Synthetic Common Law

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I. INTRODUCTION

Suppose two parties negotiating a contract are considering which body of law should govern any future disputes. In the past, they have chosen New York law, as have most parties in their area of practice, but a recent New York case has been decided in a way the parties agree should not govern their contractual relationship. California law includes a few cases in subjects similar to the parties' area of practice, with reasoning and outcomes that they find acceptable, but those decisions are nearly a century old, and the parties worry that a judge might decide a future dispute based on different principles. Courts in a few other states have published decisions in related areas, but nothing directly on point. What should the parties do?

This hypothetical is increasingly common, particularly in substantive areas of practice with rapidly evolving technologies. Parties contracting in the areas of computer law, corporate law, finance, intellectual property, telecommunications, and other areas frequently cannot find their ideal choice of law, and instead are forced to choose an inferior alternative. The same is true of parties contracting in areas that are subject to judicial uncertainty, where the lower courts have only just begun addressing a particular issue, or where the appellate courts that have addressed the issue are split.

Oliver Wendell Holmes, in advocating for the common law, recognized these limitations as applied to law generally, although he did not imagine how technology would overwhelm the ability of the common law to fill statutory gaps.† Holmes told the story of a Vermont justice of

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† See generally OLIVER WENDELL HOLMES, THE COMMON LAW (1881). Guido Calabresi extended Holmes's argument, pointing out that the common law could improve upon the gaps in statutes because of costly barriers to legislative action. See generally GUIDO CALABRESI, A COM-
the peace who, after considering a suit brought by one farmer against another for breaking a churn, ruled for the defendant because he had looked through the statutes and could not find anything about churns.2

The story illustrates not only the limits of statutory construction, but also some of the constraints on common law adjudication.3 Common law depends on human, and therefore fallible, judges. A common law judge might adhere stubbornly to the view that if a statute (or prior case) does not strictly cover the terms of a transaction, then an injured party to that transaction has no claim, or an argument does not hold. Common law rules are fraught with contradictions and ambiguity, and, because they depend upon a limited number of specific cases, necessarily contain gaps.4

Moreover, the body of common law relevant to most parties is shrinking, as the demand for judicial resources outpaces the supply and as disputes become more complex and varied.5 Appellate courts maintain a large and increasing body of unpublished decisions without precedential value.6 In published opinions, judges increasingly use heuristics in place of fact-specific analyses to simplify their resolution and explica-

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2. See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 474–75 (1897). Holmes may have adapted this story from a passage in a letter to him from Sir Frederick Pollock. In that letter, the first of a series of correspondence between Holmes and Pollock from 1874 to 1932, Pollock described a “gem from Viner’s Abridgment somewhere in title Pleader, which may be useful to you [and] is not generally known . . . . A declaration in trover for bottles without naming how many bottles is ill; but a declaration for twelve pair of boots and spurs without naming how many spurs is well enough: for it shall be intended of the spurs that belong to the boots.” 1 HOLMES–POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932 5 (Mark DeWolfe Howe ed., 1942) (letter from Pollock to Holmes dated July 3, 1874).

3. Melvin Eisenberg has made a similar point about the almost numberless rule permutations that are possible based on fact differences in common law cases. For example, he has noted that the “vehicle of harm” in a well-known British case in which the plaintiff drank from a bottle containing a decomposed snail “could be characterized as an opaque bottle of ginger beer, an opaque bottle of beverage, a bottle of beverage, a container of chattels for human consumption, a chattel, or a thing.” MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 54 (1988) (citing M’Allister (or Donoghue) v. Stevenson, [1932] L.R. App. Cas. 562 (H.L. 1932)).

4. In his defense of common law regimes, Melvin Eisenberg has stated that an application and extension of common law is justified when it is both socially congruent and systemically consistent. See EISENBERG, supra note 3, at 68. These justifications, to the extent one believes they are important, place additional limitations on the power of common law.

5. For this reason, commentators ranging from Lord Coke to William Holdsworth to the Judicial Conference of the United States have warned against publishing all judicial decisions and argued for publishing only those limited number of decisions with precedential value. See Jennifer Adams, Law Today: Gone Tomorrow, 53 BAYLOR L. REV. 659, 662–63 (2001).

6. See Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 VAND. L. REV. 71, 121 (2001) (concluding that “[w]ithout an increase in the number of sitting judges or a reduction in the courts’ caseload, it is unimaginable that the courts could publish detailed deliberative opinions in every case they decide”).
tion of particular cases (and presumably to minimize the probability of reversal). These phenomena raise the general question of what role, if any, "real" written opinions should play in the generation of legal rules. Put simply, does it still make sense in certain areas of law to have judges decide cases by issuing written opinions? Or is there a more efficient regime for generating certain types of legal rules that might avoid some of the institutional difficulties associated with judicial opinions?

This Article proposes "synthetic common law"—a custom-tailored choice of law alternative to the traditional common law source of legal rules. In a synthetic common law regime, parties to contracts would specify short "synthetic" cases in their agreements, indicating how different types of disputes would be resolved. They might also reference some "real" cases, perhaps altering the holding or a fact pattern just as law professors do in their classes. Because the parties would not be limited to a particular jurisdiction, they might choose to be governed by legal rules consisting of a New York case, a California case with the opposite holding of the one reported, a British case, and a smattering of "fake" cases to fit particular fact patterns. Private adjudicators would then resolve any disputes between the parties, reasoning by analogy based on the "synthetic common law" those parties had created.

In a synthetic common law regime, there would be incentives for private arbitration associations to publish menus of cases and commit to resolve disputes based on those cases. Private parties would select from among these competing associations a particular menu of cases to govern their contracts. The selected association would adjudicate any disputes based on those cases. Courts would have limited review of association judgments, as they currently do.

Synthetic common law might sound odd to a person living under the modern conceptions of precedent and stare decisis. However, during the period in which the common law evolved in a manner that numerous scholars have labeled efficient, there was no well-developed concept of


8. The primary proponent of the argument that the common law process tends to produce efficient legal rules is Judge Richard Posner. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 25–27 (5th ed. 1998). During the 1970s, George Priest and Paul Rubin developed formal models describing some of the efficiency conditions of common law litigation and adjudication. See Paul H. Rubin, Why Is the Common Law Efficient, 6 J. LEGAL STUD. 51 (1977); George L. Priest, Selective Characteristics of Litigation, 9 J. LEGAL STUD. 399 (1980). More recently, numerous scholars have
precedent at all. From the twelfth through seventeenth centuries—the heyday of efficient common law evolution—parties treated cases as merely illustrative, not as authoritative sources of law. The private Year Books included notoriously inaccurate and embroidered lists of "cases," many of which were of questionable origin or had been overruled. In many instances, these "cases" did not even have reported outcomes and were relied on more as teaching tools to illustrate principles of law than as binding statements of law. A synthetic common law system would more closely resemble early common law regimes than current approaches.

The notion of synthetic common law also fills a gap in current theory and practice. First, in terms of theory, synthetic common law is an attractive alternative to common law, statutory law, private law, and private adjudication. Because synthetic common law would be based on ex ante findings by the parties, it more likely would reflect societal practice and the parties’ expectations than does common law, which is based on ex post findings by a judge or jury. Because synthetic common law would be based on broadly ranging menus of cases, it would avoid the inflexibility of statute-based regimes. Because synthetic common law

been critical of the view of the common law as efficient. See, e.g., Todd J. Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551, 1551 n.2 (2003) (citing literature on the economic inefficiency of modern American tort law). Other scholars, including Paul Rubin, continue to regard common law processes as efficient. In his most recent article on the common law, Rubin argued not only in favor of the efficiency of particular legal rules (which he calls "micro" efficiency), but also in favor of the superior overall efficiency of the common law legal system (which he calls "macro" efficiency). See Paul H. Rubin, Why Was the Common Law Efficient?, at http://ssrn.com/abstract=498645. Keith Hylton has suggested one possible way to bridge the gap in this debate is to distinguish between the legal notion of "doctrinal" efficiency, which does not take into account administrative costs, and the economic notion of "operational" efficiency, which does. See Keith N. Hylton, Efficiency and Labor Law, 87 NW. U. L. REV. 471, 474–77 (1993). For an excellent recent analysis of the economics of the choice between arbitration and litigation, in the context of franchise agreements, see Christopher R. Drahozal & Keith N. Hylton, The Economics of Litigation and Arbitration: An Application to Franchise Contracts, 32 J. LEGAL STUD. 549, 551–55 (2003).
would rely on analogical reasoning by private judges based on cases specified \textit{ex ante}, it would avoid certain intractable problems associated with private contract provisions, including the difficulty of specifying contingencies of rapidly evolving practices.\footnote{Moreover, because private contractual provisions often are written in impenetrable boilerplate, it is far more likely that private parties will actually read and consider provisions articulated in narrative case format. Human beings often find it much more efficient to process information presented in narrative form. By presenting legal rules as narrative, a synthetic common law regime may level the playing field between parties facing information or sophistication asymmetry. Disadvantaged parties often do not read the relevant contractual provisions, but might read a provision articulated in narrative, case format. \textit{See}, e.g., Melvin Eisenberg, \textit{Text Anxiety}, 59 S. CAL. L. REV. 305 (1986) (discussing the argument that it is reasonable for consumers to refuse to read dense form contracts).} Because synthetic common law would be administered privately it would generate the benefits of existing private dispute resolution regimes;\footnote{\textit{See} Bruce L. Benson, \textit{The Spontaneous Evaluation of Commercial Law}, 55 S. ECON. J. 644, 648 (1989); Lisa Bernstein, \textit{Merchant Law in a Merchant Court: Rethinking the Code's Search for Inmanent Business Norms}, 144 U. PA. L. REV. 1765, 1790 (1996); Lisa Bernstein, \textit{Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions}, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, \textit{Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry}, 21 J. LEGAL STUD. 115 (1992); Christopher R. Drahozal, \textit{Contracting Out of National Law: An Empirical Look at the New Law Merchant}, 80 NOTRE DAME L. REV. (forthcoming 2004); Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. REV. 695 (2001); Larry E. Ribstein, \textit{Private Ordering and the Securities Laws: The Case of General Partnerships}, 42 CASE W. RES. L. REV. 1, 45 (1992).} moreover, because synthetic common law would provide to parties a list of cases to govern any dispute, it would avoid the uncertainty and secrecy associated with private arbitration.\footnote{\textit{See} Steven Walt, \textit{Decision by Division: The Contractarian Structure of Commercial Arbitration}, 51 Rutgers L. REV. 369, 387 (1999).}

