume, but not decide, that the allegations of the complaint (i.e. that I called the student a blockhead), are true, and go on to decide whether that gives rise to a claim. If the ruling is that it does not, then the case is over. If the ruling is that it does, the plaintiff still needs to go ahead and prove that what the complaint says is in fact true. You need to read cases carefully, and newspaper articles too, with this distinction in mind. The ruling on a motion to dismiss tells you nothing about the facts, only what the law is as applied to the facts set forth in the complaint. It is very common for the plaintiff to win the battle -- by being told that she does have the right to attempt to prove her allegations -- and then to lose the war, by failing to establish that her version of the facts is indeed true.

2. The next two sorts of responses at common law were both called "pleas." The first group consisted of the "dilatory pleas." The essence of these responses were not "so what?", but rather "not here" or "not now." These were pleas that admitted for purposes of argument that the facts were as plaintiff said, and also that they might state a claim for relief -- but objected

that plaintiff had brought the claim in the wrong court, or at the wrong time, or in the wrong name, or had added or omitted parties incorrectly.

The current analogues of some of these defenses are listed in the sections of FRCP 12(b) other than 6, and we'll see others as we go along. All of them raise issues of law, and will be decided by the court. Every once in a while, a factual dispute will arise in connection with one of these motions (e.g. was the complaint handed to the defendant on September 1 or September 2?). In that case, a hearing will be held by the judge sitting without a jury.

Again, when a court rules on one of these defenses, it says nothing about the merits of the claim, and quite commonly, although not always, the defect is one that can be cured, as for example, by bringing the action again in a different court or against some other party.

3. The third set of responses at common law were the "pleas in bar." There were two of them.

A. One was called the "traverse" (which is a term you will still hear; in New York, for example, if the defendant denies that he ever got the complaint, the judge will hold a "traverse hearing"). It was a simple denial: you say that I entered on your property; I say I didn't. In keeping with the purpose of isolating a single issue, at common law (although not

under modern practice) this was an admission that if I did enter, you win. In other words this form of response conceded plaintiff's legal theory and raised an issue of fact. At common law such an issue would normally be decided by a jury.

B. The second type of plea in bar at common law was the "confession and avoidance." This response was in effect, "Yes, but." For example, "I admit that I walked across your land, but I have a lease." At common law, it was necessary to confess to avoid (i.e. to admit the fact of walking on the land in order to deny the legal conclusion of trespass), but that is no longer true. It is perfectly acceptable today to respond: "I never walked across your land, but if I did, I was entitled to do so under the terms of a lease."

Today, the defenses raised at common law by confession and avoidance are called "affirmative defenses," because they arise when the defendant puts forward some additional affirmative facts to explain his conduct. There is a long list of examples in FRCP 8(c).

An affirmative defense may raise either an issue of fact or of law, or sometimes both. If you claim that you need not pay a debt because of bankruptcy, for example, the other party might deny that your bankruptcy covers this debt (which would be an issue of law) or she might deny that you ever got a discharge in bankruptcy at all (which would be an issue of fact), or she might

do both ("If you ever got a discharge in bankruptcy, which I deny, it does not cover this debt.")

