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MICHIGAN'S RECEPTION OF THE COMMON LAW: A STUDY IN LEGAL DEVELOPMENT

VINCENT A. WELLMAN†

American law had to be based on English law—in some sense and to some degree. The questions that had to be initially decided were; In what sense? and To what degree? Was the common law to be taken over lock, stock and barrel, subject to subsequent change at the hands of American courts? Or was the common law, along with a few statutes, to be imported selectively—with the English rules entitled to receive recognition as American rules only when adopted in American cases by American courts?

Grant Gilmore[1]

I. A CONUNDRUM

Michigan's 1850 Constitution provided that "the common law, and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature."[2] This provision of the Constitution played the role that was, in many states, played by a statute: in the usual parlance, Michigan had thus "received" the common law, and this

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1. GRANT GILMORE, THE AGES OF AMERICAN LAW 20 (1977).
2. MICH. CONST. of 1850, sch., § 1.

provision "adopted" or "incorporated" an English body of legally authoritative norms to serve in future judicial decisions.[3]

At first glance, the idea seems straightforward. Many lawyers in the early days of America's founding were trained in English law, of which the common law was a dominant constituent; their legal training therefore meant they were trained to understand, and use, the common law.[4] Moreover, while books might be expensive and scarce in the New World, American lawyers would have comparatively ready access to William Blackstone's *Commentaries on the Laws of England*, and thus to Blackstone's extended discussions of such standards as assumpsit and trespass, as those ideas had been developed and applied in English legal decisions.[5] Further, behind those particular discussions stood the basic idea that the "common" law was distinctive about English law and governance, a special heritage that was also available to American lawyers once they learned the common law's rules and concepts.[6] So, authoritative texts like Michigan's Constitution, which explicitly embraced the common law and enshrined it as part of the state's law and tradition, could be expected to be the norm, and hardly worthy of notice.

If only. On inspection, it turns out that the matter is vastly more complicated, and more interesting, than that.[7] The apparently straightforward idea turns out to be complex, often confusing, and in need of a more subtle understanding. In *American Legal History*, Professors Hall, Wiecek and Finkelman wrote:

> American lawyers today like to think that the common law was the only body of English law that Americans drew on for their own law, that it was adopted early in the period of English settlement, and that its reception was both inevitable and non-controversial. Each of these assumptions is wrong.[8]

This essay explores how these, and many other assumptions, are wrong about the common law and its reception.[9]

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3. *Id.*

4. *See* Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 U. PA. L. REV. 553 (1882).

5. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (Thomas M. Cooley ed., 3rd ed. 1884).

6. *Id.*

7. *See* Dale, *supra* note 4, at 554.

8. KERMIT HALL, WILLIAM M. WIECEK & PAUL FINKELMAN, AMERICAN LEGAL HISTORY: CASES AND MATERIALS 23 (Oxford Univ. Press ed., 2nd ed. 1996).

9. *Id.*

To focus that exploration, consider *Moore v Sanborn*,[10] decided by the Michigan Supreme Court in 1853, just three years after the adoption of the 1850 Constitution and its reception of the common law. The court there was called on to determine the 'navigability' of the Pine River, a tributary to the St. Claire River.[11] Michigan's geography—bordering on the Great Lakes and carved by a number of substantial rivers—meant that the navigability of those waterways was an important legal issue.[12] Before *Moore*, the test of navigability—both in England and, it appears, in Michigan—had generally followed a traditional standard in which a river was classified as navigable only upon evidence of actual commercial navigation.[13] In pursuing the question, the *Moore* court observed that the Pine River was effectively divided into two parts—one above, and one below the town of Deer Licks.[14] While the downriver portion allowed for regular use by boats, the upriver portion was only sometimes usable to float logs.[15] Although the upriver portion had been used in this way for "fifteen or sixteen years"[16], the evidence indicated that the portion of the river in question "was only capable of being used for floatage during periodical freshets" which would usually last for only two to three weeks.[17] Accordingly, when the logs jammed the river and "occasioned delay" another user of the river complained of injury.[18] The other user's complaint would lie only if all the public had a right to use the river, and that would hold only if the river was 'navigable.'[19] It was argued in defense that the upriver part of the river was not navigable "because it was incapable of commercial use by boat and hence not a public highway under English common law."[20] Rejecting the rule of English common law, the court adopted instead a "log floating" test of navigability that had been accepted by an earlier Maine decision.[21]

> The true test, therefore, to be applied in such cases is, whether a stream is inherently and in its nature, capable of being used for the purposes of commerce for the floating of vessels, boats, rafts,

10. Moore v. Sanborne, 2 Mich. 519 (1853).
11. *Id.* at 520.
12. *Id.* at 520–23.
13. *Id.* at 519.
14. *Id.* at 520–21.
15. *Id.* at 521.
16. *Id.* at 523.
17. *Id.* at 521.
18. *Id.*
19. *Id.*
20. Kelley *ex rel.* MacMullan v. Hallden, 51 Mich. App. 176, 180–81, 214 N.W.2d 856 (1974).
21. Brown v. Chadbourne, 31 Me. 9, 21 (1849).

> or logs. Where a stream possesses such a character, then the easement exists, leaving to the owners of the bed all other modes of use, not inconsistent with it.[22]

There is an obvious tension—if not outright contradiction—between the Constitution's incorporation of the common law, on the one hand, and the Supreme Court's roughly contemporaneous rejection, on the other, of a well-established rule of English common law in favor of an altogether new, and different, rule of decision. It would be troubling if Michigan's Supreme Court simply ignored the strictures of Michigan's Constitution, so soon after its enactment. Unless the court's decision-making can be seen as somehow respecting the authority of the common law, regardless of how it appears, there would seem to be a conflict of ideals between the English understanding of common law, on the one hand, and the vision of common law judging, on the other, that was embraced by Michigan's Supreme Court. The problem seems particularly acute when we consider the timing of *Moore*. Not much more than a decade later, the Michigan Supreme Court was populated by famous names: Cooley, Campbell, Christiancy, and Graves, sometimes subsumed under the label "the Big Four."[23] Together, those four justices were "generally rated as one of the finest appellate courts in the country—for a while perhaps 'the ablest State court that ever existed.'"[24] Moreover, the period after 1850 was a fecund period in American judging, characterized by Grant Gilmore as "an orgy of statute making."[25] Viewed in light of what came after it, *Moore* would seem to stand as a notable beginning in what would emerge as a period of judicial activism of the first rank.

I contend that the tension is more apparent than real, and that in *Moore*, the Michigan Supreme Court was faithful to its obligations under the 1850 Constitution. Put differently, if I can free the court from the charge that it flouted English common law, I can also free it from the charge that it flouted the strictures of the Michigan Constitution. In so doing, I will explore some of the subtleties in the idea of "receiving" the common law.

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22. *Moore*, 2 Mich. at 524–25.

