ESSAY

THE ORIGINS OF STATUTORY STARE DECISIS

*Christian R. Burset**

Federal courts apply stare decisis with extra force to decisions that interpret statutes. Critics contend that this "supercharged" deference to statutory precedent lacks a legitimate pedigree. But that charge rests on conjecture, since scholars have paid little attention to how English courts historically handled such cases. This Essay responds with a new history of statutory stare decisis. For much of the seventeenth and eighteenth centuries, it argues, common lawyers endorsed the maxim communis error facit ius*—common error makes law. That maxim counseled against overturning a course of decisions merely because they had interpreted a statute erroneously. Indeed, as one leading judge remarked, "A series of precedents against the plain words of an act of Parliament have made a law." Starting in the 1760s, however, several factors—better legislative drafting, partisan conflict over jurisprudence, and high-profile treason trials—led some lawyers, but not all, to reject* communis error *when it came to statutes. The result: By the 1790s, English law contained two rival approaches to statutory precedent—a classical paradigm, which effectively allowed a course of precedent to amend a statute; and a revisionist alternative, which held that precedent could clarify but not alter a statute's meaning. Americans inherited that*

* Professor of Law, University of Pennsylvania Carey Law School. For helpful questions and comments, I thank T.T. Arvind, Sam Bray, Emily Bremer, Vince Buccola, Jonathan Green, Chad Harper, William Hubbard, Ben Johnson, Randy Kozel, Alison LaCroix, Stefanie Lindquist, Brian Lipshutz, Farah Peterson, Ryan Snyder, Dennis Weiboldt, and Lael Weinberger, as well as workshop participants at University of Chicago Law School, the UCLA Legal History Workshop, Notre Dame Law School, University of Pennsylvania Carey Law School, University of Texas School of Law, and Washington University School of Law. I'm also grateful for research assistance from Joseph Graziano, Christopher Linfante, Bray McDonnell, Rohan Vaidya, and the D'Angelo Law Library at the University of Chicago.

Some citations include bibliographic information in brackets. The bracketed information is not contained in the cited source and could not be verified through the *Law Review*'s ordinary cite-checking procedure. Bracketed information instead reflects information drawn from other sources or widely accepted scholarly conventions. For instance, note 85 identifies [Philip Yorke, later Lord Hardwicke] as the author of *A Discourse of the Judicial Authority Belonging to the Office of Master of the Rolls in the High Court of Chancery*. The book was published anonymously, but scholars generally agree that Yorke wrote it. See, e.g., Hardwicke, Philip Yorke, Earl of, 1690–1764. A Discourse of the Judicial Authority Belonging to the Office of Master of the Rolls in the High Court of Chancery, Eng. Short Title Catalogue, https://datb.cerl.org/estc/T97350 [https://perma.cc/C73Y-U3QY] (last visited Oct. 16, 2026). A question mark inside the brackets indicates that I have evidence for the bibliographic information in question, but some doubt remains.

conflict, which endured well into the nineteenth century. This history offers a new perspective on statutory stare decisis today. It also suggests a further question: If some early Americans thought precedent could reshape legislation, what did that mean for erroneous constitutional precedents?

INTRODUCTION 1684
I. STATUTORY PRECEDENT IN THE CLASSICAL COMMON LAW 1691
A. Custom and Common Error 1692
B. Common Error and Statutory Precedent 1694
C. Stare Decisis in the First Age of Statutes 1696
D. Only Parliament Makes Law? 1699
E. Errors About Error 1703
F. Summary 1705
II. CHALLENGING THE CLASSICAL APPROACH 1706
A. Professionalized Legislative Drafting 1707
B. Partisan Jurisprudence 1709
C. Text and Treason 1712
D. The Result: Competing Approaches to Statutory Precedent 1716
III. THE VIEW FROM EARLY AMERICA 1720
A. Statutory Precedent in the Colonies 1721
B. Disagreements in the Early Republic 1724
C. New Justifications for Statutory Precedent 1730
1. Customary American Law 1730
2. Legislative Acquiescence 1733
IV. SOME FURTHER QUESTIONS 1737
A. The Rise of Supercharged Statutory Precedent 1738
1. One-Case Precedents 1738
2. Canonizing the Brandeis Rule 1742
B. Common Error and the Constitution 1744
CONCLUSION 1750

INTRODUCTION

Federal courts apply stare decisis with "enhanced force" to decisions that interpret statutes.[1] Common law cases get less respect, and

1. Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015); see also Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 Geo. Wash. L. Rev. 317, 327–28 (2005)

constitutional ones less deference still.[2] For decades, a broad spectrum of judges has applied this "super-strong presumption" against overruling statutory precedents.[3]

To get a sense of that presumption's bite, consider the legal history of baseball. In 1922, the Supreme Court held that professional baseball wasn't subject to federal antitrust statutes because it didn't qualify as interstate commerce.[4] Over time, that holding became hard to square with the Court's increasingly expansive reading of the Commerce Clause. (If growing wheat for one's own farm counted as interstate commerce,[5] why didn't the World Series?) Even so, when the issue popped up again in 1953, the Court relied on statutory stare decisis to reaffirm its earlier decision "[w]ithout re-examination of the underlying issues."[6] Baseball's antitrust exemption, the Court later acknowledged, was an "aberration" that seemed "unrealistic, inconsistent, [and] illogical."[7] But it was an aberra-

---

[hereinafter Barrett, Statutory Stare Decisis] ("A majority of the circuits has explicitly adopted the super-strong presumption against overruling statutory precedents, and in those circuits that have never explicitly applied the rule, separate opinions assume that it applies." (footnote omitted)). State courts mostly follow the same approach, but not always. See, e.g., People v. Wilson, 902 N.W.2d 378, 382 n.6 (Mich. 2017) (rejecting "any notion that cases involving statutory interpretation are to be afforded any greater stare decisis weight than other cases"); Zachary B. Pohlman, Stare Decisis and the Supreme Court(s): What States Can Learn From *Gamble*, 95 Notre Dame L. Rev. 1731, 1749 n.136 (2020) (collecting state decisions that divide over whether stare decisis applies with different force to statutory precedents).

2. Bryan A. Garner et al., The Law of Judicial Precedent 333–35 (2016). The Court has sometimes relied not on a formal statute/Constitution distinction but on the possibility of legislative correction. Compare South Dakota v. Wayfair, Inc., 585 U.S. 162, 183–84 (2018) (giving constitutional-type deference to a dormant Commerce Clause precedent), with id. at 192–93 (Roberts, C.J., dissenting) (arguing that stare decisis should apply with "special force" because Congress can override such precedents by regulating interstate commerce (internal quotation marks omitted) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 320 (1992) (Scalia, J., concurring in part and concurring in the judgment))).

3. William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1362 (1988) [hereinafter Eskridge, Overruling Statutory Precedents]; see also, e.g., Groff v. DeJoy, 143 S. Ct. 2279, 2297–98 (2023) (Sotomayor, J., concurring); Allen v. Milligan, 143 S. Ct. 1487, 1515 (2023) (Roberts, C.J.); id. at 1517–18 (Kavanaugh, J., concurring in part); Lee J. Strang & Bryce G. Poole, The Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents, 86 N.C. L. Rev. 969, 971–72 (2008) (discussing the Rehnquist Court); cf. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2279–80, 2286 (2024) (Gorsuch, J., concurring) (noting the Court's reluctance to overrule statutory precedents but emphasizing exceptions).

4. Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208–09 (1922).

5. Wickard v. Filburn, 317 U.S. 111, 124–25 (1942).

6. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam); see also United States v. Shubert, 348 U.S. 222, 230 (1955) ("*Toolson* was a narrow application of the rule of stare decisis.").

7. Flood v. Kuhn, 407 U.S. 258, 282 (1972) (internal quotation marks omitted) (quoting Radovich v. NFL, 352 U.S. 445, 452 (1957)).

tion "fully entitled to the benefit of stare decisis."[8] If the Court had unduly restricted the scope of antitrust legislation, the error was Congress's to fix, not the Court's.[9]

Courts routinely invoke super-strong stare decisis to retain statutory interpretations they would otherwise discard.[10] It's awkward, then, that most scholars view the doctrine's historical foundations as "shaky."[11] "The notion of an enhanced standard of deference to statutory precedent apparently had not occurred to founding-era commentators," then-Professor Thomas Lee concluded, "or to the Supreme Court in the

---

8. Id.

9. Id. at 283. This account simplifies the story quite a bit. For a more detailed telling, see generally Stuart Banner, The Baseball Trust: A History of Baseball's Antitrust Exemption (2013).

10. Skeptics might doubt whether the doctrine really matters, particularly for the Supreme Court. See Lee Epstein, William M. Landes & Adam Liptak, The Decision to Depart (or Not) From Constitutional Precedent: An Empirical Study of the Roberts Court, 90 N.Y.U. L. Rev. 1115, 1118 (2015). Undoubtedly, the Court hasn't always followed the doctrine consistently. See Frederick Schauer, Stare Decisis—Rhetoric and Reality in the Supreme Court, 2018 Sup. Ct. Rev. 121, 130–31. But the fact that judges and advocates act as if the doctrine exists suggests that it has *some* pull. See Jack Knight & Lee Epstein, The Norm of *Stare Decisis*, 40 Am. J. Pol. Sci. 1018, 1032–33 (1996); cf. Quentin Skinner, Some Problems in the Analysis of Political Thought and Action, 2 Pol. Theory 277, 292 (1974) (explaining that an actor's professed principles can constrain her—even if she doesn't believe them—when she needs to legitimate her conduct). And some recent decisions are hard to explain otherwise. Consider Kimble v. Marvel Ent., LLC, 576 U.S. 446, 449 (2015). "The sole question presented" was whether to overrule Brulotte v. Thys Co., 379 U.S. 29 (1964), a little-loved decision about patent royalties. *Kimble*, 576 U.S. at 449. *Brulotte* had few defenders, and the Court acknowledged a "broad scholarly consensus" against it. Id. at 461; see also Anita S. Krishnakumar, Textualism and Statutory Precedents, 104 Va. L. Rev. 157, 169 (2018) (collecting critiques). Nonetheless, the Court retained *Brulotte*. The best explanation, Professor Herbert Hovenkamp observes, is that *Kimble* "was a *stare decisis* decision, pure and simple." Herbert Hovenkamp, *Brulotte*'s Web, 11 J. Competition L. & Econ. 527, 542 (2015); accord *Kimble*, 576 U.S. at 472 (Alito, J., dissenting) ("Even the Court does not defend the decision on the merits.").

For a more recent example, consider the petition for certiorari in *Beck v. United States*. Petition for Writ of Certiorari, Beck v. United States, 146 S. Ct. 405 (2025) (No. 24-1078). The petition invited the Court to "limit or overrule" Feres v. United States, 340 U.S. 135 (1950), which held that the Federal Tort Claims Act doesn't waive the government's sovereign immunity for injuries incident to military service. Petition for Writ of Certiorari, supra, at ii. In Justice Sotomayor's telling, *Feres* was an "atextual" decision that "has garnered near-universal criticism," "caused significant confusion," and "produce[d] deeply unfair results." *Beck*, 146 S. Ct. at 405–06 (statement of Sotomayor, J., respecting denial of certiorari). Nonetheless, she voted to deny the petition "out of respect for the Court's rules of *stare decisis*" in statutory cases. Id. at 405.

11. See, e.g., Eskridge, Overruling Statutory Precedents, supra note 3, at 1364; Amy Coney Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011, 1019–20 (2003). This Essay focuses on pedigree-based critiques, but scholars have also advanced theoretical objections to the prevailing doctrine of statutory stare decisis. See, e.g., Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 427–29 (1988); Eskridge, Overruling Statutory Precedents, supra note 3, at 1397–1409; Randy J. Kozel, Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis, 97 Tex. L. Rev. 1125, 1130–36 (2019).

Marshall and Taney years."[12] In his assessment, the doctrine first emerged in the late nineteenth century and "crystallized in a series of opinions in the Hughes Court."[13] Professor Caleb Nelson's research points the same way. Well into the nineteenth century, he argues, "the demonstrated error of a past interpretation of a statutory or constitutional provision was reason enough to overrule the past interpretation unless there were special reasons" to do otherwise.[14] Indeed, statutory precedents typically received *less* deference than common law ones because the statutory text made it easier to show that a prior decision was wrong.[15]

If that's right, then we might doubt the doctrine's life expectancy before an originalist Supreme Court. Justice Clarence Thomas has already sharpened the knife.[16] In his view, "the 'judicial Power' vested in the federal courts" doesn't permit the Court's present doctrine.[17] Instead, it demands a simpler rule: "When faced with a demonstrably erroneous precedent"—one that contradicts "the original understanding of the relevant" constitutional or statutory "text"—courts "should not follow it."[18]

His critique depends on contrasting English and American law. As he sees it, "[f]ederal courts today look to different sources of law when exercising the judicial power than did the common-law courts of England."[19] Stare decisis "made sense in a common-law legal system in which courts systematically developed the law through judicial decisions," he argues.[20] "But our federal system is different."[21] The Constitution charges federal

---

12. Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 730–31 (1999).

13. Id. at 731.

14. Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 21 (2001) [hereinafter Nelson, Stare Decisis] (emphasis omitted).

15. See id. at 21–23, 44–45 ("To the extent that the underlying legal provision was determinate, . . . courts were not thought to be similarly bound by precedents that misinterpreted it.").

16. He's not the only member of the Court to have questioned the doctrine. See, e.g., Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 121 n.53 (2010) ("[F]ederal courts permit the institutional interest in stability to trump the obligation of faithful agency every time that they employ stare decisis to adhere to a prior erroneous interpretation of a statute. This conflict would be eliminated if courts [ceased] . . . giving statutory decisions 'super strong' stare decisis effect . . . .").

17. Gamble v. United States, 139 S. Ct. 1960, 1981–82 (2019) (Thomas, J., concurring).

18. Id. at 1982–85. In addition to insisting that federal courts *must* overrule demonstrably erroneous precedents, Justice Thomas has also suggested that courts *may* overrule decisions that reflect an imperfect but "textually permissible interpretation." Id. at 1984. Scholars have observed that the latter, discretionary prong departs from traditional views of precedent. See William Baude, Precedent and Discretion, 2019 Sup. Ct. Rev. 313, 321–22 (contrasting Justice Thomas's view with the historical account in Nelson, Stare Decisis, supra note 14, at 4–5).

19. *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring).

20. Id. at 1981–82.

21. Id. at 1982.

courts not with developing "unwritten" law in the first instance, as English courts did, but with "interpret[ing] legal texts."[22] In light of that basic difference, the old-world "pedigree" of stare decisis has little relevance for federal judges today.[23]

But English courts did interpret statutes—lots of them.[24] Indeed, just as twentieth-century lawyers lamented the "orgy of statute making" that afflicted American law,[25] their eighteenth-century counterparts bemoaned Britain's "epidemical madness" of legislating.[26] English judges, too, complained of the "enormous size" of the "statute books."[27] Given the sheer ubiquity of legislation, it's no surprise that eighteenth-century lawyers sometimes faced conflicts between a statute's apparent meaning and the meaning it had previously been given.[28] But scholars have paid little attention to how lawyers traditionally resolved such conflicts, especially in England.[29] Instead, scholarship has tended to focus on the early United

22. Id. at 1982, 1984.

23. Id. at 1982–84. Some circuit judges and academics have endorsed Justice Thomas's view. See, e.g., Bianchi v. Brown, 111 F.4th 438, 498 (4th Cir. 2024) (en banc) (Richardson, J., dissenting); Hamilton v. Dallas County, 79 F.4th 494, 506 (5th Cir. 2023) (en banc) (Ho, J., concurring); Hammoud v. Ma'at, 49 F.4th 874, 887 (5th Cir. 2022) (en banc) (Oldham, J., dissenting); Randy E. Barnett & Lawrence B. Solum, Originalism After *Dobbs*, *Bruen*, and *Kennedy*: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 484 (2023) ("Our tentative approach to precedent is reflected in Justice Thomas's concurring opinion in *Gamble* . . . ."); cf. Chambers v. District of Columbia, 35 F.4th 870, 896 (D.C. Cir. 2022) (en banc) (Katsas, J., dissenting) ("Justice Thomas has forcefully laid out the competing view that precedent should be overruled . . . if it is 'demonstrably erroneous.' But the Supreme Court has not yet accepted this view, and so neither may we." (citation omitted) (quoting *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring))); Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 24 (1994) (arguing against stare decisis for constitutional cases and suggesting that similar arguments apply against statutory precedent).

24. See infra section I.C.

25. Guido Calabresi, A Common Law for the Age of Statutes 1 (1982) (internal quotation marks omitted) (quoting Grant Gilmore, The Ages of American Law 95 (1977)).

26. Francis Stoughton Sullivan, An Historical Treatise on the Feudal Law, and the Constitution and Laws of England 7 (London, J. Johnson & J. Payne 1772).

27. 15 The Parliamentary History of England 724, 725–26 (William Cobbett ed., London, T.C. Hansard 1813) (reporting Lord Chancellor Hardwicke's May 24, 1756, speech in the House of Lords); see also David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain 13–28 (1989) [hereinafter Lieberman, Province of Legislation] (collecting other complaints).

28. See infra sections I.B–.F.

29. During the drafting of this Essay, two important exceptions emerged. First, a forthcoming article by Professor Jonathan Green offers an illuminating history of the relationship between custom and text in the common law tradition and then uses that history to show how "classical English constitutionalism" might inform the Supreme Court's use of "history and tradition" to define enumerated constitutional rights. Jonathan Green, Some Traditional Questions About "History and Tradition," 102 Notre Dame L. Rev. (forthcoming 2026) (manuscript at 57–58), https://www.ssrn.com/abstract=5170253 [https://perma.cc/SKJ5-4VUC] [hereinafter Green, Traditional Questions]. In eighteenth-century England, he argues, "where a written law codified (or modified) a preexisting, customary right, the scope of that right continued, as before, to be defined by a tradition of

States or to examine English doctrine without distinguishing statutory from non-statutory cases.[30] As a result, lawyers interested in the long view of statutory stare decisis have had to rely on generalization and conjecture.

This Essay responds by offering a new history of statutory precedent in the long eighteenth century.[31] Until well into the nineteenth century, a single statutory decision couldn't bind later courts, let alone with "super-

---

political and social practice that preceded *and succeeded* the statute's enactment." Id. (manuscript at 4). Because custom continued to evolve, so too would the codified customary right. That historical framework, Green argues, provides an originalist justification for giving certain constitutional rights—such as freedom of speech or the right to bear arms—a dynamic definition that accounts for post-ratification practice. Id. (manuscript at 58). At the same time, however, Green observes that tensions within eighteenth-century theories of tradition might complicate efforts to translate Founding-era methods into twenty-first-century jurisprudence. Id. (manuscript at 60–61).

This Essay's argument and Green's are largely complementary, though their emphases differ. Green, with an eye to recent cases like *Rahimi* and *Vidal*, focuses on the history of laws that codified preexisting rights. Id. (manuscript at 3–4); see also United States v. Rahimi, 144 S. Ct. 1889 (2024); Vidal v. Elster, 144 S. Ct. 1507 (2024). This Essay, in contrast, examines the relationship between legislation and precedent more generally, without considering the immediate implications for the Supreme Court's history-and-tradition cases. And while Green and I both note disagreements among common lawyers about the effect of precedent and usage, this Essay aims to map the causes and contours of that disagreement more precisely.

Second, forthcoming work by Professor Ryan Snyder addresses how Founding-era courts used historical practice to interpret statutes and constitutional provisions. Ryan Snyder, Historical Practice at the Founding, 94 U. Chi. L. Rev. (forthcoming 2027) (manuscript at 3), https://ssrn.com/abstract=5894922 [https://perma.cc/QN9B-VAJ8]. English and early American courts, Snyder argues, used practice to help find the meaning of legal texts, but not to alter their meaning. Id. (manuscript at 5). To help police the line between law-finding and law-creation, courts developed a "seven-factor test" to "screen out" practices that didn't reliably illuminate a provision's original meaning. Id. (manuscript at 5). Under that test, Snyder argues, "a practice had to (1) begin shortly after the law's adoption; (2) occur repeatedly; (3) continue for a long period of time; (4) be uniform; (5) be widely accepted; (6) reflect a good-faith effort to interpret the law correctly; and (7) represent a reasonable interpretation of the law." Id.

Snyder's article sheds useful light on an important and enduring strand in Anglo-American legal thought. Unlike this Essay, however, which considers how both judicial and nonjudicial usage could shape the meaning of statutes, Snyder focuses on practice while excluding "express interpretations of the law," including judicial opinions. Id. (manuscript at 6). As a result, Snyder's approach sidesteps or discounts some of the strongest evidence that common lawyers traditionally thought that usage could trump a statute's original meaning.

Green, Snyder, and this Essay's author have previously discussed the commonalities and differences among our respective articles. William Baude, A Scholarly Roundtable on History and Practice, Divided Argument (Apr. 3, 2026), https://blog.dividedargument.com/p/a-scholarly-roundtable-on-history [https://perma.cc/F6SL-3ET7].

30. Lee's influential article spends only a few pages on English law, while Nelson's, following the path marked by Professor Frederick Kempin, focuses on U.S. law between 1800 and 1850. See, e.g., Lee, supra note 12, at 659–62; Nelson, Stare Decisis, supra note 14, at 4; Frederick G. Kempin, Jr., Precedent and Stare Decisis: The Critical Years, 1800 to 1850, 3 Am. J. Legal Hist. 28 (1959).

31. This Essay concerns horizontal, not vertical, stare decisis.

strong" force. But nor was there a Founding-era consensus that courts should presumptively reverse erroneous statutory decisions. To be sure, courts sometimes overturned statutory precedents. But judges also endorsed the maxim *communis error facit ius*—common error makes law (or, in Professor David Seipp's translation, "if everybody has been doing it wrong, let's just call it right and keep doing it"[32]). The maxim applied broadly. But it packed a particular punch for statutes: "*A series of precedents against the plain words of an act of Parliament have made a law*," as Lord Hardwicke put it in 1737.[33] Like most maxims, *communis error* had its limits. As Part I explains, not every error made law. And that maxim sat uneasily with another, which Hardwicke also endorsed: that only Parliament could make a law.[34] During the common law's "classical" era (roughly, from Coke to Blackstone), England's doctrine of statutory precedent reflected an ongoing struggle to reconcile these principles.

The classical approach to statutory precedent came under pressure in the later eighteenth century. As Part II explains, several developments encouraged lawyers to reject *communis error* for statutes and to argue instead that a statute's authentic meaning should always prevail over erroneous constructions. First, legislative drafting improved, so that it became more plausible to claim that one construction was textually superior to another. Second, a reconfiguration of partisan politics focused lawyers' attention on the distinction between legislative and judicial power. And, finally, a series of politically salient treason trials led defense lawyers to insist on strict adherence to statutory text in order to safeguard individual liberty. These developments didn't destroy the older, *communis error*–based approach. But they created a second, competing paradigm. As a result, late-eighteenth-century lawyers had to navigate two incompatible theories of statutory precedent: The classical approach held that a series of precedents could sometimes trump a statute's original meaning, while the revisionist alternative insisted that precedent could clarify but not alter an act of Parliament.

---

32. David J. Seipp, Trust and Fiduciary Duty in the Early Common Law, 91 B.U. L. Rev. 1011, 1032 (2011).

33. Ilchester v. Bendishe (1737) 25 Eng. Rep. 886, 886; West t. Hard. 184, 185.

34. Middleton v. Crofts (1736) 26 Eng. Rep. 788, 790; 2 Atk. 650, 654 ("[N]o new laws can be made to bind the whole people of this land, but by the King, with the advice and consent of both houses of parliament, and by their united authority . . . ."); 2 Atkinson MSS 301, 303 (another report of the case) (on file with Lincoln's Inn Libr.) ("By the Gen[eral] [and] fundamental principles of our constitution it is undoubtedly certain that the people of England are bound only by such Laws, as have the consent of the whole Legislature, [which] consists of the King, the Peers, and the Commons in Parliament assembled."). For background on *Middleton*, see George R. Bush, Dr Codex Silenced: *Middleton* v *Crofts* Revisited, 24 J. Legal Hist. 23, 23–25 (2003); Troy L. Harris, Secularizing a Religious Legal System: Ecclesiastical Jurisdiction in Early Eighteenth Century England, 8 Brit. J. Am. Legal Stud. 1, 1–36 (2019); Richard Helmholz, The Canons of 1603: The Contemporary Understanding, *in* English Canon Law: Essays in Honour of Bishop Eric Kemp 23, 24 (Norman Doe, Mark Hill & Robert Ombres eds., 1998).

Part III uses this English history to reevaluate statutory stare decisis in the early United States.[35] American lawyers inherited the English debate, and both the classical and revisionist paradigms had American adherents well into the nineteenth century. But the debate took a distinctively American turn, as those who favored *communis error* reframed it in republican terms that emphasized the people's sovereign right to amend their laws, whether legislatively or through everyday practice.

This history raises two further puzzles, which Part IV explores but doesn't claim to resolve. The first concerns the mismatch between the Court's present doctrine and its ancestors. Today, the Supreme Court gives "supercharged" deference to a single statutory decision.[36] Nobody advanced that view in eighteenth-century England or the early United States; the debate was whether a *course of precedent* could trump a statute's original meaning. In other words, the Court ultimately resolved the longstanding debate over statutory precedent by rejecting both sides and embracing a third option. Why?

The second puzzle involves the historical relationship between statutory and constitutional precedent. At the Founding, this Essay argues, many lawyers thought precedent could sometimes shift a statute's meaning. We know, too, that many Founding-era lawyers thought the Constitution should be construed like a statute.[37] Put together, those premises suggest that some eighteenth- and nineteenth-century Americans might have thought precedent could alter the Constitution's meaning, too.[38] Did they? If not, why?

I. STATUTORY PRECEDENT IN THE CLASSICAL COMMON LAW

Founding-era lawyers claimed to inherit what Gerald Postema has called the "classical common law," the jurisprudential framework that

---

35. Existing accounts of American stare decisis are helpful but incomplete. For instance, Kempin's widely cited article doesn't distinguish statutory from non-statutory precedent. See Kempin, supra note 30. Lee explores that distinction in depth. But because his project was avowedly presentist—"tracing the primary aspects of the Rehnquist Court's doctrine of stare decisis" to the Founding—it tended to overlook historical doctrines without obvious analogues in the present, including *communis error*. See Lee, supra note 12, at 650. Nelson, in contrast, does identify the possibility of *communis error* at the Founding. See Nelson, Stare Decisis, supra note 14, at 37 n.129. But he reduces it to a reliance-based exception to judges' duty to get statutes right. Id. That captures part of the story, see infra section III.C, but examining American law against its English backdrop allows us to see other angles.

36. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2295 (2024) (Kagan, J., dissenting); see also infra note 405.

37. See infra note 458.

38. See infra section IV.B; cf. Akhil Reed Amar, On Lawson on Precedent, 17 Harv. J.L. & Pub. Pol'y 39, 39–40 (1994) ("If a judicial misconstruction can trump a sovereign statute—the highest law promulgated by the sovereign Parliament—then one might ask why the same thing might not be true for the Constitution in America.").

dominated the seventeenth and early eighteenth centuries.[39] Sections I.A through I.E reconstruct the classical approach to statutory precedent. Section I.F provides a summary.

