

THE LAW WANTS TO BE FORMAL

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This Article examines the relationship between the formalism of an area of law, and whether it plays a central role in the legal system. English and American law were traditionally comprised of formalist private law doctrines. The influence of legal realism and the New Deal, however, caused these systems to diverge. While American private law was recast in realist terms, it also became less significant to the overall legal system. In its place, procedure and statutory interpretation emerged, and in turn became more formalized. Realism was never as influential in England where private law remains more formal and at the center of legal analysis. Procedural and interpretation doctrines, by contrast, are less prevalent and less formalized.

These trends are related. Law is attracted to formalism because a confined account of judging provides the necessary contrast between constrained judicial decisionmaking and unfettered political policymaking. When private law is formalized, it can sustain the distinction between law and politics. But when private law is seen as too pliable, pressure mounts to recast the law in a more formalist mode. Realism did not eliminate formalism from American law but caused it to migrate from the receding private law to the ascendant interpretation and procedure doctrines.

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INTRODUCTION

This Article presents a straightforward claim: the law wants to be formal. The argument is developed via a deep comparative dive into how formalism and its alternatives are distributed and practiced in English and American law. The comparison is apt because these systems share common historical roots and at one point analyzed legal questions through similar doctrinal frameworks.¹ Over time, however, they drifted apart and today differ on

1 See JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 194 (Boston, Little, Brown & Co. 1894) (“Whoever achieves anything for the advancement or improvement of the law, achieves it not for his own country alone, but for all English-speaking . . . peoples.”); A.V. DICEY, *A Common Citizenship for the English Race*, 71 *CONTEMP. REV.* 457, 469 (1897) (“An English barrister who lands . . . [in] New York feels for a moment that he is a stranger . . . but when once he enters an American court, or begins

which legal areas are highly technical and formal, and which are more flexible and context sensitive.

From the American Revolution through the early decades of the twentieth century, both English and American legal cultures were dominated by the common law, especially the emerging areas of contract, tort, property, agency, and equity, now classified as private law. These subjects comprised the vast majority of course offerings in the nascent American law schools and the scholarship published in their law reviews.² Lawsuits were typically two-party affairs that focused on rights, duties, and obligations, while lawyers on both sides of the Atlantic maintained relatively confined accounts of these concepts.

In the early-to-middle decades of the twentieth century, however, much of this began to change. A movement known as American legal realism challenged the idea that private law was an autonomous system of legal reasoning or that hard cases could be decided by precise legal logic alone. Realists argued that private law—like all law—was dominated by political, social, and economic contests that neither could nor should be excluded from direct consideration by the law. Judges ceased to be seen as legal technicians working within the narrow confines of the law and were recast as powerful figures whose actions both informed and influenced the political sphere.³

Hand in hand with the deconstruction of private law came the open embrace of the role of the state in creating law. Legal analysis shifted away from private law and toward multiparty and multifactored questions of statecraft brought about by the New Deal.⁴ Law was no longer an autonomous

debating legal questions with American lawyers, he knows that he is not abroad, but at home”); see also Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 AM. J. COMPAR. L. 609, 610–18 (2017) (analyzing these and related sources).

2 See, e.g., THE HARVARD UNIVERSITY CATALOGUE 1890–91, at 257–58 (Cambridge, Harvard Univ. 1890); see also Edwin J. Greenlee, Essay, *The University of Pennsylvania Law Review: 150 Years of History*, 150 U. PA. L. REV. 1875, 1880–81 (2002) (observing that, in late nineteenth century, law review publications contained “[d]octrinal articles focus[ed] on legal rules in traditional areas such as contracts or torts,” and were “intimately tied to the model of legal education based [on] the study of appellate cases”).

3 Standard accounts include: Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4, 8 (1982) (explaining that classic lawsuits centered on disputes between private parties concerning consequences, rights, and obligations, while “new” public lawsuits focus on “grievances over the administration of [public] program[s] and to vindicate the public policies”); Gilbert S. Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469, 1472 (1983) (noting significant differences in the public versus private law content of circuit court dockets between the 1920s and ’80s); Saul Zipkin, *A Common Law Court in a Regulatory World*, 74 OHIO ST. L.J. 285, 287 (2013) (observing that the common-law model centering on individual disputes “is in some tension with the contemporary world of legislation and administrative governing”).

4 See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1296–97 (1976) (“[M]odern federal litigation . . . do[es] not arise out of disputes between private parties about private rights,” but “the object of litigation is . . . vindication of constitutional or statutory policies.”); Zipkin, *supra* note 3, at 288 (observing that

external force acting on the community, but a creation of the political community itself.⁵ Private law never went away under this regime, but was marginalized. Today it operates mainly in the increasingly shrinking gaps of the regulatory state.⁶

Nevertheless, the formalism despised by the legal realists never abated, and as the twentieth century progressed, a new brand of uniquely American formalism emerged. This version is grounded in a structural reading of the Constitution's allocation of power between governmental branches and finds its doctrinal expression in the law of statutory interpretation and jurisdiction. Like its private law analogue, American formalism is based on a structural analysis of legal relationships and aims to confine legal analysis and limit recourse to broader political values. Yet there is a difference. Private law concepts such as duty in tort, formation and privity in contract, and the doctrines of equitable remedies restrain analysis by focusing on the parties' primary duties and obligations. On the other hand, American formalism is designed to restrain the role of courts within the constitutional system.

Comparisons between English and American law are revealing because the realist account of private law had far less influence in England and Commonwealth countries. Though nearly all common-law jurisdictions have transitioned into more active administrative states, private law continues to play a central role in the life of English law. It not only dominates its traditional sphere, but is relevant to a range of legal questions American law addresses via statutory and procedural tools. On the other hand, the English approach to statutory interpretation is considerably more open-textured than American textualism, and does not maintain the thick procedural apparatus that overlays so much of American civil litigation.

My argument is that these trends are related. Judges operating in the Anglo-American sphere face constant pressure to explain how their decisions are different from those reached through overtly political processes. The

the divide between legislative and common-law frameworks "addresses the organizing logic of the legal system").

5 See, e.g., Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1092-93 (1983) ("[R]ise of the activist state potentially transforms the nature of the humblest suit in tort, property, or contract," as legal energy turns toward "deepening interest in the way statutes shape bureaucratic incentives."); Chayes, *supra* note 3, at 8 ("The development is rooted in much more pervasive changes in the contemporary . . . ways of thinking about law and the legal system . . ."); Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 802-03 (1991) ("The growth of the administrative state and the associated . . . developments in social attitudes have brought with them a new conception of law, and a concomitant change in judicial attitudes and methods.").

6 See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 92 (1977) ("The law, state and federal, was in [a] process of being reduced to statutory form with most of the significant continuing problems being committed to administrative agencies."); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 888 (1991) ("[C]ommon law courts began viewing themselves as operating in the shadow of the legislature . . ."); Rubin, *supra* note 5, at 793 ("The conceptual structure of existing [common law] legal scholarship is simply unsuited to an analysis of the administrative state.").

classical answer is that law is different because it adheres to a set of conceptualized principles formally applied by learned judges. Legal analysis thus gravitates toward areas of law the body politic perceives as sufficiently formalized so as to constrain judicial activity and distinguish it from the political realm. By the same token, law will move away from areas seen as too accommodating of social preferences, too subject to desires of the lawyerly class, and too realist.

While realism succeeded in deconstructing private law, this success both caused and enabled private law to become less systemically important to the workings of American law. As legal thought migrated to statutory and jurisdictional concerns, these areas were theorized into formalist doctrines that pushed legal analysis inward. On the English side however, private law remains relatively immune to realist critique and retains its primary status within the legal system. There is less need for formalized laws of statutory interpretation and jurisdiction, and these doctrines are comparatively absent from the English landscape.

The argument proceeds as follows: Part I showcases the gap between how traditional questions of private law are adjudicated within each system. Part II offers a contrast between the conceptual accounts promoted by Peter Birks, the leading proponent of private law formalism in English law, and American formalism grounded in statutory and procedural law, as offered by Justice Antonin Scalia. Parts III and IV explain how the increased formalization of American statutory and procedural law displaced private law from the prominent position it once held. Part V tests the thesis out by comparing how each system mediates the relationship between citizens and their government. American law addresses these questions through public, procedural, and statutory law, while the Anglo world leans on private law to accomplish similar ends. Part VI then considers the implications of *Erie* on the allocation of private and procedural law. The Article concludes by explaining why the law craves formalism.

A note on nomenclature. As used here, formalism is an approach that limits the range of factors relevant to legal decisions. Formalism directs analysis inward toward authorized sources of law and away from broader moral, social, or political considerations hovering in the background.⁷ It militates against interpreting rules in light of consequences or finessing application to better match the rule's rationale.⁸ Formalism favors rules over standards, shifting authority away from the rule-applier toward the rule-creator.

Conceptualism reinforces formalism in two ways. First it explains *why* legal analysis should be confined. The existing legal doctrines derive from the law's conceptual core which preexist and stand outside the domain of political contestation.⁹ Formalism vindicates the rule of law by ensuring that

7 See, e.g., Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

8 *Id.* at 525.

9 The classic articulations are ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1–8 (1995), and Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950–51 (1988).

outcomes derive from the conceptual legal core rather than social preferences of its decisionmakers. Second, when established doctrines do not provide a clear answer to novel legal questions, the answer can be derived by precise reasoning from the law's internal structure. We can see formalism as the process lawyers use to reach decisions, and conceptualism as the theoretical account of legal relationships articulated by academics and scholars.¹⁰

Realism takes the opposite view and argues that formalism is rarely as determinative as its devotees assume. Judges only appear to decide cases on narrow legal grounds, but really make debatable value choices that are presented to the public as inexorable legal logic. Because decisions turn on a broader range of considerations than formalists acknowledge, realists think law should be more transparent and openly embrace the range of possible outcomes. Realist doctrine tends to emphasize the multiplicity of factors, the value-choices, and consequences embedded in legal decisions.

Realists also deny the law has a preexisting or fixed conceptual core that lawyers can identify and reason from. Rather than coherence, they find the body of caselaw merely encodes unresolved competing considerations into legal doctrine, leaving sufficient material for each side to make reasonable arguments from authorized sources of law.¹¹ Rather than search for elusive principles that do not exist, realists hold lawyers should forthrightly discuss the factors actually influencing the law and craft doctrines that address these factors directly.

Realist and formalist doctrines therefore work differently. Conceptualists present doctrine as a dense network of internally consistent rules that permit a learned lawyer to reason from upper-level concepts to a specific case. These theories focus on identifying foundational principles and creating structured taxonomies of legal doctrine. Moreover, because formalism deliberately blocks common-sense and contextualist considerations, it is prone to producing counterintuitive results. To the formalist, this is a feature rather than a bug, however, since these intuitions are exactly what legal doctrine is designed to preclude.

Realist law is skeptical of putting too much weight on tight taxonomic structures. They hold the complexity and multiplicity of legal categories produced by formalist analysis simply enables skilled advocates to manipulate the categories toward a range of outcomes. Realist doctrine is therefore flatter, simpler, and more explicit about the outward-facing considerations that underwrite legal decisions.

10 See Dan Priel, *Two Forms of Formalism*, in *FORM AND SUBSTANCE IN THE LAW OF OBLIGATIONS* 165, 166 (Andrew Robertson & James Goudkamp eds., 2019). Priel distinguishes between conceptualism and doctrinalism, noting how the former focuses on abstract principles derived from the relationship between legal categories, while the latter on the positive output of courts. See *id.* Conceptualism often provides the philosophical backing for doctrinalism.

11 See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1723–24 (1976); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 94–96 (2000).

I. FORMALISM IN PRIVATE LAW: REALISM AND RESILIENCE

This Part highlights the differential impact of legal realism in English and American law by contrasting leading private law cases decided by the House of Lords/Supreme Court of the UK with parallel cases from American jurisdictions. Though not selected at random, the English cases are widely seen as leading exemplars in their fields and offer a reasonable representation of how English courts analyze these matters. The American law analysis either relies on well-known cases or on a tradition of how the matters are framed in litigation.

Private law in both systems retains its classical terminology and is generally unaffected by legislative interventions. Nevertheless, clear differences emerge. Facts that English courts see as raising difficult questions of private law are much less portentous in American courts where functionalist analysis circumvents the conceptual questions gnawing at English law.

A. *Contract Law: Offer and Acceptance*

Assume the following facts:

Crook bounces a check or uses fake/stolen IDs and social security numbers to obtain a car from Dealer. Crook sells the car to BFP, (Bona Fide Purchaser), an unsuspecting third party, and then disappears. Dealer sues BFP for return of the car.

Which innocent party bears the loss?

1. Contemporary American Caselaw

To American courts, this issue is about as interesting as the generic description of the facts suggests.¹² For decades, courts have simply applied UCC § 2-403, at times backed up with rudimentary policy reasoning.¹³ Most of these cases are litigated only because of factual uncertainties regarding BFP's innocence.¹⁴

¹² See Sean Thomas, *Mistake of Identity: A Comparative Analysis*, 2008 LLOYD'S MAR. & COM. L.Q. 188 (contrasting English and American approaches to the mistaken identity problem; noting paucity of analytic and factual inquiry in American decisions).

¹³ See U.C.C. § 2-403 (AM. L. INST. & UNIF. L. COMM'N 2017); see, e.g., Charles Evans BMW, Inc. v. Williams, 395 S.E.2d 650, 651 (Ga. Ct. App. 1990) (straightforward application of UCC § 2-403); Dartmouth Motor Sales, Inc. v. Wilcox, 517 A.2d 804, 806 (N.H. 1986) (litigating straightforward application of UCC § 2-403 on Crook's noncompliance with vehicle registration statutes); see also Stein v. Geico Indem. Ins., 658 S.E.2d 153, 155–56 (Ga. Ct. App. 2008); Tavoulareas v. Steven Kessler Motor Cars, Inc., 686 N.Y.S.2d 17, 17 (App. Div. 1999). For more examples, see 3 RICHARD W. DUESENBERG ET AL., SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODES § 10.05, LexisNexis (updated 2020); 1 JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILLMAN, UNIFORM COMMERCIAL CODE § 4:33 (6th ed. 2020).

¹⁴ See, e.g., Christina L. Kunz, *Motor Vehicle Ownership Disputes Involving Certificate-of-Title Acts and Article Two of the U.C.C.*, 39 BUS. LAW. 1599, 1600 (1984) (finding inconsistent

2. English Caselaw

English courts approach this question with far greater solemnity.¹⁵ One Lord noted how it is a “difficult problem”; another how “[g]enerations of law students have struggled with” it,¹⁶ and a third, how it “has bemused courts and commentators alike for over 150 years.”¹⁷

What makes this so complicated?¹⁸ A basic proposition of offer and acceptance law holds that Dealer’s offer to *X* can be accepted only by *X*. But what if Crook uses fake or stolen documents to fool Dealer into thinking that Crook *is X*—an unknown victim of identity theft? Here English law employs a basic syllogism: (1) because Dealer does not intend to contract with Crook, the contract fails for lack of mutuality; (2) since no contract is created, title cannot pass to Crook; and finally (3), since Crook does not bear title, he cannot pass it onward to BFP. As a result, BFP must absorb the loss and return the car to Dealer.

But here is the catch. Crook lacks title only when the parties communicate in writing. But if the parties meet face-to-face, the law assumes Dealer “intends” to sell the car to the person standing in the showroom before him. Since the contract is valid, title passes to Crook who can then pass it on to BFP. BFP is then entitled to retain the car.

The issue raised to the House of Lords in *Shogun Finance* is that Crook both misrepresented himself face-to-face *and* used stolen/fake documents to perpetrate the fraud.¹⁹ This blend of documentary and in-person fraud sowed confusion as to the relevant inquiry. Should the law address the more realist/consequentialist question of who gets the car, or the more formalist questions of whether title passed, whether the communications between Crook and Dealer were “really” made in person or in writing, or whether Dealer “intended” to sell the car to Crook? Each approach got the vote of at least one English judge, leaving this area of law in a “sorry condition” and

results where state-specific motor vehicle statutes and UCC potentially conflict); *see also* West v. Roberts, 143 P.3d 1037, 1040–46 (Colo. 2006) (en banc) (framing case as a contest between the UCC and nineteenth-century “stolen property statute[s],” which suggest that a thief could not pass title to stolen goods).