23. Edward M. Wise, *The Ablest State Court: The Michigan Supreme Court Before 1885*, 33 WAYNE L. REV. 1509 (1987) (paying special attention to footnote 2).

24. *Id.* (quoting Irving Browne, *The Lawyer's Easy Chair*, 10 GREEN BAG 495 (1894)).

25. *See* GILMORE, *supra* note 1, at 23.

II. RECEPTION IN THE COLONIES

If we start with a simple view of legal authority, then we are led down a particular path to a particular understanding of the common law's reception. Once the common law is received, this view holds, it becomes authoritative, and hence binding on future judicial decisions. It is a complex matter to categorize the body of norms that comprises the common law (more about this later), but however we might categorize them, those norms become law upon their reception. Common law norms could, of course, be displaced by later enactments, but where they are not displaced, they should govern. Hence, common law rules, once received, should bind Michigan courts, just as if those rules had been promulgated by Michigan courts in the first place.

There is much to support this vision of the common law's post-reception authority. Consider, for example, the wording of Virginia's reception statute, enacted in 1776 by the General Convention of Virginia Representatives and Delegates, and the pattern for many such statutes to follow:

> . . . that the common law of England, all statutes and acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first [1607], and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with several ordinances, declarations, and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.[26]

This statute puts the common law of England—at least that part of the common law which is "of a general nature, not local" to England—on the same footing as English statutes enacted "in aid of" that law before the Virginia colony was settled.[27] And all the English imports were put on the same footing as Virginia's own enactments—all of them, that is, "in full force" until displaced.[28] The picture that is sometimes drawn from this reception can be lofty. "The common law of England we are to pay great deference to, as being a general system of improved

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26. *State Statutes Receiving the Common Law of England*, INST. FOR U.S. LAW, http://iuslaw.org/reception_statutes.php (last visited Mar. 22, 2017).

27. *Id.*

28. *See* INST. FOR U.S. LAW, *supra* note 26.

reason, and a source from whence our principles of jurisprudence have been mostly drawn."[29] And:

> When the American Colonies were first settled by our ancestors it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation, and change of circumstances.[30]

Reception of the common law was then held to imply a wholesale incorporation of that law's rules and doctrines.

> Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of this country must enforce it, until it be repealed by the legislature, as long as there is a subject-matter for the principle to operate upon, and although the reason in the opinion of the court which induced its original establishment may have ceased to exist. This we conceive to be the established doctrine of the courts of this country in every state where the principles of the common law prevail.[31]

Further investigation, however, reveals a more complex picture. Among other things, there was hostility in the colonies toward English law, well before the Revolution, and its status as a birthright to be cherished was not universally accepted.[32] John Winthrop of Virginia asserted, "our allegiance binds us not the laws of England any longer than while we live in England, for the laws of the Parliament of England reach no further, nor do the king's writs under the great seal go any further."[33] Additionally, while Virginia's reception statute acknowledged the authority of English statutes that had been enacted before 1607, it rejected the authority of those enacted after that date.[34]

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29. Richard L. Dale, 30 AM. L. REG. 9, 553–55 (1882) (citing Wilford v. Grant, 1 Kirby 114 (Conn. 1786)), *available at* https://www.jstar.org/stable/3305039.

30. *Id.* at 553 (quoting U.S. v. Worrall, 2 U.S. 384, 394 (1798)).

31. *Id.* at 555 (quoting Powell v. Brandon, 24 Miss. 343, 363 (1852)).

32. *See* Dale, *supra* note 29.

33. *See* HALL, *supra* note 8 (quoting John Winthrop, *Winthrop's Journal: History of New England 1630-1649*, 2:352 (New York, 1908)).

34. *See* INST. FOR U.S. LAW, *supra* note 26.

Even Blackstone questioned the authority of English law in the colonies.[35] In his *Commentaries*, Blackstone distinguished two situations.[36] In the first, "an uninhabited country be discovered and planted by English subjects."[37] In such a situation, English laws "are immediately there in force."[38] But, "this must be understood with very many and very great restrictions. Such colonists carry with them only so much of English law as is applicable to their own situation and the condition of an infant colony."[39] More importantly, in "conquered or ceded countries" the "ancient laws of the country remain" until altered by the king.[40]

> Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest or . . . by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent, dominions.[41]

Blackstone's reflections produce, at a minimum, a more cautious picture of the common law's reception.[42] While the common law might be revered by some as a birthright, it could also be regarded with suspicion as an illegitimate transplant whose reception was neither inevitable nor uncontroversial. Rather than a "birthright," it was a body of law that could have been adopted by colonists, but only if they concluded it would serve their needs. Rather than a "general system of improved reason" it represented the answers of English law and custom to the problems its people had faced.[43] And rather than a comprehensive system of doctrine, it might only be a set of starting points for further judicial decision-making.[44] At the least, its reception could well be regarded as only a product of positive law, in which case Virginia's reception of the common law would be limited to the terms and conditions of its reception statute.

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35. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 106-08 (Oxford ed., 1st ed. 1765).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See* Dale, *supra* note 4, at 553.
43. *Id.* at 553–55.
44. *Id.* at 555.

III. MICHIGAN'S TANGLED HISTORY

In one sense, Michigan had received the common law well before its 1850 Constitution. To see how, and to what extent, that reception had already taken place requires some history about how Michigan was created from a much larger territorial expanse.

The land that now comprises Michigan was originally part of the Northwest Territory, created by the Northwest Ordinance of 1787.[45] That Territory spanned across what would later become five states—Ohio, Indiana, Illinois, Michigan and Wisconsin—and parts of a sixth, Minnesota.[46] Of these, Ohio was the first to become a state; to effectuate that transition, the Northwest Territory was subdivided in 1800 into the Indiana Territory, on the one hand, and Ohio and the eastern half of what is now Michigan's Lower Peninsula, on the other.[47] Then, Ohio was admitted as a state; the eastern half of Michigan was at the same time annexed to the Indiana Territory and the Northwest Territory ceased to exist.[48] Later, in 1805, Congress carved the Michigan Territory out from the Indiana Territory.[49] What are now the states of Indiana and Illinois were later segregated from the bulk, with occasional readjustments to the border defining Michigan, and leaving the Michigan territory to include some of what is now Ohio, Iowa, and the eastern part of Minnesota.[50] In 1824, Michigan was elevated to the second grade of territorial status, and in 1834 the Michigan territory was expanded to include all of Minnesota and the eastern parts of North and South Dakota.[51] In 1836, the Wisconsin Territory was organized, to consist of the present states of Wisconsin, Iowa, and Minnesota, together with the eastern portion of the Dakotas. Finally, in 1837, Michigan became a state; territorial readjustments gave the state its current expanse.[52]

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45. Historical Publications of Wayne County Michigan, documents Relating to the Erection of Wayne County and Michigan Territory, 3 (1922–1923).

46. *Id.*

47. *Id.* at 8–9.

48. *Id.* at 9–11.

49. *Id.* at 37–38.

50. *Id.* at 38–39.