Synthetic common law more closely fits the theoretical conceptions of law proffered by Bruno Leoni\footnote{BRAUN LEONI, \textit{FREEDOM AND THE LAW} (3d ed. 1991).} and F.A. Hayek\footnote{F.A. HAYEK, \textit{RULES AND ORDER: LAW, LEGISLATION, AND LIBERTY} (1973).} than do extant legal regimes. Law under a synthetic common law regime would be "discovered," not "made."\footnote{Zywicki, \textit{supra} note 8, at 1575.} Like the early common law, synthetic common law would be subject to a competitive market process, with the results of the interaction of numerous atomistic players generating spontaneous order.\footnote{Hayek, \textit{supra} note 17, at 94–123.}

In terms of practice, synthetic common law would benefit private actors by enabling them to avoid the costs of federal and state legislation while also avoiding the ambiguity and uncertainty of modern alternative dispute resolution. In many instances, it would be cheaper, clearer, and fairer than current alternatives. The advantages would be especially great for private parties in areas of rapidly evolving technologies, where
the choice between ever-expanding federal legislation or unpredictable private arbitration is increasingly unattractive. Parties would not be required to invest in judge-made legal rules to govern future disputes. Thus, synthetic common law also is an alternative regime to consider for legal scholars writing in the area of institutional competence and public choice. A public choice analysis need not compare only a legislature captured by special interests to a sluggish and ill-equipped judiciary. 20

The contribution of this article to the debate about the constitutive aspects of legal rules is captured by the following simple diagram: 21

Figure 1

<table>
<thead>
<tr>
<th>Ex Ante</th>
<th>Ex Post</th>
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<tbody>
<tr>
<td>Statutory Law</td>
<td>Common Law</td>
</tr>
<tr>
<td>Public</td>
<td>Synthetic Common Law</td>
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<tr>
<td>Private</td>
<td>Private Law</td>
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<td>Private Adjudication</td>
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The notion of Figure 1 is that the alternative legal rules can be classified based on two variables: time and source. First, does the system specify legal rules to resolve disputes ex ante or does it adjudicate dis-


21. Classifications of legal rules and institutions frequently are in fours. Consider, for example, the four-part classification of property and liability rules, depending on which party possesses the relevant property right. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). Indeed, quadripartite classifications abound: the four quadrants of a Cartesian coordinate system, the four payoff diagrams of financial options transactions, the Gang of Four, the four novels of William Gaddis, the 2x2 matrices of game theory, and so on. Most relevant here is Thomas Barton's four-part description of the structure of decisional institutions: (1) the method of problem identification (active vs. reactive), (2) the degree of deliberation involved in reaching a decision (spontaneous vs. deliberate), (3) the level of participation and control by the disputants (disputants' control vs. third-party control), and (4) the substantive justification for decisions (rigid vs. flexible). Thomas D. Barton, Common Law and Its Substitutes: The Allocation of Social Problems to Alternative Decisional Institutions, 63 N.C. L. REV. 519, 520–21 (1985).
putes based on an *ex post* specification? Second, is the system’s source of legal rules public or private?

This classification has the advantage of being independent of many of the institutional concerns present in other classifications. Instead, the scheme focuses on differences of time and source only, without regard to how the rule is formulated, controlled, or applied. In that sense, this classification is both simpler and more theoretical than prior approaches.

The left half of the diagram depicts legal rules that are specified *ex ante*. Legislatures pass statutes prior to (and with a view to) their application in particular instances. For example, the Securities Act of 1933 specifies legal rules that *then* apply to regulate conduct. Similarly, private parties formulate uniform legal rules prior to their application in particular instances. The Uniform Commercial Code specifies legal rules that *then* apply to regulate conduct. Private law can become public law if enacted or it can regulate conduct by agreement. For example, uniform provisions of the International Swap Dealers Association Master Agreement are not law in any jurisdiction, yet such provisions govern the vast majority of over-the-counter financial derivatives contracts.

In contrast, the right half of the diagram depicts legal rules that are specified *ex post*. Courts decide cases and issue decisions that become part of the common law only after a dispute has arisen. For example, *Smith v. Van Gorkom*, an important corporate law case, specified legal rules related to a director’s duty of care after the conduct at issue had occurred. Of course, the legal rules in a case—once it has been decided—become *ex ante* rules relevant to future parties; nevertheless, a judge formulating legal rules with respect to particular facts can do so only *ex post*. Similarly, private adjudication—through Alternative Dispute Resolution, mediation, or other form of arbitration—involves the *ex post* formulation of legal rules (if it involves the formulation of legal rules at all). Unlike common law, arbitration decisions typically do not have precedential value.

The top half of the diagram depicts methods of generating legal rules where the source of the applicable rules is a public (i.e., governmental) entity. This distinction is straightforward. A federal court in the South-

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22. See Barton, supra note 21 (concluding that all decisional institutions are social constructs subject to social control).
24. 488 A.2d 858 (Del. 1985).
25. Id. at 872-93.
ern District of California is a public entity; so is the Florida legislature. The bottom half of the diagram depicts methods of generating legal rules where the source is a private entity. A National Association of Securities Dealers arbitration panel is a private entity; so are Reporters on various Restatements of Laws.

The partitioning of legal rules into quadrants is a normatively indeterminate contribution to the literature on legal rules. Is \textit{ex ante} specification of legal rules better than \textit{ex post}, or worse? Are public entities preferable to private entities in formulating legal rules, or not? It is not necessary to answer questions such as these in order to accept the primary point of this diagram: that legal rules can be classified according to time and source. Thus, one contribution of this Article is the positive claim that legal rules generally can be placed within one of the four quadrants of Figure 1, depending on two factors: (1) is the rule specified \textit{ex ante} or \textit{ex post}? and (2) is it a public or private source?

According to this classification, rules specified \textit{ex ante} by public entities are statutes; rules specified \textit{ex post} by public entities are common law; rules specified \textit{ex ante} by private entities are private uniform law (for example, the Uniform Commercial Code, the Model Penal Code, and the various Restatements of Laws); and rules specified \textit{ex post} by private entities are arbitral rules. This classification is valid even if the reader rejects the notion of synthetic common law.

The normative claim made in this Article is that legal rules generated in a synthetic common law regime—the blended region at the center of Figure 1—could dominate legal rules generated within any single quadrant. Statutes, common law, private uniform law, and private adjudication each suffer from deep flaws, stemming in part from the fact that rules within one quadrant necessarily forego the advantages associated with other quadrants. Accordingly, parties in certain areas of practice, particularly areas of rapidly evolving technology,\textsuperscript{26} might benefit from

\textsuperscript{26} There might also be applications to criminal law. In the sentencing guidelines context, Albert Alschuler has proposed using fake, paradigmatic cases, not unlike synthetic common law, to guide judges in sentencing criminal defendants. \textit{See} Albert W. Alschuler, \textit{The Failure of Sentencing Guidelines: A Plea for Less Aggregation}, 58 U. CHI. L. REV. 901, 942 (1991) (noting as the advantages of such a system that "[n]o real-world case might fit any of the commission's paradigms exactly, and unusual cases might be far removed from any situation that the commission had considered. But lawyers could use the commission's paradigms at sentencing hearings in much the same way that they now use judicial precedents at other proceedings."). However, Alschuler's proposal—unlike synthetic common law—would require both the involvement of federal judges and close judicial appellate review. Moreover, because the entity creating the common law would be a regulatory monopoly, the U.S. Sentencing Commission, there would be no assurance that the "paradigmatic cases" would reflect societal practice. Of course, criminal sentencing might not be an appropriate area to introduce competing providers of law, whether synthetic or not. \textit{See infra} notes 49–55 (assessing the regulatory competition debate).
synthetic common law. Moreover, synthetic common law regimes capture the economic benefits typically associated with common law without necessarily forgoing the benefits of other non-common law regimes.27

If private parties choose to be bound by legal rules drawn both from real common law cases and from hypothetical case examples, they could blend the public/private and ex ante/ex post aspects of traditional legal rules to generate benefits beyond those associated with choosing rules from within a quadrant or switching to a different quadrant.28 In particular, the blended approach of synthetic common law might relieve some of the concerns scholars have articulated about judicial use of heuristics.

In modern society, most everything is, or can be, synthetic: food, clothing, shelter, even thought.29 Yet law continues to be real. Real parties dispute real cases. Real judges apply real law. In general terms, this Article asks the perhaps radical question: why not synthetic law?

Part II critiques and updates the arguments for and against a common law system. Part III analyzes three alternatives to a common law system: statutory law, model acts and private law,30 and private adjudication. Part IV discusses the proposal for synthetic common law and compares it to the alternatives.

II. THE LIMITS TO COMMON LAW

There has been vigorous academic debate about the merits and flaws of common law. This Part critiques and updates some of the most persuasive arguments for and against common law adjudication. In some sense, this Part seeks to understand whether we should laugh or cry in

27. See supra note 12.

28. Commentators previously have suggested replacements for legal rules within (or without) a particular quadrant, such as (1) replacing current public statutes and cases with new public law, EISENBERG, supra note 3, at 78; or (2) replacing current public statutes and cases with new private law in the form of private statutes (i.e., contractual provisions), see infra Part III.B. However, no commentator has suggested replacing public statutes and cases with new private law in the form of a blended or real common law and hypothetical cases. For an excellent review of Professor Eisenberg's book, see Stephen M. Bainbridge, Social Propositions and Common Law Adjudication, 1990 U. ILL. L. REV. 231 (1990) (reviewing MELVIN A. EISENBERG, THE NATURE OF COMMON LAW (1988)).