15 *See* *Shogun Fin. Ltd. v. Hudson* [2003] UKHL 62, [2004] 1 AC (HL) 919 (appeal taken from Eng.); *Shogun Fin. Ltd. v. Hudson* [2001] EWCA (Civ) 1000, [2002] QB 834 [13] (Eng.).

16 *Shogun Fin.* [2004] 1 AC at [1] (Lord Nicholls of Birkenhead); *id.* at [57] (Lord Millett) (noting struggles faced by generations of law students).

17 *Id.* at [111] (Lord Phillips of Worth Matravers).

18 *See id.* at [183] (Lord Walker of Gestingthorpe) (questioning the intricacies of offer and acceptance law).

19 *Shogun Fin.* [2002] QB at [3] (Lord Sedley).

ted in a “Gordian knot.”²⁰ In a 3–2 ruling, the House of Lords reaffirmed the traditional view and left the BFP in this case holding the bag.²¹

3. American Law Through the Twentieth Century

The formalistic distinction between fraud committed face-to-face versus in writing reflects an older American tradition tracing its origin to an 1883 decision by the Massachusetts high court.²² But in time, American courts became less comfortable with a doctrine that turned on the mode of trickery

20 *Id.* at [51] (Lord Brooke); *id.* at [23] (Lord Sedley). Lower courts entertained several alternative framings including focusing on relationship between dealer and finance company and the precise wording of the purported contract. *See id.* at [40]–[42] (Lord Dyson).

21 *Shogun Fin.* [2004] 1 AC at [193] (Lord Walker). Though *Shogun* turned on whether Crook is considered a “debtor” under the Hire Purchase Act of 1964, the court held this was dependent on whether Dealer and Crook concluded a contract pursuant to traditional common-law principles. *See id.* at [12]–[16]. The approach favored by the two dissenting Lords had scholarly champions who advocated that England adopt the UCC’s approach. *See* Thomas, *supra* note 12, at 188–213.

22 *See* Phillips v. Brooks, Ltd. [1919] 2 KB 243 at 246 (Eng.) (“The headnote in [*Edmunds*] contains two propositions, which I think adequately express my view of the law.” (citing *Edmunds v. Merch.’s Dispatch Transp. Co.*, 135 Mass. 283 (1883))). *See, e.g.*, *Mercantile Nat’l Bank of the City of N.Y. v. Silverman*, 132 N.Y.S. 1017, 1019 (App. Div. 1911) (“The primary question . . . is whether . . . the appellant intended to make the individual with whom he had the correspondence the payee . . .”), *aff’d per curiam*, 104 N.E. 1134 (N.Y. 1914); *Rodliff v. Dallinger*, 4 N.E. 805, 807 (Mass. 1886) (Holmes, J.) (reasoning that whether contract is void or voidable turns on the intent of initial seller); *see also* SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 635 (1909); 2 SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 635 (2d. ed. 1924); 2 SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* §§ 336–48 (rev. ed. 1948) [hereinafter WILLISTON, *SALES OF GOODS* 1948]; 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 69 nn.15–16 (rev. ed. 1924) (collecting cases).

employed by Crook.²³ Legal realists reframed the issue as a policy choice between the defrauded Dealer and the innocent BFP.²⁴

This move was part of a broader realist assault on the concept of “title to chattels.” Karl Llewellyn and Grant Gilmore—principal drafters of the Uniform Commercial Code (UCC)—led the charge. Llewellyn held title to chattels was a “mythical” or even “mystical” construct, and chided formalists who thought that title was something whose “*location . . . [was] determinable with certainty.*”²⁵ Likewise, in his celebrated article *The Commercial Doctrine of Good Faith Purchase*,²⁶ Gilmore explained how in contests between Dealers and BFP’s the law was moving away from formal analysis of property rights toward functional concerns:

[C]ourts were finding new ways to shift distribution risks. Their happiest discovery was the concept of “voidable title”—a vague idea . . . whose greatest virtue . . . may well have been its shapeless imprecision

The ingenious distinction between “no title” . . . (therefore true owner prevails over [BFP]) and “voidable title” . . . (therefore true owner loses to [BFP]) made it possible to throw the risk on the true owner in the typical commercial situation while protecting him in the noncommercial one.²⁷

23 See Clarence D. Ashley, *Mutual Assent in Contract*, 3 COLUM. L. REV. 71, 74–76 (1903) (disagreeing with the House of Lords in *Cundy v. Lindsay*, and arguing that the contract is binding since the seller intends to contract with the writer of the forged documents (citing *Cundy v. Lindsay* [1878] 38 LT 573 (HL))); see also Note, *Assent to Contract Under Mistake as to Offeror’s Identity*, 16 HARV. L. REV. 381, 381 (1903) (disagreeing with *Cundy*, and arguing mistaken identity transactions create voidable title); Note, *Effect of Mistake of Person, Misrepresentation of Person and Impersonation in Crimes, Contracts and Negotiable Instruments*, 68 U. PA. L. REV. 387, 387–88 (1920) (analyzing cases); L. Vold, *Fraud on the Seller*, 3 DAKOTA L. REV. 299, 300–01 (1931) (presaging UCC approach and noting the incoherence of the face-to-face versus writing distinction); Charles B. Collins, *Title to Goods Paid for with Worthless Check*, 15 S. CAL. L. REV. 340, 340–41 (1942); Calvin W. Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser*, 10 VAND. L. REV. 55, 55–57 (1956); William D. Warren, *Cutting off Claims of Ownership Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 477 (1963) (using classic realist rhetoric to critique courts distinguishing outcomes based on the method of fraud). *But see* Note, *The Owner’s Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code*, 72 YALE L.J. 1205, 1225–26 (1963) (favoring the English position).

24 See, e.g., *Stanton Motor Corp. v. Rosetti*, 203 N.Y.S.2d 273, 275–76 (App. Div. 1960) (finding for BFP by noting the policy issues in play as between the two innocent parties); *Dudley v. Lovins*, 220 S.W.2d 978, 980 (Ky. 1949) (same).

25 K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 165–66 (1938); see U.C.C. § 2-401 (AM. L. INST. & UNIF. L. COMM’N 2017). For a discussion on Llewellyn and the Code’s conception of “title” and “property,” see Jeanne L. Schroeder, *Death and Transfiguration: The Myth that the U.C.C. Killed “Property,”* 69 TEMP. L. REV. 1281, 1282, 1339–41 (1996).

26 Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

27 *Id.* at 59–60. Williston however, continued to support the face-to-face versus writing distinction. See 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1517 (1920); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1517 (Walter H.E. Jaeger ed., 3d. ed. 1957); see also WILLISTON, SALES OF GOODS 1948, *supra* note 22, §§ 343, 346(a); 3 SAMUEL

This theoretical assault on traditional title and offer/acceptance doctrine became the consensus American view now reflected in both the UCC and common law.²⁸

B. *Unjust Enrichment/Property Law*

While differences between Anglo and American law are found across the private law spectrum, some of the largest gaps exist at the intersection of unjust enrichment and property law.²⁹

1. Contemporary Anglo Law

In the House of Lords decision *Foskett v. McKeown*,³⁰ Murphy embezzled his client's funds and used these monies to pay some of his life insurance premiums.³¹ When Murphy later committed suicide, his victims argued they could trace their stolen funds into the insurance premiums and were therefore entitled to a proportional share of the insurance proceeds.³² Murphy's heirs countered that victims could recover no more than the nominal amounts paid into the policy from stolen funds.³³

Foskett occasioned a lengthy disquisition into the conceptual underpinnings of contract, property, and restitution law with the aim of locating the precise interests of each party across the transactional chain. This occasioned intricate analysis of tracing, following, and claiming law; the legal relationship between a bank and its account holder; and the nature of rights in an unmaturing life insurance policy.³⁴ Sensing this excursion a bit overwrought, Lord Millett appealed to conceptual coherence, stating: "It is, of

WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT SALES OF GOODS §§ 635–636 (rev. ed. 1948).

28 See *Pingleton v. Shepherd*, 242 S.W.2d 971, 972 (Ark. 1951) (since seller's voidable title was not voided, BFP acquired valid title); *Ross v. Leuci*, 85 N.Y.S.2d 497, 501 (City Ct. 1949) (though consent obtained by fraud, fraudster obtained voidable title which he passed to the bona fide purchaser); *Dudley*, 220 S.W.2d at 980 (buyer vested with a voidable title and passed title on to BFP even though sellers were mistaken as to buyer's identity and check was not honored); RESTATEMENT (SECOND) OF CONTS. § 153 cmt. g, illus. 11–13 (AM. L. INST. 1981) (noting "[m]istakes as to the identity of a party ha[s] sometimes been treated as [a] distinct" category of mistake, "but the modern trend is to apply" general rules of mistake); see also Rolf B. Johnson, *A Uniform Solution to Common Law Confusion: Retention of Title Under English and U.S. Law*, 12 INT'L TAX & BUS. LAW. 99, 129 (1994) (contrasting the categorical English approach with the more flexible approach under the UCC).

29 See Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 103–04 (2008) [hereinafter Saiman, *Restitution in America*]; Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 994 (2008) [hereinafter Saiman, *Restitution and Legal Doctrine*].

30 [2001] 1 AC 102 (HL) (appeal taken from Eng.).

31 See *id.* at 107–08 (Lord Browne-Wilkinson).

32 See *id.*

33 See *id.*

34 *Id.* at 133–34 (Lord Millett).

course, always open to the parties in any case to dispense with complex calculations and agree upon a simpler method of apportionment. But . . . [there exist] an enormous variety of financial instruments. For present purposes they form a seamless web.”³⁵ Lord Browne-Wilkinson similarly underscored this was a “case of hard-nosed property rights,”³⁶ where considerations of fairness cannot interfere with the result mandated by law.³⁷

2. Contemporary American Law

Unlike the House of Lords, the Mississippi Supreme Court took only a few paragraphs to explain that when life insurance is purchased with embezzled funds, the burden shifts to the heirs to show the policy was *not purchased* with stolen assets.³⁸ This court does not consult academic scholarship, Roman law, or engage in historical or theoretical accounts of property and restitution. It simply asserts the court must impose a constructive trust on the insurance proceeds because “neither equity nor the law” permits a thief to take credit for payments at the expense of innocent victims.³⁹ The case makes no effort to defend this allocation through the operative legal principles, but instead concludes with a rough-justice compromise.

3. American Law Through the Twentieth Century

Notwithstanding the Mississippi decision, earlier American reports contain numerous cases wrangling with how to account for stolen monies paid into insurance policies—indeed many are cited by the House of Lords in *Foskett*.⁴⁰ This question used to receive considerable attention from the legal academy, including: Samuel Williston’s *The Right to Follow Trust Property when Confused with Other Property* (*Harvard Law Review* 1888); James Barr Ames’s *Following Misappropriated Property into Its Product* (*Harvard Law Review* 1906); and a comment, *Rights of a Dependent Beneficiary Under Insurance Policies Pro-*

35 *Id.* at 145.

36 *Id.* at 109 (Lord Browne-Wilkinson).

37 *Id.*

38 Lackey v. Lackey, 691 So. 2d 990, 993 (Miss. 1997).

39 *Id.* at 995 (quoting Brown v. N.Y. Life Ins., 152 F.2d 246, 250 (9th Cir. 1945)).

40 See *Foskett* [2001] 1 AC at 103, 135; Lohman v. Gen. Am. Life Ins., 478 F.2d 719, 721 (8th Cir. 1973); Vorlander v. Keyes, 1 F.2d 67, 68 (8th Cir. 1924); Baxter House, Inc. v. Rosen, 278 N.Y.S.2d 442, 443–44 (App. Div. 1967); Truelsch v. Nw. Mut. Life Ins., 202 N.W. 352, 354 (Wis. 1925); Holmes v. Gilman, 34 N.E. 205, 205 (N.Y. 1893); Shaler v. Trowbridge, 28 N.J. Eq. 595, 596, 601–05 (N.J. 1887); see also 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 29.1.9 (5th ed. 2008) (collecting cases).

cured with Misappropriated Funds (*Yale Law Journal* 1925)⁴¹—all cited in *Foskett*.⁴²

As the twentieth century wore on the interest in formal common-law logic that propels these inquiries receded. Only a smattering of recent cases—or scholarship in leading journals—engage these issues in detail,⁴³ while leading treatises remain essentially unchanged from editions published just around the Second World War.⁴⁴ Though the legal issue is no more resolved today than a century ago, the conceptual account of private law animating these decisions faded.⁴⁵

41 See Samuel Williston, *The Right to Follow Trust Property When Confused with Other Property*, 2 HARV. L. REV. 28, 28 (1888); James Barr Ames, *Following Misappropriated Property into Its Product*, 19 HARV. L. REV. 511, 511–12 (1906); Comment, *Rights of a Dependent Beneficiary Under Insurance Policies Procured with Misappropriated Funds*, 35 YALE L.J. 220, 220–27 (1925).

42 *Foskett* [2001] 1 AC at 130–31, 134. Other scholarship on this topic from that era includes comments and notes published at James F. Kelly, Note, *Following Misappropriated Funds into Life Insurance Policies*, 4 ST. JOHN'S L. REV. 239, 239 (1930); Decisions, 5 BROOK. L. REV. 474, 474–76 (1936); Miscellany, 12 VA. L. REG. 375, 380–82 (1926); Recent Cases, 59 HARV. L. REV. 459, 462–63 (1946); Recent Cases, 9 MINN. L. REV. 470, 490–91 (1924); Recent Cases, 84 U. PA. L. REV. 901, 913–14 (1936); Recent Decisions, 31 MICH. L. REV. 841, 869–70 (1933).

43 None of the recent cases engage in serious inquiry into the issues raised in *Foskett*. See *In re McLain*, 516 F.3d 301, 311–16 (5th Cir. 2008) (applying Texas law) (dealing with bankruptcy matters); *N.Y. Life Ins. v. Waxenberg*, No. 07-cv-401-T-27, 2009 WL 632896, at *3–5 (M.D. Fla. Mar. 11, 2009) (dealing with attorneys' fees and procedural questions); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 444 (Tex. App. 2006) (dealing with factual questions and admissibility of expert witnesses); *Marineau v. Gen. Am. Life Ins.*, 898 S.W.2d 397, 401 (Tex. App. 1995) (cursory analysis of issue); see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 illus. 4, 12 (AM. L. INST. 2011) (eliding the conceptual issues of *Foskett*, as the matter is to the equitable “discretion of the court”). The same trend is found in scholarship. See Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 68 CORNELL L. REV. 172, 172–73 (1983); Claire Seaton Rosa, Note, *Should Owners Have to Share? An Examination of Forced Sharing in the Name of Fairness in Recent Multiple Fraud Victim Cases*, 90 B.U. L. REV. 1331, 1336 (2010).

44 See GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 925 (rev. 2d ed. repl. vol. 1995) (referencing only one case past 1950); 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS §§ 508.4, 516.1 (4th ed. 1989) (showing that the overwhelming percentage of cases cited on issue are pre-1950); see also GEORGE J. COUCH, COUCH ON INSURANCE § 74:37–38, Westlaw (database updated June 2020) (one case after 1951); Annotation, *Right with Respect to Proceeds of Life Insurance of One Whose Funds Have Been Wrongfully Used to Pay Premiums*, 24 A.L.R.2d §§ 1–5, Westlaw (database updated Oct. 2020) (showing an overwhelming percentage of cases discussing this issue are from 1880–1950); 46A C.J.S. *Insurance* § 1968, Westlaw (database updated June 2020) (same).

45 See *Lackey v. Lackey*, 691 So. 2d 990, 993–96 (Miss. 1997) (citing conflicting cases and reaching an equitable compromise on the matter); SCOTT ET AL., *supra* note 40, §§ 508.4, 516.1 (debating as to whether victims of embezzlement can claim pro-rata share in insurance payout).

C. Equity

Several themes emerging from the property/unjust enrichment context reprise when considering equity, or what American lawyers call “remedies.” Indeed, whether to think of this area as “remedial” discretionary practices or a structured taxonomy of “rules of equity” is a core difference between Anglo and American legal cultures.⁴⁶

1. The Freewheeling Constructive Trusts of American Law

The American law of constructive trusts offers a notoriously broad remedy to correct misappropriation, embezzlement, wrongdoing, and general unfairness.⁴⁷ As far back as 1919, Justice Cardozo famously announced: “A constructive trust is the formula through which the conscience of equity finds expression . . . [which offers] no unyielding formula. The equity of the transaction must shape the measure of [the] relief.”⁴⁸ Following Cardozo’s lead, courts used the constructive trust (and its equitable cousins), to remediate “any form of legal or equitable wrong.”⁴⁹

American courts grant constructive trusts even absent a showing of fraud or misrepresentation,⁵⁰ and do not generally require prior relationship between the constructive trustee and the victim.⁵¹ The primary limitation on this remedy is found in the bankruptcy context, where the contest is not between the wrongdoer and the victim, but between the victim and the

46 See Saiman, *Restitution and Legal Doctrine*, *supra* note 29, 994–99.

47 The most nuanced American treatment are found in: HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 297–327 (2004); Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265, 277–84 (1998); Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 313.