51. *Id.*

52. *See* Wise, *supra* note 23, at 1510. The astute reader will have noticed an oddity about the dates. Michigan's first Constitution came in 1835, but it wasn't recognized as a state until 1837. As Edward Wise observed:

> The precise date on which Michigan achieved statehood is controversial. In 1833, the territorial council petitioned Congress for an enabling act authorizing the election of a convention to draft a state constitution. Congress delayed passing such an act because of the boundary dispute with Ohio over the Toledo strip. Nonetheless, on January 26, 1835, without

Although the Northwest Territory encompassed several states, the initial governmental organization did not depend on, or even recognize, those divisions.[53] The whole of the Territory was subject to a governor, a secretary and three judges, all appointed by Congress;[54] the governor and the court shared legislative authority;[55] and a true Legislature would be elected later.[56] The first territorial subdivisions to be recognized were counties, with some local judicial and administrative functions. The first instantiation of Wayne County was organized in 1796 to include most of the land that would become the Michigan Territory along with parts of what are now Ohio and Indiana.[57] Wayne County was reorganized in 1803 when Ohio became a state and the eastern portion of Michigan was reconnected to the Indiana Territory;[58] at that point, the County encompassed all of what is now Michigan's Lower Peninsula, much of the Upper Peninsula, and parts of Illinois, Indiana, and Wisconsin that drained into Lake Michigan.

From the outset, a dispute arose about the legislative powers of the Territory's governor and judges. Section 5 of the Ordinance provided that:

> The Governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district . . . but afterwards the Legislature shall have authority to alter them as they shall think fit.[59]

The first Governor was Arthur St. Clair; the first judges, Parsons, Symmes, and Varnum. On July 30, 1788, Governor St. Clair wrote to

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> congressional approval, the territorial council called for the election of delegates to the convention that produced the Michigan Constitution of 1835. The constitution was ratified in October 1835; a governor and legislature were elected at the same time. The new state government began to function on November 1, 1835, although Michigan was not formally recognized as a state by the federal government until January 26, 1837.

Id.

53. Northwest Ordinance, An Ordinance for the government of the Territory of the United States northwest of the River Ohio, § 1 (July 13, 1787), *available at* avalon.law.yale.edu/18thcentury/nworder.asp.

54. *Id.* at §§ 3–4.

55. *Id.* at § 5.

56. *Id.* at § 11.

57. Burton Historical Collection, *Proclamation by Winthrop Sargent, 1796*, DET. PUB. LIBR. (1992), *available at* https://archive.org/details/cu31924028870546.

58. Burton Historical Collection, *Proclamation by William Henry Harrison, 1803*, DET. PUB. LIBR. (1992), *available at* https://archive.org/details/cu31924028870546.

59. *See* Historical Publications, *supra* note 45.

Parsons and Varnum to object that they were overstepping their bounds.[60] As St. Clair saw it, the grant of legislative authority only empowered them to adopt laws that had already been adopted in the original states: they had, in his view, no proper power to enact new laws, nor even to combine parts of laws into a new whole.[61] The judges, on the other hand, perceived a larger need and justification. What, in their view, was required, were laws that were "necessary and best suited to the circumstances of the district;" any more literal or limited reading of the Ordinance's grant of legislative authority would defeat the purposes of the Ordinance, and would fail to produce laws suited to the needs of a new territory.[62]

The Ordinance also provided the foundations of a legal system, and in that respect provided that legal disputes in the Northwest Territory were tied in important ways to the common law. Section 4 of the Northwest Ordinance, providing for three judges, established that they "shall have a common law jurisdiction."[63] Section 14 of the Northwest Ordinance further provided that certain following "articles shall be considered as articles of compact between the original States and the people and States in the said territory."[64] Of those, Article II stated that the inhabitants of the Territory should "always be entitled to the benefits of" writs of *habeas corpus*, and trial by jury; a proportionate representation of the people in the Legislature; and of judicial proceedings "according to the course of the common law." [65]

Michigan history is less clear, and perhaps less laudatory, about the role of the common law. To be sure, the Schedule to the 1850 Constitution provided, "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force."[66] But reference to the common law was new. The antecedent in Michigan's first Constitution reads differently: "All laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature."[67] What can be seen is a struggle from the founding of the Northwest Territory to the 1850 Constitution about the virtues, and the centrality, of the common law in creating laws for Michigan.

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *See id.*
66. MICH. CONST. of 1850, § 1.
67. MICH. CONST. of 1835, § 2.

The struggle can be seen, at the outset, in a sharp disagreement between the Territory's Governor and its judges.[68] St. Clair advocated a narrow construction of the Ordinance's grant of legislative power, contending that the Territory's legislative power was limited to "adopting" laws, and that required that those adopted already had been enacted by one of the original states.[69] As it turns out, St. Clair rejected an expansive legislative power in part because he hoped that common law would play the dominant role instead. In his view, the common law could provide an "unchanging framework of legal principles" that would limit the scope of judicial legislation.[70] Put differently, St. Clair believed reliance on common law would limit the power of judges. In contrast, Judges Parsons and Varnum argued for an expansive legislative power, and decried the common law as undesirably tied to the circumstances of its English origins, including the dominance of a monarchy over the needs of the Territory's people.[71] By most measures, St. Clair's vision seems to have prevailed. In 1795, the judges adopted a reception statute for the Northwest Territory, modeled on Virginia's earlier 1776 legislation:

> . . . The common law of England, all statutes or Acts of the British Parliament in aid of the common law, prior to [1607] and which are general in nature, not local to that kingdom, and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered as of full force.[72]

Ohio's establishment as a state occasioned a new territorial government.[73] William Hull was appointed Governor of Michigan in 1805, and the three new judges were Augustus Woodward, Frederick Bates and John Griffin.[74] After Bates was replaced in 1808 by James Witherell, he, Woodward, and Griffin were a stable panel of Michigan's highest judges for sixteen years.[75] Of these, Woodward's was the dominant voice, and he sought to craft a law for Michigan that was rooted in a sense of justice shared by the whole territorial community.[76]

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68. *See supra* text accompanying note 20.
69. *See* Historical Publications, *supra* note 45.
70. Richard P Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788-1831*, 4 S. CAL. INTERDISC. L.J. 161, 182 (1995).
71. *See* Historical Publications, *supra* note 45.
72. *See* INST. FOR U.S. LAW, *supra* note 26.
73. Cole, *supra* note 70, at 192.
74. *Id.* at 195–96.
75. *Id.* at 196.
76. *Id.* at 197.