29. As to thought, some scholars have attempted to use findings in the field of artificial intelligence to explain law and legal reasoning. See, e.g., Dan Hunter, Out of Their Minds: Legal Theory in Neural Networks, 7 ART. INTEL. & L. 129 (1999) (examining the use of neural networks in modeling legal reasoning).

response to Holmes’s story about the churns.\textsuperscript{31} Is the story funny because of its implausibility—the assumption being that the common law is fair and efficient? Or is the story upsetting because it seems all too plausible—the implication being that the common law is neither fair nor efficient?

\textbf{A. The Case for Common Law}

In the modern regulatory state, dominated by federal statutes and administrative rules, it is easy enough to relegate the common law to the role of historical nicety. From the thirteenth century until recently, common law was the primary source of law in the United States and England and was revered by scholars and practitioners.\textsuperscript{32} In modern society, it assumes a lesser role. Notwithstanding the fact that much of law school still involves the study of common law topics, many legal commentators, scholars, and practitioners have abandoned the common law in favor of statutes and private law (including model and uniform laws).\textsuperscript{33} In a few areas of rapidly evolving technology, common law is experiencing a renaissance, with some scholars advocating common law adjudication as a higher-speed alternative to the often-sluggish modern administrative state.\textsuperscript{34}

Judge Learned Hand, drawing from Blackstone,\textsuperscript{35} described the common law as "a monument slowly raised, like a coral reef, from the
minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work."

This romanticized notion of the common law as coral reef is (or was, until recently) deeply embedded in the psyche of lawyers and legal academics. The language is loaded: Learned Hand's metaphor of the coral reef implicitly praises the role of judges in developing a "monument" (i.e., common law) through an incremental, gradual, and fair process.

Why such lofty praise? As the argument goes, there are two chief advantages to the common law. First, it provides a mechanism for resolving disputes in a fair and efficient manner. Second, it generates a supply of incremental and consistent legal rules that reflect social practice.

1. Evolution and Efficiency

First, the superiority of a common law approach is rooted in the notion that courts resolve disputes in a fair and efficient manner by reasoning from existing standards, either of society generally or of the legal system specifically. This function—dispute resolution—depends on current and past practice. Disputes typically derive from a claim of right by an individual or institution based on the application, meaning, or implications of a particular society's existing standards.

The process of common law dispute resolution is both decentralized and passive. A decentralized approach ensures that judges will hear disputes involving a large swath of experience in society; common law rules then should reflect differences in standards among various segments within society. Just as importantly, courts play a largely passive role, responding only when parties set in motion a particular legal dispute.

Ideally, a society's method of dispute resolution should be efficient and fair. Commentators have argued that the decentralized, passive common law is both. The efficiency argument has an evolutionary flair. In its most basic terms, the argument is that the common law is an efficient dispute resolution system simply because it is the system that has survived the test of time. The English common law system survived

38. Id. at 1.
39. There may be a gap, of course, between the fact of evolution and the argument that evolution is efficient. In evolutionary biology, for example, there is strong evidence of evolutionary patterns that belie "survival of the fittest" arguments. The fact that a particular practice survives during a period of selection and variation does not necessarily mean it is the optimal current practice. For a
despite repeated threats, powerful criticism, and almost insurmountable obstacles, including—some argue—the emergence of Parliament as a power in the eighteenth century.\textsuperscript{40} As the argument goes, if common law adjudication had not been an efficient means of resolving disputes, given the state of English society at the time, it likely would not have persisted over time.

Moreover, the fact that common law rules survived while legislatures were empowered to enact different rules is especially strong evidence that a well-functioning\textsuperscript{41} democratic society could do no better than those common law rules. Just as the common law was threatened in England,\textsuperscript{42} the expansive reach of Congress has threatened U.S. common law for many decades. Again, the argument goes, if the common law were not an efficient system, elected representatives would have substituted more efficient rules.\textsuperscript{43}

In the 1970s, Judge Richard Posner and others attempted to buttress the intuitive appeal of the argument for common law with economic analysis. Their arguments also have an evolutionary perspective. In general, the economic argument, first advanced by Posner and William Landes, is that to the extent common law adjudication involves private parties acting in their own self-interest and judges deciding cases based on wealth-maximizing standards, only efficient rules will survive.\textsuperscript{44} Accordingly, the common law is wealth-maximizing. Judges leave

\begin{footnotes}
\footnotetext[40]{Arthur R. Hogue, Origins of the Common Law 241 (1986). Tullock has argued that the common law was threatened several times during the Middle Ages, when the common law survived more in the memories of individual judges and practitioners as oral histories than in formal records. See Tullock, supra note 37, at 5–6, 8 (noting that the law was largely judge-made and unwritten, although some “common law court decisions were recorded, and occasionally the record would be consulted”).}
\footnotetext[41]{This argument assumes the democracy is a well-functioning one, an assumption that may or may not be true.}
\footnotetext[42]{See Tullock, supra note 37, at 6 (quoting Justice William Blackstone as saying in 1783 that the competence of Parliament was so great that Blackstone knew “of no power in the ordinary forms of the constitution that is vested with authority to control it”).}
\footnotetext[43]{This argument ignores the fact that high transaction costs, especially the collective action costs that dominate democratic voting, may prevent the legislature from effectively amending poor common law rules, although there is evidence that at least on occasion Congress can act to overturn or “amend” judicial decisions, notwithstanding these transaction costs. See, e.g., 18 U.S.C. § 1346 (2000) (amending definition of “property” in the mail fraud statute to include intangible rights, after the Supreme Court held that such rights were not included); see generally Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965) (examining group theory and collective action).}
\end{footnotes}
inefficient rules to the side and over time preserve and follow only efficient rules.

Other scholars then attempted to explain how the structure of common law adjudication reinforces this efficiency-seeking process. For example, George Priest argued that the process of litigation, and how parties choose whether and when to litigate, pushes common law rules in the direction of efficiency. Inefficient legal rules are litigated more frequently, so judges can dedicate their efforts to establishing efficient rules, which then lead parties to settle cases out of court. Along different lines, but still advocating for the common law, Guido Calabresi was one of the first scholars to use economic analysis to demonstrate some of the disadvantages of a primarily statutory regime in the United States as compared to a regime allowing common law judicial "amendment" of statutes through interpretation. These economic arguments added an element of science and logic to the claim that the common law provides the best method of dispute resolution.

The economic arguments supporting the common law can be updated in the context of the ongoing debate about regulatory competition. This debate considers the question of whether a single monopolist regulator (e.g., the federal government) is superior or inferior to a group of competing regulators (e.g., the state governments). This argument, too, is evolutionary in tone: is the regulatory system that survives over time superior, or is the surviving system simply a result of a path-dependent movement from a set of somewhat arbitrary initial conditions?


46. See CALABRESI, supra note 1, at 5. Calabresi was prescient in arguing that such amendment was required, in part because of barriers to formal legislative amendment, including interest-group pressures; federal statutes in particular have multiplied many-fold in recent decades, without much, if any, improvement in the clarity of legal rules. See, e.g., Stephen D. Clymer, Unequal Justice: The Federalization of Criminal Law, 70 S. CAL. L. REV. 643 (1997) (describing recent expansion of federal criminal law).


contours of the debate vary, from corporate law to securities law to environmental regulation. The common law is a good candidate for the regulatory competition debate because it originally depended on extensive competition among courts and judges. For example, just as many scholars argue that the competition among states for corporate charters is a race to the top, driving the development of (Delaware) corporate law, one can argue that competition among courts and judges generally was a race to the top.

1927–28 (1998) (suggesting that corporate law has developed based on vague, open-ended standards).


50. See, e.g., Stephen J. Choi & Andrew T. Guzman, Portable Reciprocity: Rethinking the International Reach of Securities Regulation, 71 S. Cal. L. Rev. 903 (1998) (arguing for regulatory competition among national securities law regimes); Partnoy, supra note 12, at 785–807 (criticizing and suggesting amendments to proposals for competition among international securities law regimes); Romano, supra note 49 (arguing for regulatory competition among state securities law regimes within the United States).


52. Randy Barnett has written about the evolution of common law from the competitive law merchant:

Many of [common law’s] principles originated with the competitive law merchant that preceded the growth of the common law. Many more were determined in an era when common-law courts competed for legal business with other legal systems and therefore had a far greater incentive than today to be sensitive to the expectations of both parties. With this as its origin, I suggest that the correspondence between common sense and common law is no coincidence.


53. The argument in corporate law is that corporations choose to incorporate in Delaware to benefit from that state’s value-enhancing corporate law rules. See, e.g., Romano, supra note 49, at 2384 n.76 (substantiating this claim with event studies).