48 *Beatty v. Guggenheim Expl. Co.*, 122 N.E. 378, 380–81 (N.Y. 1919); *see also* H. Jefferson Powell, “*Cardozo’s Foot*”: *The Chancellor’s Conscience and Constructive Trusts*, LAW & CONTEMP. PROBS., Spring 1993, at 7, 15–16 (noting *Beatty* reflects the classic articulation of American constructive trust law).

49 See GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.3, at 100 (1978 & Supp. 2008). A concise listing of uses is outlined in Andrew Kull, *Deconstructing the Constructive Trust*, 40 CANADIAN BUS. L.J. 358, 361 (2004). *See In re Estate of Savich*, 671 N.W.2d 746, 751 (Minn. Ct. App. 2003) (“A constructive trust is not limited to situations involving fraud or other wrongdoing, but may be imposed when there is clear and convincing evidence that it would be ‘morally wrong for the property holder to retain’ the property.” (quoting *Estate of Spiess v. Schumm*, 448 N.W.2d 106, 108 (Minn. Ct. App. 1989))); *Jaser v. Fischer*, 783 A.2d 28, 35 (Conn. App. Ct. 2001) (reasoning that a constructive trust can arise under almost any situation where a party “obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy” (quoting *Spatola v. Spatola*, 492 A.2d 518, 520 (Conn. App. Ct. 1985))).

50 See PALMER, *supra* note 49, § 1.3; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 reporters’ note cmt. a (AM. L. INST. 2011); *see also Constructive Trust*, BLACK’S LAW DICTIONARY (8th ed. 2004) (“Despite its name, [a constructive trust] is not a trust at all” but is “[a]n equitable remedy that a court imposes against one who has obtained property by wrongdoing.”); *Constructive Trust*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[T]he device does not create a ‘trust’ in any usual sense of that word.”).

51 See PALMER, *supra* note 49, §§ 1.3, 15a, at 94 (citing cases).

wrongdoer's other victims or creditors.⁵² Dan Dobbs, arguably the most mainstream American remedies scholar of the late twentieth century, highlighted the influence of legal realism in this area, noting “[c]onstructive trust is the name we give to [the] decision, not the reason for it.”⁵³ He cautioned against taking the trust terminology too seriously, because it “stand[s in] for one or more of the potential effects, but the term has no mystical significance.”⁵⁴

2. The Conceptualized Constructive Trusts of English Law

English constructive trust law is more confined,⁵⁵ and the differences illuminate the broader jurisprudential debate about the nature of private law reasoning. The realist-inspired American version assumes constructive trusts are remedies imposed by courts to reverse wrongdoing. Doctrinally, this means less insistence that the remedy perfectly correlate with the violated right and that trial court awards of constructive trust are reviewed under deferential “abuse of discretion” standards rather than the more searching *de novo* review that attends to questions of law.⁵⁶ The prevailing English view rejects that constructive trusts are court-fashioned remedies, but holds they arise by operation of law in response to correlative violations of the victim’s property rights.⁵⁷ English law therefore subdivides constructive trusts into

52 See *Poss v. Morris* (*In re Morris*), 260 F.3d 654, 666–68 (6th Cir. 2001); *Kitchen v. Boyd* (*In re Newpower*), 233 F.3d 922, 931 (6th Cir. 2000); *Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers of Conn.* (*In re Dow Corning Corp.*), 86 F.3d 482, 494–95 (6th Cir. 1996); *XL/Datacomp, Inc. v. Wilson* (*In re Omegas Grp., Inc.*), 16 F.3d 1443, 1448 (6th Cir. 1994); DAGAN, *supra* note 47, at 299–302; Kull, *supra* note 47, at 265; Sherwin, *supra* note 47, at 315–16; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 (AM. L. INST. 2011).

53 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–REMEDIES–RESTITUTION § 4.3, at 398 (2d ed. 1993).

54 *Id.*

55 See, e.g., J.D. HEYDON & M.J. LEEMING, JACOBS’ LAW OF TRUSTS IN AUSTRALIA 238 (8th ed. 2016) (observing that, in the United States, “the term ‘constructive trust’ is more loosely used than has been the case in England and Australia”).

56 See *United States v. Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008) (reviewing “imposition of a constructive trust” under an “abuse of discretion” standard); *Am. Metal Forming Corp. v. Pittman*, 52 F.3d 504, 508 (4th Cir. 1995) (same); *David Welch Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339, 345 (Ct. App. 1988) (same); *United States v. Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008) (same).

57 *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 (HL) at 714–15 (appeal taken from Eng.); *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* [1981] 1 Ch. 105 at 124 (Eng.) (rights and remedies are “indissolubly connected” and the distinction between them is “idle”); see also ROBERT CHAMBERS, RESULTING TRUSTS 3 (reprt. 2006) (1997); Peter Birks, *The End of the Remedial Constructive Trust?*, 12 TRUST L. INT’L 202 (1998); Lord P.J. Millett, *Restitution and Constructive Trusts*, 114 LAW Q. REV. 399, 399–400 (1998); Charlie Webb, *The Myth of the Remedial Constructive Trust*, 69 CURRENT LEGAL PROBS. 353, 355 (2016). For Anglo critiques of this orthodoxy, see CRAIG ROTHERHAM, PROPRIETARY REMEDIES IN CONTEXT 27–31 (2002); Simon Evans, *Defending Discretionary Remedialism*, 23 SYDNEY L. REV. 463, 463, 500 (2001); Simon

the institutional (also called substantive/resulting/implied) constructive trusts, which arise as a matter of law, and “American style” or “remedial” constructive trusts that do not.⁵⁸

Though some Commonwealth courts have moved in the American direction,⁵⁹ the UK Supreme Court expressly disavowed these developments, explaining that “[p]roperty rights are fixed and ascertainable rights,” and “[w]hether they exist . . . depends on settled principles, even in equity.”⁶⁰ English law has therefore “not recognised the remedial constructive trust favoured in . . . the United States.”⁶¹

D. Tort

1. Duty Analysis in American Law

Starting in the late 1950s and '60s, California courts held that lawyers and other professionals could be liable to nonclients despite the lack of contractual privity between them. *Biakanja v. Irving* involved a suit against a notary who produced a will deemed invalid for want of attestation.⁶² The decision is generally devoid of theorizing on the nature of legal liability, and rests on the realist view that “privity is a matter of policy and involves the balancing of various factors.”⁶³ A follow-up case discussed a will drafted by a lawyer that failed to comply with the rule against perpetuities.⁶⁴ Since the

Gardner, *The Element of Discretion*, in 2 THE FRONTIERS OF LIABILITY 186, 197–203 (P.B.H. Birks ed., 1994); Darryn M. Jensen, *The Rights and Wrongs of Discretionary Remedialism*, 2003 SINGAPORE J. LEGAL STUD. 178, 180; Donovan W.M. Waters, *Liability and Remedy: An Adjustable Relationship*, 64 SASK. L. REV. 429, 447–53 (2001).

⁵⁸ *Westdeutsche* [1996] AC at 714–15. These categories were first articulated by Roscoe Pound, but have failed to gain traction in the American discourse. See Roscoe Pound, *The Progress of Law, 1918–1919 Equity*, 33 HARV. L. REV. 420, 422–23 (1920). On occasion, American courts will discuss differences between constructive and resulting trusts. See, e.g., *Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261–62 (1st Cir. 2004); *Markgraf v. Welker*, 873 N.W.2d 26, 34 (N.D. 2015); *In re Estate of Abernathy*, 778 So. 2d 123, 127–28 (Miss. 2001). But the distinctions are often muddled together. See, e.g., *Nichols v. Nichols (In re Estate of Nichols)*, 856 S.W.2d 397, 401–03 (Tenn. 1993) (merging standards); see also Kull, *supra* note 47, at 359–61.

⁵⁹ See, e.g., *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 219 (Can.); *Grimaldi v Chameleon Mining NL (No. 2)* [2012] 200 FCR 296 (Austl.); *Elders Pastoral Ltd. v. Bank of N.Z.* [1989] 2 NZLR 180 (CA) (N.Z.); *Kelly v. Cahill* [2001] 1 IR 56, 62 (H. Ct.) (Ir.). For a review of English law with comparisons to Canadian and Australian law, see Ying Khai Liew, *Reanalysing Institutional and Remedial Constructive Trusts*, 75 CAMBRIDGE L.J. 528, 540–44 (2016).

⁶⁰ *Bailey v. Angove's PTY Ltd.* [2016] UKSC 47, [28].

⁶¹ *Id.* at [27]; see also *FHR Eur. Ventures LLP v. Cedar Cap. Partners LLC* [2014] UKSC 45, [47] (remedial constructive trusts have “authoritatively been said not to be part of English law”).

⁶² *Biakanja v. Irving*, 320 P.2d 16, 17 (Cal. 1958).

⁶³ *Id.* at 19.

⁶⁴ See *Lucas v. Hamm*, 364 P.2d 685, 686 (Cal. 1961).

purpose of a will is to benefit third parties, the court held that “as a matter of policy, [the putative heirs can] recover as third-party beneficiaries.”⁶⁵

Neither case attempts to justify its result in terms of the theoretical underpinnings of private law, or whether the claims are best classified as a contract or tort. When later forced to confront the matter, the California court nonchalantly stated that it could be either.⁶⁶

2. Duty Analysis in Contemporary English Law

A similar issue came before the House of Lords in the late 1990s. Lawyers had followed client instructions to draft a will dispossessing the client’s daughters.⁶⁷ The family later reconciled, and lawyers were instructed to prepare a new will.⁶⁸ The lawyers negligently delayed and the testator died with the old will in force.⁶⁹ The daughters sued the lawyers claiming the inheritance they were due under the should-have-been revised will.⁷⁰

Because the case did not neatly fit into either contract or tort concepts, the lead opinion is structured as a balancing act between the “impulse to do practical justice” (favoring plaintiffs) and the “conceptual difficulties” raised by accommodating liability within ordinary private law principles.⁷¹ As a matter of contract law, the heirs were third-party beneficiaries and not in contractual privity with the lawyers.⁷² From the tort side, omissions are not generally actionable.⁷³ Nevertheless, the “impulse to do practical justice” pushed the House of Lords to extend its line of professional liability cases,⁷⁴ and hold that the duty owed to the client could extend to intended beneficiaries.⁷⁵

3. Trends in Twentieth Century American Tort Law

Traditionally, both English and American law precluded claims for want of privity of contract or duty in tort. Realist thinking, however, chipped away at these requirements,⁷⁶ and mainstream American law stopped taking the

65 See *id.* at 689 (in dicta).

66 See *Heyer v. Flaig*, 449 P.2d 161, 163–64 (Cal. 1969) (noting that applying *Biakanja* criteria in a contractual setting leads to both contract and tort causes of action). Much the same was true in the insurance bad-faith context. See *Comunale v. Traders & Gen. Ins.*, 328 P.2d 198, 202–03 (Cal. 1958) (observing that insurance bad-faith action can arise in either contract or tort); see also *Crisci v. Sec. Ins. Co. of New Haven, Conn.*, 426 P.2d 173, 178–79 (Cal. 1967) (same).

67 See *White v. Jones* [1995] 2 AC 207 (HL) at 216–19 (Lord Nicholls).

68 *Id.* at 217.

69 *Id.* at 217–18.

70 *Id.* at 218.

71 *Id.* at 255, 259 (Lord Goff of Chieveley) (emphasis omitted).

72 *Id.* at 266.

73 *Id.* at 267–69.

74 *Id.* at 259, 262.

75 See *id.* at 268–269.

76 See WILLIAM LLOYD PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 380, 394–402 (1953) [hereinafter PROSSER, *Borderland*] (collecting cases).

idea of “duty” seriously altogether. By the 1950s, the peregrinations of duty analysis were presented to first-year law students as the parade example of common law’s conceptual and doctrinal malleability.⁷⁷

This line of critique ran from Holmes,⁷⁸ to Francis Bohlen,⁷⁹ Leon Green,⁸⁰ and Cardozo,⁸¹ and eventually crystallized in William Prosser’s midcentury treatise, destined to become the leading authority of the era.⁸² Prosser explained:

The statement that there is or is not a duty [of care] . . . is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . “[D]uty” is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.⁸³

Prosser’s realist-inspired account describes duty as an empty vessel whose primary justification is that “[i]t is embedded far too firmly in our law to be discarded.”⁸⁴ On Prosser’s reading, defendant’s “no duty” claim typically fails, and tort law transitioned from a conceptual analysis to a policy judgment about the boundaries of liability.⁸⁵

Though the pendulum has swung back in recent decades, traditional limitations on tort recovery can still be understood as “historical anomalies” that had become “‘outmoded’ or obsolete,”⁸⁶ requiring courts to clear away

77 See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 12–19 (1949).

78 See, e.g., O.W. HOLMES, JR., *THE COMMON LAW* 75–76, 105–08 (Boston, Little, Brown & Co. 1881); *The Theory of Torts*, 7 AM. L. REV. 652, 652 (1873) (unsigned article written by Oliver W. Holmes); see also John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1753–56 (1998).

79 See Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 209, 209 (1905).

80 See Leon Green, *The Duty Problem in Negligence Cases* (pts. 1 & 2), 28 COLUM. L. REV. 1014, 1033–44 (1928), 29 COLUM. L. REV. 255 (1929).

81 See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 937–38 (1981). But see Goldberg & Zipursky, *supra* note 78, at 1766–70.

82 For the traditional account, see LEVI, *supra* note 77, at 7–19; PROSSER, *Borderland*, *supra* note 76 at 391–400; G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 137–79 (rev. ed. 2003); and Rabin, *supra* note 81, at 925–28, 950–54. But see Goldberg & Zipursky, *supra* note 78, at 1746 n.45 (arguing that Cardozo believes in a relational account of duty rather than the public policy conception conventionally attributed to him).

83 WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 53 (3d ed. 1964). This is quoted and critiqued in Goldberg & Zipursky, *supra* note 78, at 1763. This stance continues in more recent law. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW: AN ANALYTICAL PRIMER ON CASES AND CONCEPTS* 225 (1997), which is critiqued in Goldberg & Zipursky, *supra* note 78, at 1770–71.

84 PROSSER, *supra* note 83, § 53.

85 See Goldberg & Zipursky, *supra* note 78, at 1752–66 (outlining and critiquing the “Holmes-Prosser” assault on duty).

86 Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 608 (1992) [hereinafter Schwartz, *Beginning and Possible End*] (footnote omitted) (quoting Robert E. Keeton, Comment, 21 VAND. L. REV. 906, 915 (1968)) (noting that the rise of mid-twentieth century tort law was arrested in 1980). Stan-

“various encumbrances operating on tort law.”⁸⁷ It became commonplace to discount privity and duty requirements in academic circles, pointing to the malleability of “special relationships,”⁸⁸ and to the distinction between actionable misfeasance and non-nonfeasance.⁸⁹

E. *Interim Summary*

Though we have examined four areas, substantially parallel narratives emerge across a range of substantive private law issues, including: rise of promissory estoppel and section 90 of the *Restatement of Contracts*;⁹⁰ products liability under section 402A of the *Second Restatement of Torts*;⁹¹ availability of remedies for third-party beneficiaries in contract;⁹² expansion of vicarious liability concepts in tort;⁹³ and continuing relevance of the law/equity distinction.⁹⁴

Throughout the late nineteenth and early twentieth centuries, across the Atlantic divide private law was understood as “general commercial law,”⁹⁵ with a similar doctrinal architecture that was largely independent of which

dard accounts include: WHITE, *supra* note 82, at 63–113 (describing how tort liability expanded over the twentieth century); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 965–67 (1981) (describing the rapid rise of mid-twentieth century tort law, with a special emphasis on California courts).