A. *Custom and Common Error*

Common law judges saw themselves as articulating a body of law that preexisted their decisions.[40] That view left no room for the modern conception of stare decisis in which a single case has binding force.[41] Because a judicial decision merely explained the underlying law, the decision couldn't *be* law, and thus couldn't constrain judges whose own understanding of the underlying law might differ.[42] But while individual decisions lacked binding effect, a series of precedents could acquire the force of law nonetheless. Explaining why takes some unpacking.

From the classical perspective, law existed fundamentally as customary practice.[43] Lawyers and judges distilled that practice into the verbal

---

39. Gerald J. Postema, Classical Common Law Jurisprudence (Part I), 2 Oxford U. Commonwealth L.J. 155, 156 (2002) [hereinafter Postema, Part I]; Gerald J. Postema, Classical Common Law Jurisprudence (Part II), 3 Oxford U. Commonwealth L.J. 1, 27–28 (2003) [hereinafter Postema, Part II]; David Lieberman, Legislation in a Common Law Context, 28 Zeitschrift für Neuere Rechtsgeschichte 107, 108 (2006) [hereinafter Lieberman, Common Law Context]; cf. David J. Ibbetson, Case-Law and Doctrine: A Historical Perspective on the English Common Law, *in* Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft 27, 29, 33–35 (Reiner Schulze & Ulrike Seif eds., 2003) (describing an "early modern" era of English law). Michael Lobban has questioned Postema's label, doubting that there is "a single theory which embraces everyone from Coke to Burke." Michael Lobban, Postema and the Common Law Tradition, 35 Ratio Juris 71, 74–75 (2022). Lobban rightly emphasizes the common law's internal diversity, but as he recognizes, the "classical" label doesn't require one to ignore differences among "classical" jurists. See id.; cf. T.T. Arvind & Christian R. Burset, Partisan Legal Traditions in the Age of Camden and Mansfield, 44 Oxford J. Legal Stud. 376, 392 (2024) [hereinafter Arvind & Burset, Partisan Legal Traditions] (showing that a single common law tradition can contain internal tensions).

40. John Baker, An Introduction to English Legal History 206 (5th ed. 2019) [hereinafter Baker, English Legal History]; Philip Hamburger, Law and Judicial Duty 175 (2008).

41. See Baker, English Legal History, supra note 40, at 209–11 (noting that "the doctrine of the binding force of a single precedent did not appear for centuries" in English law).

42. See Postema, Part II, supra note 39, at 12–14; cf. Matthew Hale, The History of the Common Law of England 45 (Charles M. Gray ed., 1971) (1713) [hereinafter Hale, History of the Common Law] ("Decisions of Courts of Justice . . . are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons . . . .").

43. See David Lieberman, Law/Custom/Tradition: Perspectives From the Common Law, *in* Questions of Tradition 233, 233 (Mark Salber Phillips & Gordon Schochet eds., 2004) (describing "England's system of customary or common law" as formulated by Edward Coke, John Selden, Matthew Hale, and William Blackstone); A.W.B. Simpson, The Common Law and Legal Theory, *in* Oxford Essays in Jurisprudence (Second Series) 77, 94 (A.W.B. Simpson ed., 1973) (describing the common law as a system of practices and ideas received by a caste of lawyers). Even more fundamentally, human law had to conform to natural law. See Lieberman, supra, at 246. But a practice's universality was seen as evidence

formulations that filled treatises and law reports. But because those distillations merely provided evidence of underlying usage, no formulation could be "conclusively authoritative."[44] Accordingly, every judicial opinion remained vulnerable to attack on the ground that it failed to capture the *real* common law as it existed, ultimately, in the practice of the people.[45] By the seventeenth century, the connection between law and practice was often a fiction.[46] Still, in theory, law was supposed to emerge from how people behaved.[47]

Because law depended on practice, classical lawyers sometimes conflated *what had been done* with *what ought to have been done*. This attitude was captured by the maxim *communis error facit ius*—"common error becomes right" (or "law").[48] If everyone comes to share a particular understanding of the law, that understanding becomes law, even if it started off wrong.[49]

---

of conformity with natural law. See Stuart Banner, The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped 49, 51 (2021) [hereinafter Banner, Decline of Natural Law]. Moreover, this requirement held that the laws of nature could be "subjected to variation and amendment by the positive law," including custom. R.H. Helmholz, Natural Law in Court: A History of Legal Theory in Practice 99 (2015). In practice, therefore, arguments from natural law rarely eclipsed arguments from practice. Id. at 124–25.

44. Postema, Part II, supra note 39, at 14.

45. Id. at 20.

46. See Baker, English Legal History, supra note 40, at 206 ("The supposition that common-law principles exist before anyone has said what they are is a philosophical abstraction rather than a historical fact."); James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, 58 U. Chi. L. Rev. 1321, 1361 (1991) (describing an "evidentiary crisis of custom" in the seventeenth century); see also Green, Traditional Questions, supra note 29 (manuscript at 26 n.182) (explaining that the common law, though based in customary practice, was not a "stenographic 'consolidation of popular custom'" (quoting Postema, Part I, supra note 39, at 159)).

47. See Simpson, supra note 43, at 95 (arguing that the value of a formulated proposition of common law "depends upon the degree to which such propositions are accepted as accurate statements of received ideas or practice"); Asheesh Kapur Siddique, The Ideological Origins of "Written" Constitutionalism, 21 Early Am. Stud. 557, 569 (2023) (explaining that Blackstone characterized common law power as deriving "from its repeated practical use and reference over an extended period of time").

48. William Noy, The Principal Grounds and Maxims, With an Analysis of the Laws of England, *in* Maxims in Law and Equity 32–33 (William Waller Hening ed., Richmond, Thomas W. White 2d Am. ed. 1824) (separately paginated work); see also, e.g., Edward Coke, The Fourth Part of the Institutes of the Laws of England 240 (London, E. & R. Brooke 1797) (1644) (citing the maxim). The maxim has roots in Roman law. See Guido Rossi, Representation and Ostensible Authority in Medieval Learned Law 504 (2019) (describing the maxim as a "crystalli[zation]" of the few surviving elements of the Roman *lex Barbarius*); William M. Gordon, *Communis Error Facit Ius*, *in* Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry 447, 449–52 (Andrew Burrows, David Johnston & Reinhard Zimmermann eds., 2013).

49. See Gordon, supra note 48. Some lawyers resisted the notion that error could truly *become* law, rather than merely being treated as such. So, for instance, Sir Henry Finch's influential treatise rendered the maxim as "[c]ommon error *goeth for* a law." Henry Finch, Law: Or, a Discourse Thereof, in Foure Books 40 (London, Assignes of John More 1636) [hereinafter Finch, Law] (emphasis added). But Finch seems to have abandoned that idea;

The idea, Sir John Baker explains, was that "a current of precedents will not be overturned merely because, late in the day, it is discovered that the underlying principle was logically precarious or historically unsound."[50]

Communis error connoted more than mere frequency. It called to mind another pillar of common law jurisprudence: *communis opinio*, or "common erudition"—the idea that the common learning of the legal profession was an authoritative source of law.[51] For both maxims, "common" meant something like "universal."[52] And under both, universal practice took priority over principle. That explains how precedents could acquire binding force. Courts could overrule a single wrong decision. But a course of consistent decisions or shared opinions could transmute error into law.[53]

B. *Common Error and Statutory Precedent*

The framework sketched above applied to both common law and statutory cases. Statutes were distinctive in the obvious sense that Parliament, unlike courts, could make new law.[54] But in other respects, statutory and common law adjudication had much in common, and judicial interpretation often played a crucial role in shaping statutes.[55] Until the middle of the eighteenth century, most legislation was poorly drafted, and it was only in the nineteenth century that judges gained reliable access to official copies of acts of Parliament.[56] As a result, courts tended to focus less on

---

the law-French edition of the same work (published earlier but written later) reproduces the Latin maxim without qualification ("*facit ius*" (makes law)). Henry Finch, Nomotechnia 10 (London, Societie of Stationers 1613) [hereinafter Finch, Nomotechnia] (italics added); see also Wilfrid Prest, The Dialectical Origins of Finch's *Law*, 36 Cambridge L.J. 326 (1977) (explaining Finch's writing timeline). Similarly, while his earlier English version said that certain defective acquittances "shall bee *allowed for* good," Finch, Law, supra, at 40 (emphasis added), the later law-French version simply says "est bon" (is good), Finch, Nomotechnia, supra, at 10. See also Henry Finch, A Description of the Common Laws of England (London, A. Millar 1759) (anonymous translation of the law-French version).

50. J.H. Baker, The Law's Two Bodies: Some Evidential Problems in English Legal History 6 (2001) [hereinafter Baker, Two Bodies].

51. See id. at 81–89; Michael P. Healy, *Communis Opinio* and the Methods of Statutory Interpretation: Interpreting Law or Changing Law, 43 Wm. & Mary L. Rev. 539, 549 & n.50 (2001).

52. See Emily Kadens, The Puzzle of Judicial Education: The Case of Chief Justice William de Grey, 75 Brook. L. Rev. 143, 150 (2009) (discussing "the '*communis opinio*' that all active members of the bar shared").

53. See, e.g., East India Co. v. Skinner (1695) 90 Eng. Rep. 516, 516–17; Comb. 342, 342 ("The [tax collectors'] . . . warrant was granted before any default, which ought not to be . . . . [B]ut the practice having been in this case of taxes, to grant such a conditional warrant to distrain, *communis error facit jus*." (italics added)).

54. Baker, English Legal History, supra note 40, at 221.

55. Medieval statutory interpretation might have worked differently. See S.E. Thorne, The Equity of a Statute and *Heydon's Case*, 31 Ill. L. Rev. 202, 217 (1936) ("Prior to *Heydon's Case* [in 1584,] we find no effort to extend statutes . . . beyond their literal word content in the light of what they were intended to do.").

56. See Baker, English Legal History, supra note 40, at 219; 1 The Statutes at Large, at xxvii (Owen Ruffhead ed., London, Mark Baskett, Assigns of Robert Baskett, Henry

statutes' language than on their "spirit" and purpose.[57] What that meant in practice was that judges frequently employed maxims, presumptions, and equitable interpretation to make sense of Parliament's messy work.[58]

Because judges took such an active hand in construing statutes, the statutes themselves often faded into the background. Indeed, Sir Matthew Hale, a leading seventeenth-century judge, thought that in the long run statutes dissolved into the *corpus juris*: "[M]any of those Things we now take for Common Law, were undoubtedly Acts of Parliament, tho' now not to be found of Record."[59] Even if the text of a statute survived, it wasn't necessarily the first place a lawyer would look to figure out its legal meaning. "Precedents are Laws interpreted by Usage," William Blackstone wrote in 1753, and "if there has been no Interpretation, we must resort to the Law itself."[60] Lawyers often started with practice and precedent, even before text.[61]

Woodfall & William Strahan 1769) [hereinafter Ruffhead]; infra section II.A. In the seventeenth century, it was not yet routine to publish all statutes officially. See Richard J. Ross, The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520–1640, 146 U. Pa. L. Rev. 323, 443 (1998) (recounting Sir Robert Cotton's suggestion "that 'some dangerous statutes might not be published'" (quoting Kevin Sharpe, Sir Robert Cotton, 1586–1631: History and Politics in Early Modern England 42–43 (1979))); see also Ian Williams, "He Creditted More the Printed Booke": Common Lawyers' Receptivity to Print, c. 1550–1640, 28 Law & Hist. Rev. 39, 67–68 (2010) (noting that some early modern lawyers argued that a statute's legal character depended on whether it had been printed officially).

57. See Jonathan Green, The Misunderstood History of Interpretation in England, 56 Ariz. St. L.J. 911, 947 (2024) [hereinafter Green, Misunderstood History].

58. John Baker, The Oxford History of the Laws of England: Volume VI, 1483–1558, at 79–80 (2003) [hereinafter Baker, Oxford History]; Gerald J. Postema, Bentham and the Common Law Tradition 23–24 (2d ed. 2019) [hereinafter Postema, Bentham and the Common Law]; Lieberman, Common Law Context, supra note 39, at 110; see also Jud Campbell, Determining Rights, 138 Harv. L. Rev. 921, 939 (2025) (explaining that "declaratory" statutes, which referred to a preexisting natural or customary right, were interpreted by looking to that unwritten right rather than to the statutory text); Jeffrey A. Pojanowski, Reading Statutes in the Common Law Tradition, 101 Va. L. Rev. 1357, 1377–80 (2015) (summarizing classical views of legislation).

59. Hale, History of the Common Law, supra note 42, at 44; see also Postema, Bentham and the Common Law, supra note 58, at 24–26 (discussing Hale's theory); cf. Sheppard v. Gosnold (1672) 124 Eng. Rep. 1018, 1019–20; Vaugh. 159, 162–63 (CP) ("[T]he Act of Parliament it self . . . is no where extant now, but undeniable evidence of it appears . . . . [A]nd in truth, most of the common law cannot be conceived to be law otherwise than by Acts of Parliament, or power equivalent to them, whereof the rolls are lost . . . .").

60. Draft Letter from William Blackstone to Randle Wilbraham (Jan. 9, 1753), *in* The Letters of Sir William Blackstone: 1744–1780, at 23, 26 (W.R. Prest ed., 2006).

61. Blackstone's comment is all the more striking because he was interpreting the laws of Oxford and Cambridge universities, which derived from a civil law tradition in which precedent played a comparatively minor role. See also Kevin Costello, Quo Warranto and the Borough Office Holder, 1700–1792, *in* Law and Constitutional Change 122, 133 (David Capper, Conor McCormick & N.M. Dawson eds., 2025) (reporting that in early-eighteenth-century disputes over borough charters, "the political community in the boroughs never read the charters but simply relied upon what their predecessors did in similar cases in the past").

Given that framework, it should come as no surprise that *communis error* applied equally to statutory and common law precedents.[62] A single erroneous decision couldn't change the meaning of a statute any more than a single case could change the common law. But a common statutory interpretation could *become* law over time, even if it ran against the statute's apparent meaning.[63] Take *Capell's Case*, in which Queen's Bench was asked to reverse a judgment because the underlying writ had disregarded a minor but unambiguous statutory directive.[64] Although "the justices in strict consideration of the law" thought the judgment was "error," they declined to reverse it, because "the common course" of practice had ignored that particular provision.[65] For common lawyers, the case illustrated the principle that "*communis error facit jus*" in statutory and nonstatutory cases alike.[66]

As with most maxims, *communis error* had its limits. For instance, in 1592, judges refused to enforce a recognizance that failed to comply with a statutory requirement, despite "many precedents" to the contrary.[67] Error could make law, but not always.

C. *Stare Decisis in the First Age of Statutes*

Figuring out when the maxim applied became increasingly urgent as England entered its first "age of statutes" in the eighteenth century.[68]

---

62. Contra Brogan v. United States, 522 U.S. 398, 407 n.3 (1998) (denying that *communis opinio* or *communis error* historically applied to statutes); cf. Gordon, supra note 48, at 453–54 (questioning whether *communis error* can apply to statutes).

63. See Baker, Oxford History, supra note 58, at 80. The continental *ius commune* exhibited a similar dynamic. See Richard H. Helmholz, Statutory Interpretation—Then and Now, 41 Man. L.J. 1, 16 (2018).

64. Capell's Case (c. 1590) 74 Eng. Rep. 788; 4 Leo. 150. Specifically, the writ disregarded a statutory instruction on how to name the Court of Great Sessions in Wales. Id.

65. Id. at 791; 4 Leo. at 155; accord Morgan v. Griffith (1575), *in* 3 Reports from the Notebooks of Edward Coke 482 (John Baker ed., 2022) (Popham, C.J.) ("[N]evertheless because all the precedents since the making of the said Act were of the same form as the said writ was, the said writ was adjudged sufficient."). For the reporting and procedural history of *Capell's Case*, see 2 Reports from the Notebooks of Edward Coke, supra, at 246 n.1.

66. *Capell's Case,* 74 Eng. Rep. at 791; 4 Leo. at 155 (argument of Attorney General Popham) (italics added); accord Meskin v. Hickford (1624) 123 Eng. Rep. 1167, 1171; Bridg. J. 16, 21 (argument of John Bridgman) ("The custome and course in a Court, and the [precedents] in a Court, do make a law."). Some writers seem to have disagreed with the maxim. That might explain why one mid-seventeenth-century lawyer felt compelled to remind readers "[h]ow prejudicial it would be to the whole Kingdom, if that rule were infallible, That no Precedent or Prescription, Usage or Custom (as some have said) should prevail against an Act of Parliament." Arguments Proving From Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery (1693) 21 Eng. Rep. 576, 576; 1 Rep. Ch. 1, 3.

67. Ayscough v. Fulshawe (1592), *in* 3 Reports from the Notebooks of Edward Coke, supra note 65, at 470.

68. The allusion is to Calabresi, supra note 25.

Medieval legislation had been rare.[69] The Tudor Parliaments were more active, but the real break came after the Glorious Revolution (1688), when Parliament's new political strength led to a flood of legislation.[70] By the middle of the eighteenth century, lawyers were routinely lamenting the bloat of Britain's statute book.[71]

Despite the growing quantity and scope of parliamentary activity, courts continued to employ the classical approach to statutory precedent. True, they now professed greater fealty to text and felt less free to adjust Parliament's handiwork through equitable interpretation.[72] But *communis error* survived. Take Chief Justice John Holt's statement in *Clay v. Sudgrave*, decided in 1700.[73] The existing scope of admiralty jurisdiction over mariners' wage disputes, he concluded, "is against the statute expressly, though now *communis error facit jus*."[74]

Or consider *Regina v. Bewdley*, decided in 1712.[75] There, all twelve common law judges agreed to disregard the text of a seven-year-old statute because administrative and judicial practice had ignored it.[76] The case arose from a protracted struggle to control the borough of Bewdley, where

---

69. Green, Misunderstood History, supra note 57, at 927; see also George Garnett, 'The Logic of Authority, and the Logic of Evidence', *in* Time, History, and Political Thought 67, 69 (John Robertson ed., 2023) (explaining that the very notion of "statute" was still evolving in the Middle Ages).

70. Baker, English Legal History, supra note 40, at 219–20; Julian Hoppit, Patterns of Parliamentary Legislation, 1660–1800, 39 Hist. J. 109, 125 (1996). Colonial legislatures also produced more legislation, especially after 1750. See Aaron Graham, Jamaican Legislation and the Transatlantic Constitution, 1664–1839, 61 Hist. J. 327, 328 (2018) (explaining that legislative volume in Jamaica increased exponentially between 1664 and 1839); Aaron Graham, Legislatures, Legislation and Legislating in the British Atlantic, 1692–1800, 37 Parliamentary Hist. 369, 373 (2018) (finding that the output of colonial legislatures "increased only slowly between 1692 and 1750 . . . but then expanded rapidly between 1750 and 1775").

71. See supra notes 26–27 and accompanying text.

72. See Green, Misunderstood History, supra note 57, at 932 ("[T]he institutional position of judges charged with enforcing statutes . . . changed radically after the Glorious Revolution. Straightforward appeals to equity became more difficult to sustain . . . . The courts adapted by largely jettisoning the language of equity, and advertising their deference to the legislature's intention."). But cf. Saikrishna Bangalore Prakash, Spirit, 173 U. Pa. L. Rev. 937, 946 (2025) (emphasizing the later persistence of "spirit" in statutory interpretation); 1 John Ward & T[imothy] Cunningham, The Law of a Justice of Peace and Parish Officer, at xx (London, H. Woodfall & W. Strahan 1769) ("In some cases the letter of an act of parliament is restrained by equity, in others it is enlarged, and in others the construction is contrary to the letter.").

73. (1700) 91 Eng. Rep. 34; 1 Salk. 33.

74. Id. at 35; 1 Salk. at 33. Holt construed the "error" strictly, refusing to extend it beyond existing precedent. Id.; accord 91 Eng. Rep. 1285, 1286; 1 Ld. Raym. 576, 577 (another report of the case); see also Waltham v. Sparkes (1695) 91 Eng. Rep. 924, 925; 1 Ld. Raym. 41, 42 ("[A]ll the justices of peace in England did so, and therefore, though they have not authority to do it in strictness of law, yet *communis error facit jus*."); Baker, Two Bodies, supra note 50, at 109–10 (giving additional examples).

75. (1712) 24 Eng. Rep. 357; 1 P. Wms. 207.

76. Id. at 362; 1 P. Wms. at 223.

rival Whig and Tory families had set up competing governments under competing charters.[77] England's Tory ministry sued the Whig faction (in the name of the Crown), and a jury returned a verdict that effectively dissolved the Whig charter.[78] The defendants objected that the jury had been selected illegally: The *venire* (jury pool) had been taken "*de vicineto de Bewdley*" (from the neighborhood or vicinage), but a statute required jurors to be drawn "*de corpore comitatus*" (from the whole county).[79]

The case seemed open-and-shut: The statute required one thing, and the *venire* said another.[80] With the text plainly against them, the Crown's lawyers appealed to precedent: "The practice of the crown office ever since the making of this act . . . has been to award the *venire de vicineto*, and it was never controverted till now."[81] The officials who prepared *venires* had never heeded the statute, so why start?

The argument worked. The judges acknowledged what the statute said. But they upheld the *venire* anyway, in light of "the constant practice, ever since the making of the act, having been otherwise."[82] "[T]o make a contrary resolution in this case," they explained, "would be, in some measure, to overturn the justice of the nation for several years past."[83] *Bewdley*'s striking facts—every common law judge had agreed that a practice of merely seven years could trump the unambiguous text of a recent statute—gave it enduring weight.[84] Twenty-five years later, Lord Hardwicke cited the

---

77. Id. at 357–58; 1 P. Wms. at 207–09; see also Paul D. Halliday, Dismembering the Body Politic: Partisan Politics in England's Towns, 1650–1730, at 310–12 (1998); Philip Styles, The Corporation of Bewdley Under the Later Stuarts, 1 U. Birmingham Hist. J. 92, 126–27 (1947); Stuart Handley, Bewdley, Hist. Parliament, https://www.historyofparliamentonline.org/volume/1690-1715/constituencies/Bewdley [https://perma.cc/92Q9-DYUH] (last visited Aug. 14, 2026).

78. *Bewdley*, 24 Eng. Rep. at 359; 1 P. Wms. at 212.

79. Id. (citing Administration of Justice Act 1705, 4 & 5 Ann. c. 16, § 6). The statute was the last step in relaxing the "vicinage requirement, that jurors be drawn from the neighborhood of the events." John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 243–44 (2009).

80. *Bewdley*, 24 Eng. Rep. at 359–60; 1 P. Wms. at 214–15 (argument of Serjeant Pratt).

81. Id. at 361; 1 P. Wms. at 219 (argument of Attorney General Northey). For more on the operation of the Crown Office, see generally Douglas Hay, Dread of the Crown Office: The English Magistracy and King's Bench, 1740–1800, *in* Law, Crime and English Society, 1660–1830, at 19, 26–27 (Norma Landau ed., 2002).

82. *Bewdley*, 24 Eng. Rep. at 362; 1 P. Wms. at 223.

83. Id. Chief Justice Parker further argued that the statute could be ignored because it was a "matter of no great consequence." Id. His theory seems to have been that the jury pool wasn't outcome determinative. That wasn't obviously true, especially in a politically charged decision concerning local government. In any event, later citations to *Bewdley* didn't rely on Parker's distinction between consequential and inconsequential statutory provisions. See, e.g., R v. Harman (1739) 93 Eng. Rep. 184, 185; Sess. Cas. 182, 183 (argument of counsel); R v. Haddock (1737) 95 Eng. Rep. 333, 335; Andr. 137, 141 (argument of counsel).

84. See, e.g., Medina v. Norris [1735] (PC) (appeal taken from Eng.) (argument of counsel) (citing *Bewdley*, 24 Eng. Rep. at 357; 1 P. Wms. at 207), *in* Frederic Thomas Pratt, Law of Contraband of War app. C at 293 n.1, 298 (London, William G. Benning & Co. 1856).

case to support the proposition that "[*a*] *series of precedents against the plain words of an act of Parliament have made a law.*"[85]

But what counted as precedent? In *Bewdley*, the judges had pointed to the Crown Office (which was responsible for drawing up *venires*), whose practice courts had endorsed "*sub silentio.*"[86] That left open questions about the relative authority of judicial precedent and administrative usage. To confuse matters further, the Crown Office was an adjunct of the Court of King's Bench, performing some of the functions of a clerk of court today.[87] So *Bewdley*'s message wasn't entirely clear. Could usage alone control an act of Parliament?[88] Or did that usage also require judicial endorsement?[89] In the following decades, commentators would continue to contest whose practice mattered.

D. *Only Parliament Makes Law?*

Bewdley also left a deeper puzzle: Why should precedent ever outweigh Parliament's clear command? Some commentators pointed to English law's basis in custom.[90] Others emphasized reliance and the public utility of repose.[91] (As Holt said of a dubious indictment, "there are too many

---

85. Ilchester v. Bendishe (1737) 25 Eng. Rep. 886, 886; West t. Hard. 184, 185 (citing *Bewdley*, 24 Eng. Rep. at 357; 1 P. Wms. at 207); see also Memorandum Regarding *Ilchester v. Bendishe* From Lord Hardwicke's Notebook (Nov. 26, 1737) 25 Eng. Rep. 887, 887; West t. Hard. 186, 186 ("[I]f the words [of the statute] had been more strict, yet the precedents produced would have made the law, being all the precedents in this case, and none to the contrary."); [Philip Yorke, later Lord Hardwicke], A Discourse of the Judicial Authority Belonging to the Office of Master of the Rolls in the High Court of Chancery 195–96 (London, W. Bowyer 2d ed. 1728) (1727) (citing *Bewdley*, 24 Eng. Rep. at 357; 1 P. Wms. at 207, with approval); cf. Corp. of Burford v. Lenthall (1743) 26 Eng. Rep. 731, 732; 2 Atk. 551, 553 (Hardwicke, L.C.) (citing *Bewdley*, 24 Eng. Rep. at 357; 1 P. Wms. at 207, to explain why "I ought to be bound by . . . precedents" in awarding costs despite lack of statutory authority).

86. 24 Eng. Rep. at 362; 1 P. Wms. at 223.

87. See 1 Richard Gude, The Practice of the Crown Side of the Court of King's Bench, and the Practice of the Sessions 23 (London, R. Pheney, S. Sweet, A. Maxwell & Stevens & Sons 1828) (listing administrative responsibilities of the Crown Office); 1 Robert Richardson, The Attorney's Practice in the Court of King's Bench 5–9 (London, J. Worrall 5th ed. 1769) (1739) (similar); James C. Oldham, The Origins of the Special Jury, 50 U. Chi. L. Rev. 137, 189, 198 (1983) (describing judges' deference to the Master of the Crown Office on certain procedural questions).

88. In one case, Common Pleas had interpreted the Statute of Frauds according to what "the usage has ever been in actions of this nature." Hopkins v. Mayton (1721), *in* Reports of Sir Peter King, Chief Justice of the Common Pleas: 1714–22, at 227, 228 (Lloyd Bonfield & L.R. Poos eds., 2017). The court noted a contrary judicial decision but held it "not to be law" and so ignored it. Id. (citing Philpott v. Wallet (1682) 83 Eng. Rep. 579; 3 Lev. 65).

