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The Idea of the Common Law in West Virginia Jurisprudential History: Morningstar v. Black & Decker Revisited

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THE IDEA OF THE COMMON LAW IN WEST VIRGINIA JURISPRUDENTIAL HISTORY: MORNINGSTAR V. BLACK & DECKER REVISITED

James Audley McLaughlin*

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I remember thinking it odd, very odd, that during a moot court oral argument, a law student claimed that an English case (Winterbottom v. Wright1), decided in 1840-something, was the law of West Virginia and could not be overruled by the court—that only the legislature could overrule it. Perplexed, I said, “But the court could overrule its own decisional doctrine made just two years ago, right?”

“Yes,” came the reply.
“In other words,” I said, “a decision made more than a hundred years ago,

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1 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). This is actually the case not followed in Morningstar v. Black & Decker, infra note 4. I believe it was the case cited by the student in the colloquy below.
by a foreign court seventy years after we had declared our independence from that foreign court’s government, was binding on us; whereas a decision made by our own court, for our state, in our own time, was not binding.”

He nodded.

“Doesn’t that strike you as absurd?” I continued.

“Well...” came the hesitant reply.

I hurried on: “Where did you get such an absurd notion?”

“From the state constitution,” came the now more confident reply.

“Read it,” I said.

He read the following: “Such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.”

“But,” I said, “who would interpret those words to mean that Winterbottom v. Wright must now be followed?”

“Our Supreme Court of Appeals,” came the reply. Then he cited several cases.

“Oh,” said I, slumping behind the bench.

The interpretation of Article VIII, Section 13, claimed by the student advocate to be contained in West Virginia cases would create an absurdity worthy of Monty Python. Any claim for this absurd reading as part of West Virginia “law” was laid to rest in Morningstar v. Black & Decker in 1979. This claimed reading of the common-law-shall-continue clause was, as far as my research discloses, never part of the constitutional doctrine of West Virginia, at least in the strong sense of the Supreme Court of Appeals holding (for instance): “We would find liability on the facts of this case but for the English case from 1845 that says: no liability on indistinguishable facts. Since our legislature has not seen fit to overrule this outdated doctrine, and even though no modern English court and no modern American state or federal court outside West Virginia follows it, we must adhere to the mandate of our constitution and follow the 1845 case.” Nonetheless, a weaker

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2 See infra note 4.

3 My best recollection is that this colloquy took place in 1973. The student was Fred Delp, who, I also recall, was an excellent student. Of course, the colloquy is reconstructed and not verbatim. Ed. note: Frederick L. Delp was an Associate Editor of the W.Va. L. Rev. 77 (1974-75).


5 253 S.E.2d 666 (W.Va. 1979). In this case, Justice Thomas B. Miller, speaking for a unanimous court, refused to follow Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), as to privity of contract in products liability cases. The court’s operative holding was that a plaintiff in a products liability case does not need to prove “that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit [him to prove]... the defective condition of the product as the principal basis of liability” id. at 677. The court’s secondary holding, one that is crucial to this essay, “was... that Article VIII, Section 13 of the West Virginia Constitution and W.Va. Code, 2-1-1, were not intended to operate as a bar to this Court’s evolution of common law principles, including its historic power to alter or amend the common law.” Id. at 676.

6 See supra note 4, and quoted in text at note 2.
version of this absurdity may have existed for some time prior to 1979. Even if the West Virginia Court never allowed a holding to turn on this absurdity, the Court for years paid lip service to the notion that it was absolutely bound by old cases from our own, other American courts and English courts (collectively called "the common law"), but not so absolutely bound by its own more recent cases. What could have led to this distortion of the doctrine of stare decisis and the idea of "the common law?"

The answer requires an exploration of the history of American jurisprudence. The American idea of the law, and especially the private law of judicial decisions, underwent a metamorphosis from 1863 to 1979 that is reflected in a fair number of pre-Morningstar West Virginia cases interpreting Article VIII, Section 13. However, the jurisprudential metamorphosis was not crystalline and unproblematic, like a caterpillar becoming a butterfly. Rather, the metamorphosis was murky, complex, and contested, as is the shifting and changing of any socially-constructed, linguistically-dependent reality.\(^7\) Because of the rough complexity of the passage from one jurisprudential explanation to another, the careful, commonsense judges of the West Virginia Court fused several incompatible versions of what the words "common law" mean. Untangling that conflation is the burden of this little essay.

I shall begin this untangling by discussing the extent to which it may be said that West Virginia followed, for a time, a doctrine of absolute adherence to old common law precedent but of only reasonable adherence to recent common law precedent. Then I will describe the transformation of the American idea of the common law from the colonial period to the present. Using the history of that complex and variegated transformation of the idea of the common law, I shall attempt an explanation of how the West Virginia Supreme Court came to announce (if not actually use) the absurd doctrine noted in the opening colloquy. I then conclude with a caveat about the common law tradition (transformation and all) and official syllabus points in Supreme Court case reports. That such "caveats" about the common law tradition might still be necessary after Morningstar\(^8\) is evidenced by the dissent of Justice Elliot Maynard in a 1999 case\(^9\) in which he states that: "[N]owhere in the Constitution is this Court granted the power to create causes of action."\(^10\)

I. THE EXISTENCE OF THE DOCTRINE OVERRULED BY

\textit{Morningstar v. Black and Decker.}

In \textit{Morningstar v. Black and Decker}, Justice Thomas B. Miller takes very


\(^8\) See supra note 5.


\(^{10}\) Id. at 435. I shall say more about this dissent below.
seriously the doctrine proposed by Black & Decker's defense lawyers as an absolute barrier to the Court's reconsidering and modifying the rules of decision in a products liability tort action. The precise barrier proposed was that as a result of W.Va. Code, section 2-1-1, and the provision found in Article VIII, Section 13, of the West Virginia Constitution, the Court is not "empowered to alter the common law as it existed in 1863." 11

Justice Miller cites a number of West Virginia cases pertinent to the defendant's proposed doctrine, but reaches no definitive conclusion as to its status as "law" in West Virginia. He no doubt reaches no definitive conclusion because its status is clearly ambiguous. Before parsing the cases cited by Justice Miller, and a few more, to try to resolve that ambiguity, a brief taxonomy of the possibilities is in order.

There are actually four possible manifestations of this doctrine: two versions of the formulations of the doctrine and two senses of its actual decisional use. I alluded to both the formulation and the use above when I discussed the strong and weak versions of the absurdity. I have suggested a strongly absurd formulation of the doctrine and a more weakly absurd formulation. The strongly absurd formulation states that one is bound by old cases from a foreign jurisdiction, but not by newer cases from our own jurisdiction. The weaker version leaves out the foreign jurisdiction. Our federal union leaves open an intermediate absurdity of sister-state cases which are not quite a "foreign jurisdiction." It is not as absurd to be absolutely bound by sister state cases as it is to be bound by English cases.

The strong use of the doctrine requires the application of a rule even when the court believes the rule to be wrong, obsolete, or even silly. Moreover, the bad rule is determinative of the case. A decisional doctrine is at its strongest when it forces a court to use a "bad rule" to reach a "bad result." On the other hand, a decisional doctrine is at its weakest when it "forces" a court to use a "good rule" to reach a "right result." "Forces" is now in quotation marks because it take no force (coercion) to make a court do what it wants to do. A decisional doctrine so used is a mere rhetorical device, a make-weight, an extra (and unnecessary) reason for the decision. A decisional doctrine is also weakly used when it is cited but circumvented. A court might say, "We would have had to reach the wrong result because of an outdated rule, but we have cleverly dodged the doctrine." When the doctrine is either a make-weight or circumvented, its decisional force is untested.

Can one determine that a little rhetorical push would in fact become a genuinely coercive shove, if all one has seen are little rhetorical pushes? The weak use of a decisional doctrine does not really tell one that the state's law contains that doctrine. Between uses and formulations, there are four possible combinations pertinent to our examination of West Virginia cases that make reference to the decisional doctrine overruled in Morningstar: strong use of the strongly absurd formulation; weak use of the strongly absurd formulation; strong use of the less absurd formulation; and weak use of the less absurd formulation.

To be absolutely clear, I am, of course, not saying that it is absurd to be

11 Morningstar, 253 S.E.2d at 670.
absolutely bound by prior case rulings. It may be unwise, or even foolish in certain cases, but it is not absurd. The English House of Lords, sitting as the United Kingdom's highest court, had such a rule until recently. But absolute adherence to old cases, but not more recent cases, is absurd. And absolute adherence to old cases from another jurisdiction, and not to more recent cases from one's own jurisdiction, is really absurd.

Prior to 1979, did West Virginia have, as a matter of announced judicial judgment, some version of the absurdity alluded to above? As will be shown below, West Virginia never had the strong use of the strongly absurd version, but it may have had (for a very short, but recent, time) the weak use of the strongly absurd formulation. Moreover, West Virginia had, for some period after 1910, the weak use of the weakly absurd formulation.

A. The Early Cases in West Virginia Read the Constitutional Common-Law-Shall-Continue Clause Reasonably.

The best evidence for the existence of a rule—one that said that pre-1863 English cases are binding and judicially untouchable—is the legislative gloss put on the constitutional provision in 1868: "The common law of England, . . . shall continue in force within the [state of West Virginia], except in those respects wherein it was altered by the general assembly of Virginia before [June 20, 1863]. . . . or has been, or shall be, altered by the Legislature of this state." Notice that W.Va. Code, section 2-1-1, specifically mentions England, which the constitutional provision does not, and it mentions Virginia, from which West Virginia had just emerged. However, it does not mention the courts of Virginia as having had the power to overrule or modify the English common law. Section 2-1-1 appears to say that if, for example, an 1806 English case held that the common law doctrine of "ancient lights" needs only a twenty-year prescription period (instead of "time immemorial"), and the 1806 decision is ignored, modified, or altogether abrogated by a 1825 Virginia Supreme Court case, that the 1806 case nonetheless is the law of West Virginia no matter how abominable the West Virginia court may believe the 1806 doctrine to be. The above is a "plain reading" of the statutory gloss. However, the statute has never been read that way.

In 1869, Judge Edwin Maxwell, speaking for the three-member West Virginia high court, first interpreted the constitutional common-law-shall-continue

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12 See GARY SLAPPER and DAVID KELLY, ENGLISH LEGAL SYSTEM, 36-37 (Cavendish 1995). "As regards its own previous decisions, up until 1966 the House of Lords regarded itself as bound by its previous decisions. In a Practice Statement of that year (1966), however, Lord Gardiner indicated that the House of Lords would in future regard itself as free to depart from its previous decisions where it appeared right to do so. Given the potentially destabilizing effect on existing legal practice based on previous decisions of the House of Lords, this is not a discretion that the House of Lords exercises lightly (Food Corp of India v Anticistro Shipping Corp (1988)). There have been a number of cases, however, in which the House of Lords has overruled or amended its own earlier decisions. See, e.g., Conway v. Rimmer (1968); Herrington v. British Rail Board (1972); Miliangos v. George Frank (Textiles) Ltd (1976); R v. Shivpuri (1986)). Id at 38.