87 Schwartz, *Beginning and Possible End*, *supra* note 86, at 610.

88 A complete history can be found in JAY M. FEINMAN, *PROFESSIONAL LIABILITY TO THIRD PARTIES* 11–27 (2d ed. 2007).

89 See Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778, 797 n.107 (1953); see also PROSSER, *Borderland*, *supra* note 76, at 387–422.

90 See, e.g., Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 716–718 (1984).

91 See Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, J. TORT L., no. 3, 2007, at 1, 17 (“[T]he judge-made law of torts in England and Wales . . . did not develop analogues of the tort set out in § 402A of the Second Restatement . . .”).

92 It took parliamentary legislation for English law to arrive at the American rule allowing certain third-party beneficiaries to enforce the contract against a breaching party. See *Contracts (Rights of Third Parties) Act 1999*, c. 31, § 1 (Gr. Brit.).

93 On the American expansion, see PROSSER AND KEETON ON THE LAW OF TORTS § 70 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984); William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584, 585 (1929); Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 164–73 (1954); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1231–32 (1984). On Commonwealth reactions, see PAULA GILIKER, *VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE* 196–222 (2010); Claire McIvor, *The Use and Abuse of the Doctrine of Vicarious Liability*, 35 COMMON L. WORLD REV. 268, 268 (2006); Marianne Tutin, Note, *Vicarious Liability: An Ever Expanding Concept?*, 45 INDUS. L.J. 556, 556–64 (2016).

94 See Andrew Burrows, *We Do This at Common Law But That in Equity*, 22 OXFORD J. LEGAL STUD. 1, 1–5 (2002); James Edelman & Simone Degeling, *Fusion: The Interaction of Common Law and Equity*, 25 AUSTRALIAN BAR REV. 195 (2004); Michael Kirby, *Equity’s Australian Isolationism*, 8 QUEENSL. U. TECH. L. & JUST. J. 444, 467–69 (2008).

95 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842); see also *Balt. & Ohio R.R. v. Baugh*, 149 U.S. 368, 379 (1893) (referencing “general rules of the common law”).

jurisdiction articulated it.⁹⁶ American casebooks relied on English cases precisely because they were not “foreign law” or even “English law,” so much as the prime exemplar of the transjurisdictional common law.⁹⁷ Holmes profitably corresponded with Pollock,⁹⁸ Cardozo was revered on both continents,⁹⁹ and the common law was deemed the patrimony of English-speaking peoples.¹⁰⁰

In the standard history, as realist-inspired lawyers came to see private law as another form of state-based regulation, they shifted from internalist accounts toward instrumentalist ones.¹⁰¹ While realists generally favored expanding the liability horizon, private-law instrumentalism can be used to conservative ends (classical law and economics) just as much as for avowedly redistributionist purposes.¹⁰² The divergence is less about policy goals than about the nature of private law adjudication itself.¹⁰³

96 See, e.g., *N. Assurance Co. of London v. Grand View Bldg. Ass'n*, 183 U.S. 308, 317–24 (1902) (reviewing English and Canadian holdings on contract interpretation in the context of interpreting an insurance policy under American law); see also EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 69–72 (1992) (observing that *Northern Assurance* reflected the jurisprudential assumptions of the era).

97 For some early twentieth-century examples, see *State v. Wilson*, 161 S.E. 104, 110 (S.C. 1931) (“While the common law of England is of force in this state . . . [courts] are not bound by the decisions of the courts of England, for ‘We have a right to take our own view of the Common Law.’” (quoting *Shcut v. McDowel*, 6 S.C.L. (1 Tread.) 35, 38 (S.C. Const. App. Ct. 1812))); *Ingram v. Fred*, 210 S.W. 298, 300 (Tex. Civ. App. 1918) (“The decisions of the English courts are not conclusive proof of what the common law of England really is, although they are entitled to great weight.”).

98 See 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932 (Mark DeWolfe Howe ed., 1941).

99 See Note, 54 LAW Q. REV. 491, 493 (1938) (“[I]n his life and . . . work Justice Cardozo represented so nobly these great ideals of Anglo-American justice that he will be welcomed into the goodly company of Coke and Mansfield, Marshall and Holmes.”).

100 See Priel, *supra* note 1, at 610–18.

101 See Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 625 (2004) (Jules Coleman, Scott Shapiro & Kenneth Einar Himma eds., 2004) (exemplifying instrumentalist theories holding that private law is “a regulatory enterprise of the state”).

102 See John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1641–48 (2012) (describing American tradition of private law skepticism that embraces scholars of many generations and political leanings). Dan Priel understands that American law is grounded on democratic ideals that embody the customs and will of the contemporary majority and are thus more open to social science and instrumentalist logic. Anglo law is more attracted to philosophical accounts of corrective justice that closely examine the duties, rights, powers, and remedies owed to each party, as well as Edward Coke’s claim that law is based on “artificial reason” understood only by lawyers immersed in the logic of the cases. See Priel, *supra* note 1, at 624–37; see also *infra* text surrounding notes 113–28 (discussing Peter Birks).

103 See Shyamkrishna Balganesh, *Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence*, 35 COMMON L. WORLD REV. 135, 161–63 (2006) (explaining that a more essentialist Anglo approach has an easier time expanding liability for internet torts than American consequentialist views); see also Ralf Michaels, *Of Islands*

Moreover, American decisions are not *always* more expansive,¹⁰⁴ or more realist. In the vastness of each system, numerous counterexamples are easily located, and the expansionism of American private law has receded from its high-water mark.¹⁰⁵ Moreover, the divergence is probably greater in matters of equity, trusts, and restitution¹⁰⁶ than in either contracts or torts; and even within contract law, more prevalent in offer and acceptance law than in the parol evidence rule.¹⁰⁷

Nevertheless, even formalist expressions of American private law are often grounded on realist assumptions about what the law is,¹⁰⁸ and overall comparison shows conceptual reasoning from private law doctrines is a more dominant feature of English than American law.¹⁰⁹

and the Ocean: The Two Rationalities of European Private Law, in THE FOUNDATIONS OF EUROPEAN PRIVATE LAW 139, 142 (Roger Brownsword, Hans-W Micklitz, Leone Niglia & Stephen Weatherill eds., 2011) (noting that both “juridical” and “instrumentalist” approaches to private law can be used for conservative or liberal ends).

104 English courts sometimes follow American results, and sometimes do not. But even when the results are the same, the methodology differs. See, e.g., BRUCE FELDTHUSEN, ECONOMIC NEGLIGENCE: THE RECOVERY OF PURE ECONOMIC LOSS (5th ed. 2008) (recognizing that while American and Anglo systems exhibit different ways of conceptualizing pure economic loss torts, the results are remarkably similar); Peter Handford, *Psychiatric Injury in Breach of a Relationship*, 27 J. LEGAL STUD. 26, 46–48 (2007); Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused “Middle Theory,”* 50 UCLA L. REV. 531, 556–59 (2002); Kay Wheat, *Proximity and Nervous Shock*, 32 COMMON L. WORLD REV. 313, 335 (2003).

105 For contract law, see Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2117–23 (2014) (noting relatively individualistic and conservative nature of U.S. contract law). For tort, see Schwartz, *Beginning and Possible End*, *supra* note 86, at 681–83. For a discussion of the professional liability cases, see Goldberg & Zipursky, *supra* note 78, at 1775 nn.160–61.

106 See Saiman, *Restitution in America*, *supra* note 29, at 103.

107 See LAW COMMISSION, LAW OF CONTRACT: THE PAROL EVIDENCE RULE, 1986, Cmnd. 9700 § 2.45 (UK) (“While a wider parol evidence rule seems to have existed at one time, no such wider rule could, in our view, properly be said to exist in English law today.”). For a review of the more formal American doctrine, see Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRIES L. 457, 485–86 (2019).

108 See Goldberg, *supra* note 102, at 1641–53; Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 643–60 (1999) (noting that many expressions of modern American formalism are defended on empirical or consequential grounds).

109 This trend is also reflected in the academy. See Susan Bartie, *The Lingering Core of Legal Scholarship*, 30 J. LEGAL STUD. 345, 354–55 (2010) (explaining that core doctrinal scholarship about common/private law matters is held in higher esteem in England and Australia than in the United States); John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in WHAT ARE LAW SCHOOLS FOR? 1, 5 (P.B.H. Birks ed., 1996); Stapleton, *supra* note 104, at 571–74; see also Reinhard Zimmermann, Essay, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L.J. 659, 688–90, 689 n.155 (1998) (noting demise of doctrinal scholarship in American law reviews).

II. RELOCATING FORMALISM

Notwithstanding the vast impact of realism on American law, formalism did not disappear. Instead it moved to the areas of law left open by the receding private law: originalism and structuralism on the constitutional front,¹¹⁰ textualism on the statutory and administrative front,¹¹¹ and jurisdictional demarcations of the role of courts on the procedural front.¹¹²

These shifts can be seen by contrasting theories put forth by each system's leading conceptualists of the past generation: the late Professor Peter Birks in the Anglo world, and the late Justice Scalia in the American. As Regius Professor of Civil Law at Oxford, Birks held one of the most prestigious academic posts in the non-American English-speaking world.¹¹³ Though his primary focus was restitution,¹¹⁴ by seeding a generation of students as judges and professors across England and the Commonwealth, Birks became the most influential figure in English private law.¹¹⁵

Birks was a doctrinal lawyer whose oeuvre is dominated by claims that taxonomy, analytical mapping, and tight conceptual categories are the foundations of proper legal thinking.¹¹⁶ Though not jurisprude, Birks under-

110 See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1–19 (1999); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 697 (1999); John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1170–74 (2007); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–54 (1989).

111 Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 545–52 (1983); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 697–702 (1997).

112 See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155–56, 1159–64 (1992); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1702–06 (2004).

113 Andrew Burtows & Alan Rodger, *Introduction to Mapping the Law: Essays in Memory of Peter Birks* 1 (Andrew Burtows & Alan Rodger eds., 2006).

114 See generally PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* (1985); PETER BIRKS, *UNJUST ENRICHMENT* (2d ed. 2005), along with scores of articles. As a testament to his influence, Birks served as the editor of the first edition of Oxford's two volume treatise titled *ENGLISH PRIVATE LAW* (Peter Birks ed., 2000).

115 On Birks's influence, see *Introduction to Mapping the Law: Essays in Memory of Peter Birks*, *supra* note 113, at 1, 1–9; Charles Rickett & Ross Grantham, *In Memoriam—Professor Peter Birks*, in *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS* 1, 1–4 (Charles Rickett & Ross Grantham eds., 2008); Gerard McMeel, *What Kind of Jurist Was Peter Birks?*, 19 *RESTITUTION L. REV.* 15, 15 (2011); see also Jack Beatson, *Peter Birks*, *GUARDIAN* (July 15, 2004), <https://www.theguardian.com/news/2004/jul/16/guardian-obituaries.obituaries> (observing that Birks's "intellectual legacy is the unusually large group of productive legal scholars who can accurately be described as Birksian in their approach").

116 Commonwealth skepticism of the Birksian project can be found in, for example, STEPHEN WADDAMS, *DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING* 4–22 (2003); Steve Hedley, 'And So the Legal World Goes Round': The Search for a Meaningful Law of Restitution 1 (Oct. 2016) (unpublished manuscript) (available at <https://ssrn.com/abstract=2854292>) ("If 'unjust enrichment' is our map, we need something in addition to help us decide where we should be going.").

stood his own project in contrast to American realism. “A sound taxonomy . . . is an essential precondition of rationality” which stands as a bulwark against realism, which will always “play from a winning hand” unless the law is rigidly classified.¹¹⁷ Birks held that conceptual thought is essential to “honour the democratic bargain”¹¹⁸ (what Americans know as the countermajoritarian difficulty), since rule by judges is only justified if judges are “both the masters and the servants of a complex system of reasoning.”¹¹⁹ This “specialised rationality” of the law differentiates it from legislative politics or popular notions of rationality.¹²⁰ The “best hope of controlling power” in complex modern society,¹²¹ said Birks, is a rigorous and rigid classification scheme whose “raw materials are all in place in the law library.”¹²² Drawing a purposeful contrast to the realist legacy of Holmes, Birks called for “more logic and less experience.”¹²³ Without systematized taxonomy, law is “no more than an alibi for illegitimate power.”¹²⁴

Variations of these concerns are equally present in the writing of Antonin Scalia. Like Birks, Scalia forcefully argued that only a confined account of judging could address concerns over the judicial role in a democracy. But while the desire to constrain judges led Birks to deepen the conceptual account of private law, Scalia assumes it is irredeemably realist. Scalia’s theories are designed to protect the democratic bargain by *keeping private law away* from the most important departments of American law.

While Scalia’s celebrated essay *Common Law Courts in a Civil Law System* is usually remembered for introducing textualism, the essay does not open with a discussion of statutes.¹²⁵ Instead, Scalia restates and effectively reaffirms the hyper-realist account of the common law. Recounting the excitement of a first-year contracts class, Scalia notes:

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting!¹²⁶

While Birks and Anglo conceptualists argue for the classical idea that judges merely declare preexisting common-law principles rather than make

117 Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U.W. AUSTRALIA L. REV. 1, 4, 98 (1996) (praising Anglo law for “not yet succumb[ing] to the realist destruction of legal science”).

118 *Id.* at 97.

119 *Id.* at 98–99; see also Birks, *supra* note 57, at 214–15 (“Lawyers have no special competence in distributive justice.”).

120 Birks, *supra* note 117, at 98.

121 *Id.* at 99.

122 *Id.*

123 *Id.* at 5.

124 *Id.* at 99.

125 ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed, 1997).

126 *Id.* at 7.

law through their judgments, Scalia expressly rejects it.¹²⁷ And while Birks finds the judge constrained by the law's internal reasoning, following the realists, Scalia holds it is empty rhetoric. Precedent and legal analysis *only appear to constrain*, but in reality (realism!), the common-law judge picks the rule first and proceeds by “distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.”¹²⁸

Though “content to leave the [state-based private] common law” alone,¹²⁹ Scalia's aim is to keep these realist sensibilities far from the text-driven “civil-law system” of federal statutory, procedural, and constitutional law.¹³⁰ The goal is not only to drive a wedge between common law and statute, but to quarantine the realist assumptions that infected private law from the formalist approach he deemed mandated by a structural reading of the Constitution.

Whether by genius, luck, or foresight, Scalia's move proved prescient. Though American private law continues to bear its realist heritage (recent counter-trends are discussed later), the “civil law” of statutes and procedure took a dramatic turn in Scalia's direction. But while American formalism shifted to public, statutory, and procedural law, these shifts are *not typical* of the Anglo world. There, private law formalism remains strong and its doctrines are significant across the legal orbit. And it has not been displaced by American-styled jurisdictional and interpretation law.

The ensuing Parts show why these trends are related.

III. FORMALISM IN STATUTORY INTERPRETATION

The standard account offers little mystery over why legal doctrine moved from private law toward statutory interpretation. The administrative state is a creature of statute. As lawmaking power moved from the common law to the tools of legislated governance, intensive doctrinal analysis followed.

Familiarity with Anglo law complicates this wisdom. The regulatory state is a feature of many twentieth century common-law regimes. But outside the United States, common law is less likely to be displaced by the law of interpre-

127 *Id.* at 10 (“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”); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and in judgment); Allan Beaver, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421, 421–23 (2013); Peter Birks, *Mistakes of Law*, 53 CURRENT LEGAL PROBS. 205, 217–18 (2000); Priel, *supra* note 10, at 170 (observing that Anglo conceptualists are the “last holdouts of the declaratory theory”). For a rehabilitation of the concept by an American textualist, see Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 532–559 (2019).

128 SCALIA, *supra* note 125, at 9.

129 *Id.* at 12.

130 *Id.* at 7.

tation and its norms are correspondingly less doctrinalized.¹³¹ The difference may have less to do with the existence of statutes *per se* than with assumptions governing how they are read.

A. *Theories of Statutory Interpretation*

Few areas of American law have been subject to more recent scholarly conceptualization than statutory interpretation.¹³² What began as relatively quixotic efforts by Justice Scalia and Judge Frank Easterbrook in the 1980s¹³³ begat enough textualist theory and counter-theory to occupy libraries. Textualism is premised on a structural reading of the Constitution that requires courts to stand dormant unless directed to act by an express statutory mandate. The result is inward-facing doctrines that focus exclusively on legislated text, while prohibiting consideration of other social or even legal factors in discerning statutory meaning.¹³⁴

While the textualist mode has not gained universal adoption,¹³⁵ interpretation at all levels of American law moved decisively in this direction as debates regarding textualism's conceptual and empirical underpinnings have become a mainstay of scholarly and judicial writing.