89. See infra section I.E.

90. See Reed Browning, Political and Constitutional Ideas of the Court Whigs 157 (1982) (discussing Hardwicke); supra section I.A.

91. See supra note 83; see also Smith v. Packhurst (1740) 26 Eng. Rep. 881, 884; 3 Atk. 135, 139; Finch, Nomotechnia, supra note 49, at 10 (describing *communis error* as a "politicall

that way to reverse them all."[92]) Lord Mansfield offered a related rationale, rooted in his commitment to legal certainty.[93] Statutory precedents, he argued, "ought, for the sake of certainty, to be observed, as if they had originally made a part of the text of the statute."[94]

None of these answers quite resolved the problem. Recall Hardwicke's insistence that only Parliament could make a law.[95] If he was right, then decisions like *Bewdley* looked awfully like usurpation. Perhaps for that reason, the barrister William Hawkins rendered *communis error* as a canon of construction. He was trying to explain why, although a statute said that only knights could be coroners, men of lesser rank routinely filled the office.[96] That practice started, he explained, because it was hard to find knights willing to serve.[97] Still, he contended, this wasn't a case of necessity nullifying a statute. Because the law's "principal Intent" was to exclude "Persons of mean Ability," the statute was satisfied as long as coroners were "Men of good Substance and Credit," knights or not.[98] A practice born of pragmatism had revealed the statute's true meaning. "Usage," Hawkins concluded, was "the best Interpreter of Laws."[99]

Edward Coke had said something similar when commenting on Littleton's *Tenures*. Littleton, writing in the fifteenth century, had suggested that "no action can be brought upon" the sixth chapter of the Statute of Merton (enacted 1235), because "it was never seene or heard, that any [such] action was brought."[100] That was potentially momentous. The chapter itself—which concerned wards who married without permission—might not strike readers as a pillar of English law. But because it implemented a provision of Magna Carta, Littleton's logic suggested that even the English constitution's foundations might crumble through

---

precept[]" rooted in the idea that law favors "publike repose"); William Noy, A Treatise of the Principal Grounds and Maximes of the Lawes of This Nation 9–10 (London, W. Lee, D. Pakeman, R. Best & G. Bedell 3d ed. 1660) (1641) (classifying *communis error* as a "political" maxim to be deployed only insofar as it served the common good).

92. Taylor v. Griffith (1702) 87 Eng. Rep. 1133, 1133; 7 Mod. 115, 115; accord R v. Thompson (1787) 100 Eng. Rep. 10, 13; 2 Term Rep. 18, 23 (making a similar point about certain criminal convictions based on insufficient evidence).

93. Christian R. Burset, Redefining the Rule of Law: An Eighteenth-Century Case Study, 70 Am. J. Comp. L. 657, 671–76 (2022).

94. Windham v. Chetwynd (1757) 97 Eng. Rep. 377, 380; 1 Burr. 414, 419; see also Neil Duxbury, Elements of Legislation 15 n.45 (2013) (suggesting that the "main reason" courts tend to follow statutory precedents is to minimize "the risk of interference with vested rights").

95. See supra note 34 and accompanying text.

96. 2 William Hawkins, A Treatise of the Pleas of the Crown, Book 2 at 42–43 (London, E. Nutt, R. Nutt & R. Gosling 3d ed. 1739) (1721).

97. Id. at 43.

98. Id.

99. Id.

100. 2 The Selected Writings and Speeches of Sir Edward Coke 696 (Steve Sheppard ed., 2003) [hereinafter Coke Writings] (citing Statute of Merton 1235, 20 Hen. 3 c. 6).

disuse.[101] Coke tried to escape that destabilizing implication by recasting usage as interpretation.[102] Formally, Coke insisted, it was impossible for "An Act of Parliament" to "lose [its] force" through "non User."[103] But a statute's "non usage" might indicate "that the Law will not beare" its apparent meaning.[104] In Coke's hands, desuetude became gloss.[105]

Coke's maneuver blurred two distinct maxims: *communis error* and *optimus interpres legum consuetudo* ("usage is the best interpreter of laws").[106] Both had roots in English and Roman law, but they worked differently. Most importantly, *interpres consuetudo*, unlike *communis error*, didn't permit usage to nullify a statute.[107] "Where the penning of a statute is dubious, long usage is a just medium to expound it by," Chief Justice John Vaughan explained in *Sheppard v. Gosnold*.[108] But not where a statute was clear: "[I]f usage hath been against the obvious meaning of an Act of Parliament, by the vulgar and common acceptation of the words, then it is rather an oppression of those concern'd, than an exposition of the Act . . . ."[109]

At first glance, *Sheppard* might seem to reject any application of *communis error* to statutes.[110] But context suggests something less categorical. *Sheppard* concerned the collection of customs duties—a setting, Vaughan suggested, where usage was an especially poor guide to legal meaning. He gave the not-so-hypothetical example of a customs collector "seiz[ing] a mans goods" until the owner paid whatever the collector

---

101. See Theodore F.T. Plucknett, A Concise History of the Common Law 339 (5th ed. 2010) (1956).

102. Cf. John Baker, The Reinvention of Magna Carta 1216–1616, at 335 (2017) [hereinafter Baker, Magna Carta] (noting Coke's "devotion to the great charter").

103. Coke Writings, supra note 100, at 698.

104. Id.; accord Hale, History of the Common Law, supra note 42, at 44 ("Usage and Custom generally receiv'd, do *Obtinere vim Legis* [obtain the force of law], and is that which gives Power sometimes to the Canon Law . . . [and] sometimes to the Civil Law . . . ."); see also A Discourse Upon the Exposicion & Understandinge of Statutes With Sir Thomas Egerton's Additions 165 (Samuel E. Thorne ed., 1942) ("For althoughe the force of statutes be suche that no contynuaunce of tyme can gayne anie prescripcion against them, . . . yet, notwithstandinge as [it] devoureth all thinges, so hathe it in some poyntes enfeebled the strengthe of our statutes.").

105. See Coke Writings, supra note 100, at 698; cf. Baker, Magna Carta, supra note 102, at 91 ("An Act of Parliament was to be construed according to common law and reason, and if it was so obscure that it could not be understood by law or reason it could hardly be given any effect."); Ian Williams, *Dr Bonham's Case* and 'Void' Statutes, 27 J. Legal Hist. 111, 118–19 (2006) (explaining that a court might treat as "void" a statute that "common lawyers could not understand, and therefore could not apply," in light of background legal principles).

106. See Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908, 937–38 (2017) (describing the origins of the *interpres consuetudo* canon).

107. Sheppard v. Gosnold (1672) 124 Eng. Rep. 1018; Vaugh. 159.

108. Id. at 1023; Vaugh. at 169.

109. Id. at 1023; Vaugh. at 170.

110. Cf. Bamzai, supra note 106, at 937 n.116 (interpreting Vaughan as stating that "[c]ustom did not trump plain legal text").

demanded.[111] In theory, the owner might challenge an illegal exaction in court. But it was often cheaper to pay and move on. In time, that cycle of illegality and acquiescence would give rise to a "usage" by which "all the goods in the land may be charged" without parliamentary authorization; "for when the concern is not great, most men (if put to it) will rather pay a little wrongfully, than free themselves from it over-chargeably."[112] It was important, therefore, to examine how a usage was "circumstanc'd" before giving it weight.[113]

In context, *Sheppard* concerned when, not whether, usage might trump a statute's text.[114] Even so, the decision's broad language encouraged some lawyers to question *communis error* more generally. Take *Rex v. Harman*.[115] In the parish of St. Clement Danes, the justices of the peace had appointed five overseers of the poor. One of them, Harman, refused to execute his office, for which the parish fined him. He contested the fine, arguing that his appointment had been void because the relevant statute authorized only four overseers.[116]

The case produced a fight over the scope of *communis error*. The parish's lawyer, Solicitor General John Strange, cited *Bewdley* as holding that "a practice of seven years" might supersede even "the words of an Act of Parliament, upon the principle, that *communis error facit jus*."[117] Surely

---

111. *Sheppard*, 124 Eng. Rep. at 1023; Vaugh. at 170. Collectors didn't receive a flat salary; instead, they had a financial incentive to maximize their collections. See William J. Ashworth, Customs and Excise: Trade, Production, and Consumption in England, 1640–1845, at 159–60 (2003).

112. *Sheppard*, 124 Eng. Rep. at 1023; Vaugh. at 170.

113. Id.

114. See Attorney General v. Chitty (1744) 145 Eng. Rep. 707, 709; Park. 37, 43–45 (opinion of Parker, C.B.) (citing *Sheppard* while nonetheless invoking "usage" to define "great raisins" for tax purposes in a way that "may now seem to be contrary to the letter of the old Book of Rates"); Green, Traditional Questions, supra note 29 (manuscript at 37 n.271) (explaining that *Sheppard* was a case in which usage hadn't defeated a "presumption in favor of a strict construction of" a statute in derogation of the common law).

115. There are three printed reports of *Harman*. Two are in the *English Reports*: (1739) 87 Eng. Rep. 1320; 7 Mod. 402 and (1739) 93 Eng. Rep. 184; Sess. Cas. 182. The third, based on a contemporary manuscript, is in 1 Edmund Bott & Francis Const, Decisions of the Court of King's Bench, Upon the Laws Relating to the Poor 13–15 (London, Whieldon & Butterworth 3d ed. 1793) (1771). There's also a manuscript report in the Lincoln's Inn Library, Ib King's Bench Rep. 53 (on file with Lincoln's Inn Libr., Miscellaneous Manuscripts) [hereinafter Lincoln's Inn, King's Bench Rep.].

116. See Poor Relief Act 1601, 43 Eliz. 1 c. 2. Why would a parish appoint too many overseers? Money, perhaps: Because local governments could fine no-show officeholders, there was a financial incentive to appoint men who wouldn't execute their duties, including religious dissenters who couldn't satisfy the religious test needed to take office. See *Harman*, 93 Eng. Rep. at 185; Sess. Cas. at 183 (reporting the argument that the practice of appointing extra overseers "is used only for oppression" and for "taking fines for not serving"); James Oldham, English Common Law in the Age of Mansfield 240–43 (2004) [hereinafter Oldham, English Common Law].

117. *Harman*, 93 Eng. Rep. at 185; Sess. Cas. at 183 (italics added); accord 87 Eng. Rep. at 1321; 7 Mod. at 404.

that principle applied, he continued, when a parish had been appointing supernumerary overseers for decades.[118] Harman's counsel replied that *interpres consuetudo*, not *communis error*, provided the proper framework, and that the relevant authority wasn't *Bewdley* but *Sheppard*: "Usage, according to the opinion of Lord Vaughan, *expounds only doubtful Acts*, not plain and obvious statutes."[119] Here the statute was plain enough: It sanctioned "[four,] three or two" overseers, not five.[120] Faced with these dueling authorities, the justices of King's Bench accepted *communis error* but also emphasized its limited scope.[121] Justice Edmund Probyn, for instance, said usage might "vary an Act of Parliament," but only if the usage was "universal through the kingdom," as it had been in *Bewdley*.[122] Here, in contrast, only a handful of parishes had adopted the practice in question, so the statute itself controlled.[123]

In the end, those comments were dicta, since the court quashed Harman's prosecution on other grounds.[124] (More on that shortly.) Still, the case illustrates judges' preference for avoiding direct conflicts between statutes and precedents—and a continuing commitment to *communis error* when forced to choose. A few years after *Harman*, Chief Justice William Lee invoked that maxim without hesitation, noting that in *Bewdley* "the Court gave an opinion in the very teeth of an Act of Parliament, because the course of the Court and the practice of the Crown Office had been otherwise."[125] Courts didn't ignore statutes lightly. But neither would they lightly discard well-established precedent.[126]

E. *Errors About Error*

As *Harman* showed, invocations of *communis error* sometimes raised empirical questions about a usage's universality. What if a court answered

---

118. *Harman*, 87 Eng. Rep. at 1320; 7 Mod. at 404; see also 93 Eng. Rep. at 185; Sess. Cas. at 183 ("[I]n this and many other of the great parishes in London, they had almost constantly appointed above four overseers . . . .").

119. *Harman*, 87 Eng. Rep. at 1320; 7 Mod. at 404 (argument of counsel) (emphasis added); accord 93 Eng. Rep. at 185; Sess. Cas. at 183.

120. Poor Relief Act 1601, 43 Eliz. 1 c. 2.

121. See, e.g., *Harman*, 87 Eng. Rep. at 1322–23; 7 Mod. at 406 (opinion of Lee, C.J.). The justices took some time to reach that conclusion. See R v. Harman (1740), *in* II Lincoln's Inn, King's Bench Rep., supra note 115, at 686–87 (reporting interim deliberations in court).

122. *Harman*, 87 Eng. Rep. at 1323; 7 Mod. at 407.

123. Id.; accord Bott & Const, supra note 115, at 14 ("Usages that can vary the construction of an act of parliament must be universal . . . ."); see also 93 Eng. Rep. at 186; Sess. Cas. at 184 (reporting Justice Page as saying that "[t]he usage that has been insisted on is of no weight; to which Chief Justice agreed").

124. *Harman*, 93 Eng. Rep. at 186; Sess. Cas. at 184.

125. R v. Farewell (1743) 93 Eng. Rep. 1132, 1133 n.1; 2 Str. 1209, 1209 n.1.

126. See, e.g., 16 Charles Viner, A General Abridgment of Law and Equity 502 (Aldershot, n. pub. 1742) (collecting authorities). Viner cited *Sheppard* but didn't suggest that it undermined *communis error*. See 19 id. at 520 (1744).

those questions incorrectly?[127] The solution, English courts decided, was that decisions based on *communis error* could be reexamined if they relied on shaky factual claims.

We can see this by tracing the fate of *Harman*. Recall that the court in that case never ruled definitively on the legality of appointing too many overseers. So parishes kept at it, and King's Bench kept dodging the question.[128] Eventually, Lord Mansfield, the newly appointed chief justice, decided to end the cycle. In *Rex v. Loxdale*, after yet another parish invoked longstanding practice to justify its appointment of supernumerary overseers, he asked how broadly the alleged usage had spread.[129] "[A]gents on both sides" investigated and reported that many parishes had complied with the statute's literal terms.[130] "After reading the report," Mansfield announced that "usage is, as it were, out of the case."[131] The court had previously hesitated to enforce the law as written because the judges had been "misled by assertions" of contrary practice.[132] But once it became clear that the statute was workable, the court felt free to insist on "its natural import" (i.e., as authorizing at most four overseers).[133] The judges conceded that their decision might inconvenience the few parishes accustomed to appointing extras. But that was Parliament's problem, not the court's.[134]

As *Loxdale* suggests, even judges who accepted that usage might control a statute found ways to cabin practices they distrusted. One approach was to scrutinize a usage's existence. *Money v. Leach* illustrated another strategy. There, Mansfield rejected the government's argument that "long and uninterrupted" use had legitimated general warrants.[135] Citing *Bewdley*,

---

127. Lawyers throughout early modern Europe struggled with the practicalities of proving custom. Emily Kadens, Convergence and the Colonization of Custom in Pre-Modern Europe, *in* Comparative Legal History 167, 182–84 (Olivier Moréteau, Aniceto Masferrer & Kjell A. Modéer eds., 2019); see also Whitman, supra note 46, at 1356–61. English courts treated the existence of a universal custom as a question for the court, while the existence of a local or particular custom went to the jury. See R v. Nottingham (1752) 96 Eng. Rep. 794, 795; Say. 36, 37 (opinion of Lee, C.J.); Neil Duxbury, Custom as Law in English Law, 76 Cambridge L.J. 337, 348 & n.57 (2017). Local customs could prevail against the common law but not against statutes. See Duxbury, supra, at 343 ("A local custom was a tricky proposition. A court enforcing one was in essence declaring a special law to prevail, in the relevant locality, over the general *non-statutory* law of the land." (emphasis added)).

128. See R v. Loxdale (1758) 97 Eng. Rep. 394, 394–95; 1 Burr. 445, 445–46.

129. Id. at 395; 1 Burr. at 446.

130. Id.

131. Id.

132. Id. at 394; 1 Burr. at 445.

133. Id. at 395; 1 Burr. at 446; see also id. at 397; 1 Burr. at 450 (opinion of Foster, J.) (reporting that the judge "never had any doubt" about the statute's true meaning, but had previously "supposed the usage to be otherwise than as it now appeared to be"); id. at 397; 1 Burr. at 451 (opinion of Wilmot, J.) (reporting a similar declaration).

134. Id. at 397; 1 Burr. at 450 (opinion of Foster, J.) (noting that "the application must be to Parliament" to cure any inconvenience).

135. Money v. Leach (1765) 7 (on file with the Nat'l Archives, TS 11/923/3237) [hereinafter TS Report of *Money*]; see also T.T. Arvind & Christian R. Burset, A New Report

he acknowledged that "[u]sage, no doubt, has great weight."[136] But he emphasized several limits on usage's influence.[137] First, he echoed Justice Probyn's insistence that *communis error* obtains only when the error is truly common; occasional or local mistakes didn't count.[138] Second, Mansfield reframed reliance-based justifications for *communis error* as a limiting principle. Usage could defeat "clear principles and Authorities of Law," he declared, only when "the inconvenience of Setting the Error right would be greater, than in letting it continue in the way it was."[139] In his view, *Bewdley* had fit that description; general warrants didn't.[140] Finally, Mansfield addressed a question that *Bewdley* had left open: whether mere usage sufficed to overcome a statute. He thought not. In his telling, the practice of issuing general warrants had emerged accidentally when clerks mindlessly copied a defective template.[141] Such unthinking mistakes, Mansfield suggested, could hardly overturn positive law.[142]

F. *Summary*

It might be helpful to summarize where things stood around 1760.

First: Precedent—defined broadly to include official and popular usage as well as judicial decisions—could trump an act of Parliament.[143] Chief Justice Sir John Eardley Wilmot summarized the conventional view

---

of *Entick v. Carrington* (1765), 110 Ky. L.J. 265, 290 n.180 (2022) [hereinafter Arvind & Burset, A New Report] (discussing this report's reliability). The term "general warrant" "refers to unparticularized warrants that fail to name the person to be arrested, the place to be searched, or the property to be seized." Id. at 281.

136. TS Report of *Money*, supra note 135, at 7.

137. Arvind & Burset, Partisan Legal Traditions, supra note 39, at 387–88.

138. Money v. Leach (1765) 97 Eng. Rep. 1075, 1088; 3 Burr. 1742, 1767 ("This is only the usage of a particular office . . . ."); id. at 1086; 3 Burr. at 1762 (argument of John Dunning) ("The practice of a particular magistrate cannot controul the law."). Similarly, in Lench v. Pargiter (1779) 99 Eng. Rep. 48; 1 Dougl. 68, Mansfield confronted a three-decade-old practice in his own Court of King's Bench. Mansfield rejected the usage, not only because it seemed inconsistent with the relevant statute, but also because Common Pleas had adopted a contrary practice. Id. at 48–49; 1 Dougl. at 69.

139. TS Report of *Money*, supra note 135, at 7.

140. Mansfield suggested that this was a demanding requirement; he cited *Bewdley* as an example in which "the Inconvenience would have been ten Times more in overturning what had been done there, than in letting it remain as it was." Id.; see also *Money*, 97 Eng. Rep. at 1082–83; 3 Burr. at 1755.

141. TS Report of *Money*, supra note 135, at 8.

142. See id. at 7–8. Mansfield wasn't unusual in thinking that mere usage by lower-level officials couldn't trump a statute. See, e.g., A Catalogue of the Legal Manuscripts of Anthony Taussig 127 (John Baker & Anthony Taussig eds., 2007) (recording Francis Buller's argument that "an usage to explain an Act of Parliament should be a judicial usage in Courts of Justice, and not a practice in pais" (internal quotation marks omitted)); cf. A Justification of the Issuing and Execution of the Warrant for Taking the Author of the *North Briton* Into Custody, 272 Liverpool Papers 53 ([1763–1765?]) (on file with the British Libr., Add MS 38461) (citing *Bewdley* for the proposition that "[w]ise and able judges have always paid great Regard to the Uniform Usage of *Courts and of Great Officers*" (emphasis added)).

143. See supra notes 75–85, 117–126 and accompanying text.

in an advisory opinion to the House of Lords: "A course of precedents and judicial proceedings in Courts of Justice, make the law," he explained on behalf of all judges present.[144] "[I]t would be endless to cite cases upon it. A course of practice for a few years has been held to control an Act of Parliament."[145]

Second: Although this principle—conveyed by the maxim *communis error facit ius*—was generally accepted, judges often sought to limit its scope. Most notably, Chief Justice Vaughan in *Sheppard* and Lord Mansfield in *Money* argued that judges should refuse to recognize usages that originated in abuse or by accident.[146]

Third: The theoretical basis of *communis error* remained unsettled. One justification focused on reliance and repose. Another theory was that error truly *made* law, which was rooted in customary practice. And yet another view reduced *communis error* to a canon of construction, so that a supposedly erroneous usage merely revealed a statute's true meaning.[147]

Fourth: Whatever the basis of *communis error*, the maxim suggested that judges didn't always need to overrule erroneous statutory precedents. To the contrary, judges arguably had a duty not to correct well-established errors.[148]

II. CHALLENGING THE CLASSICAL APPROACH

The classical approach to statutory precedent represented eighteenth-century orthodoxy. But starting in the 1760s, some judges and lawyers denied that precedent could trump unambiguous legislation. Three developments drove that shift. First, Parliament got better at drafting statutes, making it more plausible to treat the text itself as authoritative (section II.A). Next, intensified partisan conflict led lawyers to pay closer attention to the nature of legal authority, including the relationship between statutes and precedent (section II.B). That tension came to a head in debates over treason, as radical Whigs resisted politically charged prosecutions by urging judges and jurors to discard longstanding constructions of the treason statute in favor of its plain text (section II.C). As a result, English law at the end of the eighteenth century contained two rival approaches to statutory precedent (section II.D). The classical paradigm survived. But it now competed with a revisionist alternative, which insisted that statutes had a fixed meaning that precedent couldn't change.

144. R v. Wilkes (1769) 97 Eng. Rep. 123, 126; Wilm. 322, 330.

145. Id.

146. See supra notes 110–113, 135–140 and accompanying text.

147. See supra notes 90–94, 96–99 and accompanying text.

148. See supra notes 126, 138–139 and accompanying text.

A. *Professionalized Legislative Drafting*

One reason courts had traditionally felt free to depart from a statute's text was that the text was often a mess. Seventeenth- and eighteenth-century statutes were often "amateurish,"[149] "ill-expressed"[150] projects drafted by legislators with little training or experience.[151] So judges often turned to precedent and other interpretive tools to make sense of legislation that might otherwise defy comprehension.[152] Consider Mansfield's dismissive treatment of the Statute of Frauds (enacted 1677): "In so inaccurate a statute, I therefore think [a] word . . . might accidentally slip in, and ought not to be attended to, as if it carried any special legal meaning."[153]

Over the course of the eighteenth century, however, Parliament's output gradually improved.[154] In 1766, the lawyer and antiquarian Daines Barrington objected to the "very great impropriety" of "treating statutes, and particularly *modern ones*, as being ill penned."[155] He conceded the "ignorance" and "obscurity" of "ancient" legislation, which he was eager to revise.[156] But "modern statutes," he insisted, "are infinitely more perspicuous and intelligible."[157] Starting in the 1750s, the House of Commons and the Treasury began paying professional counsel to prepare

---

149. Green, Misunderstood History, supra note 57, at 936.

150. Courtenay Ilbert, The Mechanics of Law Making 60 (1914).

151. See Lieberman, Province of Legislation, supra note 27, at 17–20; Ruffhead, supra note 56, at v–xvi.

152. See, e.g., Stanley v. Stanley (1739) 26 Eng. Rep. 289, 290; 1 Atk. 455, 457 (Hardwicke, L.C.) (describing two statutes as "very incorrectly penned"); Caswall v. Duke of Portland (1741) 38, 39 (on file with the Ind. Univ. Lilly Libr., Parker MSS) (opinion of Abney, J.) (complaining that an eighteenth-century statute had been "very carelessly & inaccurately drawn"); Clyde Croft, Lord Hardwicke's Use of Precedent in Equity, *in* Legal Record and Historical Reality 121, 134–35 (Thomas G. Watkin ed., 1989); The Parliamentary History of England, supra note 27, at 740 (reporting Hardwicke's complaint in 1756 that "almost every law" originating in the House of Commons required "some new law for explaining and amending it").

153. Wyndham v. Chetwynd (1757) 96 Eng. Rep. 53, 54; 1 Black. W. 95, 99 (citing Statute of Frauds 1677, 29 Car. 2 c. 3); see also Arvind & Burset, Partisan Legal Traditions, supra note 39, at 384 (discussing Mansfield's warning against relying on "particular expressions" in a copyright statute (internal quotation marks omitted) (quoting Millar v. Taylor (1769) (KB) (opinion of Mansfield, C.J.), *in* Speeches or Arguments of the Judges of the Court of King's Bench 103 (Leith, William Coke 1771))); James Oldham, Lord Mansfield, Stare Decisis, and the Ratio Decidendi 1756 to 1788, *in* Ratio Decidendi: Guiding Principles of Judicial Decisions 138, 147–48 (W. Hamilton Bryson & Serge Dauchy eds., 2006) [hereinafter Oldham, Mansfield, Stare Decisis, and Ratio Decidendi] (discussing *Wyndham*).

154. Julian Hoppit, Britain's Political Economies: Parliament and Economic Life, 1660–1800, at 55–56 (2017) [hereinafter Hoppit, Britain's Political Economies].

155. Daines Barrington, Observations Upon the Statutes 100 n.n (London, W. Bowyer & J. Nichols 2d ed. 1766). By "modern," Barrington apparently had in mind statutes starting from the end of the seventeenth century. See id. at 158.

156. Id. at 158, 407, 436.

157. Id. at 158.

bills.[158] In the following decade, it also became easier to find accurate copies of statutes thanks to new compilations by Owen Ruffhead and Danby Pickering.[159] As statutes improved in precision and availability, courts had fewer excuses to ignore the plain commands of a sovereign Parliament.[160]

Some contemporary lawyers emphasized the methodological consequences of Parliament's growing competence. "[T]he cases of construction upon old statutes . . . are not to be applied to cases upon modern statutes," Lord Camden admonished in 1765.[161] "The best way to construe modern statutes is to follow the words thereof . . . ."[162] In the 1750s, remember, Blackstone had assumed that a lawyer would start with "Interpretation" before "resort[ing] to the Law itself."[163] Camden reversed that order of operations: "Does not every Body see then, that you must first examine the Law itself, before you can apply the Construction?"[164] Justice Francis Buller, too, emphasized the "essential difference between the expounding of modern and ancient Acts of Parliament."[165] Previously, he explained, Parliament had expected courts to construe its statutes "so as to reach all the cases within the mischief to be remedied."[166] But "in modern times," he continued, the legislature took "great care" to set the statute's limits.[167] Because of that change in parliamentary practice, he concluded, "Courts are not permitted to take the same liberty in

158. Sheila Lambert, Bills and Acts: Legislative Procedure in Eighteenth-Century England 67–69 (1971); see also id. at 45–47, 75–77 (discussing earlier instances of this practice).