14 Id.
clause in \textit{Cunningham v. Dorsey}.\footnote{3 W.Va. 293 (1869).} Maxwell characterized the force of the West Virginia constitutional provision as glossed by the West Virginia Legislature in the following proposition:

\begin{quote}
The common law of England, so far as it is not repugnant to the principles of the bill of rights and the constitution of the State of Virginia, was in force in that State when the constitution of the State took effect, and is, therefore, the law of this State, unless repealed or modified by the general assembly of Virginia or the legislature of this State.\footnote{Id. at 298.}\footnote{Id.}
\end{quote}

Judge Maxwell quoted the “common-law-shall-continue ordinance” of the May 1776 Virginia convention (Virginia was anticipating the Declaration of Independence) to the effect that the “common law of England, and all statutes or acts of parliament made in aid thereof, prior to [1603] . . . shall be in full force until altered by the legislative power . . . .”\footnote{Id.} Then he assumed the relevant English cases were pre-1603 cases. He found one that gave him a time-out-of-memory prescription period, which would mean that plaintiff would not get the benefit of an “ancient lights”\footnote{The doctrine of “ancient lights” was the most rejected of all English common law doctrines by American jurisdictions. See LAWRENCE M. FRIEDMAN, \textsc{A History Of American Law} 413 (2d ed. 1985): (“By the late 19th century every state except three had rejected this easement.”). By 1994, the encyclopedia \textsc{Am. Jur. 2d} could proclaim: “It has been observed that no American common-law jurisdiction recognizes a landowner’s right to acquire an easement by prescription.” \textsc{1 Am. Jur. 2d Adjoining Landowners} §91 at 889 (emphasis added) (the emphasized language defines the doctrine of “ancient lights”). The doctrine was an exception to the common law rule that one had no right to sunlight through adjoining property even if adjoining property owner’s motive for blocking sunlight was pure spite. Koblegard v. Hale, 53 S.E. 793 (W.Va. 1905) (there, for spite, the defendant put up a fence to block sunlight through a church window; so even praying on praying was allowed in the name of property rights). In order to gain the easement of “ancient lights” a property owner had to have a window through which sunlight passed continually from across an adjoining property for the prescription period. The prescription period was twenty years after a seventeenth-century English Act of Parliament. Prior to that it had been “time out memory.” Judge Maxwell rejected the twenty-year period of seventeenth- and eighteenth-century English cases because those cases were influenced by the Act of Parliament. For Maxwell, time immemorial was the prescription period, a period few plaintiffs could meet. Judge Berkshire, in \textit{Powell v. Sims}, 5 W.Va. 1 (1871), left a remnant of the doctrine for cases of “extreme necessity.” This language was picked up by the West Virginia court in 1950 in \textit{Normar v. Ballard}, 605 S.E.2d 710 (W.Va. 1950). For a fairly recent, much-cited case, see \textit{Prah v. Maretti}, 321 N.W.2d 182 (Wis. 1982), where using the balancing test of private nuisance law, the Court gives perhaps some protection to a solar energy home where if the neighbor moved his proposed house just a few feet it would not destroy the solar house’s energy system. \textit{Prah} decidedly does not use the doctrine of ancient lights based on the property concept of prescriptive easement. Nonetheless, it recognizes the interest one has in receiving sunlight on one’s property, and that if it is interrupted for no good reason (spite is out), then a deprived property owner ought to have relief. This approach is called pragmatism or functionalism. Competing property interests are accommodated and, perhaps, the public policy of promoting clean, alternative energy sources is promoted. Roscoe Pound and Karl Llewellyn advocated this kind of common law growth and change. See \textit{Infra passim}.} easement; the result Judge Maxwell apparently wanted. The post-1603 case had been influenced by an act of parliament passed after 1603 and...
therefore it was not part of the common law that was binding in Virginia under its early ordinances and laws. Since the post-1603 English case was not binding in Virginia, it was not binding in the state newly formed from Virginia’s western counties—West Virginia. It would appear then, that Judge Maxwell believed that the constitutional reference to the common law’s continuance was to the common law of Virginia, not England.

Judge Maxwell’s reasoning goes something like this: West Virginia had inherited the English common law through Virginia. Virginia, by its 1776 convention, accepted only English common law and those Acts of Parliament “in aid of the common law” that were passed prior to the colonial period (e.g. The Statute of Uses of 1536). The post-1603 English Acts of Parliament received no respect in America in 1776. Thus, any changes in English common law, as manifested in English cases decided after 1603 and influenced by Acts of Parliament after 1603, were not part of the “true” common law. (Remember, the Virginia colonists in 1776 were angry at the English sovereign (King in Parliament) and not at the revered common law tradition.) The common law of England was not the hated sovereign’s will, but was the ordinance of reason and English custom—unwritten law made manifest in judicial decisions. The English sovereign (Acts of Parliament) influenced the post-1603 changes in the common law decisions on “ancient lights.” Therefore, those post-1603 English common law cases were not part of the common law that was binding in Virginia, and thus binding in West Virginia.

Hence, Maxwell opined that the doctrine of “ancient lights,” as delineated by pre-1603 cases, is the true common law and it gives no right to the plaintiff in Dorsey.

Judge Maxwell avoided the hard question in Dorsey: What if the binding English cases actually give a plaintiff a right to a remedy against impairment of his “ancient lights,” but the court believes in the right to be inappropriate in America’s wide open spaces and in America’s policy of individualistic development of property? In other words, must the court follow English common law cases where it hates the rights given by those cases?

In 1871, the West Virginia Supreme Court of Appeals got such a case, Powell v. Sims. Its answer was an emphatic “NO!” Judge Berkshire squarely faced the constitutional issue and stated in an opinion concurred by Edwin Maxwell that “[t]he common law of England is in force in this state only so far as it is in harmony with its institutions, and its [the common Law of England’s] principles

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19 See id.
21 Ralph Lazier Berkshire of Morgantown, in Monongalia County, West Virginia, was one of three men elected in 1865 to the first West Virginia Supreme Court of Appeals and its first “president,” i.e. the presiding judge of the three-judge panel.
applicable to the state of the country and the condition of society." Then in the Court's second syllabus point, it flatly rejected the English doctrine of "ancient lights."

The rejection of the rule that the Court was absolutely bound by English cases could not have been more firmly stated: the Court will follow English precedent when it believes it appropriate to our society, otherwise the court will simply reject it. Moreover, Powell rejected English precedent after careful consideration of the constitutional common-law-shall-continue-in-force provision. Thus, from nearly the beginning of this state's Supreme Court jurisprudence, it rejected the absurd doctrine that Morningstar v. Black & Decker purported to overrule.

Nor does Judge Berkshire blindly follow "American common law." He does, however, say that the common law doctrine of "ancient lights" had not fared well in American courts and that if he followed American judicial precedents, he would have to reject the doctrine of Ancient Lights. But, in rejecting the constitutional interpretation that would make English common law cases absolutely binding, he does not reason that since the constitution uses the phrase "common law" and not the "common law of England," then the phrase is ambiguous as between common law of America (for some reason, he does not cite the statutory gloss that specially refers to English common law), and therefore he is choosing the common law of America. Rather, he said the following:

The question of easement of lights does not appear ever to have been before the court of appeals of Virginia, and being therefore unaided as well as unfettered by any such authoritative adjudication, we are left free to adopt and apply, to the case now under review, such principles consistent with the rights of the parties in the premises, as will in our judgment best comport with the public good and the existing condition of things in this

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22 Powell, 5 W. Va. at 1, syllabus point 1 (emphasis added).
23 Id. at syllabus point 2; see also supra note 18 as to "ancient lights."
24 Curiously, Justice Miller cited Powell v. Sims, 5 W. Va. 1 (1871), as one of several cases where the West Virginia court refused to follow an old English case, but had made no mention of the common-law-shall-continue clause.
25 "American common law" is simply the aggregation of sister states' judicial precedent that relies on no enacted source. After the restatement movement began to spew forth black letter rules of contract, torts, conflict of laws etc., in the early 1930s, one might say that "restatements" restated American common law. Of course, starting in the early nineteenth century, American treatise writers compiled an American common law. The two most famous were Joseph Story (Commentaries—a series of treatises written between 1831-1845 on Conflicts, Equity and many common law subjects), and James Kent of New York (Commentaries on American Law in four volumes, published between 1826 and 1830). When Kent's Commentaries were published, the great nineteenth century historian George Bancroft declared: "Now we know what American law is; we know it is a science." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 329 (2d ed. 1985). For the literature that collectively compiled an American common law (the nineteenth century's version of the twentieth century's restatements), see the two sections entitled "The Literature of The Law." Id. at 322-33 & 621-29. Friedman also discusses the restatement movement. See id. at 676.
country. The essential inquiry therefore, now is what principle ought to govern us under the facts of this case?26

Notice here that Judge Berkshire is stating several things of interest. First, the English common law cases are no constraint at all. Second, a distinct Virginia case on Ancient Lights would have mattered and been some constraint ("unaided as well as unfettered") on the Court's decision, but the words "aided" and "fettered" taken together suggest that Virginia judicial decisions would have helped inform their reasoning and been a stare decisis-like constraint, but the Court would not have felt absolutely bound. Third, other American cases would also be of help and strongly influential to its judgment, but not be absolutely binding.

The decision in Powell v. Sims has never been overruled or modified. Indeed, syllabus point 3 of the decision was cited in 1950 in Normar v. Ballard,27 in which Judge Fred Fox declared that the state Legislature overruled the doctrine of "ancient lights," even though the 1868 law abrogating "ancient lights" was not mentioned in Powell v. Sims. In Normar, the Court relied on Powell v. Sims to find a shrunken version of "ancient lights" extant in West Virginia and, ironically, used the common-law-shall-continue clause to hold that it must follow the third syllabus point of Powell v. Sims as to a shrunken version of "ancient lights." I say "ironically" because rigid adherence to this ancient syllabus point goes against the spirit of Judge Berkshire's opinion quoted and discussed above. The idea of the common law had changed in America between 1871 and 1950. I will discuss that change in Section II. But first we must continue our journey through West Virginia cases to see when, if ever, West Virginia adopted some permutation of the absurd reading of the common-law-shall-continue clause.

B. The Court Continues Its Reasonable Reading of the Common-Law-Shall-Continue Clause Until 1916, But Seldom Cites the Clause. After 1916, the Court Occasionally Makes Weak Use of the Clause.

If Judge Ralph Lazier Berkshire is any indication, the early West Virginia Court judged common law cases in the "Grand Style."28 In a stretch of some twenty-four years between 1889 and 1912, Henry Brannon dominated the Court. Brannon had the political values of classical legal thought, 29 but he was not a formalist. His opinions are full of explanations of the justice, fairness, and reasonableness (as public policy) of the legal doctrine he had chosen as the basis of the Court's decision. Yet in comparison to his contemporary, Marmaduke Dent, Brannon was a formalist. Dent was not just a "Grand Style" judge, he was a "Flamboyant Style" judge. He quoted poetry (including his own), the Bible, the

27 60 S.E.2d 710 (W.Va. 1950).
classics, and myriad other non-traditional sources of the law.\textsuperscript{30}

In any event, as is well documented in Professor John Phillip Reid’s biographical study of Dent’s career (in which Brannon plays a feature role), Dent and Brannon set a tone for the West Virginia Supreme Court at the beginning of the twentieth century.\textsuperscript{31} To that court, the common law was a process of deciding cases based on precedent, but the precedent had to be persuasive that the precedential doctrine was based on justice and sound policy. Brannon and Dent fought over what was justice (Brannon was on the liberty side, Dent on the equality side of justice) and what was sound policy. Reid stated:

[Brannon] expounded law in a West Virginia which needed industry and with this in mind, stressed the need of protecting corporations, opening the mountainous regions for commercial exploitation and development. Of course, Dent asked him, ‘Opened for whose benefit?’ While some legal scholars might criticize Brannon for ignoring this question, or even for not appreciating its social implications, they can hardly criticize him for failing to answer it.\textsuperscript{32}

For purposes of the West Virginia idea of the common law, the important thing is that policy mattered to Brannon and Dent. They believed that the common law should embody sound public policy.

It would then appear that perhaps until 1916, the West Virginia Court adhered to the sensible reading of the common-law-shall-continue clause of Powell v. Sims.\textsuperscript{33} For example, in 1914, the United States Court of Appeals for the Fourth Circuit confidently asserted, after citing Judges Berkshire and Brannon, that “we are of the opinion that even if at common law, as originally adopted by the state of West Virginia, the organization was unlawful, it does not follow that that part of the common law is now applicable in that state, owing to the changed conditions to which we have referred.”\textsuperscript{34} Yet, in 1916, the West Virginia Supreme Court of Appeals stated, as to a matter of common law procedure, that “[u]ntil altered or repealed by the legislature such part of the common law . . . as were in force when the constitution was adopted . . . continue to operate and bind the courts of this state.”\textsuperscript{35} The Court cites to a 1902 North Dakota case and three encyclopedias as evidence of the common law rule’s furthest extension, which did not reach the case at bar. The phrase, “the common law” seemed to mean to Judge Poffenbarger, the

\textsuperscript{30} JOHN PHILLIPS REID, AN AMERICAN JUDGE, MARMADEUKE DENT OF WEST VIRGINIA 65-69 (1968).

\textsuperscript{31} Id.

\textsuperscript{32} Id. at 73-74.

\textsuperscript{33} Supra note 20.

\textsuperscript{34} Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 653, 698 (4th Cir. 1914).