Anglo interpretation by contrast is less theorized, less salient in the academy,¹³⁶ less doctrinalized, less politically contentious—and notably less textualist.¹³⁷ Generalizing from writings by Justices on the UK Supreme Court,¹³⁸

131 Scholars have recently taken to conceptualizing statutory interpretation as hard doctrinal rules of law rather than unwritten “rules of thumb.” See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017). Others discuss whether *Erie* principles apply to statutory interpretation law. See, e.g., Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1907–24 (2011) [hereinafter Gluck, *Intersystemic Statutory Interpretation*]; Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 811 (2013).

132 See, e.g., Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 241 (1992).

133 See generally SCALIA, *supra* note 125; Easterbrook, *supra* note 111.

134 See, e.g., Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 700 (2008) (describing how, post-*Erie*, federal courts lack constitutional authority to engage in policymaking decisions characteristic of common-law adjudication); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

135 See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1310 (2018) (concluding that few appellate judges fully subscribe to Scalian textualism).

136 See STATUTE L. SOC'Y, *TEACHING LEGISLATION IN UNITED KINGDOM LAW SCHOOLS: SUMMARY OF SURVEY RESULTS 6* (2011), <http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/Teachinglegislation-surveyresultsMar12.pdf> (finding fewer than twenty percent of English law schools have a course on legislation).

137 See Ben Chen & Jeff Gordon, *Interpretive Formalism in the Law of Obligations: Thirty Years After Form and Substance*, in *FORM AND SUBSTANCE IN THE LAW OF OBLIGATIONS* 373, 373 (Andrew Robertson & James Goudkamp eds, 2019) (explaining that, while American

the High Court of Australia,¹³⁹ the English Court of Appeal,¹⁴⁰ and one of Oxford's leading private law scholars, now a Justice on the UK Supreme Court,¹⁴¹ a reasonably consistent picture emerges. While Anglo interpretation was flat and literalist in the middle decades of the twentieth century, it has shifted toward the approach of midcentury American legal process scholars.¹⁴² English and Commonwealth scholars have their share of methodological disagreements,¹⁴³ and are concerned with judicial usurpations of the parliamentary role.¹⁴⁴ But attention to these matters pales in comparison to the intensity found within American law.

These differences are made concrete in the rhetorical gap between English law's *always-speaking* canon and the textualist approach to updating (or rather, not updating) legal meaning over time. The English canon holds that since statutes are written in the eternally present tense (they are "always speaking"), they must be read in light of contemporary law and policy.¹⁴⁵

statutory interpretation has become more formalist, Australian courts have moved in the opposite direction).

138 See JUSTICE JOHN DYSON, *The Shifting Sands of Statutory Interpretation*, in JUSTICE: CONTINUITY AND CHANGE 114, 115–24 (2018).

139 See Justice Michael Kirby, *Statutory Interpretation: The Meaning of Meaning*, 35 MELBOURNE U. L. REV. 113, 116 (2011).

140 See Justice Philip Sales, *Modern Statutory Interpretation*, 38 STATUTE L. REV. 125, 128–29 (2017).

141 See ANDREW BURROWS, THINKING ABOUT STATUTES: INTERPRETATION, INTERACTION, IMPROVEMENT (2018).

142 See *id.* at 79 – 81.

143 See, e.g., Justice James Spigelman, *The Intolerable Wrestle: Developments in Statutory Interpretation*, 84 AUSTRALIAN L.J. 822, 831 (2010); see also James Edelman, Justice of the High Court of Australia, Address at the Constitutional Centre Twilight Seminar: Uncommon Statutory Interpretation (May 6, 2012), https://www.supremecourt.wa.gov.au/_files/uncommon_statutory_interpretation_may_2012.pdf.

144 See, e.g., *R ex rel. Prudential plc v. Special Comm'r of Income Tax* [2013] UKSC 1, [2013] 2 All ER 247 [52], [61]–[67] (Lord Neuberger P); *id.* at [81] (Lord Hope DP); *id.* at [101] (Lord Reed SCJ); *Woolwich Bldg. Soc'y v. Inland Revenue Comm'rs* (No. 2) [1992] 3 All ER 737 (HL) at 783 (Lord Slynn of Hadley) (expressing doubts about the line between common-law development and usurping legislative role); see also *Michael v. Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 All ER 635 [130] (Lord Toulson SCJ). For scholarly commentary by English and Commonwealth judges, see TOM BINGHAM, *The Judge as Lawmaker: An English Perspective*, in THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES 25, 25–34 (2000); Michael Kirby, *Judicial Activism*, 27 U.W. AUSTRALIA L. REV. 1, 1–3 (1997); Robert Walker, *Developing the Common Law: How Far is Too Far?*, 37 MELBOURNE U. L. REV. 232, 250–53 (2013); Lord John Dyson, *Where the Common Law Feels to Tread*, 34 STATUTE L. REV. 1, 1–2 (2013).

145 See, e.g., *R v. Ireland* [1997] 4 All ER 225 (HL) at 228–29, 233 (owing to the always-speaking canon, the term "actual bodily harm" found in an 1861 statute is read to include "psychiatric illness" even though this was not within the intention of the Victorian legislature). A more controversial application is found in *Yemshaw*, where a 3–2 majority found the government's obligation to provide accommodation for the victims of "violence" under the Housing Act extended to nonphysical domestic violence. See *Yemshaw v. Hounslow London Borough Council* [2011] UKSC 3, [2011] All ER 912 [27]–[29] (Lady Hale SCJ). Some criticized the court for trespassing on Parliament's domain. See Richard Ekins,

Textualists, by contrast, are concerned that allowing a court to interpret older text in light of current policy affords too much room to interpose judicial policy judgments onto the statute. Textualism rejects the always-speaking canon and deliberately freezes statutory language as of the moment of its enactment.¹⁴⁶ This does not mean that all—or even most—cases are decided differently, but it does lead each system to ask different questions.

B. *Textualism and the Shrinking Role of Private Law*

1. Implied Rights of Action

One of the most important shifts wrought by textualism involves whether a court can imply a private right of action for violations of statutory directives. In the midcentury, American courts often answered in the affirmative,¹⁴⁷ and when statutes did not spell out relevant burdens of proof, defenses, standards of care, or remedies, these courts looked to analogous private law to fill the gaps.¹⁴⁸ Since textualism casts this form of reasoning into disrepute,¹⁴⁹ however, private law has become less relevant to statutory interpretation.¹⁵⁰

Though Anglo courts rarely match the expansiveness of midcentury American interpretation, they assume that that a private right *can be* inferred from a statute even absent an express textual mandate. One doctrinal expression of this view is embedded in the tort known as “breach of statutory

Updating the Meaning of Violence, 129 LAW Q. REV. 17, 20 (2013); see also Edelman, *supra* note 143 (transcript at 26–29).

146 See, e.g., *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (“[A] ‘fundamental canon of statutory construction’ [is] that words generally should be ‘interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.’ (omissions in original) (quoting *Wis. Cent. Ltd. v. United States* 138 S. Ct. 2067, 2074 (2018))). But see *id.* at 544 (Ginsburg, J., concurring) (“[S]ometimes, ‘[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world . . . make old applications anachronistic.’” (second alteration in original) (quoting *West v. Gibson*, 527 U.S. 212, 218 (1999))).

147 See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (“[I]t is the duty of the courts to . . . provide such remedies as are necessary to make effective the congressional purpose.”). More generally, see Donna L. Goldstein, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?*, 50 FORDHAM L. REV. 611, 615 (1982) (observing that, in the 1960s, courts often implied rights of action); Linda Sheryl Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 TEMP. L.Q. 469, 475–77 (1980) (same).

148 See Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 45–48, 51 (2015) (“[C]ourts that might once have invoked generic principles of unwritten law now use the rubric of statutory interpretation to impute answers to the particular federal statute that they are implementing.”).

149 See Jonathan A. Marcantel, *Abolishing Implied Private Rights of Action Pursuant to Federal Statutes*, 39 J. LEGISLATION 251, 268–69, 271–78 (2013).

150 See *Alexander v. Sandoval*, 532 U.S. 275, 287–93 (2001) (affirming that courts must look only to the text and not rely on the “contemporary legal context” to determine whether this is a private right of action); Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2084–89 (2017).

duty.”¹⁵¹ This action is a hybrid of statutory text and common-law principles, where the legal *duty* is drawn from statute, while the infrastructure of the tort claim is imported from private law.¹⁵²

This tort reflects English law’s rejection of the textualist and realist dichotomy, so often stressed by Scalia, that laws are either expressly legislated or else fabricated by judges. Consider the following black letter statement of the High Court of Australia:

The intention that such a private right shall exist is not . . . conjured up by judges to give effect to their own ideas of policy and then “imputed” to the legislature. The legitimate endeavour of the courts is to determine what inference really arises . . . from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation¹⁵³

For textualism, this is heresy, and exactly what it is designed to avoid.¹⁵⁴ Yet this framing stands as the uncontested black letter rule in breach of statutory duty cases.¹⁵⁵

2. The Demise of General Federal Common Law

One common explanation for the demise of common law within the federal statutory scheme is that such interpolations are constitutionally prohibited. This view assumes the Supreme Court’s dictum in *Erie Railroad Co. v. Tompkins*, stating that there is “no federal general common law,”¹⁵⁶ precludes courts from referencing the common law in statutory interpretation.

However, as Caleb Nelson has explained, in its original meaning as understood in the decades following *Erie*, this dictum applied only to a relatively narrow class of cases. When proceeding in diversity (or ancillary) jurisdiction, a federal court must point to the common-law rules of a specific state rather than a vaguer set of “federal general common law.”¹⁵⁷ Beyond that, *Erie* initially had minimal impact on how common law interacted with federal

151 See Neil Foster, *Statutes and Civil Liability in the Commonwealth and the United States: A Comparative Critique*, in *TORT LAW: CHALLENGING ORTHODOXY* 170, 173 (Stephen G.A. Pitel, Jason W. Neyers & Erika Chamberlain eds., 2013).

152 See *Brit Am Tobacco Exports BV v Trojan Trading Co Pty* [2010] VSC 572 (23 December 2010) [26] (Vic) (“Breach of statutory duty is a type of tort, in which the statute creates a civil right and the common law supplies a remedy, (such as damages.)”); see also *Lochgelly Iron & Coal Co. v McMullan* [1934] AC 1 (HL) at 9 (Lord Atkins) (holding that, though the duty arises from statute, breach of statutory duty is a tort); *id.* at 18 (Lord MacMillan) (same); *id.* at 23 (Lord Wright) (same).

153 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Austl.) (emphasis added).

154 See *Sandoval*, 532 U.S. at 286–87.

155 See Foster, *supra* note 151.

156 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

157 *Id.*; see Nelson, *supra* note 148, at 51.

statutes.¹⁵⁸ Indeed, in the post-*Erie* heyday of the legal process school, courts frequently drew on common/private-law concepts to gloss statutory regimes.¹⁵⁹

Starting in the 1980s, however, the “no federal general common law” dictum became an argument that textualism is a doctrine of structural constitutionalism necessary to protect the separation of powers.¹⁶⁰ The phrase may now mean that federal courts are barred from extending statutes in light of unwritten (often private law) principles.¹⁶¹ Craig Green has labelled this *Erie*’s “New Myth,”¹⁶² but myth or otherwise, this view deliberately rejects the approach of the legal process school and holds that written statutes and common law are like “oil and water” that cannot mix. The result—if not the goal—is to restrict (unwritten) private law from infiltrating the federal statutory domain.¹⁶³

The aversion to reading statutes in light of common law means questions that once implicated general common law are recast as matters of statutory interpretation law.¹⁶⁴ Take for example whether claimants in bankruptcy can assert property rights over specific assets, or whether they must cast their lot with the unsecured creditors who typically get mere pennies on the dollar. Anglo-Commonwealth law understands this as a private law issue that requires theorizing the boundaries of contract, property, equity, and restitution.¹⁶⁵ A line of American decisions, however, approaches the matter by setting up a contest between private/common-law rights arising from state law (which tends to allow claimants to assert specific property rights) and the textual reading of the Federal Bankruptcy Code (understood to favor pro-

158 See Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 597–97 (2008) (observing that *Erie* carries no implications for federal interpretation of federal law)

159 See cases and materials cited in WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 598–622, 955–971 (4th ed. 2007).

160 This trend was noted as early as the mid-1980s. See George D. Brown, *Of Activism and Erie—The Implication Doctrine’s Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 620–21 (1984) (observing that *Erie* is cited to limit the common-law powers of federal courts interpreting federal law).

161 See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004); Craig Green, *Can Erie Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813, 827 nn.73–74 (2013) (citing sources for this trend).

162 See Green, *supra* note 158, at 596–97, 615.

163 See *id.* at 629; see also Nelson, *supra* note 148, at 24 nn.80–82.

164 See Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 750–51 (2013).

165 See *FHR Eur. Ventures LLP v. Cedar Cap. Partners LLC* [2014] UKSC 45, [43]; *In re Polly Peck Int’l plc (No. 2) v. Stone* [1998] 3 All ER 812 (AC) at 827; *In re Goldcorp Exch. Ltd.* [1994] 2 All ER 806 (PC) at 828; *Fortex Grp Ltd v MacIntosh* [1998] 3 NZLR 171 (CA) at 178–79 (N.Z.); see also Birks, *supra* note 57; Liew, *supra* note 59, at 529–34, 549; Graham Virgo, *The Genetically Modified Constructive Trust*, 2 CANADIAN J. COMPAR. & CONTEMP. L. 579, 579–83 (2016).

rata distribution).¹⁶⁶ Andrew Kull, America's leading restitution scholar, notes that under textualist readings of the Bankruptcy Code,¹⁶⁷ "the most orthodox legal proposition, if not tied to a specific code section, may actually be challenged as spurious."¹⁶⁸

As formalized textualism expands, undertheorized private law shrinks.

C. Textualism and the Freezing of Equity

Part I noted that some of the most significant differences between English and American private law surround doctrines of restitution and equity. English law approaches these questions in terms of "hard-nosed property rights,"¹⁶⁹ and fashions remedies precisely correlating to the breach, while American law interprets equity as a zone of flexible discretion.¹⁷⁰

In the absence of private law constraints American courts have produced a series of peculiar "only in America" textualist doctrines that ponder how contemporary lawsuits would have been decided by the equity courts of the late eighteenth century. Here the tables are reversed. Questions that Anglo lawyers see as basic applications of private law rules become tangled in convoluted historical quagmires that resist functionalist analysis. And what English law sees as boring, apolitical "lawyers' law"¹⁷¹ becomes transformed into heated ideological battles at the U.S. Supreme Court. Two examples serve as demonstrations.

Computerized banking systems make it easy for funds to be instantaneously transferred across the globe. In response, commercial claimants have sought *ex-parte* freeze orders preventing defendants from hiding monies that may be needed to satisfy a judgment (commonly known as *Mareva* injunctions).¹⁷² Using conventional analysis of equity, English courts permit these

166 See Emily Sherwin, *Why In re Omegas Group Was Right: An Essay on the Legal Status of Equitable Rights*, 92 B.U. L. REV. 885, 889–90 (2012); see also sources cited *supra* notes 47–54 and accompanying text.

167 See e.g., 5 COLLIER ON BANKRUPTCY ¶ 544.02[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2010); Chen & Gordon, *supra* note 137, at 390–91.

168 Kull, *supra* note 47, at 266–67 (lamenting the textualist interpretation of "common-law statutes" such as the UCC and Bankruptcy Code).

169 *Foskett v. McKeown* [2001] 1 AC 102 (HL) at 109 (appeal taken from Eng.) (Lord Browne-Wilkinson).

170 See *supra* text surrounding notes 47–54; see also Saiman, *Restitution and Legal Doctrine*, *supra* note 29, at 1004, 1017–25 (2008); Saiman, *Restitution in America*, *supra* note 29, at 112–13 (2008).

171 See ANDREW BURROWS, *The Interaction Between Common Law and Statute*, in THINKING ABOUT STATUTES: INTERPRETATION, INTERACTION, IMPROVEMENT, *supra* note 141, at 45, 79–80, 84.