54. There is a question about whether common law competition was a race to the top or a race to the bottom. But it certainly was a race. See, e.g., Tom W. Bell, The Common Law in Cyberspace, 97 Mich. L. Rev. 1746, 1767–70 (1999) (book review) (describing efficiency arguments). The specialized courts of the law merchant often are cited as the predecessors to common law rules. See I. Trotter Hardy, The Proper Legal Regime for “Cyberspace”, 55 U. Pitt. L. Rev. 993, 1019–21 (1994) (explaining that even when “Law Merchant courts eventually declined in use... the Rules of the law merchant continued to be applied by common law courts”); David R. Johnson & David Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1387–91 (1996) (comparing Law Merchant that “did not destroy or replace existing law” with the modern impact of cyberspace); see also Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765 (1996) (using the National Grain and Feed Association and its “private legal system” as an example of merchant law in a merchant...
driving the development of English—and later American—common law. Over time, so the argument goes, the system that survived is superior.\(^{55}\) If it had not been superior, private parties would have opted to have their disputes governed by another regime; alternatively, rational and well-informed judges would have responded with different decisions. The viability of this argument depends on empirical research, which has not yet been done in the common law context.\(^{56}\)

For some scholars, it is enough to establish that the common law is an efficient\(^{57}\) method of dispute resolution. Yet there remains the additional question of fairness. To some extent, the above evolutionary arguments support the notion that the common law is fair. In a world with perfect information and zero transaction costs, rational, fully informed judges would resolve disputes in a manner that maximized the welfare not only of the parties to the dispute but of society as a whole. If they did not, the argument goes, parties in future disputes (or affected non-parties) would point out the ill effects of a particular decision, and a rational, fully informed judge would alter the applicable common law legal rule. If some judges were irrational or ill-informed, parties would find other, better judges.\(^{58}\)

Notwithstanding these weaknesses, there are strong arguments that the common law is a fair method of dispute resolution because it protects parties’ expectations. The credibility of common law adjudication is based on the notion of replicability, i.e., that courts employ consistent methodologies across cases.\(^{59}\) Numerous scholars and commentators
have focused on the preservation of expectations through replicable decision-making as justifying the fairness of common law. Melvin Eisenberg has noted that disputes in the United States during the nineteenth century often relied on usages, and therefore by definition depended on the behavior and expectations of private parties. Justice Cardozo believed in the general rule of following precedent to ensure that private parties' rights and beliefs would be protected in an evenhanded, consistent, and fair manner. Jeremy Bentham—an opponent of common law generally—advocated a predictable judicial framework to protect parties' expectations, saying that "[t]he business of the Judge is to keep the distribution of valuables and of rewards and punishments in the course of expectation ..." Holmes, in his story about the judge in the churn case, hinted that the result is apocryphal: any judge would resolve a dispute about a damaged churn in a sensible way, in line with the parties' expectations.

Finally, recent empirical work in psychology supports a conclusion that there are non-economic reasons to believe common law adjudication is fair to the parties involved. Common law adjudication gives parties the thing they seem to desire most: their day in court. Studies in the psychology literature suggest that disputants believe having a chance to describe their version of the story to an impartial adjudicator is the most

objectivity “which requires courts to resolve disputes by ... applying rules that are applicable not only to the immediate dispute, but to all similarly situated disputes”).

60. See EISENBERG, supra note 3, at 38 (describing courts adopting miners' usages as rules of law in mining claims, and whalers' usages as rules of law in disputes over the property rights of harpooned whales).


62. The deference is that due to the determination of former judgments is due not to their wisdom, but to their authority: not in compliment to dead men's vanity, but in concern for the welfare of the living. That men may be enabled to predict the legal consequences of an act before they do it: that public expectation may know what course it has to take: that he who has property may trust to have it still: that he who meditates guilt may look for punishment, and in the self-same guilt for the same punishment ... Why should decisions be uniform? Why should succeeding ones be such as to appear the natural and expected consequences of those preceding them? Not because it ought to have been established, but because it is established ... The business of the Judge is to keep the distribution of valuables and of rewards and punishments in the course of expectation: conformable to what the expectation of men concerning them is, or if apprized of the circumstances of each case, as he is, he supposes would be.


63. See supra note 2 and accompanying text.
important factor determining whether they perceive a particular process of dispute resolution as "fair." In fact, this "day in court" factor outweighs every other variable tested, including the actual outcome of the dispute.\textsuperscript{64} If these studies are correct, to the extent the common law is perceived as fair, it generates greater happiness among disputants than would a system that did not give parties the opportunity to air their views.\textsuperscript{65}

2. The Supply of Legal Rules

A common law approach provides a second, equally valuable, function. Courts add to and enrich the supply of legal rules in a way that reflects the values of society.\textsuperscript{66} Thus, a key advantage to a common law approach is that judicial rules evolve slowly as a flexible response to the actions and preferences of individuals and institutions involved in disputes.\textsuperscript{67} As such rules evolve, those parties, as well as other non-parties who learn of the rules, can live and plan accordingly. Then, other individuals and institutions are involved in the next round of cases, which generates the next set of legal rules, and so forth, all reflecting the behavior and values of society.

Several scholars have concluded that the common law upholds the rule of law more effectively than civil law because of its flexibility coupled with the "stickiness" of precedent.\textsuperscript{68} Implicit in this argument is a distrust of the democratic process: the notion is that judges with life tenure are able to resolve disputes in an impartial manner and therefore are better at generating legal rules than legislators, who may be captured by particular individuals or institutions.\textsuperscript{69}

\textsuperscript{64.} See, e.g., Tom R. Tyler et al., The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations, 2(2) GROUP PROCESSES AND INTERGROUP RELATIONS 99 (1999) (describing these studies).
\textsuperscript{65.} However, the fact that disputants believe common law adjudication is fair does not necessarily dispose of the fairness question: disputants might irrationally overweight the benefits of being heard in an apparently fair process; in reality, the process might be unfair.
\textsuperscript{66.} See Tyler, supra note 64.
\textsuperscript{67.} Some scholars have argued that the behavior of parties in those relatively few cases that involve a published decision is not representative of the behavior of other parties. I consider these arguments infra at Part II.B.1.
\textsuperscript{68.} See, e.g., F.A. Hayek, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY (1973) (arguing that common law is preferable to civil law because legislative rules are both less flexible in form and more susceptible to sudden change); Eisenberg, supra note 3, at 6–7 (arguing that common law courts should play the role of developing the rule of law on a case-by-case basis).
\textsuperscript{69.} See Eisenberg, supra note 3, at 4–5.
Also implicit in this argument is the notion that common law legal rules evolve over time to reflect the values and practices of society in a more current and accurate manner than statutes can. Common law is passive and evolves in response to changes in the behavior of disputants. Common law rules are more adaptable than codified rules. As society changes, judges can quickly alter the relevant legal rules. Statutes, in contrast, are fixed and difficult to change. The legislature would find it too costly and burdensome to make similar, quick changes to reflect changes in society. Legislation often cannot anticipate future controversies, especially in rapidly changing areas of practice. Legislation necessarily is active, and action requires time and is subject to the political process.

On the other hand, because common law rules are "sticky," judges may not change them simply based on a whim. Change must be incremental, requires careful analysis, and is subject to review. In contrast, the legislature, when it is moved to act, may act immediately and on its own, with only the level of analysis that individual politicians facing re-election might think necessary, even if the legislative action directly reverses prior law.

Interestingly, several legal scholars recently have argued that in the area of rapidly evolving technologies—particularly involving telecommunications and the Internet—common law uniquely is able to generate timely rules to govern the actions of sophisticated parties. Melvin Eisenberg has argued that courts, not legislatures, have a unique capacity to generate the large body of legal rules a technologically advanced society needs to do its business. Bruce Keller has pointed to the emergence

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71. Many court systems have implemented so-called “fast track” or “rocket docket” approaches to speed the resolution of individual cases. See Chris A. Carr & Michael R. Jencks, The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision, 88 KY. L.J. 183, 197 n.34 (2000) (citing several articles describing such systems). Other courts, such as those in the Southern District of New York, resolve cases more slowly, and instead spend more time writing a smaller number of careful, often lengthy, opinions.


73. Our society has an enormous demand for legal rules that private actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited, and much of that capacity must be allocated to the production of rules concerning governmental matters, such as spending, taxes, and administration; rules that are regarded as beyond the courts' competence, such as the defini-
of common law in intellectual property disputes, where a statutory regime, especially given a sluggish Congress, is much too slow. Peter Huber has advocated for common law rules in the telecommunications industry.

Lawrence Lessig has discussed the benefits of common law related to the Internet. Judges and litigants recently have attempted to apply common law to disputes in the financial derivatives industry, where a statutory regime may be irrelevant at best. The arguments in favor of a common law system may be strongest in those areas involving rapid technological change, where the advantages of adaptability are more important and where parties would benefit from a quick supply of relevant legal rules.

One final advantage to the common law's ability to supply legal rules is that by reporting decisions, courts generate a public record of what otherwise would be only unwritten law, customs, and oral legal traditions. Especially in the business context, the certainty generated by a written record is essential; common law provides certainty by enabling parties to rely on reported judicial decisions.

_Editors Note_:

> The common law has emerged as a source of protection for intellectual property rights throughout this century whenever statutory protection for new forms of media were still evolving.


> HUBER, supra note 72, at 7–8, 205–06.

> Lessig, supra note 722, at 1752–54; see also LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 218–23 (1999) (noting problems with legislators and need for judicial action in regulating the Internet).

> See infra Part II.B.2.

> Several scholars have noted that private parties interacting repeatedly in small groups may find ways of enforcing social practices without reported common law or published statutes. See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (describing such private enforcement regimes); Catherine Mansell-Carstens, _Popular Financial Culture in Mexico: The Case of the Tanda_, in _CHANGING STRUCTURE OF MEXICO: POLITICAL, SOCIAL, AND ECONOMIC PROSPECTS_ 77, 78–80 (Laura Randall ed., 1996) (describing the “tanda” or “rosco,” an informal mechanism used by members of many small Mexican villages to allocate credit). However, in many instances—and particularly for parties transacting in a global business environment, where the possibility of informal resolution may be difficult—parties will need a formalized, specified system of dispute resolution. Even in markets where parties risk suffering reputational costs from breaches of the parties’ expectations, those reputational costs alone—without the possibility of
The reporting of decisions also ensures that changes in legal rules will be gradual and will need to be explained by reference to flaws in or departures from prior reported judicial reasoning. As publicly reported decisions increase in number and quality, the credibility of the common law system improves. A common law system with a sufficient number of well-reasoned, publicly reported decisions can both provide parties with guidance in their daily lives and assure participants in the system that individual disputes will be resolved with appropriate attention and care.