\textsuperscript{35} Holt v. Otis Elevator, 90 S.E. 333, 335 (W.Va. 1916).
author, an identifiable body of rules just generally accepted by American judges
and jurists as part of the "common law."36

But in 1911,37 the same court did not cite the constitutional common-law-
shall-continue clause in using the doctrine of Rylands v. Fletcher38 for the first
time: "This principle has few exceptions, and has been applied in a large number of
cases, both in England and this country."39 From its long discussion and its
reference to Rylands as "a leading English case," it seems fair to assume that the
court adopted the Rylands Rule not because of its pedigree, but because it was
persuaded that its content was just.40 Thus, in 1911, the court appeared to believe
that "the common law" is a process based on precedent that must persuade.

In 1929, the West Virginia Supreme Court of Appeals reaffirmed the 1911
attitude in Currence v. Ralphsnyder,41 when it stated:

[t]hat line of cases follows the common law, and is not persuasive
on us, as this court is committed to a more liberal view. . .
Consequently it is well said that the legal principle upon which
common law champerty is grounded no longer exists. Why then
uphold the body of this law when the spirit has departed.42

The Court then cites a case,43 which cites an 1894 opinion by Henry Brannon
stating that "the reason ceasing the law itself ceases."44

Then in 1935, the same court, in a choice of law case, cites the
constitutional common-law-shall-continue clause for the proposition that "the
common law is the basis of the jurisprudence of this state."45 Therefore, the Court
opines, a common law rule is the basis of West Virginia public policy and trumps
lex loci. But the court indicated it believed the common law to be "a process based
on precedent," and not a "body of rules," when it stated: "We are impressed, as was
the Michigan court in the Bandfield case, that the rule [interspousal tort immunity]
is founded in wisdom; and whatever may have been the original theory of the rule,
in our judgment the fullness of time has justified its existence."46 Again, the

36 905 SE at 335.
37 Weaver Mercantile Co. v. Thurmond, 70 S.E.126 (W.Va. 1911).
38 L.R. 1 Ex. 265 (1866); upheld in the House of Lords, L.R. 3 H.L. 330 (1868).
39 Weaver Mercantile Co., 70 S.E. at 129. But see FRIEDMAN, supra note 18, at 485-86.
40 Weaver Mercantile Co., 70 S.E. at 128.
41 151 S.E. 700 (W.Va. 1929).
42 Id. at 702.
46 Id.
precedential rule must be persuasive or it will not be followed. Pedigree seems not to matter.

In 1947, the Court seemed persuaded that an innkeeper should be strictly liable to guests for injury or property loss or damage. Therefore “the common-law policy” should continue.47 The Court cites an opinion by Marmaduke Dent from 1896.48 Dent had mentioned the “common law of England” as holding the innkeeper strictly liable but Dent did not cite the constitutional common-law-shall-continue clause as the reason the rule must be followed. Rather, he is persuaded it is a good rule based on sound policy. Again, both the 1947 Court and the 1886 Court believe the common law to be a process based on precedent that must continue to persuade. The common law was to neither court a body of identifiable rules that could be adopted en masse and incorporated into West Virginia law as a species of enacted law.

In 1950, in State v. Arbogast,49 the Court seems to invoke and actually use the common-law-shall-continue clause and the statutory gloss.50 The Court opines that “[t]he reasons given for the rule are many and varied, none of which seem logical or sound at this time.”51 Although this is a criminal case, the common law rule was invoked as a defense to the crime of larceny.52 Since the crime is statutory, the state’s rebuttal to the defense should be statutory too. Moreover, the rule of lenity favors allowing the common law defense. In any event, the Court did not need to invoke a pre-1863 English case, because the state conceded “the common law rule.” It cites a West Virginia case that does not invoke the constitution-shall-continue clause.53

Then in 1956 and 1962, women’s rights became the subject of common law rulings. In Walker v. Robertson,54 a challenge was made to an all-male jury in a civil case. Although the Court invoked the common-law-shall-continue clause to uphold the all-male jury, real reliance on the clause seems disingenuous. Women, in 1956, got little constitutional respect.55 The Court seemed eager to find an excuse to keep women off juries. Moreover, the Court said that the challenge to the jury

49 57 S.E.2d 715 (1950).
50 See W.VA. CODE § 2-1-1 (1999).
51 57 S.E.2d at 716 (W.Va. 1950).
52 Id. at 716.
53 Id.
54 91 S.E.2d 468 (1956).
55 See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961)(upholding a women’s automatic exemption from jury service unless she requested inclusion on the jury rolls); Goesart v. Cleary, 335 U.S. 464 (1948)(upholding the right of a state to bar women from serving on juries, and the most famous (now infamous) of all, Bradwell v. Illinois, 83 U.S. 130 (1872)(upholding the right of a state to bar women from the practice of law). Not until 1971, in Reed v. Reed, 404 U.S. 71 (1971), was a woman’s place in the equal protection clause recognized.
array was not timely made and there was no showing of prejudice. Finally, the reference to the “common law” is not to an old English doctrine now in dispute, but to a current West Virginia practice, a practice that the then male-dominated government and legal culture seemed to like. So this is a weak case for believing that the court strongly believed the common law was a body of rules that had been incorporated into the body of enacted West Virginia law. Nonetheless, it is a clear case of the fourth permutation of the absurdity: a weak use of the less absurd formulation.

At first glance, the 1962 case of Seagraves v. Legg,56 seems to be the best candidate to exemplify the strong use of the less absurd formulation of the following doctrine: if a rule was part of the common law in 1863 (or 1872 when the constitution was reenacted), then the court may not change it. “The common law” in the less absurd formulation is a sort of brooding omnipresent body of rules in the sky—apparently in the sky over England and America and the rest of the English speaking world.57 The Court cites the common-law-shall-continue clause,58 W.Va. Code, section 2-1-1, and in effect says only that the Legislature has the power to change “the common law.”59 The Seagraves Court spills a lot of ink over the fact that few states have overruled the common law doctrine that men have a cause of action for loss of consortium, but women do not.60 Instead of making an argument to justify the distinction between men and women in making loss of consortium claims, the Court opines that the Married Woman Acts may have removed the reason for a man having a claim for loss of consortium.61

In the end, the Court disliked the cause of action for loss of consortium held by men, and was unwilling to expand this dubious cause of action to include women. Because equal protection for women was not a fully developed constitutional claim, the Court failed to take seriously the underlying equality issues in the case.62 Thus, Seagraves is not a good case for the strong version of the

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56 127 S.E.2d 605 (W.Va. 1962).

57 This is obviously a reference to Justice O.W. Holmes famous aphorism in Southern Pacific Co. v. Jensen, 244 U.S. 207, 218 (1917)(Holmes, J., dissenting). Holmes declared that “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.” Id. at 222.

58 Seagraves, 127 S.E.2d at 608; W.Va. CONST. art. VIII, § 21.

59 See Seagraves, 127 S.E. 2d at 608.

60 Id.

61 Id.

62 Id. at 608. The Court stated:

It is the contention of the plaintiff that the denial to her of the cause of action for negligent loss of consortium of her husband in the case at bar denies her a right granted her husband and therefore is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. This position is not well taken when considered in the light of the provisions contained in the Constitution of this State preserving the common law, coupled with the fact, which is not controverted even in the cases expressing the minority view, that the wife has no cause of action for such loss of consortium at common law. Our Legislature has not enacted any law giving her such
weaker formulation of the absurdity of absolute adherence to old cases. It is not a

case where the court says, "We hate this doctrine but we cannot overrule it because

of the common-law-shall-continue clause." It is however, another case

exemplifying the weak use of the weaker formulation of the absurdity of absolute

adherence to old cases.

In 1965, the Court, in abrogating the doctrine of charitable immunity in
torts, declared that "[i]n as much as the immunity doctrine is not part of the
common law of this state, but rather is case law, this Court is without legal
limitation to reconsider the principles adopted in its former decisions." This
distinction between "common law" and "case law" is significant in two ways. First,

it makes clear the absurdity of the weak formulation of the common-law-cannot-be-
judicially-changed doctrine (remember the weak formulation is the "common law"
before 1863, the strong formulation is the common law as manifested in pre-1863
English cases). Second, it somehow obscured from Judge Caplan and the rest of
the Court the absurdity of the weak formulation. Apparently, to Judge Caplan, the
"common law" is a "body of rules" that came into the state by constitutional
mandate. "Case law" is apparently, from what Judge Caplan said earlier in his
opinion, a process of deciding cases based on precedent that must persuade the
present court." Case law" then, is exactly what Llewellyn called the "Grand Style" of
common law development. But by calling it "case law," the Court concealed from itself the fact that "the common law" has always been "case law,"
and "case law" has always relied on stare decisis for both its stability and
flexibility. Without that concealment, the Court would have seen the absurdity of
being absolutely bound by old cases from other jurisdictions (England and
American states), but not absolutely bound by new cases from its own jurisdiction.

Then in 1975, in a progressive decision abrogating the common law
doctrine of municipal tort immunity, Judge Charles Haden, Jr. came the closest of
any opinion writer to use the strong formulation of the absurdity (i.e. that the court
would be absolutely bound by a pre-Civil War English case) when he wrote:

Consequently, if the common law of England or the laws [passed
by the general assembly] of Virginia prior to June 20, 1863, have
been recognized and applied as having extended a general grant of
immunity to municipalities from tort litigation, the constitutional
and statutory inhibition against judicial abrogation of such
doctrine would appear to present this Court with a formidable

causal of action, which is necessary under the constitution and statutory law of this state
before a wife can have a cause of action for loss of consortium of her husband due to
injuries caused by negligence. Id.

I quote the entire paragraph because it is so remarkable. It must mean, if it is to make any sense at
all, that common law rights are not subject to equal protection evaluation. Does that mean that the common
law is prior to, and privileged over, constitutional law?

Adkins v. St. Francis Hosp., 143 S.E.2d 154, 163 (W.Va. 1965)(emphasis added.)

Id. at 160-162.

See LLEWELLYN, supra note 28, and discussion infra in Section III.
The West Virginia Supreme Court of Appeals noted that a 1964 West Virginia case\(^6\) had a “mistaken understanding of the common law incorporated into West Virginia jurisprudence.”\(^7\) Therefore, “it, like any other decision, is subject to reconsideration and if found to be wrong, may be overruled and excised from the body of decisional law.”\(^8\) “On the other hand,” Judge Haden asserted further, “if that case represents an accurate rendition of the common law in force in the Commonwealth of Virginia, and consequently operable and binding within the boundaries of this State prior to June 20, 1863, change from its provisions should come from the Legislature and not from this Court.”\(^9\)

Except for the assumption about the “common law in force in the Commonwealth of Virginia,” this statement is what the student advocate told me was the law of West Virginia in the colloquy quoted at the beginning of this article.\(^7\) It is what I termed “absurd.” The slight change by Judge Haden’s reference to the common law \textit{in force} in Virginia does not reduce the absurdity because the common law of England \textit{was} the common law of Virginia until the Virginia legislature changed it.\(^2\) Obviously, Judge Haden, the very voice of West Virginia legal culture, did not think the strict adherence to old cases from another sovereignty to be absurd even though he did not believe in such strict adherence to new cases from his own sovereignty. Why did he not notice the absurdity? Using the history noted below and some “sense” of his situation, the following explanation seems plausible: because Judge Haden distinguished \textit{Russell v. Men of Devon},\(^2\) he essentially finessed the application of the doctrine to the case at hand as not being a barrier to the result the court wanted to reach. Judge Haden never took a hard look at the doctrine itself. If he had taken a “hard look,” he might have questioned his obvious assumption that the “common law” is a body of rules. Indeed, Judge Haden must have assumed that the common law was a body of \textit{identifiable written} rules. He referred to the “common law” in the constitution and interpreting statute as if it was a “body of rules” which the constitution and statute incorporated by reference.\(^7\) Further, Judge Haden’s doctrine apparently assumed an almost code-like quality to these “body of rules,” such that a constitutional or


\(^{67}\) Jones v. City of Mannington, 136 S.E.2d 882 (W. Va. 1964).

\(^{68}\) \textit{Id.}

\(^{69}\) \textit{Id.}

\(^{70}\) \textit{Id.}

\(^{71}\) \textit{See supra note 3.}

\(^{72}\) 215 S.E. at 852-54.