172 *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund*, 527 U.S. 308, 327–29 (1999).

measures,¹⁷³ and similar results obtain in the Commonwealth and several American states.¹⁷⁴

In a fractured 5–4 decision, however, the U.S. Supreme Court deemed these injunctions beyond the power of federal courts.¹⁷⁵ Given that textualist doctrine freezes statutory meaning as of the moment of its enactment, Justice Scalia held the relevant question is whether an equity court of 1789 (the date of the statute authorizing federal court jurisdiction) would have issued a freezing injunction.¹⁷⁶ (Answer: no.) This doctrinal apparatus transformed an otherwise private law inquiry about the merits of the injunction into a historical one.

Further, in contrast to the functionalism attending many American applications of equity,¹⁷⁷ Scalia’s majority opinion is unmoved by pragmatic concerns or the dissent’s methodological critiques of its statutory antiquarianism.¹⁷⁸ Channeling separation of powers concerns, Scalia held that federal courts are barred from creating remedies “previously unknown to equity jurisprudence.”¹⁷⁹ Functionalist concerns are irrelevant to reading the statutory text and should instead be directed to “where such issues belong in our democracy: in the Congress.”¹⁸⁰

Commonwealth observers were notably unimpressed. Writing in the *Law Quarterly Review*, Lawrence Collins (later, Lord Collins of the UK Supreme Court) explained that “from an English viewpoint, the discussion . . . seems to be superficial and based on obsolete material.”¹⁸¹ Not to be outdone, an Irish scholar took to an American law review to note the Court’s reasoning was “sloppy, superficial, intemperate, bombastic, unbalanced, and

173 *Mareva Compania Naviera SA v. Int’l Bulkcarriers SA* [1980] 1 All ER 213 (AC) at 215 (Lord Denning MR); *Nippon Yusen Kaisha v. Karageorgis* [1975] 3 All ER 282 (AC) at 283 (Lord Denning MR). The result was later confirmed by a formal rule. See Civ. P. R. 25.1(f) (1998) (UK) (authorizing freezing injunctions)

174 See David Capper, Essay, *The Need for Mareva Injunctions Reconsidered*, 73 *FORDHAM L. REV.* 2161, 2162 (2005) (“The only major common law jurisdiction where the *Mareva* injunction has not flourished is the United States.”); Masayuki Tamaruya, *The Anglo-American Perspective on Freezing Injunctions*, 29 *CIV. JUST. Q.* 350, 354–55 (2010).

175 See *Grupo Mexicano*, 527 U.S. at 333.

176 *Id.* at 332.

177 See *supra* notes 47–54 and accompanying text.

178 See *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part) (“[The majority] relies on an unjustifiably static conception of equity jurisdiction. . . . [W]e have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England, [not] the specific practices and remedies of the pre-Revolutionary Chancellor.” (emphasis in original) (citations omitted)).

179 *Id.* at 332 (majority opinion).

180 See *id.* at 332–33; see also Tamaruya, *supra* note 174, at 363–68 (noting that, while practical differences are less dramatic, there are strong methodological differences between the judiciary and the political valence of legal procedure).

181 Lawrence Collins, *United States Supreme Court Rejects Mareva Jurisdiction*, 115 *LAW Q. REV.* 601, 604 (1999).

downright insulting to judicial colleagues in kindred legal traditions.”¹⁸² A more measured Commonwealth writer framed the matter in terms of comparative allocations of private and statutory/procedural law. What English lawyers see as debtor-creditor law administered by commercially sophisticated judges in London, becomes a political hot potato over the remedial latitude granted federal courts in America.¹⁸³

D. *Textualism and Trusting Trust Law*

A similar example emerges from the U.S. Supreme Court’s reading of ERISA, a federal statute designed to fortify trust law and protect employees’ benefit and retirement plans from employer maladministration.¹⁸⁴ Traditional trust law required fiduciaries (or their agents) to fully compensate beneficiaries for the financial consequences of a breach. ERISA seems to embed this obligation in statute, allowing beneficiaries to obtain an injunction or “other appropriate equitable relief” upon a showing of breach.¹⁸⁵

Nevertheless, Justice Scalia’s 5–4 decision reasoned that by including the term *equitable* in the phrase “appropriate equitable relief,” Congress really intended to *limit* the range of remedial options to those “*typically* available in [historical] equity.”¹⁸⁶ Because Scalia incorrectly held that compensatory damages were typically available only “at law” but not “in equity,” the claim was barred.¹⁸⁷

The result is plainly difficult. ERISA “abounds with the language and terminology of trust law” and codifies “principles developed in the evolution of the law of trusts.”¹⁸⁸ Though the Court did not contest that monetary compensation for breach of trust was historically available in equity,¹⁸⁹ the Court’s textualist assumptions allowed it to assume the term “equitable” must *limit* available remedies to those deemed “*typically* equitable.”¹⁹⁰ Scalia’s oversimplified understanding that money damages were “typically legal,” allowed the claim to be denied. Paradoxically, ERISA beneficiaries are *worse off* under the statute than under the common law it was designed to fortify.

182 Capper, *supra* note 174, at 2180.

183 Tamaruya, *supra* note 174, at 356–57, 363.

184 See John H. Langbein, *What ERISA Means by “Equitable”: The Supreme Court’s Trail of Error in Russell, Mertens and Great-West*, 103 COLUM. L. REV. 1317, 1321–31 (2003).

185 Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 502(a), 88 Stat. 829, 891 (codified as amended at 29 U.S.C. § 1131(a)(3) (2018)).

186 *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis in original).

187 See *id.* at 256, 260 (quoting Brief for the United States as Amicus Curiae at 9, *Mertens*, 508 U.S. 248 (No. 91-1671)).

188 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); see also Langbein, *supra* note 184, at 1326 (observing that ERISA’s drafters assumed the trust law background would allow further “refinements to be worked out in fiduciary practice under regulatory and judicial oversight”).

189 See *Mertens*, 508 U.S. at 256. For common-law background, see UNIF. TR. CODE §§ 1001(b)(3), 1002(a)(1) (UNIF. L. COMM’N 2010); RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a (AM. L. INST. 1959).

190 Langbein, *supra* note 184, at 1353 (emphasis added).

The trouble did not end there. A follow-up case sought restitution from an ERISA beneficiary who received payments for the same claim from two different insurers.¹⁹¹ In another 5–4 ruling, Scalia denied recovery on the theory that ERISA only permits “equitable” rather than “legal” restitution.¹⁹² Both the dissent and commentariat decried the fancifulness of this view.¹⁹³ ERISA was enacted two generations after the merger of law and equity in the federal system, and these technical-historical distinctions were hardly on the minds of the drafters of the time. Rather than interpret “equitable” as referring to traditional trust law—the commonplace meaning when the statute was drafted¹⁹⁴—Scalia held that in using this single word Congress intended to stealthily revive the distinction between legal and equitable restitution, with recovery limited only to the latter.¹⁹⁵

These ERISA and equity cases neatly illustrate the interplay between textualism, private law, and the demand for formalized doctrine to restrain legal liability. By pressing interpretation inward, textualism decreases the relevance of background private law and reframes the issue exclusively in terms of statutory interpretation law. The related anxiety over federal common law causes the Court to “treat[] ordinary *applications* of traditional fiduciary and remedy law as impermissible *extensions* of the statute.”¹⁹⁶ Further, the Court’s lack of familiarity with private law leads it towards implausible understandings of such basic concepts as “restitution” and “equity,” and thus bumbles how they function within a complex statutory scheme.¹⁹⁷ Finally, they show that American-styled formalism can produce equity doctrines every bit as baroque as the analysis in *Foskett*, which looked to Roman laws on commingled oil to determine how money flows through the modern banking system.¹⁹⁸

The private-law-centric approach of English law is not afraid of “equitable remedies.” By contrast, since the American system gives courts broad remedial discretion, it will invariably impose limits by other means—up to

191 *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 206–09 (2002). Further implications of this doctrine are found in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 359, 361–63 (2006); *CIGNA Corp. v. Amara*, 563 U.S. 421, 424–25, 439 (2011); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 98 (2013); and *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 577 U.S. 136, 142–44 (2016).

192 *See Great-West*, 534 U.S. at 209–10.

193 *See id.* at 224–25 (Ginsburg, J., dissenting); Langbein, *supra* note 184, at 1320 n.15.

194 This was the most likely meaning of the term to a late twentieth century American lawyer. *See Mertens*, 508 U.S. at 265–67 (White, J., dissenting).

195 *See* Langbein, *supra* note 184, at 1356–57 (asserting that Scalia’s reading wholly ignores innovation of the 1937 *Restatement of Restitution*, which anchors restitution in unjust enrichment rather than dividing it into law and equity).

196 *Id.* at 1329 (emphasis in original).

197 For more on this theme, see Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 525, 544–51 (2006) (arguing that U.S. courts have no coherent theory or practice governing how principles of general law are relevant to statutory interpretation).

198 *See Foskett v. McKeown* [2001] 1 AC 102 (HL) at 121 (appeal taken from Eng.) (Lord Hope).

and including convoluting modern legal analysis with the jurisdictional assumptions of a bygone era.¹⁹⁹

IV. PROCEDURAL FORMALISM

Civil procedure in American law is not merely about how litigation is conducted or the docket managed, it is a foundational tool used to keep courts—particularly federal courts—from straying outside their constitutional lane. In the middle part of the twentieth century, courts armed with the newly minted Federal Rules of Civil Procedure worked to remove procedural hurdles and steer litigation toward substantive issues,²⁰⁰ but more recently, procedural doctrines have become increasingly restrictive. Modern courts apply a number of “antecedent” procedural bars designed to weed out claims before the substantive merits are addressed.²⁰¹

The shift in the valance of procedural law has led Arthur Miller, one of the most eminent scholars in the area, to issue a series of laments over the closing of the courthouse door.²⁰² Though Miller’s normative assessment is contestable, his observations regarding how procedure structures civil litigation are hard to discount.²⁰³ By both law and custom, procedural matters are

199 See Chen & Gordon, *supra* note 137, at 399–400; Saiman, *Restitution in America*, *supra* note 29.

200 The history of the Federal Rules and its philosophical roots are chronicled in Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943–75 (1987). See Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 316–17 (1938) (noting the improved flexibility and simplicity of the Federal Rules as promulgated in 1938).

201 See, e.g., Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) (discussing the recent introduction of new antecedent pleading requirements). Empirical assessments of these requirements include: David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015). More positive assessments of this trend are found in Brian T. Fitzpatrick, Essay, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1622 (2012); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474–75 (2010).

202 See, e.g., Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 592–96 (2011); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 23–24 (2010); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 372 (2013); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984–85 (2003).

203 See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1841–56 (2014) (cataloging procedural devices used since the 1980s to dispose of civil cases).

dealt with first,²⁰⁴ deferring consideration of all other issues to later stages in the litigation.²⁰⁵ Because lawyers are incentivized to fight first and hardest on procedural terrain, the allocation of conceptual and doctrinal resources follows. While these impacts are most prominent in federal courts, scholars have examined how these norms trickle down to state litigation.²⁰⁶

English procedural law, by contrast, is both less formalized and less important.²⁰⁷ A course in the topic is *not even offered* in most English law schools,²⁰⁸ and the subject is “barely on the curricular map.”²⁰⁹ Scholars from England’s leading academic hubs have only recently started to write books on procedure,²¹⁰ as English lawyers learn the subject in vocational programs administered by the bar associations.²¹¹ One commentator ruefully noted how “civil procedure has not attracted a high level of academic attention or sustained critical examination as compared with other areas of law,” and was dismayed at the “paucity of rigorous analytical or theoretical literature” in the Commonwealth.²¹² Even private law scholars complain that English students live under the “mistaken but tenacious impression that civil

204 See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95, 101 (1998) (holding that courts must determine subject matter jurisdiction before determining the merits); 32A AM. JUR. 2D *Federal Courts* § 562, Westlaw (database updated Aug. 2020).

205 See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (noting that when “only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.” (footnote omitted)).

206 See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 703 (2016) (“[F]ederal law exerts a gravitational force that draws states to mimic federal law”); A. Benjamin Spencer, *Pleading in State Courts After Twombly and Iqbal*, 2010 POUND CIV. JUST. INST. 1, 14–20.

207 See Paul MacMahon, *Proceduralism, Civil Justice, and American Legal Thought*, 34 U. PA. J. INT’L L. 545, 563–74 (2013) (contrasting the outsized role of American procedure with its limited role in Anglo law); see also Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMPAR. L. 277, 278 (2002); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMPAR. L. 709, 709, 740 (2005) (observing that America “has a set of procedural characteristics that seem to set it off from almost all of the rest of the world”). For another point of comparison, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1211 (2005) (contrasting the centrality of procedure in American law schools with the “negligible interest” in European legal education, which focuses “instead on conveying abstract principles of substantive law”).

208 Andrew Boon & Julian Webb, *Legal Education and Training in England and Wales: Back to the Future?*, 58 J. LEGAL EDUC. 79, 80 (2008); see also MacMahon, *supra* note 207, at 570 n.92.

209 See NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM* 23 (2003); MacMahon, *supra* note 207, at 574 n.111.

210 See ANDREWS, *supra* note 209; see also ADRIAN ZUCKERMAN, *ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE* (3d ed. 2013).

211 See MacMahon, *supra* note 207, at 570.

212 Susan M.C. Gibbons, Book Review, 4 OXFORD U. COMMONWEALTH L.J. 129, 129–30 (2004) (reviewing ADRIAN ZUCKERMAN, *CIVIL PROCEDURE* (2003)).

procedure consists of an arbitrary set of technical rules, to be endured in the real world but ignored in university.”²¹³

A. *Contemporary Standing Doctrine*

Few doctrines better encapsulate the differences between English and American formalism than standing law, “perhaps the most important of [all the Supreme Court’s jurisdictional] doctrines.”²¹⁴ As conceptualized by Justice Scalia and fellow travelers, standing vindicates the constitutional separation of powers.²¹⁵ Standing is thus elevated to a threshold jurisdictional issue that addresses a court’s constitutional capacity to hear the case. Standing cannot be waived by the parties or by the court,²¹⁶ and must be raised by the court itself even on appeal²¹⁷—powerful tools rarely afforded to other doctrines.

Despite affirmations of its foundational status, standing was not particularly important prior to the rise of the administrative state.²¹⁸ It was rarely seen as constitutional or jurisdictional in scope,²¹⁹ and the matters standing law addresses were reviewed under “an amalgam of statutory interpretation and common law assumptions”²²⁰—as remains the case under English law.²²¹ The Constitution’s text also says nothing about standing, and even as avowed a textualist as Justice Scalia must find these requirements embedded in constitutional structure rather than its express written provisions.²²²

213 Ben McFarlane, Book Review, 121 *LAW Q. REV.* 343, 343 (2005) (reviewing ADRIAN ZUCKERMAN, *CIVIL PROCEDURE* (2003); ANDREWS, *supra* note 209).

214 *Allen v. Wright*, 468 U.S. 737, 750 (1984).

215 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881, 881 (1983); *see also* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (Scalia, J.); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 *DUKE L.J.* 1219, 1229 (1993).

216 *See, e.g., Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996) (“[S]tanding . . . is jurisdictional and not subject to waiver.”).

217 *See, e.g., Pa. Prison Soc’y v. Cortés*, 508 F.3d 156, 158 (3d Cir. 2007).

218 *See, e.g., F. Andrew Hessick, Standing, Injury in Fact, and Private Rights*, 93 *CORNELL L. REV.* 275, 299 (2008) (“If injury in fact is fundamental to ensuring the balance of power, one would expect the Court to have adopted the injury-in-fact requirement long before 1970.”).

219 *See* Heather Elliott, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 466–67 (2008) (cataloguing academic critiques of standing law including that it “lacks a historical basis”); William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 224 (1988) (“It is . . . clear that current standing law is a relatively recent creation.”); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 *RUTGERS L. REV.* 1, 7 (2001) (“Standing as a constitutional mandate itself is a relatively recent innovation.”).

220 Fletcher, *supra* note 219, at 226.

221 *See* MacMahon, *supra* note 207, at 568–74 (discussing differences in procedural doctrines between American and English systems).

222 *See* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992); Scalia, *supra* note 215, at 881–82.

The core of standing doctrine requires a plaintiff to show (1) it suffered a concrete and particularized injury in fact, and (2) a causal connection between the injury and the allegedly wrongful conduct.²²³ There is an obvious affinity between these criteria and private law doctrines as interpreted by Anglo-conceptualists. Both focus on the structural and correlative relationship between the parties, and both seek to ensure the plaintiff has the right of redress from its chosen defendant. Standing parallels the function of duty in tort, privity in contract, and the relationship between enrichment and impoverishment in restitution law.