Among other things, this meant that the territory's law should reflect its foundations in settlers from both French and English origins.[77] With that, Woodward also argued against the wholesale "continuance . . . in the United States of common law."[78] What he wanted instead was a wide range of discretion in making laws, with the expectation that the result would be laws both appropriate to Michigan's particular circumstances, and comprehensible to the populace.[79]

Woodward's tenure on the Michigan bench overlapped substantially with the governorship of Lewis Cass, appointed in 1813 and serving until 1831.[80] Cass differed sharply from Woodward in his view of judicial lawmaking. For Cass, "a central object of judicial lawmaking was the development of central and stable principles of law, insulated from the perturbations of momentary popular sentiment."[81] Cass's influence was considerable, and towards the end of his tenure as Governor, he wrote:

> But the great principles, which protect the rights of persons and property in our country, are too firmly established and too well understood to require or even to admit frequent or essential alteration. Their application and observation has been settled for ages, and it is the part of the true wisdom to leave them as we have found them, with such changes only, as may be necessary, to remedy existing evils, or to accommodate them to the advancing opinions of the age.[82]

To recall the observation of Professors Hall, Wiecek and Finkelman,[83] this brief summary of Michigan legal history shows, at the least, that its reception was both labored and controversial.

IV. WHAT IS "THE COMMON LAW" THAT IS TO BE RECEIVED?

Surveying the attitudes of Michigan's territorial governors and judges reveals a wide disparity of views about the common law. On the one hand, it was praised as a fount of wisdom and a bulwark to protect rights. On the other hand, it was derided as antiquated, monarchial, and a limitation on judicial creativity. How can one and the same idea provoke so many divergent and opposed reactions? This leads, in turn, to another

77. *Id.* at 200, 213.
78. *Id.* at 201.
79. Cole, *supra* note 70.
80. *Id.* at 168.
81. *Id.* at 231.
82. *Id.* at 236.
83. *See* HALL, *supra* note 8.

question. When a legal system "receives" the common law, what do we mean by "the common law" such that we can investigate how *it* (whatever it is) was received? The answer turns out to be much more complex than one might anticipate.

In an earlier discussion,[84] I observed that we can differentiate (at least) three related but distinct ideas that fall under the heading "the common law" as lawyers and judges tend to think of it.[85] Recognizing how these ideas are, in truth, distinct, can ground our understanding of how the common law's reception might offer such divergent prospects to different viewers.

A. The Common Law as an Historical Fact

There is, to begin with, a specific historical dimension to the common law that begins with England's conquest by William of Normandy. Prior to 1066, England was a conglomeration of kingdoms—Sussex, Essex, Northumberland, and so on, and the legal systems of those various kingdoms—such as we can recognize the idea of a legal system—tended to be quite local.[86] Even after England's conquest, much of the legal system was still local.[87]

But William conquered all of England and imposed a national system of government, including "royal" or national courts.[88] The most famous of these was King's Bench, but that was only part of a system of national courts with bewilderingly overlapping jurisdictions—Chancery, Court of the Exchequer, and others.[89] The differences among them can baffle the observer; what is important, for my purposes, was that the royal courts were distinct from local courts, and from their predecessors in Sussex and Northumberland, precisely because they were national in jurisdiction. Decisions by these courts were accordingly authoritative for all of England.[90] As they began, through their decision-making, to develop something that could be called law, that law would be common to all of England.[91] Hence, the "common" law.

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84. Vincent A. Wellman, *A Common Mistake About the Common Law*, MICH. B.J., Jan. 2013, at 39.

85. *Id.*

86. *See* Dale *supra* note 4, at 554.

87. *Id.*

88. Wellman, *supra* note 84.

89. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 11–18 (2002).

90. *Id.*

91. *Id.*

One part of Blackstone's argument underscores the idea that the common law was fundamentally limited by its history.[92] Recall that, for Blackstone, the American plantations were dependent on the mother country, but nonetheless legally distinct because they had been wrested away from the dominion of some pre-existing government.[93] In consequence, the common law of England could have no authority in the colonies.[94] For better or worse, the common law of England was common only to England and would not necessarily apply to foreign territory even after the foreign territory was subjected to British rule.[95] The conclusion would have been different if English colonists had created a new dominion out of nature: in that situation, the colonists would have carried English common law with them, albeit with very great, and very many, restrictions.

When conceived along these lines, America's early period lacked anything that could be thought of as a common law. Each state's reception of English common law would depend on the specifics of the steps—statutory or constitutional—taken by that state to adopt the common law.[96] These would be taken at different times, and—depending on the wording of each state's receiving provision—could well differ in scope. (As we have seen, different states made different provisions for which English enactments were adopted.) Since no state's court could hold sway beyond that state's jurisdiction, there would be no law common to Michigan, Massachusetts, and Virginia.[97] Law common to all the states could arise only by virtue of some federal act or judicial fiat.[98]

The prospect of a federal common law was raised in 1842 by Justice Story's holding in *Swift v Tyson*.[99] Thereafter, in the eyes of Grant Gilmore and many others, for "the next half century the Supreme Court of the United States became a great commercial law court. As novel issues generated controversy and conflict, the court's function was to propose a generally acceptable synthesis."[100] If a common law of the country could work for commercial law, then it might be thought to work

92. *See* Dale, *supra* note 4.
93. *See supra* text accompanying note 41.
94. *See supra* text accompanying note 41.
95. *See supra* text accompanying note 41.
96. *See* Dale, *supra* note 4, at 553–54.
97. *See generally* GILMORE, *supra* note 1, at 20–21.
98. *Id.* at 20.
99. Swift v. Tyson, 41 U.S. 1 (1842).
100. *See* GILMORE, *supra* note 1, at 34.

for law in general.[101] But, as *Moore* confirms, *Swift* did not deter state courts from continuing to make their own law in various areas.[102]

There is one respect in which the opinion in *Moore* might be taken to suggest a law common to the various states. Recall that Justice Martin distinguished Michigan's geography from that of England, and on that ground, opined that the English rule "can aid us very little . . . as we have no navigable streams within the common law signification of that term."[103] Instead, he wrote, "we accordingly find that in all the States that [common law] rule has been enlarged so as to meet the condition and wants of the public and necessities of trade and commerce." [104] In particular, Justice Martin relied heavily on the reasoning of an earlier case in Maine, *Brown v. Chadbourn*,[105] which had also concluded that a stream's use for floating logs rendered it navigable.

Justice Martin relied, in other words, on a consensus that he found in American cases discussing the same issues as those raised in *Moore*, and felt justified in his conclusion because other courts, deciding analogous cases, had reached the same conclusion. In that sense, *Moore* can be seen to represent a kind of common law—namely, a tendency toward commonality of reasoning.[106] But, however much Martin relied on the decision of the Maine Supreme Court, there is no sense that he felt obligated as a matter of law to decide *Moore* in the same way as *Brown*; to the contrary, the opinion in *Moore* shows the highest court of one jurisdiction making its own decision, for its own reasons. In that sense, the early American states lacked a law common to all the country, and in that sense the common law was not received.