\(^{74}\) This body of identifiable “common law” rules is what Judge Caplan had contrasted to “case law” in Adkins v. St. Francis Hospital. \textit{See id} at 163.
ordinary legislator could know of its content. Finally, he had to assume that what that body of rules is and what it ought to be are entirely separate questions, and therefore the only important question in determining whether a rule is part of the body of rules called the “common law” is whether an English common law court decided it.

These assumptions by Judge Haden are pregnant with implications about the meanings of both “law” and “the common law.” They are the conflation of two seemingly incompatible ways of looking at “law” and “the common law.” Here, a page (or so) of history is worth an hour or so of analysis. So let us briefly examine the history of the American idea of the common law because it helps explain West Virginia’s “unnoticed absurdity.”

II. THE IDEA OF COMMON LAW IN AMERICAN LEGAL HISTORY

A. The Colonial Period

In the American colonial period (1603-1776) each colony had a judicial system of some sort, but with no two systems exactly alike. Each had a designated place, designated officials, and a procedural structure to try private “meum and tuum” claims, and public criminal cases. To some extent, they used common law procedures (e.g. juries) and precedent from English common law courts. Most lawyers in colonial America, at least in the forty or fifty years just before independence, would have said their courts were governed by the common law. But to the general public through most of the colonial period, the “common law” connoted an ideal. The words the “common law” stood for the rights of Englishmen everywhere. The rights included the right to trial by jury in criminal and civil cases, and the right to established rules and standards as opposed to the arbitrary whim (or despotic edict?) of government.

This ideal of established law, “being a government of law not men,”

75 See generally Lawrence M. Friedman, A HISTORY OF AMERICAN LAW (2d ed. 1985).
76 Id.
77 Id.
78 Id.
80 See The Declarations and Resolves of the Continental Congress (1774) (“Resolved 5: That the respective colonies are entitled to the common law of England and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”) reprinted in HALL, supra note 80, at 64-65.
81 The first use of the phrase “Government of laws, and not of men” was by John Adams (1735-1826), our second president, while back in Boston after attending the First Continental Congress, in a series of letters to the Boston Gazette signed “Novanglus.” Adams attributed it to James Harrington (1611-1677), an English radical Whig who wrote THE COMMONWEALTH OF OCEANA (1556), with which Adams was
included, when the phrase “common law” was used, law that was deep and old and true. It referred to a tradition of unwritten customary law honed and articulated and refined in countless lawsuits, where the “artificial reason” of trained and experienced judges worked to ever greater perfection the standards and rules for settling disputes and punishing miscreants. But the “common law” also connoted a strong negative. Many who used the phrase “common law” negatively criticized it as being unnatural and involving unnecessary complexity and prolixity. To them, it meant a body of esoteric knowledge available only to lawyers. The common law was sophisticated law to rude, sparsely-populated, unlettered communities; sophistication meant delay, technicality, and injustice.

The “common law,” then was truly a bog of connotations. What, if anything, did it denote? What real world “thing” did it reference? It denoted a body of principles, standards, and rules collected in printed form by Sir Matthew Hale in his history first published in 1713, by Sir Edward Coke (1552-1634), by Sir

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See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 10 (1969). Indeed, what is truly extraordinary about the Revolution is that few Americans ever felt the need to repudiate their English heritage for the sake of nature or of what ought to be. In their minds natural law and English history were allied. Whatever the universality with which they clothed their rights, those rights remained the common-law rights embedded in the English past, justified not simply by their having existed from time immemorial but by their being as well “the acknowledged rights of human nature.” The great appeal for Americans of Blackstone’s Commentaries stemmed not so much from its particular exposition of English law, which, as Jefferson said, was all “honeyed Mansfieldism,” sliding into Toryism, but from its great effort to extract general principles from the English common law and make of it, as James Iredell said, “a science.” The general principles of politics that the colonists sought to discover and apply were not merely abstractions that had to be created anew out of nature and reason. They were in fact already embodied in the historic English constitution - a constitution which was esteemed by the enlightened of the world precisely because of its “agreeableness to the laws of nature.” The colonists stood to the very end of their debate with England and even after on these natural and scientific principles of the English constitution. And ultimately such a stand was what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it.

Id. at 10 (emphasis added) (footnotes omitted).

“[Sir Edward] Coke... replied that the reason on which law was founded was a species of “artificial reason” that only a person trained and experienced in law could exercise.” RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 10 (1990).

See FRIEDMAN, supra note 75, at 108, and passim.

Id.


For a biographical sketch of Coke, see THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 242-45 (5th ed. 1956); CATHERINE DRINKER BOWEN, THE LION AND THE THRONE, THE LIFE AND TIMES OF SIR EDWARD COKE 508-512 (1957). In Kloper v. North Carolina, 386 U.S. 213 (1967), Chief Justice Earl Warren stated “Coke’s institutes were read in the colonies by virtually every student of the law. Indeed, Thomas Jefferson wrote that at the time he studied law (1762-67), Coke Lyttleton was the universal elementary book of law students and to John Rutledge of South Carolina, the Institute seemed “to be almost the foundation of our law.” Id. at 225.
Anthony Fitzherbert (1470-1538), by Sir Thomas Littleton (1422-1481), by Henry of Bratton (called Bracton) (1210-1268), and by Ranulf de Glanville (1130-1190). Then, in the later eighteenth century, came William Blackstone’s Commentaries, which eclipsed all the others. After 1765 or so, a reference to “the common law” meant the law crystallized in Blackstone. The English legal historian F.W. Maitland wrote in 1902:

Accurate enough in its history and doctrine to be an invaluable guide to professional students and a useful aid to practitioners, [Blackstone’s] book set before the unprofessional public an artistic picture of the laws of England such as had never been drawn of any similar system. No nation but the English had so eminently readable a law-book, and it must be doubtful whether any other lawyer ever did more important work than was done by the first professor of English law. Over and over again the Commentaries were edited, sometimes by distinguished men, and it is hardly too much to say that for nearly a century the English lawyer’s main ideas of the organization and articulation of the body of English law were controlled by Blackstone. This was far from all. The Tory lawyer little thought that he was giving law to colonies that were on the eve of a great and successful rebellion. Yet so it was. Out in America, where books were few and lawyers had a mighty task to perform, Blackstone’s facile presentment of the law of the mother country was of inestimable value. It has been said that among American lawyers the Commentaries “stood for the law of England,” and this at a time when the American daughter of English law was rapidly growing in stature, and was preparing herself for her destined march from the Atlantic to the Pacific Ocean. Excising only what seemed to savor of oligarchy, those who had defied King George retained with marvelous tenacity the law of their forefathers.

So to the colonial mind, the words “common law,” denoted a more-or-less fixed set of words in the form of rules and standards. Professor Morton J. Horwitz, in The Transformation of American Law 1780-1860, begins his book with this

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88 See PLUCKNETT, supra note 87, at 274-75.
89 Id. at 241, 277-78.
90 Id. at 258-65 and passim.
91 Id. at 256-57, 295-98.
92 FRIEDMAN, supra note 75, at 21.
93 Id. at 112.
94 HELEN M. CAM, SELECTED HISTORICAL ESSAYS OF F.W. MAITLAND 116-17 (1957), in an essay entitled "History of English Law" (emphasis added).
observation:

In eighteen-century America, common law rules were not regarded as instruments of social change; whatever legal change took place generally was brought about through legislation. During this period, the common law was conceived of as a body of essentially fixed doctrine to be applied in order to achieve a fair result between private litigants in individual cases.\(^5\)

Fixed doctrine though it be, it was widely understood that there was no canonical form, no codification equivalent, of the common law. It was not statutory (or positive) law. It was unwritten law. This “unwritten law” was discovered and articulated by judges deciding actual cases. These judges discovered norms immanent in either immemorial custom or usage, or in natural law and justice, and in the law that “every man has implanted in him.” Unwritten law existed at the beginning of time. Thus, a classic case of first impression or an unprecedented judicial decision could be retroactively applied to the facts before the court. The new decision was not really retroactive application of new law, because the pronounced law had become immanent in our known customs. New law became a true rule ready for reason’s discovery in the hearts of men who “just know” right from wrong.

Custom, reason, and human nature are really three different, though complimentary, ontological forms of law, but more importantly, each suggests a different epistemology. “Custom” has an empirical aspect to it. “Reason” has a Platonic aspect that it alone can discover the true rule, the natural law. It is not unlike discovering the natural truths of geometry. “Implanted law” is intuitive because we “just know” it. It is part of human nature and therefore, Aristotelian. In one historic epoch or another, they each have been dominating as the explanation for the genius and genesis of the common law. In the colonial period in America, a common belief was that common law was a product of immemorial custom tempered by judicial reasoning.

Each of the three explanations for the genesis of the common law yields a somewhat different justification for any particular doctrine. Moreover, each leads to different (and sometimes decisively different) explanations for change, for filing gaps in the law, for transferring the common law to a new locale, and for applying “new” common law rules, retroactively. Of special importance to the colonies was transferring the common law to the thinly populated, rural, and agricultural vastness that became the American Colonies. Thus, a common law doctrine such as “ancient lights” could be said not to be a custom in America because of the paucity of population and the concomitant diminished fear that one’s use of one’s own property might have an impact on others. The doctrine seems not based in any natural law, such as “use one’s property so as not to harm others,” because there is really no harm from blocking light on the one side in open America. Because

\(^5\) See Horwitz, supra note 29, at l.
America was geographically and socially much different from Britain, it naturally developed different customs which early judges acknowledged required deviation from English common law norms.\(^{96}\) So if common law rules are based on natural law, the colonial mind’s reason might well have found that the “natural law”—as discovered by the British mind’s reason—a mistake. When a common law rule was based on mistaken reasoning, it could be overruled. It was in this ability to change and to correct that the common law “works itself pure.”\(^{97}\)

Although common law doctrine may always be “working itself pure,” the phrase “the common law,” or even the phrase “the common law of England,” denoted more than a specific set of doctrines. It also denoted a historically developed legal system. Within that legal system, modes of proceeding were contrasted to “common law.” “Equity” was the focal contrast. But the legal system referred to as the “common law” included equity, as well as lesser contrasts, such as ecclesiastical law, maritime law, or the law of merchants.\(^{98}\) All of these were influenced by the judicial discovery of natural justice and natural law. However, the latter three were also greatly influenced by civil law (based on the written Roman codes).\(^{99}\) Moreover, ecclesiastical law sometimes used Canon Law.\(^{100}\) But as Sir Matthew Hale pointed out, both the civil law and canon law were unwritten laws procured by English judges—not from the enacting legislature’s sovereignty (the Roman Catholic Church, or the Holy Roman Empire).\(^{101}\) Thus, equity law, ecclesiastical court law, maritime law, and the law of merchants, were part of the unwritten law of England and thus part of that system of law collectively called “the common law of England.” An American colonist may have considered the common law to be all the law of England except acts of Parliament. He may also have had in mind other systems of enacted laws that conflict with the “common law,” such as the Canon Law enacted by the Roman Church and Civil Law.\(^{102}\)

In sum, the idea of the common law that would inform the intent of the Virginia constitutional use of the term, and later the same West Virginia use, is both complex and somewhat contradictory. “Common law” connoted good and bad

\(^{96}\) On the “reception” of the common law in America, see FRIEDMAN, supra note 75; HALL, supra note 79, at 24-25.

\(^{97}\) The phrase “the common law works itself pure” is Lord Mansfield’s. See FRIEDMAN, supra note 75; HALL, supra note 80, passim, for discussion of this most famous of eighteenth century English jurists. See also RONALD DWORKIN, LAW’S EMPIRE 400 (1985). William Murray, 1st Earl of Mansfield (1705-93), was Lord Chief Justice from 1756 to 1788. Mansfield was a large influence on William Blackstone and Joseph Story.

\(^{98}\) See FRIEDMAN, supra note 75, at 48-58; PLUCKNETT, supra note 87, at 675-707.

\(^{99}\) See PLUCKNETT, supra note 87, at 294-300.

\(^{100}\) See id. at 301-306.

\(^{101}\) See POSNER, supra note 83, at 16-29.