II. And After

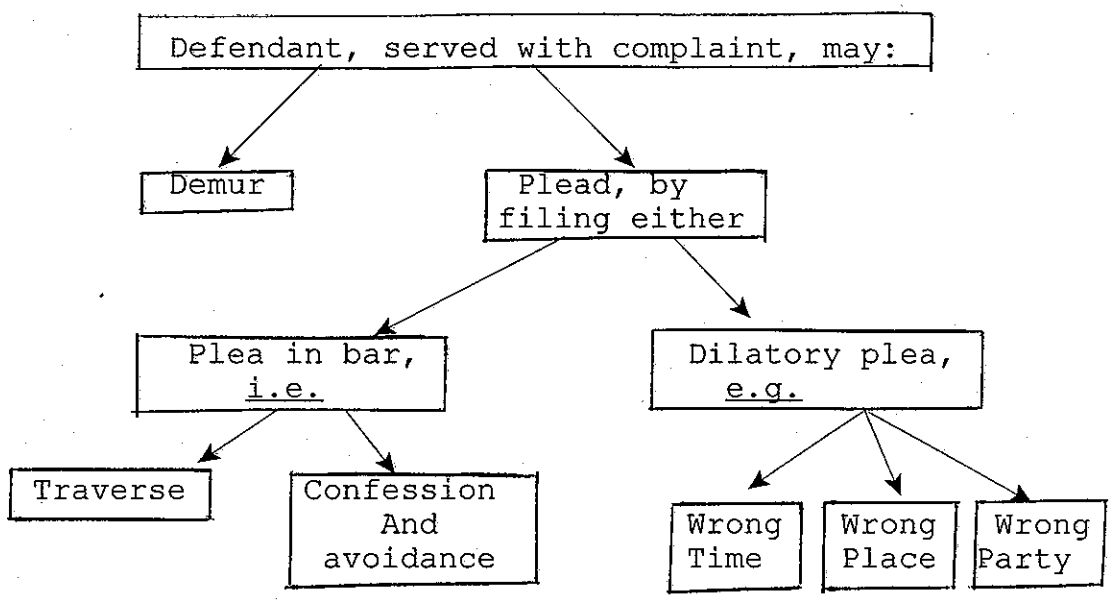
Under modern practice, the pleadings will end at this point in the usual case. The parties will proceed to "discovery," in which they use a variety of legal devices that we will be studying later to find out each other's claims and the evidence in support. The common law system was different. The parties kept filing pleadings indefinitely until they had isolated a single issue, which would ordinarily be decided by the court if an issue of law or by a jury if an issue of fact. This created a large paper burden at the pleadings stage, but a simple trial. (Discovery, except by bringing a rare separate bill in equity, didn't exist at all; to a large extent, England still doesn't have it). By contrast, modern pleadings are extremely skimpy and uninformative, and modern discovery and modern trials tend to be very complicated.

In modern practice, after any challenges to plaintiff's legal theories are made by pretrial motions, there may be an intermediate step, called the motion for "summary judgment" (FRCP 56(c)) to test whether there really are facts in dispute or just an unsupportable allegation or denial. If that hurdle is crossed, then there will be a trial, either by a jury or a judge.

(Which one depends on a number of factors that we will talk about later).

Both at common law and today, the goal of a trial is not to decide a point of law but an issue of fact, namely, whose version of the legally critical events is true.

III. A Flowchart of Common Law Pleading, Illustrating its Much-Missed Beauty and Logic



Outline of Historical Lecture

*(1) **The difference between law and equity**

Key features of an action at law:

A. Defendant summoned. Goods seized if defaults.

B. Defendant given notice by the pleadings of what case is about.

C. Plaintiff will lose case if fails to adhere strictly to pleading requirements for the particular type of action brought.

D. If plaintiff does adhere to requirements and the pleadings reveal a disputed issue of fact either party is entitled to trial by jury.

E. Victory for plaintiff results in a money judgment enforceable against the defendant's property.

Distinguishing features of equity:

A. Entry to system premised on "no adequate remedy at law"

B. Each of the procedural features above is the opposite.

C. Different reasoning style.

(2) **Common law pleading**

(App. 65-71)

(3) **The forms of action at common law**

(App. 5; partial list near bottom of CB 558)

[Cases cited in the stray anecdote at this point are Sereboff v. Mid Atlantic Medical Services, 126 S.Ct. 1869 (2006) and eBay, Inc. v. MercExchange, 126 S.Ct. 1837 (2006)]

*(4) **The meaning of the term "at common law"**

A. The rule in England, whether in the law or equity courts, before the American Revolution.

(E.g., "At common law a husband was permitted to inflict reasonable chastisement on his wife.")

B. Suits in the common law as opposed to the equity courts.

(E.g., U.S. Const., Amd. 7: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.")

C. The rule in common law as opposed to civil legal systems.

(E.g., "The common law disfavors restraints on the transferability of property.")

D. Judge-made as opposed to legislatively-created legal rules.

(E.g., "Under the common law of Pennsylvania, a railroad is not liable for injuries to a trespasser on its property unless it has committed gross negligence.")

*Most important subjects for you to absorb from this lecture.