By publicly reporting decisions, courts also broadcast norms to society so that parties and lawyers can resolve the vast majority of disputes without burdening judicial resources. To the extent a society relies on the norms of self-regulating private communities transacting with each other in repeated interactions, public decisions can reinforce those norms while making it clear that although most transactions will not lead to a dispute, clear rules will apply to those that do.

B. The Case Against the Common Law

Many legal scholars dispute the view of the common law as an attractive, efficient coral reef. As to the efficiency of common law, there are arguments pointing to severe cracks in the reef's foundation, which cannot support the weight of costly, complex dispute resolution. The core of these arguments is the economic notion that a common law sys-
tem is a tragedy of the commons: overuse is rampant, court resources are rationed, and outcomes are inefficient.

As to the common law's ability to generate legal rules, there is a preliminary theoretical question as to whether there is any reef at all (i.e., "whether the common law can be said to exist at all"), and a more pragmatic question about the value of published common law decisions in modern society. For various reasons—fewer opinions written; more opinions depublished, selectively published, or vacated; more decisions subject to confidentiality orders or under seal; and increased use of private adjudication—the common law is disappearing from public view, and often is no longer useful to parties planning their lives and business affairs.

1. Devolution and Inefficiency

First is the argument that any common law system that could survive in a democracy necessarily is inefficient. The argument goes like this: judicial resources, including published decisions, are a public good with no assigned ownership rights. Accordingly, if the government establishes courts but does not charge a user fee to cover costs, it encourages overuse of judicial resources and therefore inefficiencies. The only way to prevent such inefficiencies is for the government to charge a high enough user fee to cover all of its costs. But in a society where disputes are costly to resolve, such a fee would be very high and necessarily would disadvantage a large segment of society, who would not approve it. Therefore, any possible common law system is inefficient.

Consider the following thought experiment: residents of a newly established state have no system of dispute resolution. These residents decide to establish a "judicial park" staffed with judges at the center of the city. Any party with a dispute may enter the judicial park, where a judge will resolve the dispute and issue a well-reasoned written opinion. What problems does this state face? If entrance to the judicial park is free, any party with a dispute will enter the park to utilize judicial re-

84. Simpson, supra note 80, at 9.
86. A public good is a commodity or service which does not exhibit either "depletability" (i.e., if an additional user consumes a public good, the benefits of that good are not depleted) or "excludability" (i.e., it is difficult or impossible to exclude consumers from the benefits of a public good). See WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 543-44 (1985).
sources. Judicial resources will be overused and a tragedy of the commons will result. All parties will demand well-reasoned opinions, which are very expensive to provide. The externality benefits to such opinions are unlikely to outweigh these costs, because non-parties and judges cannot exercise discretion about which cases merit thorough review. The result will be a large number of potentially useless judicial opinions.

The state may find itself unable to generate sufficient revenue, through taxes or otherwise, to support the judicial park. If the state is able to support the park, it will do so with resources that might be more highly valued in another use. Judicial resources will not be optimally used and judges will not be able to produce an efficient body of common law.

The state could prevent this overuse by charging fees to enter the park. To the extent the fees are less than the total costs of dispute resolution, judicial resources still will be overused, albeit less so (i.e., a partial tragedy of the commons). If the fees charged are high, perhaps even high enough to cover the total costs of dispute resolution, judicial resources will be conserved, but the system will be regressive, favoring wealthy individuals and institutions. Residents of the state might find such a system politically unacceptable.

As the costs of resolving disputes in the state increase, there are only a handful of possible results. One is that the efficiency of the common law system decreases because judicial resources are more overused. Another is that the system becomes more regressive as the state passes along the higher cost of using judicial resources by charging higher fees. Still another is that the state decides to keep fees constant but then rations judicial resources, either by delaying the resolution of disputes, by dismissing a portion of suits based on specified standards, by punishing lawyers for filing frivolous suits, or by permitting judges to decide which disputes merit complete treatment in a written opinion. Public decisions about rationing are difficult, and high transaction costs may prevent private parties (including non-parties to disputes who seek externality benefits associated with published judicial opinions) from acting collectively to persuade legislators and judges to ration efficiently.

87. See Tullock, supra note 37, at 16 (describing the inefficiencies of common law as a "tragedy of the commons").
88. The cost of dispute resolution could increase for several reasons: the complexity of transactions increases, the number and/or severity of uncertain events (e.g., accidents or natural disasters) increases, or residents of the state demand fairer process. In the United States, all of these reasons for cost increases have been prevalent in recent years.
This thought experiment casts doubt on the argument that the recent evolution of the common law has been efficient. In thirteenth-century England, when the costs of resolving disputes were relatively low, it might have been possible to minimize the common law system's inefficiencies without charging high fees or rationing judicial resources. However, in modern society, it is not possible. The cost of resolving even average disputes is very high, and there are political pressures preventing state and federal governments from charging high fees for access to judicial resources. Judicial resources are rationed through an implicit pricing system; this system favors wealthy institutions and individuals, who can afford the costs of delay.

Empirical data also raise questions about the efficiency of common law. The inner workings of an effective system depend on rational, well-informed judges who move the common law in the right direction. However, judges too often fall short of the ideal standard. The judiciary is politicized, with the results in many cases depending on which judge is drawn to hear a dispute. Judges are paid much less in real terms than they were fifty years ago, and they are confronting more complex cases brought by more parties and lawyers than ever before. Especially in areas of rapidly evolving technology, it is very difficult for judges to keep pace. For example, on average, judges in the Ninth Circuit each write twenty thorough opinions per year, an amount Judges Alex Kozinski and Stephen Reinhardt have likened to "writing a law review article every two and a half weeks." Moreover, the very presence of a com-

89. In fact, there is evidence that early British courts did both. In early common law systems, courts did charge fees, see BENSON, supra note 54, at 60–62, although it is difficult to assess how those fees compared to the courts' costs. A reasonable assumption is that those courts that survived without other resources (e.g., tax revenue distributed by the crown) were charging fees high at least enough to cover their costs.

90. Delay benefits wealthy individuals and institutions involved in disputes with less wealthy individuals and institutions. See TULLOCK, supra note 37, at 17. Tullock notes that the tragedy of the commons aspects of U.S. courts could be eliminated by introducing market-clearing prices for access to courts, but that numerous interests—including lawyers—would oppose such an introduction. Id. at 17–18.


93. The United States has seventy percent of the world's supply of lawyers. TULLOCK, supra note 37, at 25.

94. For example, judges have performed especially poorly in cases involving financial innovation. See infra Part II.B.2.

95. See Alex Kozinski & Stephen Reinhardt, Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions, CAL. LAW., June 2000, at 43. I am grateful to Ed Ursin for pointing out this article, which is not available through electronic databases. During 1999, the Ninth
mon law system—especially a low-fee system coupled with liberal procedural rules—creates incentives for parties to be litigious, thereby increasing the costs of dispute resolution, in a kind of litigation death spiral. This picture of the common law process is far different from the incremental growth and beauty imagined in Learned Hand’s coral reef.

2. The Shrinking Supply of Legal Rules

Even if the common law is inefficient, it might nevertheless be of value if it adequately performed its second function: adding to and enriching the supply of legal rules in a way that reflects the values of society. There are two reasons to suspect that the U.S. common law system does not perform this function very well. First, the U.S. common law system arguably is incapable of generating legal rules at all, at least not the kind of credible, articulated legal rules parties need for use in daily life. Second, even if the common law system could generate appropriate legal rules in particular cases, reported judicial decisions in those cases are disappearing from public view, with the most important decisions disappearing first and most frequently. This disappearance of precedent is the result predicted by the judicial park thought experiment described in Part II.B.1.

First, consider the argument that the common law system is incapable of generating legal rules at all. Jeremy Bentham expressed the opinion that the common law was a fiction from beginning to end, referring to the term variously as “mock law,” “sham law,” and “quasi law.”

Circuit decided 4,500 cases on the merits, 700 by opinion and 3,800 by memorandum disposition, known as “memdispo,” for an average of twenty opinions and 130 memdispos per judge, plus another 300 or so decisions for which the judge sits on a panel and comments on a decision, but does not author it. Id. at 44. Judges write thorough opinions in only fifteen percent of cases overall (including cases not decided on the merits). Id. Memdispos cannot be cited as precedent; if they could, judges would need to spend much closer attention to drafting them. Id. (“Most [memdispos] are drafted by law clerks with relatively few edits from the judges.”).

An example is the class action, which although of great potential value and importance obviously leads to a greater quantity and cost of litigation.

At the same time, each state’s common law system competes for business, a competition that thus could be characterized as a race to the bottom. This competition is especially heated among procedural rules, including choice of law and venue. For example, consider the popularity of certain states’ courts among plaintiffs’ lawyers. Such competition is in sharp contrast with the early competition among courts during the law merchant era. See supra note 52 (describing correlation between common law principles and expectations of both parties to a dispute).

Bentham wrote of the phrase common law: “In these words you have a name, pretended to be the name of a really existing object:—look for any such existing object—look for it till doomsday, no such object will you find.” Id. See also A COMMENT ON THE COMMENTARIES, supra note 62, at 124 (“As a system of general rules, the common law is a thing merely imaginary.”).

For an analysis of Bentham’s argument and the
Many legal positivists adhere to this view.\textsuperscript{100} Legal positivism depends on two preconditions: (1) that all laws owe their status as law to the fact that they have been laid down, i.e., posited,\textsuperscript{101} and (2) that all laws exist as sets of rules, where the rule constitutes the law.\textsuperscript{102} For legal positivists, the epistemological argument is the end of the story: they reject common law, which satisfies neither of the two conditions.