\(^{102}\) “Civil Law’s” early genesis was various codes of the Roman Empire and carried on in various forms in continental European states including those in the Holy Roman Empire. “Civil Law’s” modern genesis is the Code Napoleon. For an excellent brief discussion of Civil Law, Canon Law, and the Common Law, see FLOYD L. WEINREB, NATIONAL LAW AND JUSTICE 43-53 (1987).
things, and denoted both a system of English law and a subpart of that same system. What, then, did the Virginia and later West Virginia constitutional enacting conventions intend? They wanted to form a system of law that consisted of the law in effect immediately prior to the Colonies becoming an independent sovereign, except for that part based on the enacted law of the old sovereign (England or Virginia). The State will supply new enacted law. As the old enacted law overruled and deviated from common law principles, it became accepted by courts of the former sovereign as alterations of the common law. This latter point is somewhat controversial because of the way the Virginia provision of 1776 was worded as quoted in the 1869 West Virginia case. But the West Virginia Constitution contained no anti-Virginia-enacted-law provision, unlike the Virginia constitution, which contained an anti-English-enacted-law provision.

Above all else, the phrase “the common law” stood for apolitical (or “pre-political”) law—law based on reason, traditional community morality, and custom, not political calculation, political victories, or political compromises. So the phrase “the common law” meant that the apolitical legal system used by the courts for civil and, on occasion, criminal cases, should continue. The new political sovereign will supply a new set of political laws, which political laws may trump or supplant the apolitical rules of the common law. Of course, the apolitical system contained both a tradition of change and a theory of reception by colonial regimes. Thus, nothing about the phrase “the common law” invited law frozen in time or space. Even the phrase “the common law of England,” used by the West Virginia Legislature to “clarify” the constitutional provision, had a tradition of change for changing times and changing places.

What could Black & Decker’s lawyers have been thinking when they made the absurd argument that we began this essay with? Neither West Virginia judicial precedent, nor the American idea of the common law supports it. They were thinking twentieth-century ideas of the common law and imposing them on a nineteenth-century use of the phrase “the common law.” Let us look briefly at the transformation of the idea of the common law in post-Colonial America. Scholars who have studied the patterns of judicial decision making in American history divide these patterns into three periods: from the Revolution to the Civil War, from the Civil War to World War I, and from World War I to the present. I shall use these periods, rough as they are, to describe the metamorphosis of the idea of the

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103 See Cunningham, 3 W.Va. 293 (1869); supra note 15.
104 See supra note 19 and accompanying text.
105 For frequent use of the term “pre-political,” see HORWITZ, supra note 29. Rights exist naturally, prior to political choice, and governments exist to add coercion to the moral suasion of the right.
106 Supra notes 4-5.
107 There was some weak use of the absurd doctrine as explained above. But there had never been the strong use of either the strong or weak formulation of common-law-cannot-be-changed doctrine. But see Judge Haden’s opinion in Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975) and Judge Caplan’s opinion in Atkins v. St. Francis Hospital, 143 S.E.2d 154 (W. Va. 1965). These cases give colorable support to the lawyers’ claim.
common law.

B. The Pre-Civil War Period

In the period of the first Industrial Revolution in America roughly up to the Civil War, the common law was in the process of fresh discovery. The union of states was populating and utilizing a vast new continent (remember America first doubled (1803), then tripled (1848), in land mass), adjusting to new steam-driven industry, beginning urbanization, and gradually increasing immigration from northwestern European countries. The late Professor Grant Gilmore called this the Age of Discovery. Karl Llewellyn in his masterpiece of post-modern empiricism (he read and discussed scores of cases picked mostly at random), called it the age of the Grand Style of the Common Law. Llewellyn believed that to the better judges of this era precedent was “welcome” and “very persuasive,” but that it must be tested against three types of reason: (1) the reputation of the opinion-writing judge (think of Lord Mansfield, Joseph Story, James Kent, Lemuel Shaw, John Gibson), (2) “sensible” and ordering “principle[s],” and (3) sound policy (i.e. the prospective consequences of the rule’s benefit to the community). His use of the words “principle” and “policy” require further explanation.

“Principle” is a verbal formulation of the reason or a reason it is just to settle a claim either for or against liability. For example, the idea that “one ought not to be liable for consequences that are not foreseeable [or reasonably foreseeable]” is a principle at work in many common law precedential rules. Notice that a principle evokes a sense of justice, and is backward looking because it is concerned with past events. Policy, on the other hand, is a compound of guessing at what behaviors will eventuate as a consequence of people relying on the precedential rule and a judgment about whether that behavior will be good for the community. If, for example, a person is not responsible for any damages from a breach of a promise to perform (except those that are the immediately foreseeable consequences of the breach), she will be more likely to make promises to perform. The principle facilitates contract formation. Facilitating contracts is the facilitation of commercial exchange, which increases total wealth, which in turn is good for the community. Thus, a rule based on a principle of moral foreseeability of contract damages furthers the policy of encouraging economic activity.

Kermit Hall says that “[t]he period from 1787 to 1861 has been called the ‘golden age’ of American law. Scholarship on the era describes it as ‘the creative

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110 See LLEWELLYN, supra note 28.

111 Id. at 36-37.

112 E.g. Hadley v. Baxendale, 9 Ex. 314 (1854).
period,' "the transformation' of law and 'the Americanization' of the law." 113
Roscoe Pound called this period the "formative era of American law."114 The
consensus among scholars who have studied this era is that the common law was
viewed more as a process than a set of rules. The common law was a process of
deciding private law suits. A process whose hallmark is consistency with past
decisions, but a process that is not a slave to consistency; the common law process
takes a nuanced common sense approach to consistency. The past is reexamined.
The future is anticipated. Judges are self-consciously crafting law—not making it
wholesale like legislatures—but discovering "true" principles of right relationships
between members of a community. These "true" principles imply norms of
behavior, which norms ought to be for the good of the community. The good of the
community, in this era, usually meant economic expansion.115 It apparently
eschewed formalistic approaches to legal craftsmanship.116

When West Virginia became part of the Union in 1863, this was the
Sims117 perfectly exemplifies this approach.118 But it must not be forgotten that in
this pre-Civil War era, the common law was viewed as a species of natural law.
The common law was not the positive law of some sovereign, whether the
sovereign be state government or federal government. This natural law feature of
"the common law" carried over into the post-Civil War era to be discussed next.
But the concrete implications of this "natural law not positive law" feature of
nineteenth century "common law" requires further exploration.

In a famous 1834 case, Wheaton v. Peters,119 Justice M'Lean wrote an
opinion, concurred by Joseph Story and John Marshall, eight years before Swift v.
Tyson,120 that said:

It is clear, there can be no common law of the United States. The
federal government is composed of twenty-four sovereign and
independent states; each of which may have its local usages,
customs and common law. . . . The common law could be made a
part of our federal system, only by legislative adoption.121

113 HALL, supra note 79, at 114.
114 Id.
115 See FRIEDMAN, supra note 18 and passim.
116 See HORWITZ, supra note 29, passim.
117 5 W. Va. 1 (1871).
118 See supra notes 21-24 and accompanying text.
120 41 U.S. (16 Pet.) 1 (1842). Swift is, of course, the case overruled in Erie R. Co. v. Tompkins, 304
U.S. 64 (1938).
121 Wheaton, 33 U.S. at 658.
The *Wheaton* Court continued:

When, therefore, a common law right is asserted, we must look to the state in which the controversy originated . . . . [W]e may inquire whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania. It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as part of their heritage. That this was the case, to a limited extent, is admitted. Not one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. *It was adopted, so far only as its principles were suited to the condition of the colonies:* and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each.\(^{122}\)

In argument, it was insisted, that no presumption could be drawn against the existence of the common law, as to copyrights, in Pennsylvania, from the fact of its never having been asserted, until the commencement of this suit. It may be true, in general, that the failure to assert any particular right, may afford no evidence of the non existence of such right. *But the present case may well form an exception to this rule.*

If common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on this subject. If no right, such as is set up by the complainants, has heretofore been asserted, no custom or usage established, no judicial decision been given, can the conclusion be justified, that, by the common law of Pennsylvania, an author has a perpetual property in the copyright of his works. These considerations might well lead the court to doubt the existence of this law in Pennsylvania; but there are others of a more conclusive character.

Can it be contended, that this common law right, so involved in doubt as to divide the most learned jurists of England, at a period in her history, as much distinguished by learning and

\(^{122}\) *Id.* at 658-59
talents as any other; was brought into the wilds of Pennsylvania by its first adventurers. Was it suited to their condition? But there is another view still more conclusive.

In the eighth section of the first article of the constitution of the United States it is declared, that congress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And in pursuance of the power thus delegated, Congress passed the act of the 30th of May 1790.123

The Court also stated that "[the common law] is said to be founded on principles of justice, and that all its rules must conform to sound reason."124

By seeming contrast, Justice Story wrote the following in *Swift v. Tyson*:

But, admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the 34th section of the Judiciary Act of 1789, ch. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals, in all cases to which they apply. That section provides "that the laws of the several states... shall be regarded as rules of decisions in trials at common law in the Courts of the United States, in cases where they apply. In order to maintain the argument, it is essential, therefore, to hold, that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactment's promulgated by the

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123 *Id.* at 659-660 (emphasis added).

124 *Id.* at 658.
legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed, and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. Non erit alia lex Romae, alia Athenis; alia nunc, alia posthaec; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.\textsuperscript{125}

The untranslated Latin quotation from Cicero is part of a famous oration on natural law that I here give you a little more of, in translation (with the part Justice Story quoted in italics):

True law is right reason in agreement with nature; it is of universal

\textsuperscript{125} \textit{Swift}, 41 U.S. at 18-19 (emphasis added).
application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligation by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different law now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even, if he escapes what is commonly considered punishment.\textsuperscript{126}

Can \textit{Wheaton} and \textit{Swift} be reconciled? Notice that Story does not say that “general doctrines and principles of commercial jurisprudence” are the common law of the United States. They are not the law of any place because they are not the command or “articulate voice of some sovereign or quasi-sovereign.”\textsuperscript{127} Rather, the doctrines are the ordinance of reason, a proposition that is consistent with M'Lean’s claim “that all [common law’s] rules must conform to sound reason.”\textsuperscript{128} In \textit{Wheaton}, the issue was whether a non-statutory right to copyright existed.\textsuperscript{129} It did not exist “at common law,” but it did exist problematically in England after 1760.\textsuperscript{130} Therefore the question was, “had it been received in the United States?” The reception of recent English cases is a matter for each state’s courts to decide. Since there was no common law right to copyright by ancient prescription, then only the deliberate choice to follow an English case could create a right. That deliberate choice is a quasi-sovereign act, not just the ordinance of reason. In \textit{Swift} it was not a question of the existence of a right, but an acknowledged right’s exact contours—contours dictated by reason alone. The learned Story did not believe the federal courts ought to be stuck with the bad “reasoning” of mediocre judges.

In any event, Story’s natural law view of “the common law” carried the day, indeed the next 95 years.\textsuperscript{131} Justice M’Lean viewed the common law as being essentially natural law. Yet, he felt that some parts of the law were unreasonable

\textsuperscript{126} \textit{Quoted in} Lloyd L. Weinreb, \textit{Natural Law and Justice} 40-41 (1987) (His footnote attributes the translation to Cicero, \textit{De Re Publica} (Clinton Walker Keyes trans., Cambridge, Mass. 1928)).

\textsuperscript{127} Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

\textsuperscript{128} \textit{Wheaton}, 33 U.S. at 658.

\textsuperscript{129} \textit{Id.} at 659.

\textsuperscript{130} \textit{Id}.

\textsuperscript{131} For an excellent discussion of Story’s natural law views of the common law and of the basis of the decision in \textit{Swift}, see Gerald T. Dunne, \textit{Justice Joseph Story and the Rise of the Supreme Court} 403-423 (1970).
(copyright law being such a part), such that its adoption in America required a deliberate act by common law state courts—not federal courts.

C. The Period From the Civil War to the first World War

Sometime after the Civil War the "Grand Style" changed to the "Formal Style." The "common law" changed from being a decisional process to a finite body of basic principles. The principles were "discovered" by reason, exploring the best of old cases, mostly English, in a scientific way. Law was a science according to the chief architect of this new formalism, Christopher Columbus Langdell, Dean of the Harvard Law School from 1875 to 1895. "Policy" was not a legitimate subject of judicial decision-making. All a court could legitimately do was find the law in the form of a rule and apply it according to its literal terms. "Policy" is political. The "law," and judges, are apolitical.