159. Simon Devereaux, The Promulgation of the Statutes in Late Hanoverian Britain, *in* The British and Their Laws in the Eighteenth Century 80, 84 (David Lemmings ed., 2005); see also W.N. Osborough, Eighteenth-Century Ireland's Legislative Deficit, *in* The Laws and Other Legalities of Ireland, 1689–1850, at 75, 94–95 (Michael Brown & Seán Patrick Donlan eds., 2011) (noting a similar development in the 1760s with respect to Irish statutes). As Devereaux emphasizes, those compilations were expensive and selective, so it remained difficult for magistrates and ordinary subjects to keep current even about the full scope of capital offenses. Devereaux, supra, at 84.

160. See Lieberman, Province of Legislation, supra note 27, at 54–55 (discussing how Blackstone justified declaring a statute void); see also William N. Eskridge, Jr., All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806, 101 Colum. L. Rev. 990, 1007–09 (2001) (discussing English judges' increasing emphasis on text in the late eighteenth century); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 52–55 (2001) (same).

161. Entick v. Carrington (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 275, 290.

162. Id. Some modern scholars have also suggested that old and new statutes might be interpreted differently. See Jarrod Shobe, Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting, 114 Colum. L. Rev. 807, 814 (2014); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 889 n.37 (1996).

163. See supra note 60 and accompanying text.

164. Arvind & Burset, A New Report, supra note 135, at 319 (transcribing a manuscript report of *Entick v. Carrington* (1765)).

165. Bradley v. Clark (1793) 101 Eng. Rep. 111, 113–14; 5 Term Rep. 197, 201–02 (opinion of Buller, J.).

166. Id.

167. Id.

construing [modern legislation] as they did in expounding the ancient statutes."[168] For newer statutes, at least, it became important to take the text seriously.[169] Doing so made it more plausible for judges to assert that *their* interpretation was correct and that prior constructions had erred.[170]

B. *Partisan Jurisprudence*

Partisan politics put further stress on the classical approach. Professor T.T. Arvind and I have argued that "the late 18th century saw the emergence of rival 'Patriot' and 'Tory' legal traditions."[171] In the 1760s and 1770s, judges' "conceptions of law owed much to their politics," and even good-faith efforts to perform their judicial duty sometimes took on a partisan cast.[172] This was particularly true when judges and lawyers confronted a body of law marked by internal tensions.[173] "In explaining and resolving those tensions," we argued, judges tended to accentuate rules or doctrines that best fit their politics, while downplaying whatever struck them as strange or nonsensical.[174] The result was a widening gap between "Tory" and "Patriot" views of law.[175] Lawyers responded by paying closer attention to the sources and nature of legal authority.[176]

This dynamic shaped how lawyers thought about statutory precedent. As we've seen, the common law tradition contained two competing princi-

---

168. Id.; see also id. at 113; 5 Term Rep. at 200 (opinion of Kenyon, C.J.) ("Courts extended the construction of ancient Acts of Parliament beyond the words . . . . In this case . . . we should give effect to [the statute] as far as the words of the Act warrant."). Later, American courts also distinguished ancient from modern statutes. See, e.g., Kirkpatrick v. Gibson, 14 F. Cas. 683, 684 (C.C.D. Va. 1828) (No. 7,848) (Marshall, Circuit Justice); Overseers of Poor of S. Brunswick v. Overseers of Poor of E. Windsor, 8 N.J.L. 64, 66 (1824); Browne v. Blick, 7 N.C. (3 Mur.) 511, 521 (1819); Bradford v. Treasurer of E. Tenn., 7 Tenn. (Peck) 425, 436 (1824). For similar reasons, eighteenth-century lawyers sometimes distinguished between parliamentary statutes and colonial ones, which were often drafted inexpertly. Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 566 (2003) [hereinafter Nelson, Originalism].

169. See Fortunatus Dwarris, A General Treatise on Statutes 585–86 (London, Benning & Co. 2d ed. 1848) (1830).

170. Compare Krishnakumar, supra note 10, at 160–61 (arguing that textualist justices have been more willing to overturn statutory precedents), with Tara Leigh Grove, Is Textualism at War With Statutory Precedent?, 102 Tex. L. Rev. 639, 661–75 (2024) (arguing that textualism is compatible with certain uses of precedent).

To be sure, complaints about badly drafted statutes persisted well into the nineteenth century. See, e.g., Peter King, Crime and Law in England, 1750–1840: Remaking Justice From the Margins 22–23 (2006). My point is that, starting around the 1760s, a substantial number of lawyers thought that the quality of legislation had changed in a way that demanded a new mode of interpretation.

171. Arvind & Burset, Partisan Legal Traditions, supra note 39, at 376.

172. Id.

173. Id. at 392.

174. See id. at 392–93.

175. See id.

176. Id. at 402–03.

ples: that common error could make law, and that only Parliament could legislate. Lawyers recognized the tension. Tories (such as Mansfield) tended to resolve it in favor of the first principle, while Patriots (such as Camden) emphasized the second.

Start with the Patriots. Their political goals included reducing official discretion, including the discretion of judges.[177] Toward that end, Patriots maintained that the "strict construction of a publicly known law" was "the surest guarantee of a subject's rights."[178] The letters of "Junius" provide a well-known example of that perspective. Between 1769 and 1772, a writer using that pseudonym issued a series of public letters criticizing the government.[179] One letter accused Mansfield of improperly granting bail to a thief named John Eyre.[180] Eyre's crime wasn't especially lurid—he stole paper from a municipal building[181]—but Junius tried to make the case a *cause célèbre*. Mansfield's release of Eyre, Junius asserted, lacked any statutory basis; instead, it was founded "upon the opinion of lawyers, and the practice of the court."[182] That was a problem, Junius insisted, because "the law of bail . . . has been exactly ascertained by acts of the legislature," which left no room for judicial discretion.[183]

As it happened, almost no one else cared about the case.[184] Still, Junius was onto something when he suggested that Tories and Patriots saw statutes differently. As the late Professor David Lieberman explained, Mansfield wanted judges, not Parliament, to take the lead in shaping English law.[185] This reflected his Tory politics, which valued technocratic expertise over participatory government.[186] In contrast, Patriots thought

---

177. See John Brewer, The Wilkites and the Law, 1763–74: A Study of Radical Notions of Governance, *in* An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries 128, 157–59 (John Brewer & John Styles eds., 1980).

178. Id. at 159.

179. Until recently, scholars usually pointed to Philip Francis as the likeliest author. John Cannon, Francis, Sir Philip, Oxford Dictionary of Nat'l Biography (Sep. 23, 2004), https://doi.org/10.1093/ref:odnb/10077 (on file with the *Columbia Law Review*). In a recent book, however, Professor Danielle Allen attributes the letters to multiple writers linked to Charles Lennox, third Duke of Richmond, including Francis and Thomas Paine. Danielle Allen, Radical Duke: How One Aristocrat—and the American Revolution—Transformed Britain 72–73 (2026).

180. The Letters of Junius 313–14 (John Cannon ed., 1978).

181. Eyre pulled off his crime by pretending to be a law student. Id. at 313.

182. Id. at 321–22.

183. Id. at 323. Junius rejected any argument from legislative acquiescence: "[T]he assent of the legislature to this power is merely negative . . . ." Id. at 322.

184. See id. But cf. Hugh Henry Brackenridge, Law Miscellanies 503 (Philadelphia, P. Byrne 1814) (discussing the letter with approval). Eyre duly showed up for trial, where he pleaded guilty and was sentenced to transportation. Trial of John Eyre ([c.] Oct. 23, 1771), reprinted by Old Bailey Proc. Online, https://www.oldbaileyonline.org/record/t17711023-92 [https://perma.cc/CDN2-45L4] (last visited Aug. 15, 2026).

185. Lieberman, Province of Legislation, supra note 27, at 124–26.

186. Arvind & Burset, Partisan Legal Traditions, supra note 39, at 393.

representative institutions like Parliament ought to drive reform.[187] These differing views played out in judges' approaches to statutory precedent. For the juristocratic Mansfield, statutory precedents were as worthy of respect as legislation itself.[188] In part, this was because he had a low opinion of Parliament's technical abilities.[189] But the problem ran deeper than poor drafting. It's notable that Mansfield described two great evils of his time—slavery and de jure religious discrimination—as alien to the common law and fundamentally creatures of statute.[190]

Camden, the paradigmatic Patriot judge, started from very different priors. Like other Patriots, his politics emphasized representative institutions and public participation.[191] Unsurprisingly, then, he had a relatively high opinion of legislation, and he thought a judge's duty was to enforce whatever Parliament enacted. Take his approach to the Statute of Frauds. Like other judges of his day, he professed "high regard" for "common received Usage [and] the Opinion of eminent Practitioners" as guides to legal meaning.[192] But he denied that those authorities could overcome a clear parliamentary directive.[193] And unlike Mansfield, who thought he could ignore some words that Parliament might have inserted by mistake,[194] Camden insisted on taking the statute's text at face value. "Pen a Clause how you will, there will be always Room for liberal Construction to inlarge, and rigid Construction to restrain," Camden conceded.[195] But "it must always be remembered, that the Rules of Construction were framed to supply the Defects of human Language and Capacity."[196] To venture beyond those rules was to veer into discretion—and "the Discretion of a Judge is the Law of Tyrants."[197] The only way to avoid

187. Id. at 393–94.

188. See Windham v. Chetwynd (1757) 97 Eng. Rep. 377, 380; 1 Burr. 414, 419–20 ("When solemn determinations, acquiesced under, had settled precise cases, and become a rule of property; they ought, for the sake of certainty, to be observed, as if they had originally made a part of the text of the statute.").

189. See supra note 153 and accompanying text.

190. See Lieberman, Province of Legislation, supra note 27, at 125–26; George Van Cleve, *Somerset*'s *Case* and Its Antecedents in Imperial Perspective, 24 Law & Hist. Rev. 601, 604–05 (2006); cf. 1 William Blackstone, Commentaries *10 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter Tucker's Blackstone] ("[A]lmost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament . . . .").

191. Arvind & Burset, Partisan Legal Traditions, supra note 39, at 399–400.

192. Lord Camden's Argument in *Doe* on the Demise of *Hindson*, & *Ux. & al.* v. *Kersey* 56 (London, J. Wilkie 1766) [hereinafter Camden's Argument].

193. Id.

194. See supra note 153 and accompanying text.

195. Camden's Argument, supra note 192, at 33.

196. Id.

197. Id. at 53; see also John Rayner, An Inquiry Into the Doctrine Lately Propagated, Concerning Attachments of Contempt, the Alteration of Records, and the Court of Star-

judicial tyranny was to treat statutory construction as a rule-bound, even mechanical exercise.[198]

To some extent, the difference between Mansfield and Camden was a matter of emphasis. Both judges agreed that precedent was important and that Parliament had ultimate power to legislate.[199] Then, as now, most cases were easy, and their resolution commanded broad agreement.[200] But there were hard cases, too, and disagreement over how to decide them forced lawyers to talk more explicitly about the relationship between text and precedent.

C. *Text and Treason*

Some of those hard cases were about treason. In eighteenth-century Britain, treason prosecutions depended on a statute enacted under Edward III.[201] It defined treason narrowly, with a focus on plotting the king's death or levying war against him.[202] Over time, however, judges

---

Chamber 51 (London, J. Williams 1769) (quoting Camden to critique *communis error*). Patriots' suspicion of *communis error* went beyond statutes. Recall Mansfield's statement that usage might defeat clear legal authority when "the inconvenience of Setting the Error right" greatly outweighed the benefits. Supra note 139 and accompanying text. Patriots, in contrast, maintained that usage could never trump fundamental legal principles. See, e.g., TS Report of *Money*, supra note 135, at 9 (opinion of [Yates], J.) ("[A]n Usage from the 1st year of Rome would not give [general warrants] any Sanction at all; for no Usage or Custom whatever, can ever establish anything that is in [its] first Principles illegal."); Father of Candor, A Letter Concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace or Behaviour 59 (London, J. Almon 7th ed. 1771). The source of those principles is a thorny question. See 1 James Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 204–05 (1992); Green, Traditional Questions, supra note 29 (manuscript at 19–20).

198. See also Shipley v. Redmayne (1765) 63, 65 (CP) (on file with the Ind. Univ. Lilly Libr., Parker MSS) (opinion of Pratt [later Camden], C.J.) (holding that mere probable cause couldn't justify entry under a writ of assistance, and that a contrary conclusion would require "superadding to" a statutory "Clause," which a court "has no power to do"); id. at 81 (another report of the case noting that Pratt began by "stat[ing] the words of [the] statute").

199. See Arvind & Burset, Partisan Legal Traditions, supra note 39, at 390–91; cf. Cooper v. Boot (1785) 99 Eng. Rep. 911, 916; 4 Dougl. 339, 348–49 (KB) (opinion of Mansfield, C.J.) (focusing closely on statutory language).

200. There were only two reported dissents during Mansfield's first two decades as chief justice of King's Bench. Norman S. Poser, Lord Mansfield: Justice in the Age of Reason 199 (2013).

201. Treason Act 1351, 25 Edw. 3 c. 2; see also Michael Lobban, The Travels of Treason, 87 Mod. L. Rev. 24, 24 (2024) [hereinafter Lobban, Travels of Treason].

202. See 8 W.S. Holdsworth, A History of English Law 307 (1925); Alexander H. Shapiro, Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696, 11 Law & Hist. Rev. 215, 217 (1993); cf. Barrington, supra note 155, at 224 (describing the treason laws "of most countries in Europe" as generally "much more loosely worded"); Thorne, supra note 55, at 207–08 ("[T]he reign of Edward III shows a strong tendency to limit severely the words of a statute and to refuse to extend them beyond their plain, grammatical meaning."). In addition to plotting the king's death and levying war against him, the act also defined treason to include

stretched the text to cover "constructive treason."[203] So, for instance, the statutory offense of plotting the king's death came to cover plots "whereby His Life *may* be endangered," such as by his imprisonment.[204]

Prominent writers warned against this drift.[205] The statute's very purpose, Blackstone reminded readers, was "to prevent the inconveniences which began to arise in England from [a] multitude of constructive treasons."[206] Even Hale, not always a strict textualist, drew the line at treason. "How dangerous it is to depart from the letter of that statute," he warned, "for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men."[207] Defendants echoed those critiques.[208] But they tended to be losing arguments.[209]

The American Revolution revived concerns about treason's scope. Even before the colonies declared independence, several prominent officials, including the attorney and solicitor general, labeled as treasonous certain acts of colonial resistance (like heaving tea into Boston Harbor).[210] Patriots recoiled. Camden "said he knew of no species of treason, but those described by the statute."[211] Precedents had extended the text, he acknowledged, but "constructive treason was a dangerous thing" and shouldn't be pushed further.[212] Several of his colleagues in the House of Lords agreed, as did many colonists.[213] But Camden was in the minority, and events soon

---

sex with certain royal women, murdering certain royal officials, and counterfeiting the king's seals or money. Sexual offenses and assassinations played a minor role in eighteenth-century treason prosecutions. Counterfeiting prosecutions, in contrast, were so common that they were treated like ordinary felonies. See Simon Devereaux, Execution, State and Society in England, 1660–1900, at 45–47 (2023).

203. Holdsworth, supra note 202, at 309–21; Lobban, Travels of Treason, supra note 201, at 26–27.

204. Michael Foster, A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry 195 (Oxford, Clarendon Press 1762) (emphasis added).

205. See John H. Langbein, The Origins of Adversary Criminal Trial 85–86 (2003).

206. 4 Tucker's Blackstone, supra note 190, at *76.

207. 1 Matthew Hale, Historia Placitorum Coronae: The History of the Pleas of the Crown 86–87 (Sollom Emlyn ed., London, E. Nutt, R. Nutt & R. Gosling 1736).

208. See, e.g., The Paper Delivered to the Sheriff by My Lord Russell (1683) 9 How. St. Tr. 685, 693; Shapiro, supra note 202, at 221–23, 251–54.

209. Lobban, Travels of Treason, supra note 201, at 26; see also, e.g., Adam Lebovitz, An Economy of Violence: Financial Crisis and Whig Constitutional Thought, 1720–1721, 29 Yale J.L. & Humans. 165, 196–97 (2017) (discussing the "long list of precedents, . . . none of [which] fell within the ambit of treason law, as defined by the statute," that were used to justify a set of eighteenth-century treason charges via bill of attainder). But see, e.g., Lobban, Travels of Treason, supra note 201, at 27 (discussing a successful defense). Critiques of constructive treason did spur *procedural* reforms. Shapiro, supra note 202, at 226, 253–54.

210. Carlton F.W. Larson, The Trials of Allegiance: Treason, Juries, and the American Revolution 32 (2019).

211. 18 The Parliamentary History of England, supra note 27, at 271.

212. Id.

213. See id. at 294–95; Larson, supra note 210, at 32–34.

mooted any debates about whether Americans were really levying war against George III.

Developments closer to home proved more influential in shifting British ideas about treason. In 1780, Lord George Gordon led a large crowd to protest Parliament's decision to grant limited civil rights to British Catholics.[214] The crowd turned violent, and over the next several days, it attacked Newgate Prison, the Bank of England, Catholic chapels, and Mansfield's home, until the army at last restored order (killing hundreds in the process).[215] When the dust settled, the government charged Gordon with treason—specifically, with levying war against the king.[216] As the attorney general admitted, Gordon's "war" was not "directly and immediately against the person of the king,"[217] as the statute seemed to require. Rather, the Gordon Riots involved "constructive levying of war" via an "insurrection of the people to effect by force an alteration of the established law of the country, the redress of national grievances, or the reformation of evils real or imaginary, in which the insurgents have no particular or special interest."[218] That kind of charge had plenty of precedent, as one of Gordon's lawyers conceded: "[S]o it seems, the law is; for so it seems, upon some certain occasions, judges have decided."[219]

Even so, another member of Gordon's defense team, Thomas Erskine, refused to accept the prosecution's account of the law. He insisted that his client had not committed treason as defined by the "plain *unextended letter*" of the statute.[220] Erskine argued, too, that any precedents going beyond the statute were illegitimate, and that the jury should judge his client by "*the simple, genuine* letter *of the law*" rather than "*new or occasional constructions*."[221] We don't know how the jury received that argument,[222] but Gordon was acquitted, and Erskine's denunciation of constructive treason caught the public's attention.[223] Even Samuel Johnson, no fan of the riots, said he "was glad Lord George Gordon had escaped rather than that a

214. Paul Langford, A Polite and Commercial People: England 1727–1783, at 549–54 (1998); see also Papists Act 1778, 18 Geo. 3 c. 60.

215. Colin Haydon, Anti-Catholicism in Eighteenth-Century England, c. 1714–80: A Political and Social Study 237 (1993).

216. The Proceedings at Large on the Trial of George Gordon (1781) 21 How. St. Tr. 485, 495.

217. Id. at 499.

218. Id.

219. Id. at 547 (argument of Lloyd Kenyon); see also, e.g., id. at 491; Foster, supra note 204, at 211.

220. *Gordon*, 21 How. St. Tr. at 589.

221. Id. at 591; see also id. at 589–90.

222. Mansfield's charge to the jury took constructive treason for granted. But it also included a strict mens rea requirement: Insurgents only commit high treason, he instructed, if they assemble "with intent . . . to compel the legislature to" change the law. Id. at 644.

223. See Law of High Treason, 7 Monthly L. Mag. & Pol. Rev. 77, 88 (1840) (reporting that Gordon's acquittal "was popularly regarded as a signal triumph over the doctrine of constructive treason").

precedent should be established for hanging a man for *constructive treason,*" which "would be a dangerous engine of arbitrary . . . power."[224]

Erskine's arguments against constructive treason gained new momentum in the 1790s. The British government became convinced that domestic radicals intended to import the revolutionary violence that had recently cost Louis XVI his head.[225] Official paranoia led to treason charges against several radical leaders.[226] The government presented no evidence that the defendants planned to kill George III or levy war against him.[227] Instead, the charge involved so-called "modern" or "French" treason—namely, pushing for a republican form of government.[228]

Four aspects of those treason prosecutions matter here. First, despite Gordon's acquittal a decade earlier, prosecutors initially clung to constructive treason. Indeed, they sought to extend the doctrine, permitting ever-more-attenuated chains of causality between a defendant's nonviolent advocacy and the possibility of future harm to the king.[229] Second, defense counsel and sympathetic commentators responded by attacking the very idea of constructive treason, urging jurors to ignore judicial precedent and to adhere to the statute's "strict and rigid letter."[230] Third, prosecutors felt compelled to answer by "disavow[ing] . . . any charge of constructive treason" and insisting that they were just following the statute.[231] That claim wasn't credible,[232] but it showed how even conservative government lawyers felt obliged to put a textualist face on their arguments. Fourth, the trials ended in acquittals.

---

224. James Boswell's Life of Johnson, Vol. 4: 1780–1784, at 71 (Thomas F. Bonnell ed., 2022).

225. See Adam Zamoyski, Phantom Terror: Political Paranoia and the Creation of the Modern State, 1789–1848, at 52 (2015); Christopher Michael Roberts, Experiments With Suppression: The Evolution of Repressive Legality in Britain in the Revolutionary Period, 43 Loy. L.A. Int'l & Compar. L. Rev. 125, 130–55 (2020).

226. Roberts, supra note 225, at 157.

227. Id.

228. John Barrell, Imagining the King's Death: Figurative Treason, Fantasies of Regicide 1793–1796, at 129 (2000).

229. Id. at 137–40.

230. Trial of Thomas Hardy for High Treason (1794) 24 How. St. Tr. 199, 878 (argument of Thomas Erskine); see also, e.g., id. at 312, 381, 395–96; cf. William Godwin, Cursory Strictures on the Charge Delivered by Lord Chief Justice Eyre to the Grand Jury 16 (London, D.I. Eaton 1794) (urging adherence to "a plain and permanent law"). A young Samuel Taylor Coleridge weighed in: "The old Treason Laws are superseded by the exploded commentaries of obsequious Crown lawyers, the commentary has conspired against the text: a vile and useless slave has conspired to dethrone its venerable master." S.T. Coleridge, The Plot Discovered; Or an Address to the People, Against Ministerial Treason 7 (Bristol, n. pub. 1795).

231. *Hardy*, 24 How. St. Tr. at 252 (emphasis omitted).

232. See Barrell, supra note 228, at 342–43.

Those acquittals didn't end constructive treason, which endured throughout the common law world.[233] But they helped make the doctrine "exceedingly unpopular."[234] In 1795, Parliament—unwilling to abandon a broad definition of treason, but worried about getting juries to convict for constructive offenses—enacted a new treason statute that codified many of the older judicial constructions.[235]

Contemporaries thought these developments had implications well beyond treason. If the "plain, unambiguous terms" of a statute could be broadened by precedent, Erskine warned, and "judged otherwise than if it had passed yesterday," then there was "no such thing as written law in England."[236] What was at stake, in his telling, was the very possibility of legislation. As he saw it, "a statute is ever present to speak for itself, in all courts, and in all ages," and therefore needed no construction.[237] If that was true of a medieval treason statute, why would more recent legislation be different?

D. *The Result: Competing Approaches to Statutory Precedent*

These developments—improved drafting, partisan contestation, and controversial treason prosecutions—put pressure on the classical view but didn't kill it. And so, at the end of the eighteenth century, English law contained two incompatible approaches to statutory precedent. The classical theory asserted that a series of precedents might overcome even the text of an act of Parliament, while a newer, revisionist approach insisted that legislation couldn't be changed by usage or judicial construction.

By 1800, it wasn't clear which position was more orthodox. As sections II.B and II.C noted, the revisionist approach initially appealed to Patriots and political radicals. But it soon shed its partisan valence. Edward Christian, a conservative lawyer and the first professor of English law at Cambridge,[238] endorsed the revisionist position in the 1790s. He distinguished "between cases arising merely upon the common law, and cases

---

233. See R. Kent Newmyer, The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation 60–66 (2012) ("[American] Supreme Court justices on circuit in the 1790s treason cases . . . uniformly resorted to constructive treason doctrine in charging their juries."); Lobban, Travels of Treason, supra note 201, at 28–29 ("[I]t remained theoretically possible to prosecute for the old 'constructive' treasons under the 1351 Act.").

234. Holdsworth, supra note 202, at 318.

235. Id. at 321 (citing Treason Act 1795, 36 Geo. 3 c. 7, § I).

236. Trial of John Horne Tooke for High Treason (1794) 25 How. St. Tr. 1, 269 (emphasis omitted); see also Godwin, supra note 230, at 9 (arguing that defendants cannot be convicted of treason beyond the statutory definition "till all law is annihilated").

237. *Horne Tooke*, 25 How. St. Tr. at 268 (emphasis omitted).

238. See Michael H. Hoffheimer, The Common Law of Edward Christian, 53 Cambridge L.J. 140, 140, 147–48, 162–63 (1994).

which depend upon the construction of a statute."[239] In common law cases, he argued, precedents provided the best evidence of the law and therefore commanded deference. In statutory cases, however, judges "seem as fully competent to determine a question, after any number of decisions upon it in the courts below, as after the first."[240] A long series of decisions might be worth following "as an object of general convenience," but not if it meant overturning an act of Parliament.[241] Those comments gained a wide readership after he incorporated them into his edition of Blackstone's *Commentaries*.[242]

Sylvester Douglas, a conservative barrister and future privy councilor,[243] had reached the same conclusion. When confronted with a citation to *Clay v. Sudgrave*,[244] he could hardly believe Holt had invoked *communis error* in a statutory case. "Surely it is not consonant to legal principle to hold that any usage or common error can abrogate a statute to any purpose," Douglas wrote in an editorial footnote to his edition of law reports, "or give legality to what an act of parliament expressly prohibits."[245] Unable to explain the learned judge's behavior, Douglas implied that *Clay*'s reporter had slipped up.[246]

Meanwhile, courts sent mixed signals. In *White v. Boot*, King's Bench declared per curiam that "[a]n act of parliament cannot be repealed by non-user" (i.e., failure to enforce it).[247] But a year later, the court, now with

---

239. 5 Edward Christian, Notes to Blackstone's Commentaries, Which Are Calculated to Answer All the Editions, Book 2 at 563 (Dublin, P. Byrne 1797).

240. Id.

241. Id.; see also 2 Robert Joseph Pothier, A Treatise on the Law of Obligations, or Contracts 124 n.b (William David Evans ed. & trans., London, A. Strahan 1806) (editor's note arguing that, unless overturning a statutory precedent would cause "material detriment," courts "have as much authority now to restore the law, as they have had before to subvert it").

242. 2 William Blackstone, Commentaries *280 n.8 (Edward Christian ed., London, A. Strahan & W. Woodfall 12th ed. 1794).

243. See Roland Thorne, Douglas, Sylvester, Baron Glenbervie, Oxford Dictionary of Nat'l Biography (Sep. 23, 2004), https://doi.org/10.1093/ref:odnb/7918 (on file with the *Columbia Law Review*).

244. (1700) 91 Eng. Rep. 34; 1 Salk. 33.

245. 1 Sylvester Douglas, Reports of Cases Argued and Determined in the Court of King's Bench 101 n.1 (London, A. Strahan & W. Woodfall 3d ed. 1790) (1783); see also Charles Watkins, Principles of Conveyancing x–xi & n.* (London, J. Butterworth 1800) (expressing shock that "the celebrated Bewdley case . . . has been frequently recognized *as law!*").