Even those who reject the strict legal positivism argument may nonetheless find there are other reasons to doubt the common law's ability to generate valuable legal rules. Instead of conceiving of the common law as a system of legal rules, one can regard it as customary law, namely, the body of practices and ideas received over time by a specific group, predominantly lawyers, who have used these practices and ideas in disputes and in advising clients.\textsuperscript{103} In this sense, the common law does not exist as a freestanding entity; rather, it exists only in the minds of lawyers acting based upon it.

Numerous legal philosophers have agreed that the value of common law propositions depends upon the degree to which they are accepted as accurate statements of received ideas or practices.\textsuperscript{104} Common law as customary law is valuable only if it preserves a considerable measure of continuity and cohesion. Such continuity and cohesion in turn require that the system reinforce strong pressures against innovation. New entrants to the system must be indoctrinated, to some extent, in the value of

\textsuperscript{100} Brian Simpson has described this argument with a simple question: "How can it be said that the common law exists as a system of general rules, when it is impossible to say what they are?" Simpson, supra note 80, at 17; see also id. ("As a system of legal thought the common law then is inherently incomplete, vague and fluid; it is a feature of the system that uniquely authentic statements of the rules which, so positivists tell us, comprise the common law cannot be made.").

\textsuperscript{101} Hans Kelsen wrote, "Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems." HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 114 (Anders Wedberg trans., Harvard University Press 1945). The synthetic common law system proposed here is consistent with this notion: it envisions many versions of "law," each of which is simply made up, or created. But note how radically different the operation of synthetic common law is from the traditional conception of common law. The status of synthetic common law as authoritative is driven, not by the fact that it has been created, but by the fact that private parties choose to have that "law" govern their lives.

One obvious weakness in the first condition of the positivist view is that custom, which cannot plausibly said to have been laid down, also is said be a possible type of law; however, it is difficult to say that custom is "posited" in the same way statutes are, simply because custom is composed of some underlying human action. See Simpson, supra note 80, at 11. If that were the case, what notion of law would not encompass some positive aspect?

\textsuperscript{102} See Simpson, supra note 80, at 11.

\textsuperscript{103} See id. at 20.

\textsuperscript{104} See id. at 21 (citing agreement with Hale and Blackstone).
precedent and the importance of the system’s "sticky" adherence to prior decisions.

Although these requirements may have been satisfied in the early English royal courts, it is difficult to argue that they are satisfied today. The barriers to entry in the legal profession are crumbling; non-lawyers can access and understand legal opinions and jargon; there are hundreds of law schools.105 Indoctrination into legal principles works very poorly in the United States, even when directed at first-year law students.

This breakdown in the system of customary law presents a serious paradox for proponents of the common law. If lawyers agree as to its meaning, it is not necessary, for common practice alone should be a sufficient guide for resolving disputes. If lawyers do not agree as to its meaning, rules alone are unlikely to provide the necessary authority for choosing one practice over another, however those rules are created.

A final argument supporting a conclusion that common law cannot generate credible legal rules is that courts lack the respect and authority necessary for the generation of such rules. Courts derive authority, at least in part, from individuals’ perceptions that they are objective and impartial. Yet many scholars question the objectivity of judges.106 Because judges are arbitrary, the argument goes, decisions cannot be replicated.107 And if decisions cannot be replicated, the common law cannot generate credible legal rules. Gordon Tullock has contended that during the second half of the twentieth century,108 courts have "severely eroded, if not entirely destroyed, the support-legitimacy of the common law."109

There is a second, perhaps more important, reason that the modern version of common law in the United States does not add to or enrich the supply of legal rules: decisions in those cases are disappearing from public view. More than sixty percent of federal circuit court decisions are

105. Of course, the causation may work the other way, i.e., these changes may be the reason for the shift from common law to statutory law in the United States.

106. Gordon Tullock has been a prominent proponent of this view. See, e.g., TULLOCK, supra note 37, at 2 (arguing that late twentieth-century U.S. courts have failed to maintain objectivity on a consistent basis).

107. See id. at 3 (finding that "the U.S. common law system has failed to preserve such replicability across major and growing areas of law").

108. It may be that the common law would work in a less complex society but is ill-suited to modern disputes in the twentieth-century United States. One reason may be the expansion of tort law in the United States. In the eighteenth century, the common law was composed largely of the law of contract, not of torts. Torts were thought to be of limited reach and achieved legal status only for relationships not covered by contract. Id. at 11. Because synthetic common law involves ex ante agreement by private parties, it would not substantially affect problems generated by the recent expansion of tort law, although a synthetic common law regime might be applicable to certain areas of tort law, where private parties might be able to specify a probability distribution of accidents.

109. Id. at 2–3.
not published.\textsuperscript{110} Of those opinions, a large number either disappear or are pushed out of the relevant body of common law by a variety of processes, including depublication, confidentiality arrangements, vacatur, selective publication, and publication subject to no-citation rules. All of these processes are problematic, and they erode\textsuperscript{111} the value of traditional common law. How can private parties plan their affairs based on judicial determinations that are private or withdrawn or even do not exist?

The problem is serious. As early as 1985, Judge Richard Posner noted that “[d]espite the vast number of published opinions . . . judges will confess that a surprising fraction of federal appeals are difficult to decide, not because there are too many precedents but because there are too few on point.”\textsuperscript{112} This problem has been magnified many-fold during the past twenty years, as the number of disappearing precedents has increased and as the probability has declined of finding an on-point case, especially in areas subject to rapid technological change. In 1998, the federal appellate courts disposed of more than a thousand cases on the merits without any comment at all,\textsuperscript{113} and district courts frequently dispose of cases without a detailed opinion or even oral argument. Anthony Kronman has decried the shortcut opinion judges frequently issue in place of the type of “original composition” opinion that he believes “disciplines the imagination.”\textsuperscript{114} Yet such shortcut reasoning should not be

\textsuperscript{110} Hinderks & Leben, supra note 61, at 158. Much of the scholarship in this area has focused on the California state courts, where the problem is especially acute. Less than fifteen percent of appellate decisions in California are certified for publication, and the California Supreme Court depublishes ten percent of those decisions. Carr & Jencks, supra note 71, at 219; see also Philip L. Dubois, The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of a Last Resort, 33 VILL. L. REV. 469, 487-88 (1988).

\textsuperscript{111} One commentator has described this erosion in terms of the building of a sculpture: “Our system of precedent has become subtractive as well as additive. Like a sculpture, it is shaped as much by what is removed as by what is added.” Slavitt, supra note 81, at 109. This erosion metaphor applies equally well to Learned Hand’s coral reef.

\textsuperscript{112} POSNER, supra note 92, at 123.

\textsuperscript{113} William C. Smith, Big Objections to Brief Decisions, A.B.A. J., Aug. 1999, at 34, 36 (“Last year, the federal appeals courts disposed of 25,020 appeals on the merits. About six percent of the total were disposed of ‘without comment,’ meaning the court did not expound the law as applied in the case, or did not explain the reasons for the ruling.”); Carr & Jencks, supra note 71, at 219 n.105.

\textsuperscript{114} Opinion-writing disciplines the imagination. It is one thing to reach a tentative conclusion in a case, but something very different to write an opinion defending it. The search for the right words to support a judgment one has provisionally formed often stirs up new objections and compels the reexamination of earlier beliefs. A judge may feel that he has decided a case and is finished with it. But when he attempts to justify his decision in writing, he will be forced to reenact the drama of the original conflict in his imagination, taking first one side and then the other in an effort to anticipate the strongest arguments that might be made against his own earlier position and the best responses to them. Writing judicial opinions imposes on the writer a duty of responsiveness that can be met only by giving each side to a dispute its due, by entertaining every claim in its most attractive
surprising in a society where the costs of dispute resolution are very high; it is merely an attempt to ration precious judicial resources.

Many courts now depublish or selectively publish decisions. Reduced publication means fewer case precedents and greater uncertainty, especially in business disputes. The purported justification for selective publication and no-citations rules is to allocate scarce judicial resources away from the writing of less-consequential opinions to the writing of a smaller number of well-crafted, more important opinions. Judges spend almost one-third of their time writing opinions and simply do not have the time and resources necessary to write opinions that will be suitable additions to the body of common law.

The effect of limiting publication is not merely a reduction in published decisions. Selective publication and no-citation rules also create moral hazard problems by giving judges a form of insurance against reversal. Armed with the knowledge that an opinion will not be published or cannot be cited, a judge is unlikely to devote sufficient care to crafting an opinion. As a result, both the quantity and quality of judicial deci-

light, and that in turn demands a special effort of imagination. The discipline of opinion-writing is thus a goad to the imagination, and the greater the distance of the writer from the original conflict in a case, the more valuable this discipline becomes as a guard against the relaxation of his imaginative powers: which is why it is especially needed at the appellate level. In many appellate courts, however, this discipline is weaker today than it has been in the past. In part this is due to procedural changes in court practice that permit more cases to be decided with no opinion or only an unpublished one—changes intended to increase the number of disputes that a court can decide in a given period of time. But a more important cause of the weakening of this discipline has been the growing tendency of appellate judges to work by editing draft opinions prepared for them by their clerks instead of writing opinions themselves. Editing does not in general make as strong a demand on the imagination as original composition.


115. For example, the California Supreme Court depublishes more appellate opinions each year than it publishes of its own. See Gerald F. Uelman, Losing Steam, CAL. LAW., June 1990, at 33, 43. Depublication and selective publication have been popular topics among legal commentators. See Stephen R. Barnett, Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court, 26 LOY. L.A. L. REV. 1033 (1993); Dubois, supra note 110; Joseph R. Grodin, The Depublication Practice of the California Supreme Court, 72 CAL. L. REV. 514 (1984); William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals, 78 COLUM. L. REV. 1167 (1978); Slavitt, supra note 81; Gerald F. Uelman, Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?, 26 LOY. L.A. L. REV. 1007 (1993).