Progressive historians such as Llewellyn, Gilmore, and Horwitz tend to over read this late nineteenth-century tendency in the judicial craft. Llewellyn called it the era of the Formal Style. Gilmore called it the Age of Faith. Horwitz called it the era of "classical legal thought." All three hated it for three general reasons. First, it was an era defined by an apolitical set of conservative political value choices that favored individual private power over public or collective power. Second, the common law was "true law." Legislation was an intrusion on the purity of the true law; therefore, legislation must be read narrowly and tested against time-honored common law principles. Third, the common law's true rules and their formalistic and conceptualistic application made it difficult to make progressive reforms within the common law.

Notice that there are two big differences between the Grand Style and the Formal Style eras. First, the Grand Style is very open to change; the Formal Style is quite closed. Second, the Grand Style gives some recognition that judges make some policy choices in judging, while Formal Style jurists insist on the apolitical nature of law and judging. But notice further that both nineteenth-century styles assumed that judges discovered the law, declared the law, and classified the law, but they did not make the law. It was not the product of their will, either political or moral. Judicial decisions were a product of judgment, not will. "Judgment" in the earlier era included sound social policy and natural justice. In the later era,

\[ \text{See } \text{HORWITZ, supra note 29, at 10-20. See also GILMORE supra note 109, at 41-67.} \]

\[ \text{Id.} \]

\[ \text{LLEWELLYN, supra note 28, at 38.} \]

\[ \text{GILMORE, supra note 109, at 41-67.} \]

\[ \text{HORWITZ, supra note 29, at 9-31.} \]

\[ \text{See id. passim (private property was nearly absolute and the free market was the measure of true value).} \]

\[ \text{This greatly handicapped the progressive political agenda which operated mostly through legislative reform.} \]
"judgment" meant mostly the formal extension of preexisting rules long since extracted from "true" principles of justice.

D. **The Post-World War I Period**

In the middle of the formal period arose a revolutionary figure disguised as a conservative Republican—Oliver Wendell Holmes, Jr. This thrice-wounded Civil War veteran, and scion of a physician-scientist-poet-essayist, saw law as essentially political.\(^{139}\) He did not, however, see it as merely political or as partisan politics. To Holmes, law was based on the enactments of legislatures and the accumulated decisions of judges acting for the convenience of the community. His attack on the then-prevailing Formal Style was both an attack on prevailing beliefs about what the law is and as to what it ought to be. His quarrel with nineteenth-century formalism was that the Langdell-inspired description of the common law was wrong.\(^{140}\) His famous phrase, "the life of law has not been logic; it has been experience,"\(^{141}\) was meant to convey both a sense of "doing" law and of "being" law. Logic, especially deductive logic, was not how the common law was in fact developed and extended, and was not how it ought to be developed and extended. His assertion that experience is the life of the law is an assertion about legal method (trial and error is better than logic) and about legal content. The content of the law is, and ought to be, rules directing behavior in a way useful to (good for) the community. The common law is legislation. Holmes takes the Grand Style's concern for policy and makes it the major concern of common law development and extension.\(^{142}\)

In its baldest form, the Holmes claim is that the common law is positive law. It is not a species of natural law, it is not unwritten. The common law is law that is made, not discovered, by judges. The existence of a common law doctrine is

\(^{139}\) See CATHarine Drinker Bowen, YANKEE FROM OLYMPUS, THE LIFE OF O.W. HOLMES (1946).

\(^{140}\) Holmes was not doubt influenced by John Austin's, The Province of Jurisprudence Determined (1832). See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES, LAW AND THE INNER SELF, 87, 117, and passim (1993).

\(^{141}\) OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed. 1963) (was originally published in 1881) at 5. It is worth quoting the entire paragraph following the textual quotation:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

entirely dependent on judicial pronouncement. If the common law is judicial legislation, then it ought not to be privileged over elected legislatures’ enactments. Indeed, in a democracy, elected legislatures’ enactments are much more likely to represent the will of the people than are judicial enactments.

That legislation is privileged over common law rights and duties is succinctly set out in Holmes’s dissent in \textit{Lochner v. New York.} Justice Rufus Peckham’s opinion for the five-man majority in \textit{Lochner} marked the full fruition of the Age of Faith, of the Era of the Formal Style. Indeed, \textit{Lochner’s} majority privileged the common law principle of freedom of contract over a legislative judgment that the good of the community demanded some limits on the common law right to contract. The New York legislature’s judgment that the absolute freedom to contract for one’s labor was not good for employees was given no deference by Justice Peckham, who blindly followed the common law’s assumption of a free market for labor untilted by the industrial employer’s power. Yet, this was living in a fool’s Eden—a garden that no longer existed, if it ever did.

Progressives hated \textit{Lochner v. New York}. Indeed, \textit{Lochner} served as a catalyst for a change in thinking about the nature of law. To the progressive, \textit{all} law was legislated. In a democracy, therefore, the judge-made law of the common law ought to defer to the law made by the people’s representatives elected for that purpose. Legal scholarship, mostly by law professors, urged a new view of the common law—a view more consistent with Holmes’s view adumbrated in his 1895 lecture, \textit{The Path of The Law,} and bluntly applied in his famous dissent in \textit{Lochner.} For thirty years, scholars toiled for a new vision of the common law. Two somewhat distinct visions of common law positivism developed, both tracing themselves to Holmes. Each had a different impact on how judges developed, extended, and changed the common law. Let’s call these ways of viewing the common law “analytical positivism” and “realistic positivism.”

In analytical positivism, the common law became rules laid down by judges who were the sovereign’s agents. As with classical legal thought (formalism) the common law was a body of rules. Unlike classical legal thought, the rules are “laid down” by judges, not “discovered.” The judge acts more like the classical legislator than the classical judge. To be sure, the legislating judge must have classical “civic virtue”—that is, he must legislate for the good of the

143 198 U.S. 45, at 74 (1905) (Holmes, J., dissenting).
144 See id. at 45.
145 See id.
146 Justice Peckham referred obliquely to labor law as being an impermissible purpose of state law makers. See id. at 64.
149 See generally L\textsc{ou} Fuller, \textsc{t}he \textsc{l}aw \textsc{i}n \textsc{q}uest \textsc{of} \textsc{it}self (1940); G. \textsc{e}d\textsc{ward} W\textsc{hite}, J\textsc{ustice} O\textsc{l}ver W\textsc{endell} H\textsc{olmes}, L\textsc{aw} \textsc{and} T\textsc{he} I\textsc{nner} S\textsc{elf} (1993) (as analytic positivist, see 92-95 and 116-117; as an influence on realistic positivism, see 52-53).
community, not for an interest group such as organized labor or an association of merchants or manufacturers.\textsuperscript{150} Thinking about the common law as a legislated body of rules—rules of behavior, instead of rules of decision—transforms the common law into a species of public law. The genesis of the common law is the settlement of private law suits between relatively equal parties, \textit{meum} and \textit{teum}. Thinking of the common law as a body of positive law works a fundamental change in how it should be changed, altered, and extended.

Indeed, the genius of common law development was its case-by-case declaration and refinement of rights and duties. To the positivist, rights and duties do not exist until the state, through its judges (or legislators) creates them. Moral rights and duties may exist prior to the legal remedy, but, to a positivist, moral rights and duties between private persons are not legal rights waiting to be announced. Remember that Justice Holmes not only advocated for the distinction between morality and law, he urged purging the law of rules based on “moral responsibility” defining legal responsibility.\textsuperscript{151} He urged this purging for two reasons: (1) moral thinking makes for uncertainty in the law, because moral responsibility is dependent on free will and free will requires entry into the veiled regions of mind, consciousness, and motivation (Holmes wanted objective rules and standards, rules that require proof only of publicly observable facts); and (2) public policy often trumps moral rights, because the public or collective good is often more important than individual private rights.\textsuperscript{152}

Political progressives liked this positivist way of looking at the common law because it reversed the privileging of the common law over legislation. Although officially acts of legislative bodies had always trumped the common law, legal culture (the body of those learned in the law) treated legislation—especially in the Age of Faith/Formalism—as officious intermeddling into the judicial process of discovering and declaring the “true” rules. Legislation got a cold reception in common law litigation. Enacted rules were either subjected to the old saw about legislation in derogation of the common law being narrowly construed, or more likely, after \textit{Lochner v. New York} (actually before \textit{Lochner} in many states),\textsuperscript{153} legislation in derogation of common law rights of property or contract was unconstitutional and void. Even choice of law doctrine did service to avoid legislated changes in the common law.\textsuperscript{154} If the common law is really judicial legislation, then such legislation has less democratic pedigree than the legislation of those elected specifically to make law for the public good.

\textsuperscript{150} See, e.g., \textit{The Federalist Papers} No. 51 (Jacob E. Cooke, ed., 1961). This is what James Madison would call a “faction.” See id.

\textsuperscript{151} Holmes, The Path of the Law, note 147 supra, especially his famous “bad men” theory at 167. \textsc{Fuller, supra} note 156, critiques the bad man paradigm at 95-96.

\textsuperscript{152} Holmes, supra note 148. “Behind the Logical form [of a judicial opinion] lies a judgement as to the relative worth and importance of competing legislative grounds.”

\textsuperscript{153} See, e.g., Wynehamer v. People, 13 N.Y. 378 (1856); \textit{In re Application of Jacobs}, 98 N.Y. 98 (1885); Godcharles v. Wigeman, 6 A. 354 (1886).

Progressives also like the distancing of law from morality—since the morality of the Age of Faith had become very conservative. Substituting a new public morality in the name of “public policy” allowed a new morality to trump legal culture’s old morality of *meum* and *teum* corrective justice—where everyone, no matter how economically powerful or weak, was equal before the law.

The positivist vision of the common law is inspired by skepticism about there being a true morality, especially a “true morality” of individual rights and duties. The positivists tended to be moral consequentialists, such as Jeremy Bentham and John Austin, two utilitarians, both of whom were early advocates of positivism. Indeed, Thomas Hobbes, grandfather of positivism, was skeptical of a true or singular natural law. But analytical positivists were not language skeptics. Linguistic texts could yield “objective” meaning. Therefore, they believed rules could give positive and definitive direction to judicial decision-making and to human behavior. Another group of early positivists were not so certain—the American Legal Realists.

The American Legal Realists began the movement that I call realistic positivism. It is positivist because they believe that judges do make the law in common law cases, but it is realistic because they do not believe that judges’ decisions are really determined by prior rules laid down, nor that they should be. The realist’s skepticism is based in part on language skepticism—linguistic meaning is always (or mostly) the function of the interpreter’s sense of any text—the interpreter’s own subjective “take” of the marks on paper. In the crudest vernacular: people read things to mean whatever they want them to mean—that’s just the way the world really is. But “rule skepticism” is also skepticism about the utility of rules to capture the nuanced variety and complexity of private or quasi-public dispute resolution. There are more concerns that inform one’s “situation

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156 See Dworkin, supra note 97.

157 See John Austin, *The Province of Jurisprudence Determined* (1832). See also Philip Schuckman, Cohen and Cohen’s Reading in Jurisprudence and Legal Philosophy 8 (2d ed. 1979). The author’s say: “John Austin’s *Province of Jurisprudence* set a pattern in Anglo-American jurisprudence which has been closely followed, ever since, by most Anglo-American teachers and treatises in this field. Gray and Holmes in the United States, and Holland, Pollack, and Salmond in the United Kingdom were faithful followers of Austin’s analytical approach. For Austin (1790-1859), as for his teacher, Jeremy Bentham, clear objective analysis of the law was not an end in itself but a necessary prelude to intelligent ethical criticism of actual rules.” Id. at 8.