246. See Douglas, supra note 245, at 101 n.1 ("[A]s reported by Salkeld, Lord Holt is made to say . . . ." (emphasis omitted)). As it happens, lawyers generally viewed that volume of Salkeld's reports as reliable. See John William Wallace, The Reporters, Chronologically Arranged: With Occasional Remarks Upon Their Respective Merits 247 (Philadelphia, T. & J.W. Johnson 3d ed. 1855) (1844).

247. (1788) 100 Eng. Rep. 149, 149; 2 Term Rep. 274, 275. Erskine argued the case for the defendant, insisting that the "plain and unequivocal" statutory text trumped contrary practice. Id. at 149; 2 Term Rep. at 274.

a new chief justice, backtracked.[248] Although non-user couldn't repeal a statute "where the words . . . are plain," Lord Chief Justice Lloyd Kenyon concluded, "a series of practice" might achieve something similar under the guise of resolving ambiguities.[249] (Coke, remember, had said much the same.[250]) A year later, the court tacked back again. In *Rex v. Eriswell*, Kenyon warned counsel against citing *communis error* and attacked the maxim as "dangerous."[251] Two years later, he reiterated that he would never "resort to the maxim, *communis error facit jus*."[252] But he then added, confusingly, "uniform and unbroken usage *facit jus*."[253]

The line Kenyon drew wasn't entirely clear, perhaps even to Kenyon.[254] In 1796, in a dispute about court costs, the defendant's lawyers put their faith in "the positive words of the" statute, "the effect of which cannot be destroyed by any subsequent practice to the contrary."[255] They backed up this statement with a citation to Kenyon's statement in *Eriswell*.[256] But Kenyon, rather than reaffirming his antipathy to *communis error*, expressed dismay at being asked "to overturn every thing that has been done upon the subject from the time of Lord Holt to the present moment."[257] Instead of looking solely to the text, he decided for the plaintiff based on "the universal practice that has prevailed in the Courts of

248. Leigh v. Kent (1789) 100 Eng. Rep. 621, 622; 3 Term Rep. 362, 364. *White* was decided on February 8, 1788. Technically, Mansfield was still Lord Chief Justice, but he was in failing health and hadn't taken the bench since 1786. Oldham, English Common Law, supra note 116, at 11. The court's active members were Justices William Henry Ashhurst, Francis Buller, and Nash Grose. 2 The Revised Reports at vii (Frederick Pollock ed., London, Sweet & Maxwell 1891). They remained on the bench when Lloyd Kenyon became chief justice in June 1788. Id.

249. *Leigh*, 100 Eng. Rep. at 622; 3 Term Rep. at 364. Erskine again represented the defendant in arguing for strict application of the same statute at issue in *White*. Id. at 622; 3 Term Rep. at 363. Justices Buller and Grose disowned *White* as "not law" and "overturn[ed]," although they had joined that decision sixteen months earlier. Id. at 623; 3 Term Rep. at 364–65.

250. See supra notes 100–105 and accompanying text.

251. R v. Inhabitants of Eriswell (1790) 100 Eng. Rep. 815, 825; 3 Term Rep. 707, 726; see also R v. Scot (1790) 100 Eng. Rep. 756, 757; 3 Term Rep. 602, 604 (opinion of Kenyon, C.J.) ("If a construction of this Act of Parliament, manifestly erroneous, had hitherto prevailed, we should have been bound to correct it . . . .").

252. R v. Inhabitants of Essex (1792) 100 Eng. Rep. 1193, 1194; 4 Term Rep. 591, 594 (italics added).

253. Id. (italics added).

254. See, e.g., R v. Inhabitants of E. Shefford (1792) 100 Eng. Rep. 1312, 1313; 4 Term Rep. 804, 806 (opinion of Kenyon, C.J.) ("This is one of the many cases in which we have to regret that the words of the statute have been departed from: but as there is a series of adjudged cases . . . it is too much for us to overturn them . . . .").

255. Smith v. Edge (1796) 101 Eng. Rep. 704, 705; 6 Term Rep. 562, 563.

256. Id. at 705; 6 Term Rep. at 563.

257. Id. at 705; 6 Term Rep. at 564.

Law."[258] Justice William Henry Ashhurst agreed: Even if the statute hadn't warranted the controverted practice "at the first," "it would be extremely wrong now to overturn it."[259] The judges reasoned similarly in another case they decided around the same time. "We have doubts whether this writ, in its present form, satisfies the meaning of this clause of the statute," Chief Baron Eyre said on behalf of the entire bench; "but it is too late to state this objection now, for the writs, from the period of this statute downwards, have been in the same form with the present, and *communis error fecit jus*."[260] "*General error makes law*" was still "a maxim in use among lawyers," Jeremy Bentham noted in 1793.[261]

Doctrine kept oscillating in the nineteenth century. In 1806, Thomas Erskine became lord chancellor, and he used his new seat to continue his campaign against statutory precedent. He conceded that precedent could liquidate an ambiguous statute: "If a written law would bear two interpretations, and the worst interpretation had been given to it by a series of decisions, that worst interpretation was undoubtedly the law . . . ."[262] But it was different "where a statute spoke a clear, plain, unambiguous language."[263] In such cases, he declared, "the people had a right to the protection of its letter, and they ought to insist upon that protection."[264] Referring to his earlier work as defense counsel, Erskine boasted that this very argument had saved the lives of his clients and perhaps the constitution itself. When someone had told him "that lord Hale and lord Coke were against him," he "had answered, irreverendly perhaps, but in other respects rightly, that their authorities were no more against a positive, unambiguous statute, than so many large flies buzzing against a wall."[265]

Lord Ellenborough, who succeeded Kenyon as chief justice of King's Bench, disagreed. In 1808, he invalidated a bond that failed to comply with

---

258. Id. He distinguished *Eriswell* as having involved "a *supposed* usage at *some* of the Quarter Sessions" (emphasis added). Cf. supra sections I.D–.E (discussing the requirement that errors be universal).

259. *Smith*, 101 Eng. Rep. at 705; 6 Term Rep. at 564.

260. In the Comm. of Privileges of the House of Lords (1792) 145 Eng. Rep. 826, 829; 1 Anst. 143, 154 (italics added); see also R v. Hogg (1787) 99 Eng. Rep. 1341, 1343; 1 Term Rep. 721, 724 (argument of counsel); Thomas Caldecott, Reports of Cases Relative to the Duty and Office of a Justice of the Peace: From Michaelmas Term 1776, Inclusive, to Trinity Term 1785, Inclusive 149 n.a (London, His Majesty's Law-Printers 1786).

261. Jeremy Bentham, A Protest Against Law Taxes (1793), *in* 1 The Collected Works of Jeremy Bentham: Writings on Political Economy 269, 293 (Michael Quinn ed., 2016). Despite Bentham's hostility to judicial lawmaking, his proposal for a Constitutional Code (in the 1820s) authorized judges to depart sometimes from the code's text in pursuit of public utility. Those constructions might "become law without any positive legislation by the sovereign." Michael Lobban, The Common Law and English Jurisprudence, 1760–1850, at 153 (1991); cf. Postema, Bentham and the Common Law, supra note 58, at 186–91 (noting Bentham's simultaneous rejection of judicial lawmaking and defense of stare decisis).

262. HL Deb (May 7, 1810) (16) col. 853.

263. Id.

264. Id.

265. Id.

prevailing usage, though the instrument had satisfied "the express letter of the" relevant statute.[266] He noted that the court had been "called upon to decide this case after a series of decisions have imposed a line of construction upon us, which . . . we cannot safely recede from."[267] Later, he heard *Isherwood v. Oldknow*,[268] which concerned property interests under a statute of Henry VIII.[269] Ellenborough took the opportunity to reiterate the maxim of *communis error* and to clarify its basis: "It has been sometimes said, *communis error facit jus*; but I say *communis opinio* is evidence of what the law is; not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the groundwork and substratum of practice . . . ."[270] Leases, wills, and family settlements had for centuries reflected a particular interpretation of the statute, in keeping "with the universally received opinion" of the profession and the courts.[271] It would be "too much," Ellenborough explained, for a single judge's contrary reading to upset all that practice and authority.[272] With the lord chancellor and the lord chief justice at odds about the nature of statutory precedent, English doctrine remained contested well into the nineteenth century.[273]

III. THE VIEW FROM EARLY AMERICA

The United States inherited that English debate. This Part examines how American courts and lawyers treated statutory precedent through the early nineteenth century—what one might call the "long founding" of American law.[274] During this period, American law often tracked English

266. Horwood v. Underhill (1808) 103 Eng. Rep. 722, 724; 10 East 123, 128.

267. Id.

268. Isherwood v. Oldknow (1815) 105 Eng. Rep. 654; 3 Mau. & Sel. 382.

269. See Grantees of Reversions Act 1540, 32 Hen. 8 c. 34.

270. *Isherwood*, 105 Eng. Rep. at 660; 3 Mau. & Sel. at 396–97 (italics added).

271. Id. at 660; 3 Mau. & Sel. at 398.

272. Id.

273. See John A. Fairlie, The Doctrine of Stare Decisis in British Courts of Last Resort, 35 Mich. L. Rev. 946, 956 (1937); Frederick G. McKean, Jr., Communis Error Facit Jus, 34 Dick. L. Rev. 34, 34–35 (1929). By the end of the nineteenth century, most English judges thought that precedent could liquidate a "doubtful" statute, but that even "the usage of a century cannot affect the construction" of a "clear" one. W.F. Finlason, The Judgment of the Judicial Committee in the Folkestone Ritual Case 60 nn.s & t (London, Stevens & Sons 1877); see also, e.g., Lancashire & Yorkshire Ry. Co. v. Bury (1889) 14 App. Cas. 417, 419–20 (opinion of Lord Herschell); Dwarris, supra note 169, at 562, 573. But disagreement persisted. See, e.g., Carleton Kemp Allen, Law in the Making 322–46 (7th ed. 1964); Peter Benson Maxwell, On the Interpretation of Statutes 272–73 (London, William Maxwell & Son 1875).

274. Cf. Alison L. LaCroix, The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalisms 9 (2024) (describing a "long founding moment" in the early nineteenth century (internal quotation marks omitted)). One might define the period in various ways. Part III of this Essay focuses on the time between the Seven Years' War (often treated as a starting point for the American Revolution) and the publication of James Kent's *Commentaries* and the death of Chief Justice John Marshall in the 1830s. See generally 1

law, or at least claimed to. That emulation led Americans to reproduce the contest between the classical and revisionist approaches to statutory precedent. Over time, however, that debate took on a distinctively American cast, as lawyers responded to the ideological pressures of republican self-government.

A. *Statutory Precedent in the Colonies*

Colonial lawyers emulated English practice.[275] Some of them studied in London,[276] and all of them read English law books.[277] It's no surprise, then, that colonists imitated English approaches to statutory interpretation, including the notion that precedent might alter a statute.[278] So, in 1742, a Barbadian lawyer named Jonathan Blenman invoked *communis error* to explain why Britain ought to tolerate colonial departures from metropolitan legal norms. Citing Coke, *Bewdley*, and other authorities, Blenman observed that English law permitted "a Course of Precedents, and constant Usage" to trump an act of Parliament.[279] That maxim, he argued, should apply a fortiori to the usage "of a whole Island in the *West-Indies*."[280]

James Kent, Commentaries on American Law (New York, O. Halsted 1826). For prior work that has made similar choices about periodization, see Fred Anderson, Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754–1766, at xix (2001); Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830, at 1, 277–78 (2005) [hereinafter Hulsebosch, Constituting Empire]; William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830, at 3 (1975); Ellen Holmes Pearson, Remaking Custom: Law and Identity in the Early American Republic 7 (2011). This Essay brackets the American codification movement (c. 1820–1850), which raised distinct questions about the relationship between text and precedent. See Kellen R. Funk, Sect and Superstition: The Protestant Framework of American Codification, 64 Am. J. Legal Hist. 190, 197–98 (2024); Robert W. Gordon, Book Review, 36 Vand. L. Rev. 431, 456–57 (1983) (reviewing Charles M. Cook, The American Codification Movement (1981)).

275. John M. Murrin, The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts, *in* Colonial America: Essays in Politics and Social Development 540 (Stanley N. Katz & John M. Murrin eds., 3d ed. 1983); see also, e.g., Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire 74–75 (2004) [hereinafter Bilder, Transatlantic Constitution].

276. See E. Alfred Jones, American Members of the Inns of Court *passim* (1924).

277. See Langbein et al., supra note 79, at 936–37.

278. Between 1742 and 1771, the lower house of Maryland's legislature repeatedly resolved that its statutes should be "[s]ubject to the like Rules of Common Law, or equitable Construction as are used by the Judges in construing Statutes in England." Elizabeth Gaspar Brown, British Statutes in American Law, 1776–1836, at 95 n.63 (1964) (internal quotation marks omitted) (quoting 42 Archives of Maryland, Proceedings and Acts of the General Assembly of Maryland, 1740–1744, at 321 (1923)).

279. [Jonathan Blenman], Remarks on Several Acts of Parliament (London, 1742), reprinted in 2 Exploring the Bounds of Liberty: Political Writings of Colonial British America From the Glorious Revolution to the American Revolution 1049, 1083–86 (Jack P. Greene & Craig B. Yirush eds., 2018).

280. Id. at 1086.

Colonial *communis error* posed special challenges, though, because it wasn't always clear whose *error* mattered.[281] In 1770, a lawyer for the Board of Trade warned about the "difficulties in the Construction" that might follow when British statutes applied overseas.[282] When colonial courts expounded imperial statutes, he asked, were they bound to mimic courts in England? Or could colonial judges read statutes de novo?[283] The problem remained largely theoretical before the middle of the eighteenth century, when Parliament passed few statutes with imperial effect.[284] In the 1750s, however, Parliament started legislating more aggressively for the empire,[285] forcing lawyers to consider imperial statutory precedent more often.[286]

The question became salient during the writs-of-assistance controversy of the 1760s. Writs of assistance functioned as general warrants that allowed customs agents to search ships and homes without case-by-case authorization; many colonists objected to them as unconstitutional.[287] The imperial government defended the writs' legality by noting that the Court of Exchequer routinely issued them in England.[288] That argument failed to move James Otis, a prominent colonial lawyer. In his view, only an "express act of parliament" could authorize a court to issue writs so burdensome to liberty.[289] Because no such statute existed, the English writs of assistance were illegal; and "the practice of one court against law . . . can never be deem'd a good precedent for another."[290] Even if *communis error*

---

281. See, e.g., Daniel J. Hulsebosch, The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence, 21 Law & Hist. Rev. 439, 472–75 (2003) (discussing disagreement over when English laws that did not specifically extend to conquered territories held force in British colonies).

282. 5 Acts of the Privy Council of England: Colonial Series 285 (James Munro ed., 1912) (reporting advice offered by Richard Jackson to the Board of Trade in 1770).

283. See Herbert Alan Johnson, English Statutes in Colonial New York, 58 N.Y. Hist. 277, 293 (1977) (discussing the precedential value of English statutory construction in the colonies); cf. T.O. Elias, Colonial Courts and the Doctrine of Judicial Precedent, 18 Mod. L. Rev. 356, 368–70 (1955) (analyzing the problem in the later British Empire). The same question arose after the Union of 1707 joined England and Scotland. Because some English statutes were now part of Scots law, Scottish courts had to decide whether Scotland had become subject to "the whole of the law of England," including statutory precedents, or only the statutes themselves. Trial of Robert Watt for High Treason (1794) 23 How. St. Tr. 1167, 1332; see also John Barrell, Imaginary Treason, Imaginary Law, *in* The Birth of Pandora and the Division of Knowledge 119, 120–21 (1992).

284. See Hoppit, Britain's Political Economies, supra note 154, at 125–26.

285. See id.; P.J. Marshall, The Making and Unmaking of Empires: Britain, India, and America c.1750–1783, at 78–79 (2005).

286. See, e.g., Bilder, Transatlantic Constitution, supra note 275, at 139–41.

287. Laura K. Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1242, 1244 (2016).

288. James Otis, Essay on the *Writs of Assistance* Case, Bos. Gaz., Jan. 4, 1762, reprinted in Collected Political Writings of James Otis 15, 16 (Richard Samuelson ed., 2015).

289. Id. at 17.

290. Id. (emphasis omitted).

might justify an extralegal practice in England—Otis thought not—there was no reason to transplant the error overseas.[291]

But colonists could also find *communis error* useful. The eminent Boston attorney Oxenbridge Thacher elevated precedent over a statute in his own argument against writs of assistance. When the government cited an act of Parliament in support of its case, Thacher replied that though the statute had "existed 60 Years, yet [a writ under it] was never applied for, nor ever granted, till 1756."[292] He then paraphrased Coke: "Non-user is a great Presumption that the Law will not bear it."[293] In less politically charged cases, too, colonial courts and lawyers cited *Bewdley* and other "instances of precedents prevailing against the law."[294]

The upshot is that colonial lawyers didn't share a settled view of how statutes related to precedent. Consider the notebook of Josiah Quincy, Jr. After graduating from Harvard in 1763, Quincy studied law in Thacher's office.[295] Like many aspiring lawyers, Quincy kept a commonplace book, where he synthesized his studies.[296] In one section, he recorded a list of legal maxims, including "*Communis Error facit Jus*"—adding, in a footnote, "tho' expressly ag[ainst] a Statute."[297] He also copied down Coke's argument that the absence of enforcement might effectively erase a statute.[298] But Quincy also included a *but see* ("Sed vid") citation to Vaughan's skeptical decision in *Sheppard v. Gosnold*, as well as Camden's insistence in *Entick v. Carrington* that "[t]he Best Way to construe *Modern* Statutes is to follow ye words thereof."[299] In the colonies, as in Britain, it was far from obvious how lawyers might weave those ideas together.

---

291. Id. at 9, 17; see also Hamburger, supra note 40, at 296 n.34 (noting other colonists' skepticism of *communis error*). Skepticism about writs of assistance wasn't limited to the colonies. See Shipley v. Redmayne (1765) 63, 63–83 (CP) (on file with the Ind. Univ. Lilly Libr., Parker MSS) (expanding liability for officers who improperly executed writs of assistance).

292. Josiah Quincy Jr., Notes on the Second Argument of the Case, November 1761, reprinted in Collected Political Writings of James Otis, supra note 288, at 8, 8.

293. Id.; see also supra notes 100–105 and accompanying text.

294. Maxwell's Lessee v. Lloyd, 1 H. & McH. 212, 216 (Md. Prov. 1766) (argument of counsel); see also Miller v. Lord Proprietary, 1 H. & McH. 543, 550 (Md. Prov. 1774) (argument of counsel); Davey v. Turner, 1 U.S. (1 Dall.) 11, 13 (Pa. 1764) ("[I]f this be an Error, it is within the maxim, *Communis Error facit Jus*." (italics added)); Lessee of Lloyd v. Taylor, 1 U.S. (1 Dall.) 17, 17 (Pa. 1768) (citing *Davey*, 1 U.S. (1 Dall.) at 11).

295. George H. Nash, III, From Radicalism to Revolution: The Political Career of Josiah Quincy, Jr., 79 Proc. Am. Antiquarian Soc'y 253, 254 (1969).

296. Daniel R. Coquillette, The Legal Education of a Patriot: Josiah Quincy Jr.'s *Law Commonplace* (1763), 39 Ariz. St. L.J. 317, 324–26 (2007).

297. 2 Portrait of a Patriot: The Major Political and Legal Papers of Josiah Quincy Junior app. I at 390 (Daniel R. Coquillette & Neil Longley York eds., 2007) (italics added) (citing Clay v. Sudgrave (1700) 91 Eng. Rep. 34, 35; 1 Salk. 33, 33).

298. Josiah Quincy, Jr., Law Common-Place (1763), *in* Portrait of a Patriot, supra note 297, at 81, 221 [hereinafter Quincy, Law Common-Place]; see also supra note 104.

299. Quincy, Law Common-Place, supra note 298, at 221, 229; see also supra note 162 and accompanying text.

B. *Disagreements in the Early Republic*

The Declaration of Independence severed Americans' political connection with Britain but not their dependence on English law. Nearly every state passed a statute or constitutional provision "receiving" much of English law as its own.[300] And even when positive law didn't demand it, American lawyers kept looking to English legal literature for guidance.[301] As a result, debates about statutory precedent looked similar on both sides of the Atlantic. But American debates also evolved in response to the novel problems precedent posed for a young republic: Should judges look only to statutes themselves as the best evidence of the people's will? Or should they defer to statutory precedent to check their own discretion?[302]

The debate became concrete after John Price Posey, a former Virginia legislator and justice of the peace, set fire to a county clerk's office and jail.[303] A state court convicted him of arson, a capital offense. On appeal, he argued that he was entitled to benefit of clergy, which would have spared his life.[304] Virginia defined arson according to English law. Whether

---

300. Lawrence M. Friedman, A History of American Law 81–82 (4th ed. 2019); cf. Stephen E. Sachs, *Pennoyer* Was Right, 95 Tex. L. Rev. 1249, 1262 (2017) (arguing that English common law might have persisted even without a reception statute).

301. See Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 143–44 (1977) (emphasizing Mansfield's influence after 1790); Daniel J. Hulsebosch, An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic, 60 Ala. L. Rev. 377, 399 (2009). American publishers reprinted English law reports into the nineteenth century. Erwin C. Surrency, Law Reports in the United States, 25 Am. J. Legal Hist. 48, 49 (1981); see also Kellen R. Funk, Law's Machinery: Reforming the Craft of Lawyering in America's Industrial Age 33 (2025) (reproducing an 1847 advertisement for English and American law reports). Erskine's views received special attention. See Nicola Phillips, The Politics of Libel: Thomas Erskine, Freedom of the Press, and Transatlantic Legal Culture, c. 1780–1830, 41 Law & Hist. Rev. 683, 707 (2023).

302. See Jessica K. Lowe, Murder in the Shenandoah: Making Law Sovereign in Revolutionary Virginia 135–36 (2019). This was not the only context in which courts had to balance a statute's text against other sources of legal authority. Consider, for instance, the debate about whether a court could interpret statutes equitably—even against their "plain and obvious meaning"—to ensure their compatibility with the law of nations. See Hulsebosch, Constituting Empire, supra note 274, at 193–201.

303. See Lowe, supra note 302, at 130–36. Many elite Virginians knew Posey. See, e.g., Letter from George Washington to Bartholomew Dandridge (Dec. 18, 1782), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Washington/99-01-02-10234 [https://perma.cc/ECL7-GJ4F] (last visited Aug. 15, 2026) (describing Posey as "a most consummate villain"); Letter from Edmund Randolph to James Madison (Mar. 15, 1783), *in* 6 The Papers of James Madison Digital Edition, Congressional Series 346, 347 n.5 (J.C.A. Stagg ed., 2010), https://rotunda.upress.virginia.edu/founders/JSMN-01-06-02-0113 [https://perma.cc/22Z9-PF6D] [hereinafter Madison Papers] (similar).

304. Originally, "benefit of clergy" exempted clerics from royal courts' felony jurisdiction. Over time, the privilege evolved into a device by which any first-time offender, including laymen and women, might avoid capital punishment for certain "clergyable" offenses. See Baker, English Legal History, supra note 40, at 554–57; Jeffrey K. Sawyer, "Benefit of Clergy" in Maryland and Virginia, 34 Am. J. Legal Hist. 49, 52 (1990).

arson was clergyable also depended on English law, and particularly on the interplay among several statutes that defined the scope of the privilege.[305]

Unfortunately for Posey, English courts had long interpreted those statutes as making arson nonclergyable.[306] Naturally, Posey's lawyer urged the Court of Appeals to disregard those unfavorable precedents in favor of "the letter of the statutes," which (he insisted) made arson clergyable.[307] St. George Tucker, representing the Commonwealth, disagreed, warning that "a construction which had stood the test of so many ages, was not, now, to be shaken."[308]

The judges delivered their opinions seriatim, and they mostly agreed with Tucker. That might surprise readers used to seeing *Posey* cited for Judge Henry Tazewell's elevation of text over precedent: "[A]lthough I venerate precedents, I venerate the written law more."[309] But Tazewell spoke only for himself, and only one other judge agreed with him that Posey was entitled to benefit of clergy.[310] The other eight members of the court concluded "that a settled construction of a statute, forms a precedent, which should be adhered to as part of the law itself; and ought, upon no criticism of words, to be departed from," as reporter Daniel Call summarized their views.[311] Nor, in Call's view, was this an incidental aspect of the case. In his telling, *Posey*'s elevation of precedent over text explained why "[n]o cause decided, since the revolution, is more important."[312]

The judges in the majority offered slightly different rationales. Some argued that the statutes themselves made arson nonclergyable.[313] Another

---

305. Namely, Benefit of Clergy Act 1531, 23 Hen. 8 c. 1; Standing Mute, etc. Act 1533, 25 Hen. 8 c. 3; Treason Act 1547, 1 Edw. 6 c. 12; Robbery Act 1551, 5 & 6 Edw. 6 c. 9; Accessories in Murder, etc. Act 1557, 4 & 5 Ph. & M. c. 4.

306. See Powlter's Case (1610) 77 Eng. Rep. 1181, 1192; 11 Co. Rep. 29, 36a–36b; Commonwealth v. Posey, 8 Va. (4 Call) 109, 111 (1787) (argument of St. George Tucker); 5 Tucker's Blackstone, supra note 190, at *222–23.

307. *Posey*, 8 Va. (4 Call) at 113 (argument of counsel). Daniel Call didn't compile his case report until 1827, but he based it on "the notes and memoranda of the judges and lawyers, who attended the courts," 4 Daniel Call, Reports of Cases Argued and Decided in the Court of Appeals of Virginia iv (Richmond, Robert I. Smith 1833), and there is no reason to doubt its accuracy. See 1 St. George Tucker's Law Reports and Selected Papers, 1782–1825, at 195 n.288 (Charles F. Hobson ed., 2013).

308. *Posey*, 8 Va. (4 Call) at 111 (argument of St. George Tucker); accord 3 St. George Tucker's Law Reports and Selected Papers, supra note 307, at 1753–54 (reproducing Tucker's notes of his argument).

309. *Posey*, 8 Va. (4 Call) at 116 (Tazewell, J., dissenting). For citations to Tazewell's opinion, see Gamble v. United States, 139 S. Ct. 1960, 1985–86 (2019) (Thomas, J., concurring); Nelson, Stare Decisis, supra note 14, at 7 n.21.

310. Judge George Wythe "said it would be tedious and unnecessary to state his reasons for" dissenting, so we don't know whether he endorsed Tazewell's position. *Posey*, 8 Va. (4 Call) at 122 (Wythe, J., dissenting).