B. The Common Law as a Body of Rules

This leads to the second idea that is encompassed by "the Common Law." England's national courts exercised their power through decisions in particular cases, but in the course of deciding those cases, what emerged from the royal courts (especially King's Bench) was a collection of doctrines to resolve disputes about accidents, broken agreements, contested property and so forth. In our modern terminology, the royal courts developed legal rules that could at least be distilled from the centuries of judicial decision-making. Those rules could be captured,

101. *Id.*
102. Moore v. Sanborne, 2 Mich. 519 (1853).
103. *Id.* at 522.
104. *Id.*
105. *Id.* at 524–25 (citing Brown v. Chadbourn, 31 Me. 9 (1849)).
106. I owe this point to Professor Stephen Calkins, Wayne State University Law School.

more or less, and written down, thereafter to be learned and used. In a particularly salient manifestation of that process, Blackstone could record, in his *Commentaries*, much of the then-current doctrines that were recognized and employed in the courts of England.[107] In this second sense of "the common law" we can understand how various states might "receive" the common law: American jurisdictions could accept the set of rules that had been dominant in English legal decisions at some particular time and incorporate them into a body of law for their state's courts.

Recall Virginia's ordinance of 1776:

> . . . That the common law of England, all statutes or acts of Parliament made in aid of the common law prior to [1607] and which are of general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may be consist with the several ordinances, declarations and resolutions of the General Convention, shall be the rule of decisions and shall be considered in full force until the same shall be altered by the legislative power of this colony.[108]

Focusing on this second conception of "the common law"—the "rules of decisions"—renders straightforward the idea of 'reception': when Virginia received the common law, it received all the rules of English common law—"lock, stock, and barrel" as Gilmore phrased it—and used them thereafter as part of the "rules of decision" for Virginia courts.[109]

We can extend this idea in some predictable ways. Something similar happened in 1787 for the Northwest Territory, when the Ordinance vested the territorial judges with a common law jurisdiction, and guaranteed the territory's inhabitants "judicial proceedings according to the course of the common law." Then, again, Michigan's 1850 Constitution provided that "the common law . . . shall remain in force until they expire by their own limitations or are altered or replaced by the legislature."[110] So, by its Constitution, Michigan "received" the common law, and in keeping with this second dimension of what might be meant by "the common law," incorporated the then-existing rules of contracts, property, agency and the like.

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107. *See* Dale, *supra* note 4.
108. INST. FOR U.S. LAW, *supra* note 26, at *Reception Statute of Virginia (1776)*.
109. *See* GILMORE, *supra* note 1.
110. *See* MICH. CONST. of 1850, § 1.

No matter how dramatic the decision in *Moore* might seem to be, we can observe numerous instances where early Michigan courts were confident that the common law applied, and accordingly, used rules from the common law of England to decide Michigan cases. Several of those instances called on the court to justify its use of common law rules in the face of challenges to their authority. For example, in *Stout v Keyes*,[111] the court was confronted with the argument that "if the action would lie at the common law, that law is not in force in this state as a means of civil remedy."[112] The court dismissed the argument:

> This is a somewhat startling proposition to be seriously urged at this time, when this court, as well as the circuit courts, have been adjudicating common law actions upon common law rules and principles, since their organization under the state government; and also, the territorial courts had done so previously, from the organization of the territorial government under the acts of congress and the ordinance of 1787. It can require but a few moments' consideration.[113]

In another instance, the court took pains to affirm the validity of English common law rules regarding mortgages, in the face of challenges that those rules lacked authority in the Michigan context. In *Abbott v. Godfroy's Heirs*,[114] the fundamental issue was the validity of a mortgage that was asserted to have been executed to secure payment of a debt.[115] Defendants argued that the instrument in question was "not a mortgage at common law" and moreover that the Northwest Territory Ordinance had substituted new requirements for the validity of a mortgage, which new requirements had not been met.[116] The court rejected both arguments.[117] In the first place, the court concluded that the instrument in question, whatever else was true, was an equitable mortgage and hence enforceable as such under common law.[118] In the next breath, the court rejected the applicability of the Ordinance's specific rules, because "the territory comprising this state remained under the control and jurisdiction of the British government until the year 1796, and that the ordinance,

111. Stout v. Keyes, 2 Doug. 184 (Mich. 1845).
112. *Id.* at 188.
113. *Id.*
114. Abbott v. Godfroy's Heirs, 1 Mich. 178 (1849).
115. *Id.* at 180.
116. *Id.* at 181.
117. *Id.* at 187.
118. *Id.* at 187.

though made before, was not in full force until after that time." [119] Thus, adhering to the common law's treatment of mortgages led the court to evade the application of an inconsistent provision in the Ordinance.

C. The Common Law as a Body of Methods and Values

The second conception of the common law—a set of rules used to decide cases—can be a trap for the unwary. At any given moment, it is true, the then-current state of the common law can be read as a set of rules, but it would be a mistake to treat those rules as if they were fixed and impervious to change. To the contrary, some knowledge of English legal history shows that those rules were subject to dramatic change, although often at a pace that would evade recognition.[120]

Recognizing that the common "law" was more than just a fixed set of rules leads to what I want to distinguish as the third dimension of "the common law." As I have argued, the rules that we most often associate with the common law were the result of changes over centuries of judicial decision-making; we can therefore understand that part of the "common law" was a process by which English judges came to reformulate and refine those rules together with a set of assumptions that would shape their use of that process. That process, with an emphasis on the ideas of stare decisis and precedent, distinguished English common law from code law, its Continental counterpart.[121] If we focus on this dimension of the "common law," then "receiving" the common law would mean receiving the assumptions and methods that English judges employed as they produced the rules that Blackstone reported. Put differently, if Michigan judges employed methods and assumptions that emerged from their English antecedents and developments, then in that sense, Michigan received the common law.

1. Law as Rules and Methods for Using Them

Some investigation shows that the common law was indeed more than a body of rules to be applied; that characterization would neglect important facets of how English and American authorities used the common law's rules. Recall Blackstone's theory about the force of the

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119. *Id.* at 181.

120. As I discuss later, *infra* n.150, what is described as the law of contracts was the product of several centuries of growth in the English law relating to the writ of assumpsit. Since assumpsit was part of what we would today call the law of torts, the development of contracts was a significant growth of that area of law.

121. Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 474 (2000).

common law when an uninhabited land was "discovered and planted by English subjects."[122] In that situation, he wrote, English laws were in force, but "only so much of the English law as is applicable to their own situation and the condition of an infant colony."[123] On this vision, it could be presumed that the rules of English common law would apply, but that presumption could be rebutted by facts that were true of the new situation and different from those of England. In terms more familiar to practicing lawyers, to understand a rule fully requires that one understand the grounds for its applicability, and have the capacity to distinguish situations where it does not apply.