158 Thomas Hobbes (1588-1679) wrote his most famous work on politics, *The Leviathan* in 1651. It is excerpted in many anthologies. See, e.g., Schuckman, supra note 150 at 1-5; Lloyd Weinreb, *Natural Law and Justice* 68-76 (1987).


than can ever be captured by a rule. Rules only capture the salient features of a situation and not its gestalt. Rules only make for crude justice and crude judging.\footnote{161}

Moreover, while realists see law as a compound of the sense of the “justice of a situation” and sound public policy—like the rule-making analytical positivists—they see public policy choices as more nuanced and complex than do the positivists. They would like to use the social sciences (then new) to inform their judgments as to policy. Indeed, the realists sometimes felt that the proper policy was too complex for judicial generalists to adumbrate in crude rules or standards.\footnote{163}

To the realist, the development of rights ought to be left to legislative development, with a structure of administrative experts to invoke and apply the rules. The paradigm case is International News Serv. v. Associated Press.\footnote{164} The opinion of Justice Mahlon Pitney epitomizes classical legal thought, while Justice Holmes’s concurrence epitomizes analytical positivism.\footnote{165} The dissent, by Louis D. Brandeis, represents realistic positivism at its outspoken best.\footnote{166}

Realists were truly anti-formalists.\footnote{167} To realists, the common law was a process, not a body of rules. This harkens back to Llewellyn’s Age of the Grand Style and the pre-Civil War era.\footnote{168} Thus, when Llewellyn talks about the Grand Style returning after WWI, he is talking about legal realism.\footnote{169} The formalism that Llewellyn and his contemporaries fought against was embodied in the philosophy of both analytical positivism and Langdel’s naturalistic formalism that preceded positivism. To the positivists, the rules were the product of the political will of judges; to the naturalist, they were the product of the apolitical reason of judges. Believing that the law is simply a body of rules breeds formalism. If the analytic positivist believes that the common law is a body of judicially legislated law, then a dilemma arises about change within the body of rules so legislated. If, on the one hand, the common law is a body of “enacted” law, then the time-honored tradition of judges is that they must obey it. Judges may interpret law as if it is vague or ambiguous, but they must follow its plain meaning unless “plain meaning” leads to absurdity or unconstitutionality. Thus, the present judges may not change the law “enacted” by the past judges. On the other hand, since the common law was “enacted” by prior judges of the same status as the present judges, then the present

\footnote{161}{LLEWELLYN, supra note 28, at 268-285 and passim.}

\footnote{162}{See WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).}

\footnote{163}{See HORWITZ, supra note 29, at 204 (quoting Justice Brandeis).}

\footnote{164}{248 U.S. 215 (1918); See also HORWITZ, supra note 29, at 203-05.}

\footnote{165}{Id.}

\footnote{166}{Id.}

\footnote{167}{General standards, not rules, were grist for the realist decisional mill. See Foreword: Kathleen M. Sullivan, The Justice of Rules and Standards, 106 HARV. L. REV. 24 (1992).}

\footnote{168}{See LLEWELLYN, supra note 28.}

\footnote{169}{See TWINING, supra note 121.}
judges ought to be able to legislate with the same authority as their predecessors. "Legislating" always includes repealing old legislation and legislating anew. Therefore, if the common law is legislated by past judges, then present judges can simply change it to suit their present notions of justice and sound policy.

Thus, the dilemma for strict-rules positivism is that either the rules cannot be changed (or extended) at all, or they can be changed at will. Those who are immersed in Anglo-American legal culture know that both horns of the dilemma violate the deep tradition of the common law in all ages. The difference between the Grand Style judges of before 1870 and the post-1870 Langdelian Formalists was not that one believed one could change or extend the common law at will, and the other believed it could not be changed or extended at all. Rather, the difference was a matter of degree involving a more or less strict adherence to precedent. To think of the common law as a process makes a person more open to change than thinking of the common law as a body of rules inferred from precedent. If a person thinks that a body of rules is based on right reason and deep custom, then even a formalist will occasionally reexamine existing social customs to determine whether the rule is wrong and therefore a fit subject for change. But (and here is how the positivists' dilemma really functions), if one believes the common law is a body of rules laid down by judges, then, as a Gertrude Stein might have said, the common law rules' "just-there-ness" is salient. A rule, is a rule, is a rule. Or, with an apology to Lord Tennyson, "Theirs not to make reply,/Theirs not to reason why/Theirs but to find the rule,Into the valley of Law/Rode the five judges." Thus, analytical positivism could make "the common law" even less flexible than the classical legal thought of the Age of Formalism. Something of this sort happened in West Virginia, as we shall see in the next section.

To give analytical positivism its due, most positivists advocated a much more flexible way of reading the rules of the common law than did the classicists. So, to a positivist, the common law's body of rules had more "wiggleroom" than the classicist's body of rules. Rules should be read with the policy of the rule in mind. The rules should be extended if the extension will further that policy. Rules of the common law should be read so as to further the public purpose for

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170 Benjamin N. Cardozo, The Nature of the Judicial Process 23 (1921). "The process has been admirably stated by Munroe Smith:

In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for an attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from principle do not work well, the principle itself must ultimately be re-examined. (Footnote omitted)"

171 Id. at 73 (quoting Dean Roscoe Pound: "The emphasis has changed from the content of the precept... to the effect of the precept in action and the ... efficiency of the remedy to attain the ends for which the precept was devised."). See also Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 603 (1908).
which they were designed. This "functional" approach to reading rules should be contrasted with the "conceptualistic" approach of classicists. Moreover, the analytic positivists recognized a substantial indeterminateness in language and accordingly, in rules. But rules were not nearly as indeterminate to analytic positivists as they were to realists. H.L.A. Hart wrote of the "core" and "penumbra" of the rules laid down.\textsuperscript{172} If a case is a core example (a paradigm) of the rule—follow it. If it is in the penumbra of the rule, go where the rule's function leads. Nonetheless, actually over-ruling rules instead of gradually narrowing their "core" has always been a distinct problem for analytic positivism.

In sum, the trajectory of common law thinking in 400 years of American history has been from thinking the common law as a more-or-less fixed body of rules (colonial period); to thinking the common law was discovered by judicial reason, utilizing a process of precedent and fresh discovery (pre-Civil War era); to thinking of the common law as a body of rules laid down by the apolitical reason of judges (pre-WWI era); to thinking of it as a body of rules laid down by the political (but virtuous) will of the judges (post-WWI positivists); to thinking of the common law as a process of deciding cases where there is no body of rules to give positive direction, but a body of rulings that give important and often crucial guidance to the will of the present decision-maker (post-WWI realists). In short, the idea of the common law went from formal naturalism, to functional naturalism, to conceptual/formal naturalism, to conceptual positivism, to functional realism. Somewhere in the "Age of Anxiety,"\textsuperscript{173} the Supreme Court of Appeals of West Virginia got slightly derailed from Judge Berkshire's useful Grand Style thinking.\textsuperscript{174} Is it any wonder?

III. USING HISTORY AND LEGAL THEORY TO EXPLAIN WEST VIRGINIA'S UNNOTICED ABSURDITY.

One can conclude from the cases reviewed in Section I that the Supreme Court of West Virginia did not articulate either a strong or weak version of the absurdity of being bound by old cases from other jurisdictions, but not being bound by newer cases from its own jurisdiction, until relatively recently. In any event, the Court never actually followed an old common law doctrine that it really did not like, but felt constitutionally bound to follow. Nonetheless, two highly respected West Virginia jurists, Fred Caplan and Charles Haden, did articulate the absurdity while finessing its consequences. Why did these judges not notice the absurdity? I have already suggested some reasons, above. But I now need to explain what I believe to be the overarching reason the excellent courts of the 1960s and 1970s missed the absurdity of the doctrine to which they paid lip service.

The idea of the common law had metamorphosed, as discussed above,


\textsuperscript{173} \textit{See} GILMORE, supra note 109 at 68-98.

\textsuperscript{174} \textit{See} supra notes 21-27 and accompanying text.
from an unwritten body of principles and rules discovered by the reason and experience of common law judges (nineteenth century), into a body of written rules created by judges to best serve the community (twentieth century). As noted above, the change in the idea of the common law is much more complex than this simplification, but this simple version of the change makes salient the features that cause confusion. One cannot incorporate by reference unwritten rules. Therefore the original use (i.e. the nineteenth-century use) of the phrase “common law shall continue” was not a reference to a “body of rules,” but to a time-honored process for discovering the unwritten law of the community.\textsuperscript{175}

Until the early part of the twentieth century, the West Virginia Supreme Court of Appeals paid little heed to the common-law-shall-continue clause. Then, the idea that the “common law” was actually a body of identifiable principles and rules crept in from classical legal thought and then from Holmesian positivism. Classical legal thought viewed “the common law” as originally unwritten but now mostly “written down” in cases and learned treatises, such that the unwritten law was now written, but its spirit was still unwritten universal law and unwritten community morality and custom. Holmesian positivism said the common law is that body of “written down” rules, rules announced in cases. The rules come not from unwritten community (or universal) morality and custom, but from the assessment of judges settling disputes as to what would be best for the community they help govern. The judges made this body of common law rules like a legislator making law for the good of the community. This metamorphosis of the common law as merely a process to the common law as a knowable body of written rules, and then from a “knowable body of written rules” from morality to a “knowable body of written rules” from judicial legislation, made it easy to perceive that the 1863 constitutional fathers intended to incorporate by reference this body of written rules as “the common law.”\textsuperscript{176} Remember, in Erie R.R. v. Tompkins,\textsuperscript{177} the United States Supreme Court, through the highly respected Louis Brandeis, said that Justice Story was wrong from the beginning and that the common law had always been “the articulate voice of some sovereign or quasi-sovereign.”\textsuperscript{178}

\textsuperscript{175} In Morningstar v. Black and Decker, 253 S.E.2d 666, 675 (W. Va. 1979), Justice Miller concluded: “the term the ‘common law’ encompasses two components: first a body... of case precedents extending from the present time back into the ancient courts of England;... and... a system of reasoning from case to case... that permits the common law to grow... and adapt.” He then quotes from Dean Pound’s THE SPIRIT OF THE COMMON LAW (1921).

\textsuperscript{176} See supra note 4.

\textsuperscript{177} 304 U.S. 64 (1938). There, Justice Brandeis declared for a 6-2 majority (Cardozo did not participate): “And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.” Id. at 78. Later, “the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.” Id. at 79. (Brackets in the original)

\textsuperscript{178} See Southern Pacific Co. v. Jensen, 244 U.S. 207, 222 (1917). But in Erie Justice Brandeis did refer to the “common law” as “the unwritten law of the State as declared by its highest court...” & “would apply as their rules of decision the law of the State, unwritten as well as written.” Erie, 304 U.S. at 71,73 But this reference back to a bygone era’s notion of the common law runs counter to Brandeis’s reliance on Holmes:
Even though West Virginia never made strong use of either the strongest or weakest formulation of the absurdity, the Court did make weak use of the weaker formulation: We (the Court) must follow old cases from some sort of American (or general) common law, but we need not always follow our own newer case precedent. In all the cases that cite the weaker formulation as the law of West Virginia, the weak formulation never really dictated the result reached in the cases. The Court simply avoided the cognitive dissonance of acting on an absurd principle by saying that (1) it is not a “bad rule,” it is a “good rule,” or (2) the “bad rule” does not apply to this case situation, or (3) the “bad rule” is part of our “case law” and therefore is no longer a relevant part of the common law that cannot be overruled.

The first two are rather standard cases involving judicial avoidance of bad results. The first is that it is not absurd because the court is “forced” to follow a good rule to a good result. The second avoidance technique (distinguishing the bad case) does not force the court to reach the undesired result. But the third avoidance method, contrasting “case law” with “common law,” is itself absurd. In our legal culture, it has always been understood that there are three kinds of law: constitutional, statutory, and common law. “Case law” is but a gloss on one of those three kinds of law. There is not a fourth kind of law called “case law.”

Why was the West Virginia Court able to avoid an absurdity with an absurdity? My best guess is that it is because the Court thought the “common law” was a “body of written rules.” A body of written rules has a specific knowable identity. It is located (and limited) in time and space. However, the West Virginia Court also believed in the 1960s and ’70s that the “common law” was a “process for deciding cases based on precedent”—precedent that must persuade the Court in each new case that justice and public policy allowed the rule implicit in the case to be followed. But in the context of the constitutional common-law-shall-continue

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The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law': 'but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else... 'the authority and only authority is the State, and if that be the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.' *Id.* at 79 (emphasis added) (footnotes omitted.) (Brackets in original) Brandeis's nod to the genesis of "the common law" from unwritten morality is a mere genuflection to the "myths of antiquity". The common law "in the sense in which courts speak of it today" is the uttered [promulgated] "last word" of the legislature or the supreme court" - i.e. it is written law.

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178 One ought not to need an authoritative citation for this, but if you have any doubt remember that when the federal courts have to act without the positive guidance of a statute or constitution, the courts call it "federal common law." See Henry J. Friendly, *In Praise of Erie and the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). *Erie* led to the "emergence of a federal decisional law in areas of national concern that is truly uniform because under the supremacy clause, it is binding in every forum" and the clarion, yet careful, pronouncement of *Erie* that there is no "federal general common law." See *id.* at 178.
clause, the Court picked one version for the clause (the body of written rules; the common law as a “plain fact”\textsuperscript{180} version), and another version for how the Court actually decided cases without the positive guidance of enacted law. Judge Caplan called this second version “case law” (what had traditionally been called “common law”), apparently to avoid the dissonance of contradictory definitions for the same thing.