311. Id. at 124 (reporter's note).

312. Id.

313. See id. at 115 (opinion of Henry, J.); id. at 124 (opinion of Pendleton, President).

judge didn't explain his reasoning.[314] But most argued that precedent should prevail even against the statutes' text. Judge John Blair, later a justice of the U.S. Supreme Court, was emphatic: "[I]f it were a new case, I should be at no loss to decide in favour of the prisoner. But the [contrary view] has prevailed so long, that it must be submitted to . . . ."[315] Judge Peter Lyons agreed. Citing Mansfield's judgment in *Windham v. Chetwynd*, he explained that "the solemn decisions of the judges upon a statute become part of the statute."[316] This rule was required equally by law and by policy. Because "precedents serve to regulate our conduct," Lyons continued, it was more important that they be settled than that they be right.[317] Precedent also limited judicial discretion: Allowing judges constantly to reinterpret statutes would mean that "the life or death of the citizen will . . . depend, not upon a fixt rule, but upon the opinion of the judge, who may happen to try him."[318]

To summarize: In 1787, a supermajority of Virginia judges agreed that long-established precedent should prevail over their own reading of a statutory scheme, even when that meant hanging a man whom the text might otherwise have spared.[319] This deference to precedent crossed ideological lines. It was endorsed by future Federalists (including the reporter Call and judges John Blair and James Mercer) and future Jeffersonians (including Tucker and Edmund Pendleton).[320] And that was so even though the precedent in question came from England.[321] Indeed, the only judge besides Tazewell to express any qualms about outsourcing American statutory interpretation to old English courts was Judge John Tyler. Although he embraced statutory stare decisis, he said he would be more "incline[d] to follow the letter of the statute" if the case involved "one of *our* acts of

---

314. See id. at 121 (opinion of Carrington, C.J.).

315. Id. at 122 (opinion of Blair, J.); accord id. at 119 (opinion of Mercer, J.) ("Such solemn decisions ought to be adhered to; for precedents, instead of being dangerous to life, are calculated, in every instance, to save it . . . ."); id. at 119–20 (opinion of Fleming, J.) ("But the decision . . . has been so uniformly considered as the true construction of the statutes, that it has become the law of the land; for precedents, so long acquiesced in, cannot be overturned, without more danger than benefit, as no point will ever be settled.").

316. Id. at 120 (opinion of Lyons, J.).

317. Id. ("[T]here is more danger to be apprehended from uncertainty, than from any exposition . . . .").

318. Id. Judge Blair and President Edmund Pendleton cited Lyons's opinion favorably. Id. at 122 (opinion of Blair, J.); id. at 124 (opinion of Pendleton, President).

319. St. George Tucker apparently agreed, too. As Professor Jessica Lowe points out, Tucker also argued that the statutes themselves supported his case, so he didn't have to decide between their authentic meaning and erroneous constructions of them. Lowe, supra note 302, at 135. Still, his argument suggested that, were such a conflict to arise, the court should prefer precedent. See supra note 308 and accompanying text.

320. On the other side, skeptics of precedent included the Jeffersonian Tazewell and (perhaps) the Federalist Wythe. See supra notes 309–310 and accompanying text.

321. See John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution 164 (2013) (noting that some states gave less deference to English precedents than to American ones).

assembly."[322] But in *Posey* itself, Tyler chose precedent over text. So did judges and lawyers in other jurisdictions.[323]

Sometimes, though, text beat precedent.[324] And text prevailed more often after the 1790s, when the common law became "a political football" in the fight between the nation's emerging parties.[325] As Federalists came to dominate the federal bench, Jeffersonians accused them of trying to erect a common law of the United States that would annihilate state and local authority.[326] To stop that from happening, Jeffersonians gave the common law a new conceptual basis. Instead of rooting it in customary practice, as classical lawyers had done, Jeffersonians began to ascribe the common law's force to legislative "adoption"—an argument meant to emphasize that sovereign states (rather than an amorphous American people) controlled the law.[327] The new focus on positive legislation made

---

322. *Posey*, 8 Va. (4 Call) at 113–14 (opinion of Tyler, J.) (emphasis added).

323. See, e.g., Watson v. Mercer, 33 U.S. (8 Pet.) 88, 101 (1834) ("This deed . . . was a good and valid deed at . . . the common law of Pennsylvania . . . on the principle of *communis error facit jus*." (italics added)); Bail v. McCullough, 1 Del. Cas. 423, 427 (Ct. C.P. 1797) (summarizing counsel's argument that "a series of precedents . . . established a practice" that justifies the application of *communis error*); Coburn v. Pickering, 3 N.H. 415, 427 (1826) ("If there be an error of this sort, it is one, to which the maxim of *communis error facit jus* may be most happily applied . . . ."); Jackson v. Gilchrist, 15 Johns. 89, 110 (N.Y. Sup. Ct. 1818) (noting that other states' courts of last resort have recognized and grounded decisions in *communis error*); Salling v. McKinney, 28 Va. (1 Leigh) 42, 60 (1829) ("[I]f there be any case, to which the maxim *communis error facit jus* can apply, this is surely one.").

324. Nelson, Stare Decisis, supra note 14, at 21; see also, e.g., id. at 14–21; Flanagan's Lessee v. Young, 2 H. & McH. 38, 41, 44–46 (Md. 1789) (rejecting counsel's argument that "[u]sage will overturn an act of parliament"); Farah Peterson, Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation, 77 Md. L. Rev. 712, 733 (2018) [hereinafter Peterson, Interpretation as Statecraft] ("[I]n statutory interpretation cases, one finds that Kent rarely rested on *stare decisis* unless he could rely on a previous opinion of his own."); cf. Waters v. Stewart, 1 Cai. Cas. 47, 65 (N.Y. 1804) (opinion of Spencer, J.) ("[P]ractice cannot legalize a procedure unauthorized or forbidden by the law . . . .").

325. Hulsebosch, Constituting Empire, supra note 274, at 288; see also Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic 3 (1993) (exploring early American understandings of the potential political importance of the judiciary).

326. See Stewart Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231, 1242 (1985) ("Tucker . . . argu[ed] that the Federalist plan to extend the jurisdiction of federal courts would necessarily entail a commensurate expansion of the powers of the national legislature.").

327. See Edmund Randolph, Notes on the Common Law (c. Sep. 1799), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Madison/01-17-02-0170 [https://perma.cc/Q7GR-WS53] (last visited Aug. 15, 2026) (arguing that individual states, rather than the federal Constitution, had adopted the common law); see also Tucker's Blackstone, supra note 190, editor's app. at 407; Pearson, supra note 274, at 27–29; Christian R. Burset, The Founders' Common-Law Empire, 35 Yale J.L. & Humans. 419, 432 (2024) (noting Randolph's argument); David Thomas Konig, Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication, *in* The Many Legalities of Early America 97, 116–17 (Christopher L. Tomlins & Bruce H. Mann eds., 2001); Andrew Shankman, Malcontents and Tertium Quids: The Battle to Define Democracy in Jeffersonian Philadelphia, 19 J. Early Republic 43, 55 (1999).

it harder to explain why courts should defer to statutory precedent, which classical lawyers had justified in customary rather than positive terms.[328] But it wasn't only Jeffersonians.[329] By the early nineteenth century, a broad range of commentators had become increasingly reluctant to sidestep the legislature's instructions. Some courts continued to invoke *communis error*. But they more often tried to limit its reach, as Mansfield had, to situations that implicated reliance or property interests.[330] And Justice Joseph Story rejected the maxim outright. Reviewing Holt's use of *communis error* in *Clay v. Sudgrave*, Story pronounced it "extraordinary" and approvingly quoted the reporter Douglas's denunciation of it.[331]

Given all that, one might have expected the classical approach to statutory precedent to die off. But it didn't. A few years after Story condemned *communis error*, Justice Bushrod Washington endorsed it.[332] State courts, too, continued to "yield . . . to the influence of the maxim."[333] In 1826, Story's protégé Henry Wheaton inserted a multipage footnote into his

---

328. See supra section I.A.

329. See Green, Traditional Questions, supra note 29 (manuscript at 43–44) (noting parallel developments in England in the late eighteenth century); cf. Peterson, Interpretation as Statecraft, supra note 324, at 758 (arguing that it's "unhelpful to think of statutory interpretation philosophies in terms of political orientation" in the early Republic).

330. See, e.g., McKeen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22, 32–33 (1809); Lessee of Watson v. Bailey, 1 Binn. 470, 478 (Pa. 1808) ("I should long pause, before I adopted a construction which eventually might unsettle many estates. The maxim of '*communis error facit jus*' has great weight with me, where the most injurious consequences would flow from counteracting it."); Nelson, Stare Decisis, supra note 14, at 20–21.

331. De Lovio v. Boit, 7 F. Cas. 418, 437 (C.C.D. Mass. 1815) (No. 3,776) (Story, Circuit Justice) (citing Wilkins v. Carmichael (1779) 99 Eng. Rep. 70; 1 Dougl. 101; Clay v. Sudgrave (1700) 91 Eng. Rep. 34; 1 Salk. 33); see also Nantz v. Bailey, 33 Ky. (3 Dana) 111, 119 (1835) (opinion of Robertson, C.J.) (expressing relief at not having to resort "to the extreme, and sometimes misapplied doctrine of '*communis error*'"); supra text accompanying notes 245–246 (discussing Douglas).

332. Milligan v. Dickson, 17 F. Cas. 376, 378 (C.C.D. Pa. 1817) (No. 9,603) (Washington, Circuit Justice) ("Never was there a case where the principle *communis error facit jus*, was more strictly, and necessarily applicable." (italics added)); cf. Kirk v. Smith, 22 U.S. (9 Wheat.) 241, 298 (1824) (Johnson, J., dissenting) ("Whatever may be the correct legal construction of the words of the warrant, if such has been the practical construction, *communis error facit jus,* and it is now too late to criticise on the meaning of terms.").

333. Maher v. State, 1 Port. 265, 268 (Ala. 1834); see also, e.g., Tayloe v. Thomson's Lessee, 30 U.S. (5 Pet.) 358, 367 (1831) ("Had this question occurred in the courts of [Maryland], they would be bound to say that it was now too late to overlook the practical construction which this statute has received for a century . . . ."); Roads v. Symmes, 1 Ohio 281, 312 (1824) ("[I]f there is any case, where the maxim '*communis error facit jus*' can have a proper and legitimate application, it is in cases like the present, where the error . . . has been committed by officers, constituted by the courts, and acting under their supervision and control."); Commonwealth v. Tate, 30 Va. (3 Leigh) 802, 804 (1831) ("[S]uch has been the understanding and settled usage of the country, and it is now too late to disturb it, since the common error may, in this as in other cases, make the law."); Currie v. Page, 29 Va. (2 Leigh) 617, 624–25 (1831) ("[U]sages that can vary the construction of an act of parliament, must be universal, and not only the usage of a particular parish." (internal quotation marks omitted) (quoting R v. Harman (1739) 87 Eng. Rep. 1320, 1323; 7 Mod. 402, 407)).

Supreme Court reports, attacking the doctrine and praising recent judicial efforts "to rescue the statute [of limitations] from a series of misrepresentations which has nearly destroyed its efficacy."[334] The implication was that those efforts had failed to overcome the "chain of authorities" that bound the statute to its error-riddled history.[335]

Even constructive treason hung on. The Constitution defined treason using language from the statute of Edward III: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[336] Some commentators assumed that provision incorporated the many English decisions that had glossed the same language.[337] Because those decisions endorsed constructive treason, perhaps American treason law did so, too.[338] But other lawyers disagreed, leading to a reprise of earlier English debates about text and treason.[339] Chief Justice John Marshall thought the issue remained unsettled as of 1807,[340] and his later decisions struck a middle course, accepting some parts of English doctrine while rejecting others.[341] And while he didn't quite endorse *communis error*, he expressed sympathy for judges who did: "[I]f a spurious doctrine have been introduced into the common law, and have for centuries been admitted as genuine, it would require great hardihood in a judge to reject it."[342]

---

334. Wetzell v. Bussard, 24 U.S. (11 Wheat.) 309, 316 n.a (1826) (reporter's note).

335. Id.; see also William Green, Stare Decisis, 14 Am. L. Rev. 609, 644 (1880) (attacking the weakening but still-potent doctrine of *communis error*); cf. John Chipman Gray, The Nature and Sources of the Law 318–22 (1909) (surveying the nineteenth-century American debate about whether a non-user could repeal a statute).

336. U.S. Const. art. III, § 3, cl. 1; see also Treason Act 1351, 25 Edw. 3 c. 2.

337. See, e.g., 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1791–1793 (Boston, Hilliard, Gray & Co. 1833); Willard Hurst, Treason in the United States (pt. 2), 58 Harv. L. Rev. 395, 411 (1945); cf. The Federalist No. 43, at 290 (James Madison) (Jacob E. Cooke ed., 1961) ("But as new-fangled and artificial treasons, have been the great engines, by which violent factions . . . have usually wrecked their alternate malignity on each other, the Convention have with great judgment opposed a barrier to this peculiar danger . . . .").

338. See Newmyer, supra note 233, at 61.

339. See, e.g., Ex parte Bollman, 8 U.S. (4 Cranch) 75, 112 (1807) (argument of counsel); United States v. Burr, 25 F. Cas. 55, 120, 155 (C.C.D. Va. 1807) (No. 14,693) (arguments of counsel); Case of Fries, 9 F. Cas. 924, 948 n.2 (C.C.D. Pa. 1800) (No. 5,127) (argument of counsel); Brackenridge, supra note 184, at 495 n.*; 5 Tucker's Blackstone, supra note 190, editor's app. at 11–51.

340. Letter from John Marshall to William Cushing (June 29, 1807), *in* 7 The Papers of John Marshall Digital Edition 60, 60 (Charles Hobson ed., 2014), https://rotunda.upress.virginia.edu/founders/JNML-01-07-02-0006 [https://perma.cc/5U8F-TN6C] [hereinafter Marshall Papers].

341. See *Burr*, 25 F. Cas. at 159–62; Newmyer, supra note 233, at 165.

342. *Burr*, 25 F. Cas. at 160.

C. *New Justifications for Statutory Precedent*

Why did the classical approach survive? Partly, perhaps, because statutes in the early Republic looked a lot like statutes in early modern England: "extremely poorly drafted."[343] The revisionist challenge to *communis error*, remember, emerged only after improved drafting made it more plausible for lawyers to invoke a statute's true meaning.[344] But if American statutes were incomprehensible, there was little point in fighting over the best construction.[345] Still, that doesn't seem to be the whole story, since some American judges resisted *communis error* despite the poor quality of legislatures' work.

The classical framework survived not only because of technical defects in early lawmaking, but also because Americans developed two new ways to justify *communis error*.[346] First, some judges resisted Jeffersonians' attempt to ground all law in positive legislation. Building on the older notion of law as custom, these judges contended that social practice provided the ultimate criterion of legality in a republic. A second set of judges made the opposite move. They endorsed the primacy of legislation but developed a new fiction—legislative acquiescence—to justify adherence to erroneous precedents. This section considers each justification in turn.

1. *Customary American Law.* — One strategy linked *communis error* to popular sovereignty. The classical common law, recall, grounded law in custom.[347] American lawyers recast that idea in terms of democratic consent.[348] Customs, James Wilson explained, gained their force through

---

343. Peterson, Interpretation as Statecraft, supra note 324, at 757 (discussing state statutes); see also Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 Madison Papers, supra note 303, at 350, 351–52, https://rotunda.upress.virginia.edu/founders/JSMN-01-08-02-0184 [https://perma.cc/F85U-N8P7] (last visited Sep. 26, 2026) (discussing principles that should underlie state legislative processes). Federal statutes were perhaps better, but they were far from perfect, as Justice James Iredell observed: "[I]t surely is not to be expected that extreme & unexceptionable accuracy is to be used in every instance where a Legislature are employed in transacting in a very short time business of the most intricate & important nature . . . . It has been found necessary in all Courts to make great allowances for the difficulties of Legislation." James Iredell, Reasons for Acting as a Commissioner on the Invalid Act (Sep. 26, 1792), *in* 6 The Documentary History of the Supreme Court of the United States, 1789–1800, at 288, 290 (Maeva Marcus ed., 1998); see also Ex parte Burford, 7 U.S. (3 Cranch) 448, 449 (1806) (noting the "obscurity" of the federal habeas statute).

344. See supra section II.A.

345. Cf. Nelson, Stare Decisis, supra note 14, at 21–22 (noting that it's easier to demonstrate a decision's error "where the law's external sources were thought to yield determinate answers").

346. Cf. Amalia D. Kessler, Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877, at 22–23 (2017) (arguing that equity thrived in early nineteenth-century America in part because Kent and Story gave it new conceptual foundations).

347. See supra section I.A.

348. See Kunal M. Parker, Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism 71–110 (2011) (discussing how the notion of

"voluntary adoption" by society.[349] On that view, written and unwritten law both derived their authority from the people, who consented to statutes via elected representatives and to the common law through everyday practice. Since both kinds of law rested on the same foundation of popular consent, it wasn't self-evident that statutes should always prevail over the people's actual behavior.[350]

This democratic theory of legislation had some precedent in how colonists had treated British legislation. By default, newly enacted British statutes didn't apply to the colonies unless Parliament said so.[351] But colonies sometimes adopted inapplicable British statutes anyway—either by express local legislation or by informal practice.[352] In the latter case, a British statute might become "legally in force" in a colony through "usage," without any action by either Parliament or a colonial assembly.[353] And if usage could effectively enact a statute without formal legislative action, then presumably usage could amend a statute, too.

Some state courts made that logic explicit. In *Smith v. Lessee of Craig*, a Tennessee land dispute, the parties claimed title based on rival land entries.[354] The court turned to *communis error*.[355] One of the two judges, John Overton, offered several justifications for the maxim, including legal certainty.[356] He also linked it to popular sovereignty. If the members of society "are generally satisfied with an erroneous construction of a statute, and have evinced that satisfaction by conforming their actions to it," he asked, "who has a right to find fault?"[357] In his view, statutory "constructions

---

"consent" evolved in postrevolutionary America, and how jurists like James Wilson adapted consent-based defenses of the common law to the new ideological context).

349. James Wilson, Of the General Principles of Law and Obligation (1790–1791), *in* 1 The Works of James Wilson 97, 122 (Robert Green McCloskey ed. Belknap Press 1967) (1804) [hereinafter Wilson, General Principles]; see also Pearson, supra note 274, at 22–24 ("[James Wilson] believed that a long-standing custom carried with it 'intrinsick evidence of consent,' for long and general custom was founded 'on nothing else, but free and voluntary *consent*.'" (first quoting Wilson, General Principles, supra, at 122; then quoting James Wilson, Of Municipal Law (1790–1791), *in* 1 The Works of James Wilson, supra, at 168, 184)).

350. See, e.g., James v. Commonwealth, 12 Serg. & Rawle 220, 228 (Pa. 1825) ("The instances are numerous of statutes being repealed in fact—a kind of silent legislation. . . . [T]he whole community includes as well the legislative power as its subjects . . . .").

351. See Joseph Henry Smith, Appeals to the Privy Council From the American Plantations 485–86 (1950).

352. See Brackenridge, supra note 184, at 45–46 (noting that many English statutes had "found their way into" American jurisprudence); Johnson, supra note 283, at 283.

353. Respublica v. Mesca, 1 U.S. (1 Dall.) 73, 75 (Pa. Ct. Oyer & Terminer 1783) (opinion of McKean, C.J.) (emphasis omitted); see also 1 George Chalmers, Opinions of Eminent Lawyers, on Various Points of English Jurisprudence 196–97 (London, Reed & Hunter 1814) (giving examples of British authorities that endorsed this theory).

354. 2 Tenn. (2 Overt.) 287, 287 (1814) (opinion of White, J.).

355. Id. at 290 (opinion of Overton, J.).

356. Id. at 291.

357. Id. at 294.

have always in view the happiness of the people," and that "end is attained" if the people themselves remained "content."[358] To ask whether judges should correct the people's construction was to miss the point.[359]

Take another example, this time from the U.S. Supreme Court. *Pease v. Peck* concerned a Michigan statute of limitations.[360] Everyone agreed that the limitations period had run before the plaintiff sued.[361] But the plaintiff pointed to a saving clause, which gave a longer clock to those residing "in parts 'beyond seas,'" including distant New York.[362] One might have expected the defendant to note that no ocean separated Michigan from the East Coast. But his objection was more fundamental: The clause simply didn't exist. Yes, he conceded, Michigan's territorial government had meant to insert such a provision when it adopted the statute. But the publicly printed version accidentally omitted it; and, the defendant argued, the public version controlled. So the Court had to decide not how to read the Michigan statute, but "what is the statute"—the accurate original or the misprinted public version?[363]

Communis error determined the case. Ordinarily, the Court explained, a printer's mistake "cannot change the law": the archival version would control.[364] Here, however, "the people who are governed by the laws, and the courts who administer them" had followed the public version for decades.[365] "The reception and long acquiescence" in the error "by those who had it always in their power to alter or annul [it], and did not, may justly be treated as a ratification . . . by the sovereign people."[366] In this context, "[t]he maxim *communis error facit jus*, though said to be dangerous . . . might here find a safe and proper application" that would advance "the public good."[367] So the public version prevailed.

---

358. Id. A corollary was that judges should depart from prior statutory constructions when "a change of situation, and circumstances of a people" rendered them "unreasonable or absurd." Brackenridge, supra note 184, at 74 (emphasis omitted).

359. The other judge invoked *communis error* as well, emphasizing the need for stable "titles to land." *Smith*, 2 Tenn. (2 Overt.) at 288–89 (opinion of White, J.); see also South's Heirs v. Thomas' Heirs, 23 Ky. (7 T.B. Mon.) 59, 63 (1828) ("The acquiescence of the community in the decision, may also be used as an argument. There has been a succession of judges . . . . Yet there has been no conflicting decision, and the legislature, who has the statute of limitations in their power, have never attempted so to reform it . . . ."); cf. City of Rockland v. Ulmer, 24 A. 949, 950 (Me. 1892) ("A construction the people themselves have placed upon a statute of their own making . . . should not be disregarded or overturned by the court, unless, indeed, it is found to work a manifest injustice.").

360. 59 U.S. (18 How.) 595 (1856).

361. Id. at 595.

362. Id.

363. Id.

364. Id. at 596–97.

365. Id. at 597.

366. Id.

367. Id.

Justice John Campbell was appalled. "The statute laws of a State exist in a permanent form," he wrote in dissent, "and are unchangeable, except by public authority, and are not to be ascertained from any popular impression on the subject."[368] If applying the law as enacted causes "mischief," he continued, then the cure must come from the legislature, not judicial surmises about public sentiment.[369] What's more, he added, Michigan's highest court had recently decided that the "printed statute does not form a part of the laws of that State."[370] But his colleagues found these arguments unpersuasive, and only Justice Peter Daniel joined him in dissent.[371] For the Court's majority, it seemed, usage might delete part of a statute.[372]

2. *Legislative Acquiescence.* — *Pease* rooted *communis error* in the "long acquiescence" of the "sovereign people."[373] That framing put a democratic spin on the classical tradition, which had rooted law in popular practice. Popular acquiescence, on that view, could take many forms. The legislature's silence could provide evidence that the people had approved a judicial construction—but so could popular usage, judicial precedent, or the shared understanding of the legal profession.[374]

This capacious approach to acquiescence survived in the early Republic,[375] and it seems to have shaped James Madison's understanding

---

368. Id. at 600 (Campbell, J., dissenting).

369. Id. A few years earlier, Justice John Caton of the Illinois Supreme Court had warned that if courts adopted the "principle . . . that the courts shall construe the law as the people understand it, then will a [demagogue] be justified in taking an appeal from the decision of the judge upon the bench, to the multitude in the court house yard." Seeley v. Peters, 10 Ill. (5 Gilm.) 130, 152 (1848) (Caton, J., dissenting). "[T]he danger," in his view, was "that the influence of a general public opinion, long entertained, may induce the courts to distort the law so as to conform to such opinion, rather than incur the public criticism, which might be induced by a decision which would disappoint public expectation." Id. at 153.

370. *Pease*, 59 U.S. (18 How.) at 601 (Campbell, J., dissenting).

371. Id. at 599.

372. Ultimately, the Court didn't need to rely on *communis error*, because it found that Michigan's subsequent enactment of a new code had abrogated the saving clause in any event. See id. at 597–98 (majority opinion).

373. Id. at 597.

374. See, e.g., R v. Stacey (1785) 99 Eng. Rep. 938, 939; 1 Term Rep. 1, 3 (opinion of Mansfield, C.J.) (noting that the court's practice "has been acquiesced in by the Bar, and in Parliament"); Snyder, supra note 29 (manuscript at 28–29 nn.201–215) (collecting examples of practice informing statutory interpretation).

375. See, e.g., Davis v. Cooke, 10 N.C. (3 Hawks) 608, 613 (1825) (opinion of Taylor, C.J.) ("The opinion has been general, if not universal, in this state, for the last thirty years, that . . . it is not from matter decided only where the point has been raised upon argument, but also from the long continued practice of the Courts . . . ."); McCree v. Houston, 7 N.C. (3 Mur.) 429, 453 (1819) (Taylor, C.J., dissenting) ("[A] series of decisions to the same effect, long known to the public, acquiesced in by the Legislature, and sanctioned by the Court of *dernier resort*, must be considered as establishing the Law."); Adamson ex rel. Adamson v. Smith, 9 S.C.L. (2 Mill) 269, 273 (S.C. Const. Ct. App. 1818) ("I feel confident that the point before us had been settled, by the universal acquiescence of the bench, and

of "liquidation."[376] Madison took for granted that a course of "Judicial precedents" could have "binding" or "authoritative force, in settling the meaning of a law."[377] Like Judge Overton of Tennessee, he linked this principle both to the need for legal certainty and to the legitimacy conferred by popular approval.[378] "[A]n exposition of the law publicly made, and repeatedly confirmed by the constituted authority," he wrote, "carries with it, by fair inference, the sanction of those, *who having made the law through their legislative organ*, appear under such circumstances to have determined its meaning through *their Judiciary organ*."[379] "Judicial" and "legislative precedents" both provided evidence of what ultimately mattered: "public sanction."[380]

Some judges, however, articulated a narrower conception of public approval. Instead of treating legislative acquiescence as one source of evidence, some courts started to treat it as decisive. Consider *State v. Carrier*.[381] Connecticut's Supreme Court of Errors had to decide whether a ship's cabin was a "shop" for purposes of a burglary statute.[382] To answer that question, Judge Tapping Reeve looked to precedent: "[T]here has been, ever since the enacting of the statute, an uniform construction by the Superior Court, that such cabin is a shop."[383] The lower court's rulings had

---

the bar, the legislature, and the country . . . ."); Talbot v. McGavock, 9 Tenn. (1 Yer.) 262, 277 (1829) (opinion of Catron, J.) ("I understand the bench, the bar, the legislature and the community at large have acquiesced in this decision as the law for twenty years . . . ."); Bank of Wash. v. Arthur, 44 Va. (3 Gratt.) 173, 187 (1846) (Brooke, J., dissenting) ("[This precedent] has been understood as the law . . . for more than twenty-five years, by bar and bench; and by many members of the Legislature . . . ."); LaCroix, supra note 274, at 79–80 ("[Attorney General William Wirt] found the question 'settled long since by the practice of the government, sanctioned by the acquiescence of the people.'" (quoting Letter from William Wirt to John Quincy Adams (Sep. 27, 1822), reprinted in 1 Official Opinions of the Attorneys General of the United States 567, 569–70 (Benjamin F. Hall ed., Washington, Robert Farnham 1852))).

376. On liquidation, see generally Nelson, Stare Decisis, supra note 14, at 10–21 (discussing liquidation in Madison's thought and antebellum case law); William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019) [hereinafter Baude, Constitutional Liquidation] (discussing Madison's concept of liquidation).