Despite these similarities, one of the most influential criticisms of standing law is that it does not address questions of injury and causation in light of the legal claims at issue.²²⁴ Instead, it is formulated as an abstract and self-consciously separate doctrine antecedent to the substantive merits of the claim.²²⁵ As a constitutional doctrine, standing focuses on the role of courts in a democracy rather than the correlative structure of rights and remedies.

B. *Standing and Private Law*

Standing perfectly exemplifies the shift from the formalism that rigorously monitors the structure of the private law to American formalism that rigorously monitors the role of the courts.²²⁶ The doctrine initially developed in the administrative law context to limit citizens' ability to sue the state over acts (or omissions) of executive policymaking.²²⁷ But, as a nonwaivable antecedent issue that must be addressed in every case, American courts now use it to maneuver around postrealist private law.

This process becomes apparent when comparing two ostensibly similar cases raising claims by historically disadvantaged groups for wrongs wrought to their ancestors. The Canadian case (Ontario Court of Appeals) sought restitution on behalf of Chinese immigrants, while the American litigation looked for restitution for African American slavery. Both courts denied recovery, but traveled different doctrinal routes to get there. Canadian plaintiffs raised public law claims *against the state*, yet the Ontario court focused on unjust enrichment law.²²⁸ American plaintiffs raised common-law claims against *private entities*, yet the analysis proceeds along jurisdictional terms.²²⁹

223 *Lujan*, 504 U.S. at 559–60.

224 See Fletcher, *supra* note 219, at 231–39.

225 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

226 See, e.g., Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1114 (2006) (describing “the Court’s jurisprudence as ‘hostility’ to ‘litigation’”).

227 See Elliott, *supra* note 219, at 469–501; Fletcher, *supra* note 219, at 225–26.

228 See *Mack v. Canada (Att’y Gen.)* (2002), 60 O.R. 3d 737, 750–55 (Can. Ont. C.A.).

229 *In re Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1042–43 (N.D. Ill. 2004) (raising common-law claims of conspiracy, demand for accounting, crimes against humanity, piracy, intentional infliction of emotional distress, conversion, and unjust enrichment, and one federal law claim).

The sharpest contrast is found in the concluding lines of each opinion. The courts recognize the outcome may sacrifice substantive justice on the altar of formal doctrine, and therefore close with a somewhat defensive “apology.” Citing Beverley McLachlin (then Justice, later Chief Justice, of the Supreme Court of Canada), the Ontario court reasoned:

[Plaintiff’s argument boils down to] this is what the dictates of justice and fairness require; . . .

. . . [But] recovery cannot be predicated on the bare assertion that fairness so requires. A general congruence with accepted principle must be demonstrated as well. . . .

. . . [T]he law defines what is so unjust as to require disgorgement in terms of benefit, corresponding detriment and absence of juristic reason for retention. Such definition is required to preserve a measure of certainty in the law, as well as . . . the legitimate expectation of the parties, the right of parties to order their affairs by contract, and the right of legislators . . . to act . . . without fear of unforeseen future liabilities.²³⁰

Though the claims were inherently public law in nature, the court defends itself through a classically private-law-centric account of the rule of law.²³¹ Unjust enrichment rests within a larger conceptual private law structure that sustains the legal system. While sympathetic, plaintiff’s claims do not match the private law rubric and must be denied.

The American case also closes by explaining why the “tremendous suffering and ineliminable scars” of slavery do not merit recovery.²³² But this conclusion is framed in procedural terms:

[The] claims are beyond the constitutional authority of this court. . . . Plaintiffs lack essential constitutional standing Second, prudential limitations prohibit the court from deciding such broad questions of social importance Third, the . . . political question doctrine bars the court from deciding the issue of slavery reparations Fourth, Plaintiffs’ claims are untimely. . . . Finally, under the rules of procedure . . . Plaintiffs’ Complaint fails to state a claim upon which relief can be granted²³³

Both cases were politically charged, and both conclude it is beyond the court’s capacity to offer a remedy. Beyond that, each frames the decision in terms of the method of formalism that carries most weight in the legal culture.

* * *

Looking beyond these two cases, the privileging of abstract standing law over localized private law produces—at least from the English perspective—

230 *Mack*, 60 O.R. 3d at 755 (emphasis omitted).

231 See PRIVATE LAW AND THE RULE OF LAW 6 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (“The goal of this book is to explore the idea that the perception of the rule of law as an essentially public law doctrine is in fact a *misperception*.”).

232 *In re Slave Descendants*, 304 F. Supp. 2d at 1075.

233 *Id.* at 1075.

bizarre cases and legal arguments.²³⁴ In 2008, the U.S. Supreme Court ruled on whether an assignee of claims who was contractually obligated to remit all proceeds of the litigation back to the originally assigning parties maintained a sufficient personal stake in the litigation for standing.²³⁵ Under English law, the issue presents a black letter case of assignment that is hardly subject to debate, much less litigation before the highest court in the land. Yet the case resulted in an ideologically tinged 5–4 holding on standing law.²³⁶ As one of Oxford’s leading private law scholars quipped, if handed in as a first-year contracts exam in an English law school, the four-Justice dissent would have received a failing grade.²³⁷

On other occasions, there were credible concerns that standing doctrine would prevent federal courts from hearing traditional restitution, tort, and fiduciary claims.²³⁸ Petitioners in *First American v. Edwards* argued that victims of a kickback scheme lacked standing to pursue relief since they could not show individuated “injury in fact,” because the kickback payments came from third parties.²³⁹ As with assignment law, passing familiarity with unjust enrichment makes clear that courts have long heard claims predicated on defendant’s unjust gains despite the absence of a correlative loss by plaintiff. American restitution scholars drove this point home, warning that “the Court may inadvertently disrupt an important body of law that long predates the American founding.”²⁴⁰ Similar arguments were advanced several years later in the context of the Fair Credit Reporting Act where narrow interpretation of the “concrete harm” limb of the standing inquiry threatened to preclude a statutorily authorized restitution claim.²⁴¹ Restitution scholars again filed an

234 Further difficulties of this approach are set forth in Hessick, *supra* note 218, at 277–78 (“[W]hatever the virtue of limiting the judiciary’s role in the vindication of public interests, the restriction on a litigant’s ability to seek redress in the courts for a violation of a private right is ahistorical and unjustified.”).

235 See *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 271 (2008).

236 *Id.* at 298. Indeed, several scholars have argued that the procedurally oriented conception of the modern American standing doctrine is an invention of the middle decades of the twentieth century. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (“There was no doctrine of standing prior to the middle of the twentieth century.”); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) (explaining that a distinctive body of standing doctrine does not develop until the twentieth century).

237 Conversation with Robert Stevens, Herbert Smith Freehills Professor of English Private Law, Oxford University.

238 See Jonathan R. Siegel, *Injury in Fact and the Structure of Legal Revolutions*, 68 VAND. L. REV. EN BANC 207, 208–11 (2015) (explaining how these questions came before the Supreme Court).

239 See *First Am. Fin. Corp. v. Edwards*, 567 U.S. 756 (2012) (certiorari dismissed as improvidently granted).

240 See Brief of Reporter and Advisers to Restatement (Third) of Restitution and Unjust Enrichment, as Amici Curiae in Support of Respondent at 1, *First Am. Fin. Corp.*, 567 U.S. 756 (No. 10-708).

241 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544–46, 1549–50 (2016).

amicus brief to the Court, warning that it may inadvertently “wreak havoc with the law of restitution and unjust enrichment, barring many long-established causes of action.”²⁴² The Supreme Court sidestepped the issue both times.²⁴³ But the underlying plausibility of these standing-based arguments demonstrates how formalized standing law can both displace and distort private-law analysis.

V. FORMALISM IN THE LAW OF STATE LIABILITY

I have argued that while English law relies on formalized private law, in the American context, postrealist private law gives way to doctrinalized versions of interpretation and procedural law. We now test this theory by comparing how each system addresses the state’s liability for acting beyond its authority. Governmental liability touches on some of the most important issues in a democracy. When the stakes are high, each system channels doctrinal energy toward its zone of perceived conceptual integrity and doctrinal rigidity.

To the American mindset, governmental liability is a paradigmatically public law concern that inevitably turns on close statutory analysis and jurisdictional inquiries into the citizen’s standing. Under English law, however, suits against the state accord to the so-called Diceyan principle,²⁴⁴ which (exceptions aside) requires that citizen and state meet as equals on the field of private law.²⁴⁵ Though “in cases which do not have a parallel in private law,” English law has developed a more administrative law framework (known as judicial review), for questions under “private law heading[s], such as contract, tort or unjust enrichment, the Diceyan orthodoxy remains.”²⁴⁶ “[T]he presence of a public body essentially makes no difference,” writes a noted Oxford scholar, “and the claim is treated as it if were between two private parties.”²⁴⁷

American law begins with the opposite presumption: barring an express waiver, sovereign immunity and other statutory schemes shield the state and

242 See Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 1, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339).

243 See *Spokeo*, 136 S. Ct. at 1545 (avoiding the issue by remanding the case back to the lower courts); *First Am. Fin. Corp.*, 567 U.S. at 757 (dismissing certiorari as improvidently granted).

244 See Crown Proceedings Act of 1947, 11 Geo. 6 c. 44, § 1; *Mersey Docks & Harbour Bd. Trs. v. Gibbs*, (1866) 11 Eng. Rep. 1500 (HL) at 1519 (Lord Cranworth LC); see also A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193–194 (10th ed. 1959).

245 See, e.g., *Woolwich Bldg. Soc’y v. Inland Revenue Comm’rs* (No. 2) [1992] All ER 737 (HL) at 782 (Lord Slynn of Hadley); *A-G v. Blake*, [2000] 4 All ER 385 (HL) at 390 (Lord Nicholls of Birkenhead); *Michael v. Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 All ER 635 [128]–[40] (Lord Toulson SCJ).

246 REBECCA WILLIAMS, UNJUST ENRICHMENT AND PUBLIC LAW: A COMPARATIVE STUDY OF ENGLAND, FRANCE AND THE EU 16 (2010) (emphasis omitted).

247 *Id.*

its officers from private actions.²⁴⁸ Litigation is primarily concerned with whether immunity has been waived, as private law is relegated to a secondary role. Moreover, even when formal immunity doctrines are not at issue, private law is not always determinative to assessing governmental liability.²⁴⁹

A. *Tax Refunds*

One telling comparison emerges from tax refund cases. In the pre-Brexit era, a given UK tax scheme was held to violate European Community law because it improperly discriminated between UK and other EU corporations. In response, the European Court of Justice ordered the UK taxing authority to craft a remedy for the taxpayer comparable to what would be available to similarly situated taxpayers under domestic law. In a case known as *DMG*, the tax authority argued that no remedy was necessary because domestic law would time bar the refund due to the six-year limitation period imposed by the statute from the moment the tax was paid.²⁵⁰ The taxpayer countered that the statute applied only to refunds based on mistaken assessments or calculations but, since this tax was deemed void *ab initio* as beyond the state's authority, the statutory limitation period does not apply.²⁵¹ Instead, the taxpayer framed its claim as a common-law count in restitution for the return of payments made under mistake of law. The House of Lords agreed, holding that since the limitations period for a mistaken payment grounded in unjust enrichment does not begin until the mistake is discovered (here, when the European Court held the tax contrary to Community law), plaintiff's claim was timely.²⁵²

A similar mode of analysis is found in other tax-related cases. In 2007, the House of Lords ruled that taxpayers succeeding in restitution claims for overpaid taxes are entitled to compound interest, calculated from the time the tax was paid.²⁵³ Subsequent litigation has shown that a seemingly techni-

248 Two of the most common limited waivers are the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2018) (for monetary damages), and the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2018) (for equitable relief). See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 877–905 (7th ed. 2015); PAUL FIGLEY, *A GUIDE TO THE FEDERAL TORT CLAIMS ACT* 55–59 (2012).

249 Cases alleging constitutional violations do not need a specific statutory waiver of immunity. See, e.g., 42 U.S.C. § 1983 (2018); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–98 (1971) (providing that official's immunity from suit does not apply to those who violate clearly established constitutional doctrines); *Ex parte Young*, 209 U.S. 123, 155–56 (1908) (explaining that, notwithstanding state sovereign immunity, a federal court can offer equitable relief against state officials when the state has acted unconstitutionally).

250 See *Deutsche Morgan Grenfell Grp. Plc v. Inland Revenue Comm'rs (DMG)* [2006] UKHL 49, [2007] 1 All ER 449 [6]–[8] (Lord Hoffmann).

251 See *id.* at [8].

252 See *id.* at [18]; cf. WILLIAMS, *supra* note 246, at 20–39.

253 See *Sempra Metals Ltd. v. Inland Revenue Comm'rs* [2007] UKHL 34, [2007] 4 All ER 657 [17] (Lord Hope of Craighead).

cal bit of restitution law led to billions of dollars of potential governmental liability.²⁵⁴

From an American perspective, two things about these cases stand out. First, what is in essence a constitutional law question generated by overlapping sovereignties of UK and European Community law became a forum to discuss the conceptual basis of *private* law theory.²⁵⁵ Second, that notwithstanding both the ostensibly preemptory statutory framework, and the inherent public law nature of the issues in question, the taxpayer's appeal to private law principles proved successful.²⁵⁶

Parallel American litigation centers almost exclusively on public law doctrines.²⁵⁷ In a case decided shortly after *DMG*, the U.S. Supreme Court expressly rejected a claimant's attempts to short-circuit administrative remedies via a private law mistaken payment theory.²⁵⁸ Likewise, on facts similar to *DMG*, the U.S. Supreme Court found aspects of Maryland's tax scheme unconstitutional for discriminating between in-state and out-of-state income.²⁵⁹ But the Court's remedial analysis centered on public law questions of equal protection law, rather than the intricacies of unjust enrichment theory.²⁶⁰

Interestingly, in a 2018 case addressing other conflicts between UK and EU tax law, the UK Supreme Court reversed course and held that though unjust enrichment principles entitle taxpayers to return of their overpaid taxes as principle, they *are not* entitled to compound interest on these

254 See *Test Claimants in the Franked Inv. Income Grp. Litig. v. Revenue and Customs Comm'rs* [2012] UKSC 19, [2012] 3 All ER 909 [3] (Lord Hope DP). Some have critiqued the English view as too influenced by private law and insufficiently attuned to the public law questions. See Samuel Beswick, *The Discoverability of Mistakes of Law*, 2019 LLOYD'S MAR. & COM. L.Q. 112.

255 See *DMG* [2007] 1 All ER at [22]–[23], [28]; *id.* at [38]–[39] (Lord Hope); *id.* at [151]–[58] (Lord Walker of Gestingthorpe); see also *Sempra Metals* [2007] 4 All ER at [30]–[33].

256 See *Littlewoods Ltd. v. Revenue and Customs Comm'rs* [2017] UKSC 70, [2018] 1 All ER 84 (Lord Reed). The taxpayers brought common-law restitution claims to recover improperly collected VAT taxes going back thirty years. Though the claim for £1.2 billion in compound interest was rejected, the claim for restitution netted a £268 million in recovery. See *id.* at [4]–[6].

257 See, e.g., *United States v. Dalm*, 494 U.S. 596, 608–611 (1990) (deciding a tax refund case on issues of jurisdiction and sovereign immunity without addressing the underlying restitution claim). American litigation often focuses on whether the refund scheme meets due process standards. See, e.g., *Reich v. Collins*, 513 U.S. 106, 108–10 (1994); *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 100–02 (1993); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22 (1990).

258 See *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 11–12 (2008) (“Even when the constitutionality of a tax is challenged, taxing authorities do in fact have an ‘exceedingly strong interest in financial stability.’” (quoting *McKesson*, 496 U.S. at 37)).