But why did the Court not say what it eventually said in \textit{Morningstar v. Black & Decker},\textsuperscript{181} and earlier said in Judge Berkshire’s 1871 opinion, that the “common law” is “a process based on precedent” not “a body of rules”? The answer must be that there was significant West Virginia case precedent implying that the common law is a body of written rules. As noted above, these cases were all the weak use of the weaker absurdity (“common law” antedating 1863 as opposed to “common law precedent from England” antedating 1863). Yet, the West Virginia Supreme Court of Appeals stated in unmistakable language that the Court cannot overrule old common law rules. Those cases which make such a pronouncement date from a time when the American legal culture was moving away from notions of the common law being rules \textit{discovered} and \textit{announced} by judges, and moving toward the idea that the common law was a body of rules \textit{made} and \textit{enacted} by judges. Under Brannon and Dent’s influence, until at least 1916, “the common law” was still a body of precedent that must continue to persuade. Without Brannon and Dent, the influence of Langdell and Holmes seeped in together (i.e. the Court fused the naturalist’s and positivist’s formalisms into the confused idea that the common law is a body of “\textit{true rules} \textit{made} by judges”). “True ruleness” implies fixed and certain rules. However, if the true rule is discovered by judges (as Story had declared in \textit{Swift v. Tyson}), then present judges can rediscover (by more careful reasoning) that the “true rule” is not true anymore. But if the “true and certain rule” is \textit{made} by a judge, then it is “willed” into being just like legislatively enacted rules. To Holmes, judges made law but not “true law.” Holmes had a formalist side (especially with enacted law),\textsuperscript{182} but he also had a pragmatic side (“all life is an experiment”).\textsuperscript{183} To Holmes, all law was experimental but judge-made law was especially experimental. A rule was a hypothesis as to what is best for the community, subject always to be tested in the experience of the next judge in the next case.

By conflating “true rules” and “made by judges,” both the Story/Langdell theory of change and the Holmes theory of change are eliminated. “The common law” becomes a fixed and settled body of enacted law—a body fit to be incorporated by reference.\textsuperscript{184} At first, the use was weak because it merely supported

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\item DWORKIN, \textit{supra} note 97 (Dworkin notes that most layman and many lawyer’s believe law to be a “plain fact”).
\item 253 S.E.2d 666 (W.Va. 1979); \textit{see supra} note 5.
\item \textit{See, e.g.}, United States v. Johnson, 221 U.S. 488 (1911).
\item \textit{See} Abrams v. United States, 250 U.S. 616, 630 (1919).
\item Of course, I am only speculating as to what went on in the minds of the judges in the litany of
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a result the Court thought just and proper anyway. But numerous weak uses made the glibly-announced doctrine seem to be part of the "law of West Virginia." Hence, when the use threatened to be strong (i.e. the actual reason for a result that was otherwise thought not proper), the Court managed to either distinguish the old case so that the constitutional doctrine did not apply, or declare the older case not to be "common law" but "case law." Not until 1979 was the Court squarely faced with the strong use of the doctrine. The Court quickly wiped it out.

IV. A CONCLUDING LESSON: SYLLABUS POINTS AND THE COMMON LAW TRADITION

Some lessons may be learned from our excursion into legal history and jurisprudence. Perhaps, common law courts (state courts) ought to be wary of formulating precise rules of decision as the basis for decisions they reach in common law cases. This practice may prove hazardous to healthy decision making if the precisely-worded rule is reduced to official syllabus points. They seem like legislation.

In his 1960 book, The Common Law Tradition, Llewellyn observed that official syllabus points might be an unhealthy decisional practice. It is worth quoting four paragraphs from Llewellyn's book, not only because the quotation is instructive, but also because it is illustrative of Llewellyn's unique scholarly methodology and writing style.  

Ohio deserves a special word because at the 1940 University of Cincinnati Conference on Precedent I heard Chief Justice Weygandt announce with conviction that the Ohio lawyer knew that the syllabus stated the law—certainly when screened through the facts—so that though nonsyllabus men might smile, Ohio lawyers had much less trouble than others on the matter of precedent. This did not fit either with general theory or with what I had been finding in the Ohio cases, so I have been on the lookout since.

cases cited above. But since the judges only made weak use of the doctrine they announced, the announcement was glib, offhand, and not the product of careful study.

185 See Morningstar, 253 S.E.2d at 666.
186 Llewellyn, supra note 28, at 97-99.
187 Here is Llewellyn's footnote: Report of the Cincinnati Conference on the Status of the Rule of Stare Decisis, 14 U. CIN. L. REV. 203, 218, 284-285 (1940). I made a short sampling of then current Ohio material, and reported thereon in Impressions of the Conference, ibid. 343, 348 F., that the Ohio court seemed to be doing much what nonsyllabus courts did, with their prior opinions. This in turn led to picking Ohio for one of the 300-page samplings, where the picture was the same. Years later, in preparing to deliver Marx lectures at the University of Cincinnati in the late spring of 1953, I used the successive Ohio Supreme Court full opinions found in the advance sheets of January 14 through April 22 of that year (109-111 N.E.2d). Among the 19 treated in this study (cf. Pp. 148 ff.) there were 3 or more opinions from 3 of the judges, 2 each from Weygandt, Hart, and Middleton, and one from Zimmerman, plus 7 per Curiam.
The general theory of the Ohio syllabus system is that the court prepared syllabus states the law of the State. I do not know whether the Chief meant, also, that the court's opinion does not state the law of the State. But if the "system" were what it officially purports to be, it would be substituting carefully considered digest-paragraphs for the more loosely written opinion-text as the precedent-material for use, and would therefore, if the theory were lived by, greatly cut down on growth or direction-shift by way of dicta or of rule-rationale or of such announced rules or rulings as have not seemed vital to the court which decided the prior case. One might of course fear that the opinion would become surplusage, and would not be felt as available to confine and distinguish a syllabus, or, on the other hand, to underpin a syllabus by showing that some current contention had been carefully taken into account before the syllabus rule was formulated - - much less, to build a rule of law not mentioned in the syllabus.

Neither the 1939 study, however, nor a subsequent one in 1953 uncovered any effects of this character. Detail to illustrate this is reported chiefly from the latter....

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I have only checked Ohio, but the nature of the case is clear: not even a "syllabus system" can escape from the flat fact: Divergent, mutually inconsistent precedent techniques are at work in the daily mine-run of appellate cases. The little case, the ordinary case, is a constant occasion and vehicle for creative choice and creative activity, for the shaping and on-going reshaping of our case law.

That is our system of precedent. [emphasis in original]

West Virginia too is a "syllabus state." A constitutional provision states:

When a judgment or order of another court is reversed, modified, or affirmed by the court . . . the reasons therefore shall be concisely stated in writing . . . and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case . . . which shall be prefixed to the published report of the case.\(^{188}\)

In *Bank v. Burdette*, Judge Brannon off-handedly remarked that "our constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion." Yet in an earlier opinion concurred in by Brannon, the Court held that "[t]his court only makes the more important points of law a part of the syllabus for the general information of the legal profession and public." Further, in syllabus point 5 of a 1953 case, the Court stated that "[p]oint 2, Syllabus, State v. Collins, 108 W.Va. 98 [150 S.E. 369] read in light of the opinion and the facts therein and explained." In that case, Judge James B. Riley (with Frank C. Haymond and Chauncey H. Browning) quoted several West Virginia cases to the effect: "The syllabus of the case must, of course, be read in the light of the opinion." Judge Riley goes on to endorse Dean Thomas Hardman's version of the syllabus controversy: "For an illuminating and learned discussion of the function of the syllabus of a case decided by this court see [two articles by Dean Hardman]." In the very brief second of these endorsed articles, Dean Hardman stated: "In such cases (if not in all cases) the oft-asserted theory that the syllabus is the law in West Virginia would seem to be pretty much at variance with the realities; in such cases the syllabus is at best only a partial expression of the ratio decidendi." Has court-written syllabus practice in fact caused damage to common law development in West Virginia, or has the Court merely paid lip service to the proposition that the syllabus states the law? An actual case-by-case analysis of the recent work product of the West Virginia Court would be necessary to answer this question. Until someone undertakes that study, we can only guess from the above-cited West Virginia cases and articles, and from Karl Llewellyn's study in Ohio, that syllabus practice does no great damage to the ongoing articulation of the common law in West Virginia.

This is known with reasonable certainty: The Court is required to write syllabus points by the constitution and a statute; the requirement is not mandatory; nothing in the constitution or statutory text suggests that the syllabus points, rather

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189  57 S.E. 53, 54 (W.Va. 1907).
190  Id.
191  Koonce v. Doolittle, 48 W.Va. 592, 594, 37 S.E. 644 (1900)(quoted in Thomas P. Hardman, "The Law" - *In West Virginia*, 47 W.VA. L.Q. 23 (1940)(emphasis is by Dean Hardman). Thomas P. Hardman was the Dean of West Virginia University College of Law from 1931 to 1956.
193  Id. at 700 (quoting Medford v. Levy, 8 S.E. 302 (W.Va. 1888)).
194  Id.
195  Thomas P. Hardman, Note, *The Syllabus is the Law*, 47 W.VA. L.Q. 141, 142 (1941) (footnote omitted). In a 1956 student note triggered by *State v. Franklin*, 79 S.E.2d 692 (W. Va. 1953), John Lewis McLaugherty, now the managing partner of West Virginia's largest law firm, concluded: "It is further submitted that those who believe the syllabus represents the law of an adjudicated case are forced to admit otherwise, for here in the syllabus [of *State v. Franklin*], the court states that the syllabus of the *Collins* case was read in light of the opinion—an interesting paradox for those who believe the syllabus is "the law" in West Virginia."
than the opinion, "state the law;" and ample West Virginia authority shows that the Court, when it really counts, looks to the opinion (the facts, holding, and analysis) for guidance, not the syllabus points.

I still have reservations about court-written syllabus point practice. I cannot help but think that it makes some of the judges, some of the time, believe the common law is a body of rules enacted by judges. This is apparently Justice Maynard's assumption as noted near the beginning of this article.\(^{166}\) In so far as it has that effect, it works against the great common law tradition for deciding appeals, and thus against the time-honored and tested method for the administration of justice in our community. Let me conclude with a brief quotation from Dean Roscoe Pound in an address delivered to the alumni of the West Virginia College of Law in 1940:

Thinking of law in terms of rules has led to false ideas of our common-law technique and as to our doctrine of precedents. We must remember the short life of rules

* * *

We must ever bear in mind that in law we have a taught tradition of experience developed by reason and reason tested by experience...The common law grew up as a taught tradition in the Inns of Court on the basis of the tradition of the courts. It was a taught tradition handed down from lawyer to apprentice from the seventeenth century, and is now coming to be a taught tradition of academic law schools. Both of the two great legal systems of the modern world are taught traditions and so have been resistant to forces that destroy political institutions. We have in our law such a tradition molded through the technique of the lawyer to the ever-changing circumstances of time and place and so one of the most enduring of human institutions.\(^{167}\)

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\(^{166}\) Appellate judges, as explained in this article above, can have one of two mindsets about common law change when they believe that the common law is "a body of rules enacted by judges." One makes *stare decisis* a straight jacket—enacted law is absolutely binding like any legislated law (unless unconstitutional). This is apparently Justice Maynard's position. The other is that courts can act like legislators and enact any new law they wish. See supra note 169 and accompanying text. Neither view is within the common law tradition. The majority in *Bower v. Westinghouse*, 522 S.E.2d 424 (1999), purport to follow the common law tradition which includes a "well grounded extension of traditional common-law tort principle." *Bower*, 522 S.E.2d at 429. The majority believed the "new cause of action" to be such an extension. It would, however, *not* be within the common law tradition to create a truly unprecedented new cause of action. It would, in general, *not* be legitimate for the court to create a cause of action that upsets the public's reliance on "rights" created by precedent cases. For example, to abrogate the "employment at will" doctrine *in toto* would be a strikingly illegitimate use of judicial power and far outside the common law tradition.