377. Letter from James Madison to Charles J. Ingersoll (June 25, 1831), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Madison/99-02-02-2374 [https://perma.cc/KYP2-86F2] (last visited Aug. 15, 2026).

378. Id. ("[T]he good of society requires that the rules of Conduct for its members should be certain and Known; which would not be the case, if every Judge . . . should vary the rule of law according to his individual interpretation of it."). The link between liquidation and legal certainty wasn't unique to Madison. See, e.g., Joseph Hopkinson, Considerations on the Abolition of the Common Law in the United States 29 (Philadelphia, William P. Farrand & Co. 1809) (describing the common law as deriving from "long practice").

379. Letter from James Madison to Charles J. Ingersoll, supra note 377 (emphasis added).

380. See Baude, Constitutional Liquidation, supra note 376, at 17–21.

381. 5 Day 131 (Conn. 1811).

382. Id. at 132.

383. Id.

fixed the statute's meaning, he said, because its "construction has been known to the legislature, and by their total silence on the subject, we may fairly infer their approbation of it."[384]

Reeve's opinion drew a dissent from Judge Nathaniel Smith, his former student at Litchfield Law School.[385] (Ouch!) Smith denied "that any course of adjudications by the Superior Court, however long and uniform," could block the Supreme Court from reading the statute correctly.[386] After all, the point of a *supreme* court was to correct other tribunals, regardless of "the number and uniformity of the errors."[387] The "supposed acquiescence, or indirect sanction of the legislature" didn't change that.[388] It was possible, Smith conceded, that the legislature approved of the Superior Court's construction.[389] But it was equally possible that the legislature assumed the Supreme Court would do its job and fix the lower court's mistake.[390] And even if the legislature had silently endorsed the erroneous construction, Smith insisted, that wouldn't relieve the Supreme Court from its duty: "Are we to refuse to construe according to law, statutes already made, because the legislature neglects to make another?"[391] Smith's critique anticipated modern objections to legislative acquiescence.[392] But he dissented alone, and courts in other jurisdictions adopted reasoning more like the majority's.[393]

---

384. Id. To describe the Superior Court as a "lower" court is potentially misleading; the Supreme Court of Errors was the Superior Court judges sitting en banc. 13 The Public Records of the State of Connecticut 30, 31 (Dorothy Ann Lipson & Douglas M. Arnold eds., 1989).

385. Nathaniel Smith, Ledger, Litchfield Hist. Soc'y, https://ledger.litchfieldhistoricalsociety.org/ledger/students/2383 [https://perma.cc/2EYE-CLS9] (last visited Sep. 29, 2026). Reeve had rejected Smith's first application to Litchfield. Id.

Chief Judge Stephen Mix Mitchell and Judges John Trumbull, William Edmond, and Simeon Baldwin concurred in Reeve's opinion. *Carrier*, 5 Day at 133. Judge Zephaniah Swift said he agreed with Smith's reading of the statute but wouldn't depart from the "uniform course of adjudications." Id. at 135 (Swift, J., concurring).

386. *Carrier*, 5 Day at 134 (Smith, J., dissenting).

387. Id.

388. Id. at 135.

389. Id.

390. Id. (arguing that a legislator would "probably conclude[]" that a court of last resort would correct "erroneous proceedings" of the lower courts); cf. Alexander Zhang, Legislative Statutory Interpretation, 99 N.Y.U. L. Rev. 950, 975 (2024) (giving an example of Congress's waiting to clarify a statute's meaning until the Supreme Court acted).

391. *Carrier*, 5 Day at 135 (Smith, J., dissenting).

392. See, e.g., Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting); Eskridge, Overruling Statutory Precedents, supra note 3, at 1403 ("If the Court errs, why should the legislature have to make the correction?"); Grove, supra note 170, at 681. Critiques of legislative acquiescence were nothing new. See, e.g., [George Rous?], To the Author of a Defence of the Proceedings of the House of Commons, &c., 29 Critical Rev. 62, 63 (1770) ("Neither does the acquiescence of the legislature always make law, otherwise any one branch thereof, *possessing an absolute negative*, might enjoy what power [its] members were pleased to assume.").

393. See, e.g., United States v. Hooe, 5 U.S. (1 Cranch) 318, 320 (1803) ("Whatever might be the present opinion of the court if this were the first time of being called upon to

As the emphasis shifted to legislative acquiescence, other indicia of public approval lost force. Consider the treatment of conveyancers (specialists in transferring real property). Traditionally, their collective judgment had carried persuasive, even decisive weight, and good title had often depended on their conventions.[394] In the nineteenth century, however, some American courts downplayed their authority. In *Carter v. Soulard*, for instance, the Missouri Supreme Court confronted a statute where the legislature had written "grantor" when it likely meant "grantee."[395] Conveyancers had long treated "grantor" as a printer's error. But the court declined to defer to them.[396] It would be different, the court explained, "had this construction been sanctioned by judicial decisions, for such a length of time as to induce a belief that the Legislature acquiesced in the construction."[397] But the court found it implausible that "the acts and constructions of conveyancers are as much observed by the Legislature as the decisions of courts."[398] The conjunction of judicial precedent and legislative silence might fix a statute's meaning, but professional practice couldn't.[399]

Still, remnants of the older tradition survived. In 1859, the Secretary of the Interior asked Attorney General Jeremiah Black whether a district court could appoint commissioners (predecessors of today's magistrate judges), even though "the literal words of" the relevant statute gave that power to *circuit* courts.[400] Black thought so. For one thing, several district courts had already appointed commissioners, and he wanted to avoid any conflict between executive and judicial views of the law.[401] But he offered another reason, too. "The bar, the public, and Congress have acquiesced in this construction of the statute for I know not how many years, and the

---

give a construction to that clause of the act, yet the question has been solemnly settled. . . . [Congress] g[ave] a . . . legislative construction, or at least . . . acquiescence . . . as is now conclusive."); Commonwealth v. Fitz, 11 Mass. (10 Tyng) 540, 542 (1814) (discussing legislative acquiescence through near-identical reenactment of a judicially construed provision); Davis v. Blunt, 6 Mass. (5 Tyng) 487, 489 (1810) (claiming that the legislature, through inaction, has acquiesced to a judicial interpretation of a statute).

394. See Neil Duxbury, Jurists and Judges: An Essay on Influence 64 n.13 (2001); Lieberman, Province of Legislation, supra note 27, at 138–41; Postema, Bentham and the Common Law, supra note 58, at 260–61.

395. 1 Mo. 576, 578 (1825).

396. Id. at 579.

397. Id.

398. Id. Not all authorities agreed. See Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law 216 (John Norton Pomeroy ed., New York, Baker, Voorhis & Co. 2d ed. 1874) (1857).

399. See, e.g., Haynes v. Jenks, 19 Mass. (2 Pick.) 172, 175 (1824); Thomas v. Gaines, 42 Va. (1 Gratt.) 347, 353 (1845); David Hoffman, Construction of a Power of Attorney, and of a Deed, 3 Am. Jurist & L. Mag. 52, 69–70 (1830).

400. 9 Op. Att'y Gen. 268, 269 (1859). On commissioners, see generally Charles A. Lindquist, The Origin and Development of the United States Commissioner System, 14 Am. J. Legal Hist. 1 (1970).

401. 9 Op. Att'y Gen. at 269.

executive departments have found no fault with it until very lately," he wrote.[402] "Certainly this judicial, professional, popular, legislative and executive concurrence in one doctrine, is too respectable to be lightly set aside, even if it be erroneous. *Communis error facit jus*."[403]

IV. SOME FURTHER QUESTIONS

Eighteenth-century English law offered two competing paradigms of statutory precedent, and the conflict between them endured in the early Republic. Many lawyers believed that universal error could make law, even when interpreting statutes. Others rejected *communis error*.

This history raises at least two further questions. The first concerns the gap between the Founding-era debate and present doctrine. In the eighteenth and nineteenth centuries, lawyers debated whether a *course of precedent* might outweigh a statute's text.[404] But nobody endorsed anything like the Supreme Court's present doctrine, which gives extraordinary deference to a *single* statutory decision.[405] Why, then, did the Court eventually adopt an approach outside the traditional range of views?[406] A second

---

402. Id.

403. Id.; see also Lessee of Brown v. Clements, 44 U.S. (3 How.) 650, 670 (1845) (Catron, J., dissenting) ("The [Treasury] Secretary having adjudged and settled the construction of the act . . . : the government . . . , having acquiesced without complaint, recognizing the construction as the true one, through so great a lapse of years, it is now supposed by me, the duty of this court . . . to acquiesce also."), overruled by Gazzam v. Lessee of Phillips, 61 U.S. (20 How.) 372, 377–78 (1858); G.A. Endlich, A Commentary on the Interpretation of Statutes 502 (Jersey City, N.J., Frederick D. Linn & Co. 1888) (suggesting that usage of "an authoritative and public character . . . has materially modified the meaning of apparently unequivocal language"). But cf. Jerry L. Mashaw & Avi Perry, Administrative Statutory Interpretation in the Antebellum Republic, 2009 Mich. St. L. Rev. 7, 46–48 (noting the willingness of some antebellum attorneys general to correct a course of erroneous Executive Branch interpretations).

404. This historical practice aligns with Andrew Coan's epistemic justification for statutory stare decisis, which argues that "precedents that have endured successive rounds of judicial reconsideration" are more likely to be correct and that statutory precedents that have repeatedly dodged both judicial and legislative revision are less likely to harbor major errors. Andrew Coan, Relative Stare Decisis, 2025 Utah L. Rev. 1057, 1079–80.

405. Cf. United States v. Skrmetti, 145 S. Ct. 1816, 1859 (2025) (Alito, J., concurring in part and concurring in the judgment) ("I dissented in *Bostock*, but I accept the decision as a precedent that is entitled to the staunch protection we give statutory interpretation decisions."); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015) ("[*S*]*tare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute.").

406. The Court's approach seems still more puzzling in light of the very different path taken by Australia and the United Kingdom. See, e.g., Aubrey v. The Queen (2017) 260 CLR 305, ¶ 35 (Austl.) (upholding an indictment even though it ran afoul of a statutory precedent that "had not been distinguished or judicially doubted" in New South Wales for nearly 130 years); Babaniaris v. Lutony Fashions Pty Ltd (1987) 71 ALR 225, 232 (Austl.) (Mason, J.) ("If an appellate court . . . is convinced that a previous interpretation is plainly erroneous then it cannot allow previous error to stand in the way of declaring the true intent of the statute." (citations omitted)); Ogden Indus. Pty. Ltd. v. Lucas [1970] AC 113, 127 (PC) (appeal taken from Austl.) (UK) (Lord Upjohn) ("[J]udicial statements as to the

question concerns the historical relationship between constitutional and statutory precedent: In the early Republic, did debates about statutory *communis error* inspire similar controversies over constitutional precedent? These questions fall beyond this Essay's scope, but this Part offers some suggestions for future research.

A. *The Rise of Supercharged Statutory Precedent*

Start with the first puzzle: Why did federal courts move from the old classical/revisionist debate to a consensus that rejected both options in favor of "supercharged" stare decisis?[407] This section sketches one possibility. The story starts around the middle of the nineteenth century, when courts began treating individual decisions (not just a series of decisions) as potentially binding precedents in common law cases. From there, it was a short step to thinking that a single *statutory* decision could bind future courts. Still, that latter notion remained contested for quite some time. Only in the final decades of the twentieth century, it seems, did super-strong statutory precedent firmly take hold.

1. *One-Case Precedents.* — Today, courts treat individual decisions as binding.[408] The classical common law did not. The doctrine of *communis error*, recall, deferred not to a single erroneous decision but to a course of precedent. Individual cases could acquire prominence for symbolic or political reasons, or because they served as shorthand for a body of case law.[409]

---

construction and intention of an Act must never be allowed to supplant . . . its proper construction and courts must [not] fall[] into the error of treating the law to be that laid down by the judge . . . rather than found in the words of the Act itself."); Lisa Burton Crawford & Dan Meagher, Statutory Precedents Under the "Modern Approach" to Statutory Interpretation, 42 Syd. L. Rev. 209, 210 (2020) ("Despite the central importance of *stare decisis* in [Australia's] legal system, there are questions as to when a *statutory* precedent is binding . . . ."); Matthew Harding & Ian Malkin, Overruling in the High Court of Australia in Common Law Cases, 34 Melb. U. L. Rev. 519, 520 (2010) ("When asked to overrule itself in the interpretation of a statute, the [High] Court [of Australia] has not been averse to a degree of flexibility."); J.D. Heydon, Limits to the Powers of Ultimate Appellate Courts, 122 Law Q. Rev. 399, 407–08 (2006) ("[An Australian] final appellate court which is convinced that an earlier interpretation is erroneous must correct it: the court's fundamental responsibility is to give effect to the legislative intention."); Diggory Bailey, Settled Practice in Statutory Interpretation, 81 Cambridge L.J. 28, 31, 34–35 (2022) (noting the "varying weight" that settled practice has in UK courts when interpreting Acts of Parliament); cf. Diggory Bailey, Interpreting Parliamentary Inaction, 79 Cambridge L.J. 245, 246 (2020) (noting that the UK Supreme Court has criticized reliance on legislative acquiescence); Croft, supra note 152, at 132 n.80 (noting that, in the UK, "judicial precedents are not as important in the area of statutory interpretation as in others").

407. See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2295 (2024) (Kagan, J., dissenting).

408. See, e.g., *Kimble*, 576 U.S. at 457–58 ("As against this superpowered form of *stare decisis*, we would need a superspecial justification to warrant reversing *Brulotte*."); Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.").

409. See Arvind & Burset, Partisan Legal Traditions, supra note 39, at 377–78.

But until the middle of the nineteenth century, common lawyers typically didn't treat individual cases as binding per se.[410] That was partly from necessity. Law reports varied in quality and coverage, so there was no guarantee that a case would be reported accurately (or at all); it was safer to look for patterns.[411] Law reporting, in turn, reflected the realities of judicial behavior: Most cases resulted in "rapid unreserved judgments" that didn't reward or require careful study.[412] At the same time, mandatory rules of appellate jurisdiction meant that apex courts decided lots of cases.[413] That high volume meant that each case mattered less; it also gave judges frequent opportunities to revisit past cases and discard outliers.[414] Common law theory, too, pointed lawyers to patterns of practice rather than one-off decisions.[415]

In the later nineteenth and twentieth centuries, however, improved law reporting made it more practical for lawyers to treat individual cases as authoritative.[416] Around the same time, a jurisprudential shift encour-

410. See Baker, English Legal History, supra note 40, at 207–12; Lee, supra note 12, at 661 ("During [the eighteenth and early nineteenth centuries] the English courts began to speak of a qualified obligation to abide by past decisions."); Kempin, supra note 30, at 48.

411. To give an extreme example: According to the U.S. Reports, Justice Philip Barbour "delivered the opinion of the Court" in Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 130 (1837). Justice Wayne disagreed with that characterization. In a later opinion, Wayne wrote that most of Barbour's position "had not the assent of a majority of the members of this court, nor even that of a majority of the judges who concurred in the judgment." Smith v. Turner (*Passenger Cases*), 48 U.S. (7 How.) 283, 430 (1849) (opinion of Wayne, J.). As evidence, Wayne cited Justice Baldwin's concurrence—which Baldwin had published not in the U.S. Reports but in a book prepared for commercial sale. Id.; see also Ross E. Davies, The Last Word, 11 J. App. Prac. & Process 229, 239–49 (2010). Wayne's revisionism dismayed the Chief Justice: "[I]f an opinion thus prepared and delivered and promulgated in the official report may now be put aside, on the ground that it did not express what at that time was the opinion of the majority of the court, I do not see how the decisions . . . can hereafter command the public confidence." *Passenger Cases*, 48 U.S. (7 How.) at 488 (Taney, C.J., dissenting).

412. Mike Macnair, On Reducing Undue Trust in Judges: Or, Against the Modern Doctrine of Precedent, 31 King's L.J. 41, 46 (2020).

413. William C. Marra, Precedent and Jurisdiction, 174 U. Pa. L. Rev. 1549, 1557–60 (2026).

414. See id. at 1572; see also Thomas B. Bennett, There Is No Such Thing as Circuit Law, 107 Minn. L. Rev. 1681, 1687–89 (2023) (noting that circuit court decisions weren't considered binding "circuit law" until after the 1891 Evarts Act).

415. See John P. Dawson, The Oracles of the Law 77–79 (1968); supra section I.A.

416. See Peter M. Tiersma, The Textualization of Precedent, 82 Notre Dame L. Rev. 1187, 1228–29 (2007). The shift arguably started earlier for the Supreme Court's constitutional cases. There, a combination of reliable law reports, a clear judicial hierarchy, and majority (rather than seriatim) opinions for the Court made it easier to treat individual decisions as authoritative. Cf. Letter from James Madison to Spencer Roane (Sep. 2, 1819), *in* 1 Madison Papers, Retirement Series (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony eds. 2009), supra note 303, at 500, 501, https://rotunda.upress.virginia.edu/founders/JSMN-04-01-02-0455 [https://perma.cc/MWV3-L3TN] (last visited Sep. 26, 2026) (worrying that Chief Justice Marshall's opinion in McCulloch v.

aged lawyers to see judges as making law rather than discovering it.[417] In light of these developments, it became more natural for courts to regard a single case as the definitive guide to a statute's construction. Combined with the notion of legislative acquiescence, this new understanding of stare decisis proved powerful.[418]

Rockhill v. Nelson illustrates the shift.[419] The Indiana Supreme Court was asked to overturn its prior construction of a statute of descent. That construction depended on a single, seven-year-old precedent that the court thought was probably wrong.[420] But the court declined to upset it. Because a new construction would operate retrospectively, the court worried about producing "confusion in titles."[421] Only the legislature, it said, "can change the rule by a new statute, without interfering with vested rights."[422] That the legislature had "acquiesced in" the earlier precedent provided further reason for the court to stand by its error.[423] *Rockhill* grounded its decision in property and reliance interests,[424] but other courts applied the logic of one-case statutory precedent to other areas, including evidence and criminal procedure, that didn't raise obvious reliance concerns.[425]

Maryland, 17 U.S. (4 Wheat.) 316 (1819), "tends to reverse the rule" "that the meaning of" a statutory or constitutional provision "was to result from a course of particular decisions").

417. See Banner, Decline of Natural Law, supra note 43, at 182–87; Kempin, supra note 30, at 42–43.

418. More recently, courts have sometimes taken to construing judicial opinions like statutes, which submerges the statutory text even further. Margaret H. Lemos, Should Judicial Opinions Be Read Like Statutes?, 120 Nw. U. L. Rev. 1631, 1640–41, 1657 (2026); see also Lawrence M. Solan, Precedent in Statutory Interpretation, 94 N.C. L. Rev. 1165, 1171, 1175–76 (2016); Tiersma, supra note 416, at 1247. But cf. Borden v. United States, 141 S. Ct. 1817, 1833 n.9 (2021) ("'[T]he language of an opinion . . . is not always to be parsed as though we were dealing with language of a statute.' And that is most obviously true when an opinion's language revises (for easier reading) the statute's own. Better to heed the statutory language proper." (plurality opinion) (first alteration in original) (citation omitted) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979))).

419. 24 Ind. 422 (1865).

420. Id. at 424–25.

421. Id. at 424.

422. Id.

423. Id. at 424–25.

424. See id. at 424; see also Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458–59 (1852) (discounting the need to follow a precedent that "did not decide any question of property"); Barstow v. Union Consol. Silver Mining Co., 10 Nev. 386, 387 (1875) ("It is essential that there should be some stability in the decisions under which rights of property have been acquired."); Daniel H. Chamberlain, The Doctrine of Stare Decisis: Its Reasons and Its Extent 20–21 (New York, Baker, Voorhis & Co. 1885) (discussing *Rockhill* and its recognition of the "special value [of stare decisis] as applied to rights of property"); Nelson, Stare Decisis, supra note 14, at 20 & n.62 ("[I]f past decisions had established 'rules of property' . . . the resulting reliance interests could provide a reason to adhere to the decisions . . . .").

425. See, e.g., Hammett v. State, 52 Ga. 122, 124 (1874) (criminal law); Deenis v. Deenis, 79 Ill. 74, 77 (1875) (alimony); Bradley's Ex'rs v. Lyles, 7 Ky. Op. 462, 462–63 (1874)

One consequence of the new view of stare decisis was to sharpen the distinction between judicial precedent and on-the-ground usage. In the eighteenth and early nineteenth centuries, remember, precedent and practice had similar effects on the law.[426] For both, a series of decisions could clarify (or even modify) a statute's meaning.[427] As a result, judges and commentators tended to assimilate judicial, governmental, and popular interpretations of statutes.[428] But once lawyers started treating individual judicial decisions as authoritative, those categories came apart. A single judicial decision could fix a statute's meaning; but nobody thought the one-off interpretation of a statute by a government official or private party could have the same effect.[429]

Still, at the start of the twentieth century, our current doctrine of statutory precedent hadn't quite arrived. Even into the twentieth century, many courts continued to follow the older method, looking for patterns rather than a single controlling decision.[430] Some authorities suggested,

---

(evidence); Fries v. Mack, 33 Ohio St. 52, 58 (1877) (civil procedure); Jackson v. Commonwealth, 64 Va. (23 Gratt.) 919, 925–26 (1873) (criminal procedure); see also Endlich, supra note 403, at 508 (suggesting that statutory stare decisis was strongest in cases involving "a rule of property" but applied "even in other matters"); cf. Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules." (citations omitted)).

426. In the eighteenth century, "precedent" could refer either to the authoritative effect of prior judicial decisions or to the fact of prior practice. See Green, Traditional Questions, supra note 29 (manuscript at 41 n.296) ("Precedent continued to carry a double meaning—a fact about judicial practice, and an opinion (or opinions) sanctioning some custom as law—into the late-eighteenth century."); Oldham, Mansfield, Stare Decisis, and Ratio Decidendi, supra note 153, at 139–40.

427. See Baude, Constitutional Liquidation, supra note 376, at 37–38 (discussing the earlier view of precedent in which "it was a line of cases, rather than a single decision, that ought not to be overturned" (internal quotation marks omitted) (quoting Harold J. Berman & Charles J. Reid, Jr., The Transformation of English Legal Science: From Hale to Blackstone, 45 Emory L.J. 437, 449 (1996))); Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 48–49 (2020) (explaining that judicial precedent and political practices could be grouped together in the nineteenth century, when "most major constitutional questions were settled outside the courts"); supra note 380 and accompanying text.

428. See supra section I.C.

429. See Bamzai, supra note 106, at 941–47 (describing courts' deference to "consistent and uniform" interpretations over time); Snyder, supra note 29 (manuscript at 36) (noting that only "repeated" practices were thought to shed light on the law's meaning).

430. See, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 472–73 (1915) (looking for "long-continued action" and "a regular practice" as a basis for "determining the meaning of a statute"); Marra, supra note 413, at 1588–89 (providing further examples of how "courts continued to emphasize the importance of a series of decisions well into the twentieth century"); see also State v. Covington, 72 Tenn. 51, 58 (1879) ("The settled policy . . . ought not to be set aside upon the mere words of a statute . . . after an acquiescence, by the Legislature and the profession . . . for over twenty years . . . ."). One treatise distinguished between the authority of a "single decision," which "should be followed unless clearly wrong," and "a series of decisions," which "may bind where one

too, that prior constructions should carry determinative weight only for doubtful statutes.[431] And it remained unsettled whether statutory precedents deserved greater deference than other kinds of decisions.[432]

2. *Canonizing the Brandeis Rule.* — Then came Justice Louis Brandeis. Discussions of super-strong stare decisis typically trace the doctrine to his dissent in *Burnet v. Coronado Oil & Gas Co.*[433] There, he distinguished errors amenable to legislative correction from "cases involving the Federal Constitution, where correction through legislative action is practically impossible."[434] That passage has become the canonical citation for heightened statutory stare decisis.[435] But its present status has more to do with retrospective canonization than its contemporaneous significance.

To start, invocations of *Burnet* often get Brandeis backwards. His project sought not to shield statutory precedents but to expose constitutional ones.[436] *Burnet* itself involved the constitutionality of a tax, not the construction of a statute.[437] And though Brandeis called stare decisis "usually the wise policy" in statutory cases, he string-cited more than a

---

would not." Joel Prentiss Bishop, Commentaries on the Written Laws and Their Interpretation 95 (Boston, Little, Brown & Co. 1882).

431. See, e.g., Robertson v. Downing, 127 U.S. 607, 613 (1888) (avoiding the weighing of practice when an act's "meaning is plain"); Peabody v. Stark, 83 U.S. (16 Wall.) 240, 243–44 (1872) (deferring to the executive office where there was an "absence of a clear conviction" as to the meaning of a statute, though it was not "in general obligatory upon" the Court). Thus, while Henry Campbell Black insisted that *communis error* "has no applicability to the interpretation of the written laws," he admitted "that there are some decisions in which a practical construction has been allowed to override the obvious meaning of the law." Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 296–97 (2d ed. 1911).

432. See Lee, supra note 12, at 716–18 (discussing the Taney Court). Compare In re Terms of Judges, 21 S.E. 963, 964 (N.C. 1894) ("The doctrine of stare decisis applies with equal force to constructions placed upon constitutions and upon statutes."), with Shreve v. Cheesman, 69 F. 785, 791 (8th Cir. 1895) ("[T]here are no decisions to which [stare decisis] applies more . . . than to those which construe statutes that establish or declare rules of property."), and P.J. Willis & Bro. v. Owen, 43 Tex. 41, 48–49 (1875) (arguing that legality of a state tax cannot "be disposed of by the doctrine of *stare decisis*," which pertains only to questions of "property" and "contract").

433. 285 U.S. 393 (1932); see also, e.g., Knick v. Twp. of Scott, 139 S. Ct. 2162, 2189 (2019) (Kagan, J., dissenting); Barrett, Statutory Stare Decisis, supra note 1, at 317 n.1; Coan, supra note 404, at 1062–63; Solan, supra note 418, at 1176.

434. *Burnet*, 285 U.S. at 406–07 (Brandeis, J., dissenting).

435. See, e.g., United States v. Lane, 474 U.S. 438, 460 n.1 (1986) (Brennan, J., concurring in part and dissenting in part); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting).

436. Cf. Oscar Cox, Book Review, 42 Yale L.J. 147, 148 (1932) (reviewing Mr. Justice Brandeis (Felix Frankfurter, ed.) (1932)) (describing Brandeis's "knack of overruling"); Morton J. Horwitz, The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 53 & n.99 (1993) (describing Brandeis's investment in "changing constitutional meaning"); Lee, supra note 12, at 727 (describing Brandeis's vision as "diminished deference to constitutional precedent").