Much of the court's reasoning in *Moore* exhibits this pattern. As the parties and the court well knew, the English common law rule defined navigability by commercial transportation by boat.[124] The court had little patience for the rule, or its antecedents:

> The doctrine of the English Common Law in relation to navigable rivers, can aid us very little . . . as we have no navigable streams within the common law signification of that term. Nor can its doctrine as to rivers not navigable, yet public highways from their adaptation to public use, be fully and literally adopted by us. The length and magnitude of many of our rivers, the occasions and necessities for their use, and the nature and character of our internal commerce, all require a liberal adaptation of those doctrines to our circumstances and wants, and to a condition of things, both as to capability of our streams for public use, and the occasion for such use, entirely different from, and in many respects altogether new to, those which concurred to establish the common law rule. . . .[125]

The same pattern is displayed in other early cases. In *Lorman v. Benson*,[126] for example, the court considered a challenge by the operator of an ice house on the Detroit River.[127] He complained of the defendant's boom on the same waters, creating a space for defendant's purpose of keeping and securing saw logs therein.[128] In sum, operating the boom

122. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 107 (Thomas M. Cooley ed., 4th ed. 1899).
123. *Id.*
124. Moore v. Sanborne, 2 Mich. 519 (1853).
125. *Id.* at 522.
126. Lorman v. Benson, 8 Mich. 18 (1860).
127. *Id.* at 19.
128. *Id.* at 32–34.

interfered with the plaintiff's ice house business.[129] Writing for the court, Justice Campbell observed:

> Practically the common law has prevailed here, in ordinary matters, since our government took possession; and the country has grown up under it. How, or by what particular means, it originated, would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognized by every department of government has made it the law of the land, if not made so otherwise . . . We are of the opinion that questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs.[130]

Upon reviewing English common law, the court acknowledged that English rules that were tied to the ebbing and flowing of the tides would, of course, not apply to the Detroit River.[131] But the court reasoned that the tidal flow was only a way of marking riparian rights; there were other ways to establish those rights and, once they were established, to extract the plaintiff's legal basis.[132] On that basis, the court affirmed the plaintiff's suit.[133]

And, in *Perrin v. Lepper*,[134] the court rejected the applicability of the common law doctrine of attornment.[135] There, the owners of property in Marshall had leased the property for a term of five years, in exchange for an annual sum, payable quarterly.[136] One of the owners then sold his interest in the property to another, and gave the lessees notice that one half of the rents should be paid to the purchasers.[137] Upon non-payment, the new owners sued specifically on the lease, and the lessees defended on the grounds that they had not consented to the lessor's sale and transfer of his interest in the lessee's payments.[138]

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129. *Id.*
130. *Id.* at 25.
131. *Id.* at 27, 30, 32.
132. *Id.* at 30.
133. *Id.* at 34.
134. Perrin v. Lepper, 34 Mich. 292, 294 (1876).
135. *Id.* at 294.
136. *Id.* at 293.
137. *Id.*
138. *Id.* at 293–94.

> This consent was called an attornment. It was founded upon a state of society which certainly never had any existence in Michigan. The peculiar reasons and relations out of which this doctrine sprung never having had any existence here, why should the rule itself? Where the reasons from whence a rule arose cease to exist, the rule should cease also. In a country where they never existed, the rule should not be adopted. Of course there may be exceptions to this. Other reasons for continuing a rule may arise while those from whence the rule grew have passed away, but we discover none such in this instance. The doctrine of attornment is inconsistent with our laws, customs and institutions.[139]

2. Law as Rules and Principles

Finally, it can be seen that, in other cases, the common law was treated not as a set of rules to be applied, but also as a source of "principles" which could help generate new rules for application to Michigan's circumstances. So, for example, in *Stout v. Keyes*,[140] an issue of title to real estate arose, and a challenge was made to the plaintiff's proceeding by an action on the case.[141] The court rejected the challenge, reasoning:

> It is a general principle of the common law, that whenever the law gives a right, or prohibits an injury, it also gives a remedy by action; and where no specific remedy is give[n] for an injury complained of, a remedy may be had by special action on the case.[142]

Similarly, in *Perrin*, after rejecting the doctrine of attornment, the court wrote, "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."[143]

We should note an important complexity that haunts any discussion of "law" and, in consequence, discussions of the "common law." Lawyers and judges are prone to think of 'rules' when they think of law,

139. *Id.* at 295.
140. Stout v. Keyes, 2 Doug. 184 (Mich. 1845).
141. *Id.* at 185–86.
142. *Id.* at 187.
143. *Perrin*, 34 Mich. at 295 (quoting Story, J. in Van Ness v. Pacard, 27 U.S. 137, 144 (1829)).

and, on this understanding, the rules of agency, property, and the like will be a central part of the common law that was received. But, we can thank Ronald Dworkin for observing that there can be more to "law" than just rules. As Dworkin observed, the kind of decisional law that we think so central to the common law includes not only rules, but also "principles, policies, and other sorts of standards."[144]

Some of the standards other than rules are to be found in the maxims of the common law that are relied on by judges when deciding hard cases—"no one should profit from his own wrongdoing"[145] is a salient example. So, too, are the various maxims of interpretation and construction like "*expressio unis*" or "*contra proferentum*" that figures significantly in the efforts to interpret and apply texts like wills, contracts, statutes and even constitutions. In Dworkin's most famous example, the New York Court of Appeals relied on the "no profit" maxim to deny an inheritance to a grandson who had murdered his grandfather to collect on the will that named the murdered as principal beneficiary.[146] To apply the will's provisions in the usual way would conflict so powerfully with the no-profit maxim that the court denied the grandson's inheritance, and left the bulk of the estate to two distant relatives instead.[147]

Acknowledging Dworkin's point can be significant when examining the common law's reception, because his understanding of "law" can reshape our appreciation of what was received. In particular, Dworkin's argument about the nature of "law" can undermine a frequent misconception of the common law as essentially static in nature. If the common law consists only of rules when it is received, then there is a natural drift to expect that those same rules should remain in place until "altered" by subsequent developments. And, from there, it can be an easy slide to regard as *ultra vires* any judicial change, in the form of additions or alterations to the set of rules. However, Dworkin's understanding of the "law" would undermine any such static conception of the common law and would lead us instead to expect that the set of rules would change over time. As Dworkin observes, principles and policies have

144. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977). I have argued elsewhere that the conception of law articulated by Dworkin in his early works is best understood as an extension of the ideas expressed by Henry Hart and Albert Sacks in their wide-ranging but unruly manuscript, The Legal Process. *See* Vincent A. Wellman, *Dworkin and the Legal Process: the Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413 (1987).

145. *See* Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).

146. *Id.* at 190.

147. *Id.* at 191.

"weight" that can depend on the situation to which they are applied.[148] So, as social and economic conditions change, the relevant principles and policies of law will wax and wane in importance, and, as a result, prompt judges and lawyers to rethink how well the set of rules fit with the underlying principles and policies.[149]

For example, no picture of twentieth-century American contract law could be complete without acknowledging the kind of case law developments prompted by the force of the reliance principle in contract law.[150] Put differently, no static picture of American contract law would be adequate; it would miss how, and why, that law has changed. Unless we supposed that "principles, policies, and other sorts of standards" were only a twentieth-century innovation, no picture of the common law would be adequate without recognizing those non-rule components of the common law.[151] And, unless we suppose that those non-rule components of the law were an American mutation, no picture of the common law as it came to us from England would be complete without them. Put differently, since "the common law" incorporated all of its elements and,

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148. DWORKIN, *supra* note 144, at 26.