116. See Charles E. Carpenter, Jr., The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?, 50 S.C. L. REV. 235, 243 (1998) (arguing that the "real reason" for these rules is the overload on the appellate courts).

117. See Reynolds & Richman, supra note 115, at 1183 n.95.

118. See Slavitt, supra note 81, at 123.

119.

When a judge knows ahead of time that an opinion will not be published, she can save time. First, the judge does not need to recite carefully the facts of the case because the
sions is reduced, perhaps so much that the limiting rules are unconstitu­
tional.

Consider the following example. On August 22, 2000, Judge Rich­
ald S. Arnold of the Eighth Circuit, in Anastasoff v. United States, found
unconstitutional a rule limiting the precedential effort of certain deci­
sions within that circuit, finding that the rule expanded the judicial power
beyond the limits of Article III by allowing judges the discretion to de­
terminewith whichjudicialdecisionsarebindingandwhicharenot. The
Eighth Circuit, en banc, quickly vacated Judge Arnold’s opinion. The
constitutionality of these provisions remains an open question.

Ironically, it was Judge Arnold himself who wrote the en banc opin­
ion, finding the underlying dispute moot and vacating his prior opinion in
an order with a caption warning that the Eighth Circuit’s rules may limit
citation to the opinion. For months, Judge Arnold’s original opinion
was not available through electronic databases. As of 2004, it was
available on LEXIS but was marked with a red “stop sign” symbol to in­
dicate it was no longer a valid published opinion. Once again, the de­
bate about the role of unpublished decisions such as this one remains un­
resolved, and courts continue to cite (and scholars continue to debate)
Judge Arnold’s decision.

Another phenomenon chipping away at the common law is the prac­
tice of litigants reaching a private settlement following a district court’s
judgment with the condition that the appellate court vacate the lower court's judgment. This process—known as "vacatur"—changes the shape of judicial precedent in a perverse way by eliminating a particular class of cases, typically those in which one party decides that the cost of the decision (including the cost of its precedential value in future cases) is greater than the cost of settlement.

For example, suppose Natasha sues her insurance company for its bad-faith refusal to pay her claim. Natasha and her attorney refuse to settle the case for less than $100,000. The insurer is unwilling to pay that much and files a motion for summary judgment. The judge decides against the insurer in a decision that will cost the insurer millions of dollars in future cases. The insurer then offers to settle with Natasha for $100,000. Natasha and her attorney believe she will win if the insurer appeals, but that the appeals process will be costly. Therefore, Natasha is willing to settle. In this example, the insurer might even sweeten its offer to persuade Natasha to settle. The result would be a settlement for some amount between $100,000 and the insurer's perceived cost (in present value terms) of future cases if it does not settle.

Both of the individual parties to the litigation are better off. Who is worse off? If the judicial decision being vacated was correct in terms of assessing the overall costs and benefits, vacating that decision will transfer wealth from future claimants/insureds to the insurance company, enabling the insurance company to benefit from externalizing its future costs. Those future non-parties harmed by vacatur face very high transaction costs in acting collectively, and even if they were able to agree in time to pay for the benefits of the judicial decision, it is unclear how they would do so. Bribing the judge is illegal, and cases are vacated shortly after the judge issues the opinion. Moreover, the insurer and the non-parties might not agree about how much the decision would increase the insurer's costs of resolving future cases, and there would be very little time to contract and bargain with the insurer.


127. In addition, a vacated judgment cannot be used for collateral estoppel purposes. See Carr & Jencks, supra note 71, at 216.

128. If the decision did not correctly assess overall costs and benefits, this settlement might be the optimal solution for both the private parties and for society.

129. See Resnik, Whose Judgment?, supra note 126, at 1500 (stating that vacatur can harm third parties because they possess less information and legal resources).
Not surprisingly, vacating large numbers of decisions erodes respect for courts, in part because vacated decisions likely attempted to assess the overall costs and benefits in a particular case and likely favored future litigants more than they harmed the losing party. One judge, writing in dissent in a California state case, noted that “[p]ublic respect for the courts is eroded when this court decides that a party who has litigated and lost in the trial court can, by paying a sum of money sufficient to secure settlement conditioned on reversal, purchase the nullification of the adverse judgment.”

Published judicial decisions also are disappearing because of the large number of decisions issued subject to confidentiality orders or under seal. Much litigation takes place under confidential stipulation, with documents and testimony sealed away from non-parties. Judges often conduct the pretrial phase of a case outside public view and without articulating their reasoning in writing or on the record. At pretrial conferences, after the judge calls a case, the parties’ counsel often are led to the judge’s private chambers or a conference room to discuss the case with no court reporter present. These private aspects of the judicial process undercut judicial obligations and may even induce judges prematurely to favor one side of a dispute. Like vacatur, confidentiality benefits parties to the dispute at the expense of future non-parties who might have benefited from a public decision and opinion.

Moreover, under current law, non-parties to the litigation have no basis for complaint. Courts generally have interpreted the public’s right of access to civil judicial proceedings to apply only to pleadings, motions, exhibits, and court transcripts. Other materials are off-limits. Even those materials presumptively open to the public may be closed to the public by agreement of the court and the parties; even pleadings may be sealed.

Confidentiality in disputes creates private benefits and imposes societal costs. It is unclear which weighs heavier. The private benefits include protecting the parties’ reputations and intellectual property. The

131. See Carr & Jencks, supra note 71, at 212 (describing the authors’ experience in California courts).
133. Resnik, Whose Judgment?, supra note 126, at 1493 n.84.
societal costs include the loss of value associated with the information. Some of these benefits and costs are offsetting: for example, information about a case involving the manufacture of a product may harm the manufacturer (by making it subject to future litigation costs) in the same way it benefits consumers (by giving them the information necessary to litigate). On the other hand, private benefits are likely to be localized, in most cases involving only the parties to the litigation, whereas societal benefits are likely to be diffuse, depending on the nature of the underlying activity. Absent transaction costs, one would expect those harmed by the nondisclosure of information to bargain for the information; however, transaction costs in these instances are likely to be high, due both to collective action problems and the difficulty of valuing the external costs.

The disappearance of common law may be a symptom of a more troubling problem: in the United States today, a “true” judicial common law may simply be too costly. Specifically, it may be too costly to have judges spell out their reasoning in complex business disputes. It is extraordinarily expensive for judges to hear every case publicly; decide all important issues in those cases on the record; and write detailed, well-reasoned opinions supporting these decisions. These costs are especially high for business disputes in areas of rapidly evolving technology where judges lack expertise. Nearly half of federal district court judges come from a prosecutorial background, experience that is important for any judge who will be deciding criminal cases, but many fewer have sophisticated business backgrounds. Moreover, in an environment of disappearing precedent, litigation becomes much more expensive, as parties are forced to litigate issues another court might have decided already but not have published an opinion describing the decision. Thereby, litigants find themselves forced to reinvent the wheel over and over again.

136. See Carr & Jencks, supra note 71, at 205–07 (describing perceived lack of expertise in judges presiding over business disputes).
137. Of recent appointees to federal district court, the percentages coming from a prosecutorial background were 40.7 percent under President Clinton, 39.2 percent under President Bush, 44.1 percent under President Reagan, and 38.1 percent under President Carter. See Sheldon Goldman & Elliot Slotnick, Clinton’s Second Term Judiciary: Picking Judges Under Fire, 82 JUDICATURE 264, 275 (May–June 1999).
138. Much of this is for economic reasons. For attorneys, private practice pays more than judging, which discourages entry; for judges, private practice and private judging (e.g., serving as an arbitrator or mediator) pays more than judging, which encourages exit. See William C. Smith, Bail ing From the Bench, A.B.A. J., May 1999, at 22 (noting that this drain from the bench especially is true for the best business judges). These comments are not in any way directed at the Honorable Michael B. Mukasey (for whom I clerked) of the Southern District of New York, who remains the best business judge I know. Unfortunately, Judge Mukasey has not yet had the opportunity to decide a major derivatives case. When and if he does, his opinion in that case may resolve some of the problems presented infra at Part II.B.2.
At the same time the costs of judicial decisions are increasing, the benefits of decisions are decreasing. Who gains from a reported judicial decision? The parties gain something—a description of the basis for decision—although at least one party (the losing one) likely would prefer not to suffer public scrutiny based on the decision.¹³⁹ Future litigants gain from the certainty associated with the precedential value of the opinion, but only if the opinion is clear, well-reasoned, and relevant to future disputes. Often, decisions are limited in scope to issues that are unlikely to arise in future litigation, or are too unclear, poorly reasoned, or irrelevant to be of value to future litigants.

For all of these reasons, there are limits to the common law. Commentators and practitioners should understand how these arguments are relevant, especially in costly business disputes. In the United States today, a common law system may not be able to satisfy the efficiency and fairness goals of society, even if there are persuasive arguments that common law has done so historically.

III. ALTERNATIVES TO COMMON LAW

There are alternatives to common law, including statutory law, private law, and private adjudication. As noted in Part I, alternatives can be classified based on two variables. First, is the system’s source of legal rules public or private? Second, does the system specify legal rules to resolve disputes ex ante or does it adjudicate disputes based on an ex post specification?

Part II analyzed the upper right quadrant of Figure 1, common law,¹⁴⁰ the most important dispute resolution system for the purposes of this article. This Part analyzes the alternatives in the remaining quadrants. Part III.A. considers the top-left quadrant, statutory law, including codes in civil law regimes. Part III.B. considers the bottom-left quadrant, private law, including model acts and model default terms for contracts. Part III.C. considers the bottom-right quadrant, private adjudication. There are serious problems associated with each alternative.

¹³⁹ Especially in costly business disputes, one party may lose a great deal in reputational costs from an unfavorable decision, and therefore may be willing to settle prior to decision, even if the terms of the settlement are less favorable than the party believes is warranted in the particular case.