437. 285 U.S. at 397–98.

dozen decisions where the Court had done otherwise.[438] To be sure, he seems to have thought it less important to overrule bad statutory precedents than bad constitutional ones.[439] But that's different from urging supercharged deference to statutory decisions.[440]

Burnet neither reflected nor created a consensus about statutory precedent.[441] In 1946, Justice Rutledge cautioned against a "recent tendency" to treat Congress's silence as approval of "judicial misconstruction."[442] Then-Professor Edward Levi was sympathetic to strong statutory stare decisis, but he called it a "hard" doctrine "against which judges frequently rebel."[443] Among the rebels was Justice William Douglas, who praised the Court for "overrul[ing] decisions involving interpretations of Acts of Congress and thus clear[ing] the stream of law of derelicts of its own creation."[444] More than two decades after *Burnet*, Justice Stanley Reed (joined by three colleagues) denied that the Court had adopted any firm rule of statutory stare decisis: "On this our cases conflict."[445]

---

438. Id. at 406 & n.1 (Brandeis, J., dissenting).

439. See Melvin I. Urofsky, The Brandeis–Frankfurter Conversations, 1985 Sup. Ct. Rev. 299, 314, 329.

440. Only a few years later, Justice Stanley Reed cited the *Burnet* dissent for the proposition that "stare decisis, in statutory construction, is a useful rule, not an inexorable command." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (citing *Burnet*, 285 U.S. at 406 n.1 (Brandeis, J., dissenting)).

Speaking of *Erie*—Brandeis's majority opinion in that case gave a strong nod to statutory stare decisis: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century." Id. at 77 (majority opinion). But that dictum came in an opinion whose reinterpretation of the Rules of Decision Act arguably overruled more "prior decisions at a single stroke" than any other "decision in the whole of Anglo-American legal history." Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1338–39 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Besides, the dictum may have been Justice Harlan Fiske Stone's idea. See Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: *Erie*, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America 109 (2000).

441. See Strang & Poole, supra note 3, at 973. Compare Bishop, supra note 430, at 95 ("The doctrine of *stare decisis* prevails in the interpretation of statutes as in the other departments of the law." (footnote omitted)), with Sedgwick, supra note 398, at 215 (suggesting that stare decisis applies "particularly in regard to the construction of statutes").

442. Cleveland v. United States, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring).

443. Edward H. Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 524 (1948).

444. William O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 746 (1949); see also Hayden C. Covington, The American Doctrine of Stare Decisis, 24 Tex. L. Rev. 190, 199 (1946) (arguing that courts should avoid "relegating correction to the legislature").

445. Indian Towing Co. v. United States, 350 U.S. 61, 74 (1955) (Reed, J., dissenting).

They continued to conflict in the 1960s and early 1970s,[446] and Justice Douglas remained unconvinced.[447] By the mid-1970s, however, the Court assumed more readily that precedent carried extra heft in statutory cases.[448] At the same time, the Court's shrinking (and increasingly discretionary) docket meant that each decision carried proportionally greater weight and had less chance of being revisited at all.[449] Still, the doctrine's boundaries remained contested,[450] and William Eskridge could observe in 1988 that the Court "has not established the super-strong presumption as settled doctrine."[451] But, by then, it had come pretty close.[452]

B. *Common Error and the Constitution*

Return, finally, to Justice Thomas's critique in *Gamble v. United States*.[453] This Essay has focused on its implications for statutory stare decisis. But Justice Thomas argued that the same principles should govern statutory and constitutional precedents alike.[454] We might ask whether Founding-era lawyers agreed, and whether the history of statutory precedent might therefore inform the history of constitutional stare decisis.

---

446. See Eskridge, Overruling Statutory Precedents, supra note 3, at 1385.

447. See Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry. Co., 385 U.S. 182, 185–86 (1966) (Douglas, J., dissenting); Girouard v. United States, 328 U.S. 61, 70 (1946). He wasn't entirely consistent. See United Gas Improvement Co. v. Cont'l Oil Co., 381 U.S. 392, 406 (1965) (Douglas, J., dissenting) ("[S]ince we deal with the vagaries of a statute with no constitutional overtones, I think the matter should be left where *Panhandle Eastern Pipe Line* left it . . . until Congress changes it."); Swift & Co. v. Wickham, 382 U.S. 111, 133–34 (1965) (Douglas, J., dissenting) ("An error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention of Congress . . . Congress may change it.").

448. See, e.g., Monell v. Dep't of Soc. Servs., 436 U.S. 658, 695 (1978); Edelman v. Jordan, 415 U.S. 651, 671 & n.14 (1974); supra notes 4–9 and accompanying text.

449. See Marra, supra note 413, at 1591.

450. For instance, some Justices argued that stare decisis should matter less for the Civil Rights Acts, which held "significance approximating constitutional dimension." Monroe v. Pape, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting in part); accord Maine v. Thiboutot, 448 U.S. 1, 33 (1980) (Powell, J., dissenting) (noting that "the ordinary concerns of *stare decisis* [are] appl[ied] less forcefully" by the Court in cases construing civil rights legislation); see also Johnson v. Transp. Agency, 480 U.S. 616, 672–73 (1987) (Scalia, J., dissenting) ("[T]his Court has applied the doctrine of *stare decisis* to civil rights statutes less rigorously than to other laws."). The Court later rejected that idea. Patterson v. McLean Credit Union, 485 U.S. 617, 619 (1988) (per curiam).

451. Eskridge, Overruling Statutory Precedents, supra note 3, at 1368; see also Easterbrook, supra note 11, at 427 n.17.

452. In 1989, four Justices joined a dissent suggesting that the Court's duty to respect its own statutory precedents was "strikingly similar to the duty of other federal courts to respect" vertical stare decisis. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 486 (1989) (Stevens, J., dissenting).

453. 139 S. Ct. 1960, 1984–86 (2019) (Thomas, J., concurring).

454. Id.

Early Americans disputed the Constitution's genre. (Was it a treaty?[455] Akin to a corporate charter?[456] Sui generis?[457]) But they often read it using tools of legislative interpretation.[458] It would be surprising, therefore, if debates about statutory precedent left no imprint on approaches to constitutional interpretation.

Exploring that topic fully is work for another day. But as evidence that the inquiry might bear fruit, consider *Stuart v. Laird*.[459] The case began as an attempt to collect a debt in Virginia, but it soon raised broader

---

455. See generally David C. Hendrickson, Peace Pact: The Lost World of the American Founding (2003) (considering the view that the Constitution initially served as a peace pact among the states).

456. See Mary Sarah Bilder, The Emerging Genre of the Constitution: Kent Newmyer and the Heroic Age, 52 Conn. L. Rev. 1263, 1269 (2021) ("Not infrequently, the framing generation used the word *charter* as if it was that genre to which the document belonged."); John Mikhail, Is the Constitution a Power of Attorney or a Corporate Charter?, 17 Geo. J.L. & Pub. Pol'y 407, 408 (2019) ("I have no difficulty in maintaining that the Constitution of the United States is a corporate charter, or at least that it is more appropriately regarded as a corporate charter than as any other eighteenth-century legal instrument, such as a statute, contract, treaty, or trust."). If the Constitution was seen as a charter, then it might be fruitful to investigate the relationship between text and usage in that context, too. See, e.g., Blankley v. Winstanley (1789) 100 Eng. Rep. 574, 579; 3 Term Rep. 279, 288 (opinion of Buller, J.) ("[T]his Court has held that a settled usage would go a great way to control the words of a charter."); R v. Varlo (1775) 98 Eng. Rep. 1068, 1069; 1 Cowp. 248, 250 (opinion of Mansfield, C.J.) (suggesting that "usage" can clarify "doubtful" language but cannot "overturn the clear words of a charter"); Berwick v. Johnson (1773) 98 Eng. Rep. 680, 682; Lofft 334, 339 (suggesting that long corporate usage can override only those parts of a charter introduced for a corporation's own benefit); R v. Tomlyn (1736) 95 Eng. Rep. 205, 205; Cas. t. Hard. 316, 316 (explaining that usage can't alter corporate election rules).

457. See Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era 97, 117 (2018); Nelson, Originalism, supra note 168, at 569–78 (describing early debates about what kind of document the Constitution was and how to interpret it).

458. Farah Peterson, Expounding the Constitution, 130 Yale L.J. 2, 10 (2020); see also Hamburger, supra note 40, at 294–95; McGinnis & Rappaport, supra note 321, at 129–30; Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, at 448 (2009); H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 911 (1985) ("Both agreed, Hamilton approvingly and 'Brutus' disapprovingly, that the Constitution was to be viewed as a quasi-statute, a command from a legal superior to those under its authority."). But see Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution 62–63 (2017) (rejecting the statute analogy); 1 Reports of the Trials of Colonel Aaron Burr 533 (David Robertson ed., Philadelphia, Hopkins & Earle 1808) (argument of counsel) ("I deny that any such rules of construction, however just they may be when applied to a statute, can be properly used, with reference to the constitution of the United States."). This Essay focuses on historical arguments, sidestepping the normative question of whether the Constitution *should* be assimilated to a statute. See Strauss, supra note 162, at 889–90 ("Some of the puzzling aspects of our current practices of constitutional interpretation appear problematic only because of the unreflective association of constitutional and statutory interpretation.").

459. 5 U.S. (1 Cranch) 299 (1803). It was decided six days after Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and was probably the more important case at the time. See Akhil Reed Amar, America's Constitution: A Biography 223 (2005); Jed Handelsman Shugerman, The People's Courts: Pursuing Judicial Independence in America 33 (2012).

questions about Congress's authority over the judiciary.[460] Chief Justice Marshall, sitting as a circuit judge, had ruled for the creditor. The debtor challenged that decision by arguing that Marshall's circuit court—along with the rest of the circuit courts created by the Judiciary Act of 1802—was unconstitutional.[461]

When the case reached the Supreme Court, the parties advanced now-familiar arguments about precedent. To prevail, the creditor needed to demonstrate the constitutionality of circuit courts. He started by tracing circuit-riding to the first Judiciary Act—a statute enacted by the "first congress," many of whose members had participated in the constitutional convention.[462] It was "probable," he argued, that those men "best knew [the] meaning and true construction" of the Constitution.[463] But even if the first Congress had "mistaken" the Constitution's meaning, he continued, "yet the acquiescence of the judges and of the people under that construction, has given it a sanction which ought not now to be questioned."[464] That argument invoked both *communis error* and a related maxim, *contemporanea expositio*—the idea that the contemporary views of an instrument's drafters offer special insight into its meaning.[465] In his view, both maxims led to the same place: Justices had ridden circuit from the nation's very beginning, and their long practice in doing so made it constitutional.

The debtor countered by appealing to the Constitution's text and original meaning. "An error was committed in 1789," he argued, when Congress first imposed circuit-riding duties.[466] "We now contend for the pure construction of the constitution, and hope it will be established,

---

460. Human suffering underpinned these constitutional debates; the creditor sought to execute on the debt by seizing several enslaved people owned by his debtor—"Maria and child, Paul, Jenny, Selah, Kate, and Anna." *Stuart*, 5 U.S. (1 Cranch) at 300; see also Aziz Z. Huq, The Collapse of Constitutional Remedies 48–51 (2021); Supreme Court Appellate Case File, Stuart v. Laird (on file with the Nat'l Archives, Rec. Grp. 267, Appellate Case Files of the Supreme Court of the United States, 1792–1831, roll 6, no. 141) (naming the enslaved people who were seized). As it happens, the creditor Laird was initially represented by Daniel Call, who reported *Commonwealth v. Posey*. See supra note 311 and accompanying text; *Stuart*, 5 U.S. (1 Cranch) at 300.

461. *Stuart*, 5 U.S. (1 Cranch) at 302. The debtor raised several objections: The statute "impose[d] new duties upon the judges of the supreme court, and thereby infringe[d] their independence"; amounted to "a legislative instead of an executive appointment of judges to" the circuit courts; prevented cases from being decided by "unbiassed" Justices who hadn't heard the case below; and improperly gave Justices an original jurisdiction. Id. at 305; see also David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 75–76 (1985).

462. *Stuart*, 5 U.S. (1 Cranch) at 307–08.

463. Id.

464. Id. at 308.

465. Noy, supra note 48, at 32–33; Bamzai, supra note 106, at 933–37; see also Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 290 (1827) (opinion of Johnson, J.) (distinguishing these concepts).

466. *Stuart*, 5 U.S. (1 Cranch) at 308.

notwithstanding the precedent to the contrary."[467] This was Erskine's treason-trials argument all over again.[468]

The Justices were having a similar debate behind the scenes. In 1802, Justice Samuel Chase had argued that the Constitution barred circuit riding.[469] "But the Judges have held Circuit Courts ever since the formation of the Federal Government," he continued, anticipating an objection.[470] "The fact is so."[471] But he thought the practice carried little weight. He (and perhaps others) had "never considered the question" before, and unexamined usage didn't count.[472] Justice William Cushing disagreed. Though he found "much good sense & argument" in Chase's analysis, he thought it came too late: "[C]an we, after Eleven years practical exposition of the Laws & Constitution by all federal Judges, now say, that Congress has not power to direct a Judge of the Sup[reme] Court to act with a D[istrict] Judge in an inferiour Court . . . ? I think we cannot."[473]

By the time *Stuart* reached the Court, the Justices had settled on something like the classical approach. Writing for a unanimous bench, Justice William Paterson handled circuit-riding in a single paragraph:

> To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.[474]

Though Cushing was "absent on account of ill health," his view had prevailed.[475]

Stuart's reliance on *communis error* is easy to miss. Paterson didn't cite the maxim, relying instead on *interpres consuetudo* and *contemporanea*

---

467. Id.

468. See supra notes 220–221 and accompanying text.

469. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *in* 6 Marshall Papers, supra note 340, at 109, 113–15, https://rotunda.upress.virginia.edu/founders/JNML-01-06-02-0098 [https://perma.cc/G59D-VFZ3] (last visited Sep. 26, 2026).

470. Id.

471. Id.

472. Id.

473. Id. at 116 n.5 (internal quotation marks omitted) (quoting Letter from Hannah Cushing to Abigail Adams (June 25, 1802)).

474. Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).

475. Id. at 308; cf. Letter from William Paterson to John Marshall (June 11, 1802), *in* 6 Marshall Papers, supra note 340, at 120, 120, https://rotunda.upress.virginia.edu/founders/default.xqy?keys=JNML-print-01-06-02-0101 [https://perma.cc/P8V7-SP3B] (last visited Sep. 26, 2026) (noting that Cushing had written to Paterson to explain his views). Marshall recused himself because his circuit decision was being reviewed. *Stuart*, 5 U.S. (1 Cranch) at 308.

expositio.[476] Usually, those other maxims applied only to ambiguous statutes.[477] The Court's opinion, however, didn't identify any textual ambiguity for usage to resolve. Instead, it presented precedent as dispositive without engaging the text. That style of argument resembled *communis error*, and nineteenth-century lawyers often cited *Stuart* accordingly.[478]

If *Stuart* reflected a "classical" view of constitutional precedent, other sources reveal a more "revisionist" stance.[479] Consider *McCulloch v. Maryland*.[480] For practice to carry decisive weight in constitutional interpretation, Chief Justice Marshall wrote, the question must be "doubtful"; concern the separation of powers, not "the great principles of liberty"; and reflect public deliberation.[481] Even then, Marshall suggested, practice still might not control.[482] Madison's theory of liquidation likewise reads like a repudiation of the classical paradigm. Madison thought a "course of practice" could illuminate constitutional and statutory questions alike.[483] But

476. Bamzai, supra note 106, at 941–42; see also Baude, Constitutional Liquidation, supra note 376, at 33 (describing *Stuart* as an instance of liquidation).

477. See Bamzai, supra note 106, at 935–37; see also, e.g., Edwards's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 209 (1827); 1 Story, supra note 337, § 407; supra notes 107–109 and accompanying text.

478. See, e.g., Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 164–66 (1819) (argument of counsel) (citing *Stuart*, 5 U.S. (1 Cranch) at 299, to support *communis error* as an approach to the construction of "insolvent laws"); Rogers v. Beiller, 3 Mart. (o.s.) 665, 670–71 (La. 1815) (citing *Stuart*, 5 U.S. (1 Cranch) at 309, to support *communis error*); Lyman v. Arms, 22 Mass. (5 Pick.) 213, 215 (1827) (argument of counsel) (citing *Stuart*, 5 U.S. (1 Cranch) at 299, for the proposition that "it is too late to disturb the decision, even if it was originally incorrect"); Booraem v. N. Hudson Cnty. Ry. Co., 44 N.J. Eq. (17 Stew.) 70, 71 n.note (1888) (reporter's note listing *Stuart*, 5 U.S. (1 Cranch) at 299, among cases "resort[ing] to" *communis error*); Maxwell, supra note 273, at 274 n.b. But cf. Jack v. Shoemaker, 3 Binn. 280, 285 (Pa. 1810) (opinion of Yeates, J.) (citing *Stuart*, 5 U.S. (1 Cranch) at 299, as *contemporanea expositio*). Alternatively, *Stuart* might stand for the proposition that *contemporanea expositio*, like *communis error*, could overcome the clear text of a statute. See United States v. The Recorder, 27 F. Cas. 718, 720 (C.C.S.D.N.Y. 1847) (No. 16,129) ("The supreme court of the United States has given the most solemn sanction to the doctrine, in declaring that a contemporary exposition of the constitution, practised and acquiesced in for a period of years, fixes its construction . . . ." (citing *Stuart*, 5 U.S. (1 Cranch) at 299)).

479. See, e.g., Eakin v. Raub, 12 Serg. & Rawle 330, 346 (Pa. 1825) (Gibson, J., dissenting) ("The constitution is a collection of fundamental laws, not to be departed from in practice, nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error* . . . ."). One might question whether *Stuart* reflected contemporary legal orthodoxy. See Currie, supra note 461, at 74–77 (describing *Stuart* as an outlier); Michael J. Klarman, How Great Were the "Great" Marshall Court Decisions?, 87 Va. L. Rev. 1111, 1124–25 & n.60 (2001) (describing *Stuart* as an act of political self-preservation).

480. 17 U.S. (4 Wheat.) 316 (1819).

481. See id. at 401–02 (suggesting that usage will not cure "a bold and plain usurpation" of unconstitutional authority); Baude, Constitutional Liquidation, supra note 376, at 24.

482. *McCulloch*, 17 U.S. (4 Wheat.) at 401.

483. Letter from James Madison to Charles J. Ingersoll, supra note 377; accord Letter from James Madison to Spencer Roane, supra note 416, at 502. But cf. Jack N. Rakove,

he gave practice a limited role. "There has been a fallacy," he wrote in 1831, "in confounding a question whether precedents could *expound* a Constitution, with a question whether they could *alter* a Constitution."[484] After all, he continued, everyone agreed "that precedents of a certain description, fix the interpretation of a law, yet who will pretend that they can repeal or alter a law."[485]

Who indeed—except Coke, Hardwicke, Mansfield, a supermajority of Virginia judges in *Posey*, and a unanimous Supreme Court in *Stuart*? A few years after Madison wrote his letter, a leading English treatise with a wide American readership restated the classical position that decisions over "a long period" might "repeal" an act of Parliament.[486] Read in context, Madison's theory looks less like a recitation of orthodoxy than an intervention in several debates—about the commensurability of statutory and constitutional interpretation, the primacy of text over practice, and whether mere usage can shape law without judicial *imprimatur* or public discussion.[487]

In making these observations, this Essay seeks merely to point out some directions for future research. In recent years, historians have asked how and when the Constitution came to be seen as having "a stable meaning that derived from its written status."[488] A complete answer, this Essay suggests, will require careful attention not only to American legal and political history of the 1780s and 1790s, where scholars have already

---

Original Meanings: Politics and Ideas in the Making of the Constitution 159, 345 (1996) (suggesting that Madison identified divergences between statutory and constitutional interpretation).

484. Letter from James Madison to Nicholas P. Trist (Dec. 1, 1831), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Madison/99-02-02-2483 [https://perma.cc/CX98-FDED] (last visited Sep. 6, 2026) (emphasis added).

485. Id.

486. James Ram, The Science of Legal Judgment 129 (London, A. Maxwell 1834).

487. The debates continue. For instance, proponents of constitutional liquidation require express debate before usage can fix constitutional meaning, while theorists of historical gloss or tradition give more weight to bare practice. See Curtis A. Bradley, Historical Gloss and Foreign Affairs: Constitutional Authority in Practice 22 (2024); Bradley & Siegel, supra note 427, at 55; Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1506–07 (2023); Alison L. LaCroix, Historical Gloss: A Primer, 126 Harv. L. Rev. Forum 75, 77–79 (2012), https://harvardlawreview.org/forum/vol-126/historical-gloss-a-primer/ [https://perma.cc/7TFX-KZ87]. For other discussions of whether practice can authorize departures from the Constitution's text, see Samuel Issacharoff & Trevor Morrison, Constitution by Convention, 108 Calif. L. Rev. 1913, 1914 (2020); Darrell A.H. Miller, Falsifying Tradition, 75 Duke L.J. 1311, 1323–24 (2026); Saikrishna Bangalore Prakash, Against Constitution by Convention, 108 Calif. L. Rev. 1975, 1976–78 (2020); Adrian Vermeule, Tradition as a Freestanding Source of Law, New Digest (June 25, 2024), https://thenewdigest.substack.com/p/tradition-as-a-freestanding-source [https://perma.cc/4HX9-NFVM].

488. Siddique, supra note 47, at 588; see also Gienapp, supra note 457, at 147; cf. Linda Colley, The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World 3 (2021) (documenting the global spread of single-document constitutions starting in the 1750s).

looked closely, but also to the longer history of debates about the relative strength of written law against precedent.

CONCLUSION

Eighteenth-century lawyers developed rival theories of statutory stare decisis. The older, classical view held that a course of precedent or practice could control even an unambiguous statute. The revisionist alternative insisted on the primacy of a statute's original meaning. The contest between these approaches persisted well into the nineteenth century, and only in the final decades of the twentieth did the Supreme Court adopt its current doctrine—which rejected both sides in the Founding-era debate by giving extraordinary deference to individual statutory decisions.

Readers must decide for themselves what to do with that history.[489] Some will doubt the relevance of Founding-era legal methods to present-

---

489. Cf. Letter from F.W. Maitland to A.V. Dicey (c. 1896), *in* 2 The Letters of Frederic William Maitland 104, 105 (P.N.R. Zutshi ed., 1995) (warning that history cannot remain "true to fact . . . if it begins to think what lessons it can teach").

At the risk of defying Maitland's admonition, some readers might find it helpful to preview where this Essay's historical arguments might lead. A lot depends on where one starts. Of course, originalists and non-originalists will see things differently. And even among originalists, there's persistent disagreement about whether stare decisis depends on constitutional text (such as Article III's Vesting Clause) or on unwritten practices that the Constitution neither codified nor disturbed. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2277–78 (2024) (Gorsuch, J., concurring) (discussing the origins and scope of judicial power); United States v. Rahimi, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring) ("The 'judicial Power' established in Article III incorporates the principle of *stare decisis*, both vertical and horizontal."); McGinnis & Rappaport, supra note 321, at 168–72 ("[T]he Constitution allows for precedent in two distinct ways. First, it incorporates a minimal degree of precedent under the judicial power. Second . . . the Constitution treats precedent as a matter of common law that is revisable by congressional statute."); Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813, 1865–66 (2012) ("Instead of hard-coding stare decisis into the language of the Constitution, an alternative story might analyze the doctrine as a backdrop."). Because so much depends on one's starting assumptions, this Essay offers three illustrations of the very different ways in which its argument might cash out. (These serve as illustrations only, without meaning to suggest which example, if any, reflects the soundest approach.)

Illustration #1: You're an originalist who thinks that the law of precedent depends on the original meaning of the "judicial Power" vested in federal courts. U.S. Const. art. III, § 1. After reading this Essay, you conclude that "judicial power" lacked an agreed-upon original meaning with respect to statutory precedent. Accordingly, you see that phrase as a target for Madisonian liquidation, that is, the theory that a course of repeated practice can sometimes settle the meaning of indeterminate constitutional language. See Baude, Constitutional Liquidation, supra note 376, at 13–21. You might think, too, that such a settlement occurred in the late twentieth century, when the Supreme Court coalesced around its present doctrine of super-strong statutory stare decisis. So, you conclude that originalism permits, and perhaps even requires, the Court's present approach to statutory precedent.

Illustration #2: You think that the very nature of written law means that a statute's original meaning must presumptively prevail over precedent. But you're curious whether "the Nation's historical tradition" might contain exceptions to that rule. Cf. N.Y. State Rifle

day adjudication.[490] And even if one looks to tradition for guidance, one must choose which tradition to adopt.[491] History can help pose these questions, but it can't decide them.[492] In the meantime, the debate continues. The tension between text and precedent has animated the common law for centuries. It would be surprising if it stopped anytime soon.

& Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (discussing a similar framework for the Second Amendment). Tradition, as you understand the concept, is distinct from history. When lawyers invoke "tradition," they don't mean to incorporate every past doctrine or practice; instead, they're drawing a selective picture of the past based on what they see as the tradition's normative core. See James Alexander, A Systematic Theory of Tradition, 10 J. Phil. Hist. 1, 23–24 (2016). And while the classical and revisionist approaches are both part of our *history*, it seems to you that the revisionist paradigm better fits our *tradition*. After all, you reason, early Americans held revisionist jurists like Camden and Erskine in high esteem. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1177 (1991); Phillips, supra note 301, at 684. In any event, you're not persuaded that the classical framework enjoyed sufficiently widespread respect in the early United States to overcome your textualist presumption in favor of overruling demonstrably erroneous precedents.

Illustration #3: You think the law of precedent depends on unwritten law rather than the text of Article III. You also think that the law of the past remains the law today, unless something lawfully intervened to change the law. See William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455, 1482–83 (2019). From this Essay, you learn that the law in the early eighteenth century reflected the classical doctrine of *communis error*. When did that law change? Maybe never. To be sure, revisionists attacked the classical framework. But they never changed the law, in the sense of producing a new consensus or orthodoxy. For that reason, you conclude, the classical paradigm of *communis error* remains our law today, even if courts often say otherwise. Cf. id. at 1473–77 (arguing that courts may mistake the law's content without changing it).

The fact that these illustrations point in different directions might tempt some readers to conclude that history provides no guidance at all. This Essay doesn't mean to invite that degree of skepticism. The historical record can narrow the field of plausible accounts and make it easier to falsify arguments that rest on shaky premises. But translating that record into a doctrinal rule is ultimately a question of law, not of history.

490. Cf. Randy J. Kozel, Precedent and Constitutional Structure, 112 Nw. U. L. Rev. 789, 792 (2018) (arguing that "the Constitution's structure, text, and historical context" create a "baseline" role for precedent but not every detail of its application).

491. See Arvind & Burset, Partisan Legal Traditions, supra note 39, at 403–04; Jud Campbell, Tradition, Originalism, and General Fundamental Law, 47 Harv. J.L. & Pub. Pol'y 635, 655–56 (2024); Bernadette Meyler, Towards a Common Law Originalism, 59 Stan. L. Rev. 551, 556–57 (2006); Pojanowski, supra note 58, at 1424.

492. Even if one wanted to apply eighteenth-century methods today, they might require significant adaptation. Cf. Samuel L. Bray, The Mischief Rule, 109 Geo. L.J. 967, 1008 (2021) ("[T]he mischief rule fits the legal culture that produced it—a different legal culture from our own. That conclusion generates certain limits on the application of the mischief rule today."); supra notes 155–170 and accompanying text (discussing arguments that "ancient" and "modern" statutes require different modes of interpretation). One might ask, for instance, how a concept like *communis error*, which looks to patterns of decisions, would function in a world of one-case precedents that lawyers parse like statutes. See Tiersma, supra note 416, at 1188.