149. *Id.* at 22.

150. In England and America before the 1880s, the dominant conception of the "consideration" needed to make a promise enforceable was expressed in terms of a benefit to the promisor or a detriment to the promisee. But, that idea of consideration was supplanted by another: the idea of "reciprocal conventional inducement" that was propounded by Oliver Wendell Holmes in THE COMMON LAW and was thereafter enshrined by the Restatement of Contracts as the "bargained for" test for consideration. OLIVER WENDELL HOLMES, THE COMMON LAW 230 (Mark DeWolfe Howe ed., 1963).

Just how Holmes could succeed in completely reshaping, on nothing but his own say-so, the law of contracts is a mystery well worth pondering, but reshape it he did, and as a result, the pattern of judicial decisions shifted as well. What is most important, for my purposes, is the changed results in cases where a promise had relied to his detriment. Under the earlier, benefit-detriment theory of consideration, promises could be enforced on the strength of the promisee's reliance. But, under the later, Holmesian test, reliance would be important only if it was 'bargained for'—that is, if the reliance was sought by the promisor in exchange for her promise, and was, moreover, given by the promisee in exchange for the promisor's commitment. Promises that had been enforceable under the older test would now be unenforceable under Holmes' more stringent criterion. Soon thereafter, however, what emerged was a series of decisions that held the promise enforceable because it had engendered reliance. Sometimes those cases justified their conclusions under a heading of "estoppel" and the idea came to be called promissory estoppel. Ultimately, it too came to be enshrined in the Restatement, taking root in section 90 and thereafter growing like topsy. Further, once unleashed, the reliance idea came to figure prominently in a wide range of contexts—reliance on offers before they were accepted, reliance on promises that would otherwise have been unenforceable because of the Statute of Frauds, and reliance on promises in letters of intent that explicitly contemplate a further, definitive agreement are some, but not all, of the new contexts in which the reliance principle figures in twentieth-century contract law.

151. DWORKIN, *supra* note 144.

with those, the dynamic that they engendered, receiving the common law would necessarily receive those non-rule elements and the accompanying dynamic engendered by them.[152]

Dworkin's conception of law has further implications. Understanding the law as a body that includes rules and other norms also changes our grasp of the duty of a court. A court is obligated to apply the law, and in simple cases, the duty can be fulfilled by identifying the appropriate rule and applying it in a straightforward way. But, in more complex cases, the court's duty to apply the law goes beyond identifying and applying a particular rule. Instead, the court is obligated to understand the whole body of law that might bear on the dispute—the rules (both written and decisional) as well as the principles and policies. In its fullest expression, Dworkin's conception of the law requires a court to integrate all the law—constitutional, statutory, and decisional rules, as well as the underlying principles and policies.[153] The right answer is what follows from that fully integrated theory of the jurisdiction's law.

On this more complex conception of law, the common law of England cannot sensibly be separated from the rest of English law, and the role of a court to accept and apply the common law will depend in part on how the relevant aspect of the common law fits with the rest of English law. Thus, while English decisions recognized the distinction between law and equity, understanding English common law would also require an understanding of the function of equity in the English legal system and of the boundary, as English courts understood it, between law and equity.[154]

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152. Rejecting a static conception of English common law makes sense, even without the benefit of Dworkin's framework. The more we understand the history of the law relating to torts, property, and the rest, the more we understand that the set of operative rules changed over the centuries and that the rules as Blackstone set them down were only the rules that were in place at the time he was writing. Since those changes took place over centuries, and since they were worked out in decisions that involved the pleading intricacies of the English writs, the changes were easy to miss. Here is one example: we can see that contract law, as we now recognize it, emerged slowly from the writ of assumpsit, which itself arose from the law of trespass. That is, contract law arose from what we would now recognize as tort law. True, there had been antecedent writs of debt and covenant, which recognized agreements and enforced them when appropriate. But, those writs had important limitations that kept them from generalizing into a larger category of contracts, and the larger idea—with its components of consideration, formation, performance and remedies—emerged over centuries of English lawyers trying to win cases for their clients by using whatever materials they could find.

153. *See generally* RONALD DWORKIN, *Hard Cases*, *in* TAKING RIGHTS SERIOUSLY, *supra* note 144 (discussing the challenge faced by Hercules, a judge of superhuman intellect).

154. *See* BLACKSTONE, *supra* note 35, at 62.

Among the artifacts of English legal history is the distinction between courts of law and courts of equity, and with that distinction, a distinction between those matters properly of "law," as opposed to those properly of "equity."[155] As the Michigan Supreme Court observed in *Romatz v. Romatz*:[156]

> The powers and jurisdiction of the circuit courts and circuit judges in chancery, in and for their respective counties, shall be coextensive with the powers and jurisdiction of the courts and judges in chancery in England as existing on March first, 1847, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State.[157]

In 1849, in *Norris v. Hill*,[158] the Michigan Supreme Court needed to interpret and apply its equitable jurisdiction to decide the rights of mill owners on opposite sides of the Huron River.[159] A series of land sales had been followed by years of use, resulting in a complaint that one mill owner was infringing the rights of another by using too much water.[160] It was asserted that a court of chancery had "power to ascertain and determine, by decree, the rights of the respective parties[.]"[161] But the court declined to do so, reasoning that the statute creating equitable jurisdiction "was not intended to enlarge or extend the jurisdiction" of courts of equity.[162]

What could ground the court's reasoning on this point? Receiving the common law would mean only that the court inherited common law's rules and doctrines; being given equitable jurisdiction would mean only that the court was empowered to decide cases that would traditionally have been heard in chancery. But, as the court observed in *Romatz*:

> The jurisdiction of this court is that of the English chancery, with the various additions which have been made to it by our own laws. This court has jurisdiction in case of fraud, and especially in all cases of contracts procured by fraud. In such cases this court effectually annuls the fraudulent contract, adjudges it void, causes it to be delivered up or canceled, or prohibits the parties

155. *Id.*
156. Romatz v. Romatz, 355 Mich. 81, 88, 94 N.W.2d 432, 436 (1959).
157. *Id.* (quoting MICH. COMP. LAWS § 606.4 (1948)).
158. Norris v. Hill, 1 Mich. 202, 203 (1849).
159. *Id.* at 203–04.
160. *Id.* at 210.
161. *Id.*
162. *Id.*

> from claiming any right under it. Such is the undoubted jurisdiction of this court in other cases of contracts; and if this court has not the same jurisdiction where the contract of marriage has been procured by fraud, it is the only case of a fraudulent contract to which its jurisdiction does not extend. The jurisdiction of equity in cases of fraudulent contracts seems sufficiently comprehensive to include the contract of marriage, and though this may be a new application of the power of this court, I do not perceive that it is an extension of its jurisdiction.[163]

What remains in question is the boundary between the two jurisdictions. What is the source, and the authority, of the rules that define and regulate the boundaries between law and equity? The answer could not come from either law or equity, but must emerge from court's reasoning about their proper role in a system that involves both kinds of powers.