259 See *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 549–50 (2015).

260 *Id.* at 568 (“[A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination.” (quoting *McKesson*, 496 U.S. at 39–40)).

funds.²⁶¹ The UK Court’s analysis includes classic public law considerations such as the “disruption to public finances,”²⁶² and also addresses the tension between potentially expansive private law claims and the confines of the statutory scheme.²⁶³ Nevertheless, the UK Court also took care to explain reversal in light of private law theory, relying on sophisticated analysis of unjust enrichment theory by Oxford’s leading private law scholar.²⁶⁴

B. Constitutional Torts

A similar structure is found in suits against government officials for failing to prevent injuries—most vividly, claims against the police or social-services agencies for delayed response to emergency calls for help.²⁶⁵ English law sees these cases as private law torts. The most recent decision by the UK Supreme Court explains that its denial of liability was *not* based on special immunities afforded to state defendants, but simply on plaintiffs’ failure to meet the “duty” prong of a standard negligence claim.²⁶⁶

To the extent such claims are cognizable as a matter of federal law, they are analyzed under substantive and procedural due process standards that raise classically public law concerns.²⁶⁷ These inquiries are geared toward assessing the state’s obligations to its citizens but are inapposite to the correlative duty analysis grounding common-law tort claims.²⁶⁸

261 See *Prudential Assurance Co. v. Revenue and Customs Comm’rs* [2018] UKSC 39, [2019] 1 All ER 308 [79]–[80] (Lord Reed DP) (holding that claimants can no longer recover compound interest but availability of common-law restitution claims remains unchanged); see also *Littlewoods Ltd.* [2018] 1 All ER [3]–[4], [72].

262 See *Prudential Assurance Co.* [2018] 1 All ER [65]–[66].

263 See *id.* at [50]–[65].

264 See *id.* at [68]–[80] (citing Andrew Burtows, *Interest, in COMMERCIAL REMEDIES: RESOLVING CONTROVERSIES* 247, 266 (Graham Virgo & Sarah Worthington eds., 2017)).

265 See, e.g., *Michael v. Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 All ER 635 [138]–[39] (Lord Toulson SCJ) (reasoning that, under principles of common-law negligence and barring special circumstances, police do not owe murder victims a duty of care to timely respond to a 999 call). Compare *X v. Bedfordshire Cnty. Council* [1995] 3 All ER 353 (HL), with *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194–97 (1989). See also *Gorringe v. Calderdale Metro. Borough Council* [2004] UKHL 15, [2004] 2 All ER 326 [14]–[16] (Lord Hoffmann); *Stovin v. Wise* [1996] 3 All ER 801 (HL) at 832 (Lord Hoffmann).

266 See *Michael* [2015] 2 All ER at [39]–[63], [101] (reasoning that, though “general principles [of negligence] have been worked out for the most part in cases involving private litigants, . . . they are equally applicable where D[efendant] is a public body”); see also *R ex rel. Jalloh v. Sec’y of State for the Home Dept.* [2020] UKSC 4, [33]–[34] (Lady Hale SCJ) (holding state liable under common-law false imprisonment claim for imposing illegal curfew held illegal under the Immigration Act).

267 See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332–35, 339 (1976).

268 For example, *Gonzales* presented claims against the police for failing to enforce a restraining order issued by a state court that would have prevented the father’s murder of his three children. See *Gonzales v. City of Castle Rock*, No. Civ.A.00 D 1285, 2001 WL 35973820, at *1–2 (D. Colo. Jan. 23, 2001), *rev’d*, 307 F.3d 1258 (10th Cir. 2002), *rev’d en banc*, 366 F.3d 1093 (10th Cir. 2004), *rev’d sub nom Town of Castle Rock v. Gonzales*, 545

Likewise, in cases where a police officer unlawfully detains or beats a citizen, the resulting English lawsuit looks to the law of intentional torts.²⁶⁹ A federal action by contrast is only available if the injury is conceptualized as a “constitutional tort,” and allows the officer to raise a defense of “qualified immunity.” This doctrine precludes liability unless the alleged violation has been “clearly established” under prior case law.²⁷⁰ Because this defense is not available to civil defendants, the doctrine further severs public tort law from actions that sound in private law exclusively.²⁷¹

C. *Torts Committed by State Officials*

Similar examples are found in the administrative law and general tort context. Take the case of a government official who wrongfully issued a notice of detention against a ship that prevented it from leaving port.²⁷² The shipowners sued for damages since the detention caused them to breach downstream contracts. Litigation in the English courts revolved around a conceptual riddle in the law of conversion. Defendants argued the conversion tort requires physical possession or restraint of the ship, while claimant argued that restraint via legal process was sufficient.²⁷³

Likewise, the English Court of Appeals found an environmental-health officer acting under statutory authority liable in tort for misstating the law and causing plaintiff to spend large sums on remediation that was not legally required.²⁷⁴ The High Court of Australia found a land-use commission liable

U.S. 748 (2005). Four separate American courts agonized over the borderline between substantive and procedural due process; whether the Supreme Court owed deference to the circuit court’s interpretation of state law within the latter’s jurisdiction; whether some combination of statutory language and the text printed on the back of a restraining order create a constitutionally cognizable “property right” under federal standards; and whether federal courts can be used to vindicate process rights allegedly conferred by state law. *See Gonzales*, 2001 WL 35973820, at *4–5; *Gonzales*, 307 F.3d at 1260–62; *Gonzales*, 366 F.3d at 1096–1101; *Town of Castle Rock*, 545 U.S. at 756–58, 766.

269 *See* ROBERT STEVENS, TORTS AND RIGHTS 218–28 (2007); *Marshall v. Osmond* [1983] 2 All ER 225 (AC) at 227; *Home Off. v. Dorset Yacht Co* [1970] 2 All ER 294 (HL) at 297; *Gaynor v. Allen* [1959] 2 All ER 644 (QB) at 646; *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB) at 818. Though the Law Commission has considered reforms, no changes have been enacted. *See* LAW COMM’N, ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN 117–31 (2008).

270 *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46–55 (2018); Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1156 (2005).

271 *See* Saiman, *supra* note 270, at 1155–56, 1161; *see also* Paul v. Davis, 424 U.S. 693, 701 (1976) (noting that the Due Process Clause should not become “a font of tort law to be superimposed upon whatever systems may already be administered by the States”).

272 *See* Club Cruise Ent. and Traveling Servs. Europe BV v. Dep’t for Trans. [2008] EWCH (Comm) 2794 [1]–[12].

273 *See id.* at [39]–[56].

274 *See* *Welton v. N. Cornwall Dist. Council* [1997] 1 WLR 570 (AC). *Compare id.*, with *United States v. Neustadt*, 366 U.S. 696, 697–98, 771 (1961) (holding purchaser of real estate could not proceed against inaccurate appraisal offered by Federal Housing Administration since FTCA bars claims premised on misrepresentation).

for common-law negligence for failing to advise a prospective buyer of a road-widening plan.²⁷⁵ And a New Zealand appellate court ruled that a land council which misinterpreted its zoning legislation is liable in tort to landowner *X* for permitting landowner *Y* to illegally obstruct *X*'s oceanfront view.²⁷⁶

It is unlikely that either the metaphysics of conversion or common-law negligence would become a recurring feature in contemporary American litigation. To the extent permitted, common-law tort suits against the federal government must proceed under the Federal Tort Claims Act (FTCA). This statute waives government immunity in designated cases, but bars all suits against individual officials in the scope of their employment.²⁷⁷ Though the FTCA does not formally replace the underlying tort law,²⁷⁸ the multiple exemptions it offers channel doctrine away from private law and toward statutory analysis of the FTCA's complex regime.²⁷⁹

Scholars have documented how in an earlier era, American courts used private/common-law doctrines to hold the state liable for civil violations.²⁸⁰ Tax refund cases looked to recoupment principles at common law and equity,²⁸¹ and suits against officials turned on standard tort principles as glossed by defenses of official privilege and immunity.²⁸² But as American legal thought moved away from postrealist private law, procedural and statutory frameworks came to dominate. These areas became the loci of conceptualism and formalist practice, and carry the heavy burden of justifying state liability law.

275 See *Shaddock & Assocs Pty Ltd v Parramatta City Council* (1981) 36 ALR 385, 408–09 (Austl.).

276 See *Craig v. E. Coast Bays City Council* [1986] 1 NZLR 99 (CA) at 101 (N.Z.); see also Stapleton, *supra* note 104, at 559–61.

277 See FIGLEY, *supra* note 248, at 55–56.

278 Indeed, a prerequisite for FTCA liability is for the alleged wrong to constitute a tort under relevant state private law. See *id.* at 25–55.

279 Several scholars have critiqued the FTCA regime for its complexity and resulting confusion. See, e.g., Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. DAVIS L. REV. 895, 958 (2003).

280 See Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 207 (1991) (“[In prior eras,] ship and cargo owners often brought damages actions against customs collectors and ship captains for wrongful seizures arising out of claimed violations of federal trade restrictions.”).

281 In the restitution context, compare *United States v. Dalm*, 494 U.S. 596, 602–04 (1990), with *Bull v. United States*, 295 U.S. 247, 261–63 (1935), and *United States v. State Bank*, 96 U.S. 30, 35–36 (1878).

282 For a discussion of official immunity, see Woolhandler, *supra* note 280, at 204 (“Historically, citizen-initiated suits against governmental officials were brought as private law actions. . . . [T]he official was treated as a private person who had committed a tort or other legal wrong.”); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RESV. L. REV. 396 (1987) (exploring the historical models of official claims for immunity from civil liability).

VI. *ERIE*, PROCEDURE, AND PRIVATE LAW

I have mostly avoided discussing the impact of *Erie Railroad Co. v. Tompkins*²⁸³ on the Anglo-American divide—but the standard account goes as follows. English private law remains a foundational part of the national legal system, and the highest courts are its prime expositors and final arbiters. Following *Erie*, however, private law is said to reside with the states alone.²⁸⁴ The U.S. Supreme Court has no jurisdiction in this area, and federal courts have no independent authority to articulate private law.

While *Erie* says nothing about the significance of private law or its relevance to any legal issue, in designating it as “merely” state law beyond (or beneath) the jurisdiction of federal courts, *Erie* effectively edges private law out of the national spotlight. By contrast, *Erie* and its progeny designate procedural, federal statutory, and federal public law doctrines as the foundational responsibilities of the federal courts. These doctrines establish the platform on which federal litigation plays out, and academic prestige, theorizing, and application to the nation’s most important questions followed.²⁸⁵

This account is largely correct, but I am less certain whether causation runs in only one direction—from *Erie*’s constitutional mandate to the marginalization of private law. In the early decades of *Erie*’s life, the decision had no bearing on whether private law was relevant to interpreting federal statutes.²⁸⁶ Second, *Erie* says nothing about whether federal courts can employ private law concepts to adjudicate governmental liability. Finally, because English and American law remain different even where the four corners of *Erie* do not apply suggests broader forces are at work.

For this reason, we should consider whether *Erie* is not simply the cause of private law’s marginalization, but an expression of the realist forces that led to this marginalization. Abbe Gluck makes this point explicitly, noting that “*Erie* culminated a sea change in how judges view law,” reflecting “a move from the idea of a body of ‘natural,’ general, or universal legal principles” toward the view that law was a specific “policy choice linked to a particular jurisdiction.”²⁸⁷ Further, in *Erie*’s account, the fact that state and federal articulations of the common law prove inconsistent is evidence that private law is too malleable to produce consensus.²⁸⁸ *Erie* also draws on Holmes’s denial that there are prepolitical or “transcendental” legal principles that

283 304 U.S. 64 (1938).

284 The complexities of the pre-*Erie* allocations of state and federal common-law authority are explored in PURCELL, *supra* note 96, at 59–86.

285 See EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 44–45 & n.36 (2000).

286 See *supra* notes 156–59 and accompanying text.

287 See Gluck, *Intersystemic Statutory Interpretation*, *supra* note 131, at 1902; see also Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 283 (1992) (noting that, post-*Erie*, the common law is “dead, a victim of positivism and realism”).

288 See *Erie*, 304 U.S. at 74 (“Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, [that] . . . [p]ersistence of state courts in their own opinions on questions of common law prevented uniformity . . .”).

stand outside of a state,²⁸⁹ and his assumption that all lawmaking, whether expressly statutory or unwritten private law, is a creation of the state.²⁹⁰

Erie's realist underpinnings become clearer when considering how a counterfactual decision might have read. Faced with divergent common-law results from state and federal jurisdictions, an *Erie* court assuming a formalized account of private law would have reaffirmed the centrality of confined analysis and established the conceptual framework to steer courts in this direction. Having assumed that prepolitical, partially autonomous law is a fiction (used to promote corporate interests), *Erie* argues for the opposite.²⁹¹

The intergovernmental experience of the Anglo-Commonwealth worlds provides further evidence of *Erie's* uniquely American provenance. Australia and Canada are federal systems, yet neither adopts *Erie's* assumptions about the nature of private law or how legal authority is allocated between overlapping sovereigns.²⁹² England is a unitary government, but the House of Lords/Supreme Court of the United Kingdom hears civil appeals under Scots law filtered through its own rendering of general principles of common/commercial law presumed to apply across the legal arena. For much of the nineteenth and twentieth centuries, the Privy Council heard appeals from colonies across the world.²⁹³ Where underlying local law diverged from English law, English law served as the prepolitical “general law” that carved out space for specific local features.²⁹⁴ To this day, judges and scholars from the UK, Canada, Australia, Ireland, New Zealand, Singapore, Hong Kong, and South Africa engage in a transnational discourse anchored in the general common-law principles of English private law. Despite substantial diversity in geography, constitutional structures, political climate, and substantive law—nothing resembling an Anglo “*Erie*” emerged.

Though rarely articulated, the working assumption is that the common law serves as the transjurisdictional legal substrate atop which other bodies of law—local, legislative, or administrative—sit.²⁹⁵ This does not require a full-blown commitment to natural law, or even a strong version of autonomous, prepolitical law, but at minimum presupposes a domain of “lawyers’ law” that

289 *Id.* at 79 (first citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370–72 (1910) (Holmes, J., dissenting)); and then citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting)).

290 *See id.*

291 *See* PURCELL, *supra* note 285, at 262–72.

292 *See* Mark Leeming, *Common Law Within Three Federations*, 18 PUB. L. REV. 186 (2007) (comparing the conceptualization and allocation of common law authority in Australia, Canada, and the United States).

293 *See* Michaels, *supra* note 103, at 153–54 (“In its heyday, the Privy Council’s greatest force lay not in imperial control over the colonies, but rather in its ability to symbolise how the common law can bind together vastly different cultures.”).

294 *See* LORD MANCE & JACOB TURNER, PRIVY COUNCIL PRACTICE §§ 5.19–5.38 (2017).

295 For example, Priel’s account of English law is grounded in the coherence of foundational legal categories and the rationale emerging from accumulated practices. *See* Priel, *supra* note 1, at 610–12.

is rightfully within the deliberative expertise of judges.²⁹⁶ American realism rejected this vision of private law, shifting attention toward procedure, statutes, and public law. *Erie* emerged from the same intellectual milieu and encoded these understandings into American constitutional law.

CONCLUSION

This Article not only shows that law wants to be formal but explains why. Formalism offers an answer to the countermajoritarian difficulty and the problem of the least dangerous branch. These questions flow from the understanding—only fully realized in the twentieth century—that law is something actively made by a polity rather than an external force acting upon it. But if democratically accountable legislatures are empowered to make law and social policy, why should important questions be decided by unrepresentative and unelected judges?

Both Scalia and Birks sought to answer this question by arguing the judicial role requires reasoning from a conceptual core of autonomous principles distinct from value choices. By formally applying the law's conceptual scheme, judges narrowly parse doctrinal intricacies, reserving broader social considerations for the legislative domain.

Though not without its internal critics, English private law represents the central case of law that stands outside political contestation and lends stability to the system as a whole. English private law is thus not only relevant in the arena where it was forged, but plays a major role where American lawyers expect it least: mediating between citizen and state and between domestic UK law and supranational European institutions. Owing to its significance, careful analysis of the intricacies of private law doctrine is a central feature of English caselaw, legal scholarship, and education.

American realists successfully deconstructed private law and undermined its status as a body of prepolitical legal principles. But this success correlates with the domain of private law having shrunk inward. Contemporary private law provides fewer dispositive decisional rules than in the past, particularly in cases that are central to the legitimating narrative of the legal system. That task has shifted to statutory interpretation and legal processes doctrines that govern the state and its lawmaking functions—precisely where American formalist thought has flourished.

296 See *Pettit v. Pettit* [1969] 2 All ER 385 (HL) at 390 (Lord Reid); BURROWS, *supra* note 141, at 77–81, 81 n.87 (2018) (positing a zone of “lawyer’s law” that is unlikely to be addressed by legislation and is the legitimate domain of judicial development).