Finally, we can observe an underlying pragmatism at work in *Moore*, and elsewhere. In rejecting the common law test of navigability, Justice Martin reasoned at length about the importance of water transport for Michigan's emerging industries:

> The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use—and hence, in a region where the principal business is lumbering, or the pursuit of any particular branch of manufacturing or trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient. In one instance, perhaps, boats can only be used profitably, from the nature of the product to be transported—whilst, in another they would be utterly useless. Upon many of our streams, although of sufficient capacity for navigation by boats, they are never seen—whilst rafts of lumber of immense value, and mill logs which are counted by thousands, are annually floated along them to market. Accordingly, we find that a capacity to float rafts and logs in those States where the manufacture of lumber is prosecuted as a branch of trade, is recognized as a criterion of the public right of passage and of use, upon the principle already

163. Romatz v. Romatz, 355 Mich. 81, 89, 94 N.W.2d 432, 436 (1959).

> adverted to, that such right is to be ascertained from the public necessity and occasion for such use.[164]

It can be seen that his reasoning depends heavily on an understanding of what, at the time, made Michigan's geographic and economic situation different from the situation in England and, perhaps, other states:

> We have a large territory yet undeveloped, rich in forest and in mineral wealth—washed by vast bodies of water upon three sides, and threaded by innumerable streams which are capable of navigation . . . and with a commerce already established, rivaling in extent, that of some of the Atlantic States, and rapidly growing under the influence of increasing population, settlements, and wealth, it is of the first importance that the rights of the public be recognized, to the free use of all streams susceptible of any valuable flotage . . . Although in some of the States usage and custom has been regarded as the foundation of this public right in fresh rivers, yet, in others the application of this doctrine has been denied. In the new States, from necessity, and of the very nature of things, such cannot be the foundation of the public right.[165]

Such a test would, of course, promote the use of Michigan's waters by the timber industry which was, at the time, the State's largest.[166]

There is an even more important commitment to be discerned behind the court's pragmatism. The court also embraced a view of its own responsibilities which goes considerably beyond any simple understanding of the common law's "reception." That is, the court not only thought itself free to reconsider the traditional common law rule, it felt obligated to do so.[167] In this, the Michigan Supreme Court seems to have embraced a view of the judicial role that has come to be described as *instrumentalist*. Instrumentalism can have a variety of understandings. As one commentator observed, the word is defined in Webster's Dictionary to mean "the pragmatic doctrine that ideas are plans for action which serve as instruments for adjusting the organism to its environment."[168] Another describes instrumentalism in the context of

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164. Moore v. Sanborn, 2 Mich. 519, 525–26 (1853).

165. *Id.* at 524.

166. Robert H. Abrams, *Charting the Course of Riparianism: An Instrumentalist Theory of Change*, 35 WAYNE L. REV. 1381, 1397 (1989).

167. *Moore*, 2 Mich. at 525–26.

168. WEBSTER'S UNABRIDGED DICTIONARY 952 (2d ed. 1983).

legal theory to mean the "legal rules and other forms of law [that] are most essentially tools devised to serve practical ends, rather than general norms laid down by officials in power, secular embodiments of natural law, or social phenomena with a distinctive kind of past."[169]

Discussions of American legal history have been particularly influenced by Morton Horwitz's *The Transformation of American Law, 1780-1860*, which argued at length that American legal developments before the Civil War were strikingly instrumentalist, and that this represented an important break from earlier approaches to judging:[170]

> What dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change. Especially during the period before the Civil War, the common law performed at least as great a role as legislation in underwriting and channeling economic development. In fact, common law judges regularly brought about the sort of far-reaching changes that would have been regarded earlier as entirely within the powers of the legislature . . . As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrine based on a self-conscious consideration of social and economic policies.[171]

Horwitz's description seems amply fulfilled by the Michigan Supreme Court in *Moore,* as exemplified by this portion of the court's opinion:

> The length and magnitude of many of our rivers, the occasions and necessities for their use, and the nature and character of our internal commerce, all require a liberal adaptation of those doctrines to our circumstances and wants, and to a condition of things, both as to capability of our streams for public use, and the occasions for such use, entirely different from, and in many respects altogether new to, those which concurred to establish the common law rule, and we accordingly find that in all the States that rule has been enlarged so as to meet the conditions

169. ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20 (1982).

170. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

171. *Id.* at 2–3.

> and wants of the public and the necessities of trade and commerce.[172]

But the evidence of *Moore* should be put in proper perspective. As we have seen, many Michigan decisions from the same era reveal a Supreme Court that regularly followed English common law, unless there was persuasive reason to do something different.[173] If pre-Civil War decision-making is supposed to exemplify instrumentalist judging, then instrumentalist courts must have recognized a considerable social value in continuing many of the well-established rules.[174]

IV. SOME CONCLUSIONS

I began this exploration with the observation by Professors Hall, Wiecek, and Finkleman, that the received wisdom about reception was grounded in a series of mistaken assumptions. My brief survey of Michigan's reception of the common law adds a few more erroneous conclusions to this list.

First and foremost, there is the assumption that the common law that was received was a body of rules, to be taken and applied to the States. On some occasions, Michigan courts were prepared to accept common law doctrines without reconsideration or revision. So far as I can tell, this holds true for the basic rules of law that relate to accidents—personal torts as we would now tend to describe them. But, in other controversies, English common law served more as a starting point for rule-making by courts, where it was accepted that the rules appropriate for Michigan's economy would diverge as need be from their English antecedents. This seems especially true for rules of property law. And, in still other controversies, English common law would provide only broad principles to guide Michigan's courts.

This implies a second unfounded assumption, namely that what it meant for the rules of the common law to be "in force" would be the same across the board. When the common law is understood not as a set of rules but as a mixture of rules and broader principles, Michigan's early judges seemed ready to derogate the force of the specific rules whenever those seemed inapt, but more willing to respect the broad principles that could be perceived to underlie the more specific rules.

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172. *Moore*, 2 Mich. at 522.

173. *See infra* pp. 411–12 (discussing *Stout v. Keys* and *Abbott v. Godfry's Heirs*).

174. *See* Wise, *supra* note 23, at 1557–61 (observing that the abilities for which the post-Civil War Michigan Supreme Court was praised had much more to do with the technical competence of its opinions that its willingness to craft new doctrines).

Finally, it must also be true that the idea of "the common law" must be larger, and richer, than any set of authoritative rules. As that phrase was understood at the time of the common law's reception, what was fused with the common law was also the traditions, norms, and assumptions that had shaped how English courts wielded their full range of powers. When Michigan received "the common law" it received those traditions and standards about how to wield the judicial power, so that Michigan's courts could operate within that tradition.