¹⁴⁰ Common law adjudication frequently involves the specification of legal rules ex post, particularly in cases of first impression. To the extent common law legal rules are used in future cases, an argument can be made that common law adjudication also involves the specification of legal rules ex ante. In other words, not every common law specification of legal rules will fit neatly within the upper-right quadrant of Figure 1.
A. The Viability of Statutory Law

A complete discussion of statutory law regimes is beyond the scope of this Article. The purpose of this section is to sketch briefly some of the arguments for and against such regimes, to assess when statutory regimes are more (or less) likely to be efficient and fair, and to provide a benchmark for comparing synthetic common law.

The dominant alternative to common law is statutory law. The vast majority of jurisdictions are civil law jurisdictions, in that their legal regimes consist largely of legal codes and statutes instead of common law. Moreover, the modern U.S. system is largely based on statutes and administrative law rules and regulations.

The primary purported advantage of statutes is clarity. Ideally, a private party planning future action can read a statute and understand what class of conduct is prohibited, what class is permitted, and the costs of undertaking prohibited conduct. Statutes can spell out details about how particular behavior will be governed. In doing so, statutes can attempt to regulate anticipated behavior. Accordingly, statutes are most highly valued when all contingencies can be specified clearly in advance.

Moreover, in democratic regimes statutes are thought to reflect popular will. Unlike most common law judges, who are largely unaccountable to the public, legislators face reelection and must satisfy the concerns of their constituents or lose their jobs.

Another strength of statutes (and a weakness of common law) is that "the process of judicial development of law is of necessity gradual and may prove too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances." 141 Thus, statutes are most likely to be effective when the democratic process is working to ensure protection of the reasonable expectations of parties.

Unfortunately, statutes often are far from clear. Language may be ambiguous, and resort to legislative history may be unhelpful. Statutes require interpretation by human judges, who in turn require a theory of legislation. 142 Interpretation is an elastic concept, composed of more than logic. 143 Justice Cardozo believed judges were capable of enormous

141. HAYEK, supra note 68, at 88. Hayek has noted that it is undesirable for judicial decisions to reverse a development, because the judge "is not performing his function if he disappoints reasonable expectation created by earlier decisions." Id.

142. See RONALD DWORKIN, LAW’S EMPIRE 17 (1986) (discussing judges’ needs for assistance in interpreting statutes).

143. Judge Richard Posner is a proponent of this view: The current bastion of legal formalism is not the common law; it is statutory and constitutional interpretation. It is here that we find the most influential modern attempts to derive
creativity when confronted with a wide range of statutes.\textsuperscript{144} Max Radin has emphasized the parity of statutes and common law in the hands of judges.\textsuperscript{145} In other words, although judges are not free to change the words of a statute (as they are with the common law) through the workings of judicial interpretation, judges have as much freedom in deciding difficult statutory cases as they have in deciding difficult common law cases. Judge Richard Posner has agreed with this point.\textsuperscript{146} Again, statutes are most valued when contingencies can be specified clearly.

In addition, statutes are primarily directed at regulating and limiting government; they perform less well in regulating and limiting private conduct.\textsuperscript{147} “The legislative process is buffeted by greater interest-group pressures” than the judicial process and therefore may be less likely to reflect sound policy judgments.\textsuperscript{148} As Hayek has argued, there is nothing magical about the legislative process that causes it to uncover efficient legal rules.\textsuperscript{149}

Public choice and interest group theories have demonstrated that the legislative process often works to redistribute wealth to narrow coalitions, not in the public interest.\textsuperscript{150} Under pressure from these theories, “it

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\textsuperscript{144} Cardozo included the U.S. Constitution, noting that John Marshall “gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions.” \textsc{BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS} 169–70 (1921).

\textsuperscript{145} Max Radin, \textit{A Short Way with Statutes}, 56 \textsc{Harv. L. Rev.} 388, 395–96 (1942) (discussing a court’s freedom to interpret statutes); see Max Radin, \textit{Statutory Interpretation}, 43 \textsc{Harv. L. Rev.} 863, 881 (1930) (noting that a judge’s subjective interpretation affects a statute’s meaning). James Landis argued, quite reasonably, that Radin’s approach should be limited to exclude “easy” cases, when the statute’s meaning is clear on its face or can be clarified by legislative history. \textit{See} James M. Landis, \textit{A Note on “Statutory Interpretation”}, 43 \textsc{Harv. L. Rev.} 886 (1930).

\textsuperscript{146} POSNER, supra note 143, at 392.

\textsuperscript{147} \textit{See}, e.g., HAYEK, supra note 68, at 127 (noting that for the past several centuries the overwhelming majority of statutes have been concerned with administrative law and direct measures of government).

\textsuperscript{148} POSNER, supra note 143, at 393.

\textsuperscript{149} \textit{See}, e.g., HAYEK, supra note 68, at 72 (noting that “[u]nlike law itself, which has never been ‘invented’ in the same sense, the invention of legislation came relatively late in the history of mankind”); \textit{see also id.} at 73 (“Yet there can be no doubt that law existed for ages before it occurred to man that he could make or alter it.”).

\textsuperscript{150} As Judge Posner put it:

A further complication for the theory of statutory interpretation is that we no longer think of statutes as typically, let alone invariably, the product of well-meaning efforts to promote the public interest by legislators who are devoted to that interest and who are the faithful representatives of constituents who share the same devotion.
becomes unclear where to locate statutory meaning, problematic to speak of judges discerning legislative intent, and uncertain why judges should seek to perfect through interpretation the decrees of the special-interest state.\textsuperscript{151}

At best, statutes reflect the popular will of a prior electorate, not the current one, and in areas where technologies are rapidly changing may not reflect the interests and expectations of the relevant parties. Therefore, in an imperfectly functioning democracy, statutes—even to the extent they accurately reflect constituent interests—may reflect only a portion of society's interests.

Next, consider how information becomes reflected in legal rules. In a common law system, the judge articulates the relevant legal rules after one or more private parties involved in a dispute have chosen to have the judge adjudicate that dispute. The judge decides the dispute with reference to statutory rules, prior cases, commentary, and societal practice. The information reflected in the judge's decision includes the preferences of the parties to the transaction, as well as the body of existing law. This information is described in narrative form.

In a statutory system, the legislature articulates the relevant legal rules after particular legislators (lobbied by supporters and constrained by voters) have chosen to have the legislature consider the rules. The legislature decides to adopt or reject the rules with reference to public debate, commentary, and societal practice. The information reflected in the legislature's decision includes the preferences of society generally or of the legislators' supporters specifically. This information is described in non-narrative form.

Thus, the information "forced" to be reflected in the relevant legal rules differs under common law and statutory law. The objective of fair and efficient legal rules is to reflect the interests of society. This information is the vehicle for doing so, and therefore the utility of one system over the other depends largely on the value of such information. Consequently, one should expect common law and statutory law to achieve different benefits in different areas of practice. One regime or the other is not inherently preferable. In some areas of practice, where the democratic process works effectively, statutory rules will best reflect overall societal preferences. In other areas, where a small number of private parties assisted by a judge can "outperform" the legislature, common law rules will best reflect such preferences.

\textsuperscript{151} POSNER, \textit{supra} note 143, at 400.

\textit{Id.}
It is difficult to offer a general analysis of when a particular societal practice will be more susceptible to the information-forcing mechanisms of statutory versus common law. Common law is likely to deliver superior information when the legislative process is not working effectively or in a timely manner, and when the nature of the practice is best served by narrative, as opposed to statutory rules. Private parties interacting in the "traditional" areas of common law (e.g., contract, property, tort) may find legal rules expressed through narrative clearer and easier to understand than statutory specifications. In contrast, private parties interacting in the "traditional" areas of statutory law (e.g., utilities, transportation, commercial) may prefer clear articulation of general rules and abhor the ambiguity of legal narrative.

Judge Posner has argued that reasoning by analogy is valuable in fixing the boundaries of a legal rule when language is vague and therefore is not a reliable guide to the rule's actual scope; in such instances an adjudicator should determine that scope through reference to hypothetical cases (i.e., stories). In contrast, analogical reasoning is unnecessary when a legal rule is clear, even in translation (e.g., as in the instructions for assembling a table, or in the provision of the U.S. Constitution that the President must be at least thirty-five years old).

The issue is complex, but there are reasons to believe individuals may benefit from common law over statutory rules simply because of the former's narrative structure. People rarely read statutes or regulations, and when they do they rarely find them useful. Statutes often include narrative examples or cases to clarify any perceived ambiguities, or to draw the attention of interested parties. The various Restatements of the Laws are obvious examples.

Finally, even if one rejects the above analysis of the benefits of analogical reasoning, it is more difficult to reject a series of recent studies by several economists attempting to determine whether statutory regimes or common law regimes generate superior economic results. These studies found common law systems to be superior in nearly every economic

152. See id. at 471–97.
153. See id. at 520.
155. See Eisenberg, supra note 13 (arguing that consumers faced with dense text generally respond by refusing to read and that it is reasonable for them to do so).
aspect. Economic performance speaks louder than philosophical argument.

B. Private Law

Legal scholars have been dissatisfied with the development of statutory law for many decades and have made private efforts to improve these statutes. These efforts include model acts and uniform private laws, including the various Restatements of the Laws, the Model Penal Code, and the Uniform Commercial Code.

For example, the UCC provides that every contract imposes an obligation of good faith in its performance or enforcement. Similarly, the Restatement (Second) of Contracts states as a general principle that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. Commentators draft these model acts and uniform laws outside the context of the legislative process in the hope that legislatures will adopt them and thereby rationalize or improve statutory law.

In addition, lawyers and other parties also have created private default terms or standard form contracts, many of which are widely used. Much of agency, partnership, and corporate law consists of such default rules. Numerous services provide standard form contracts for parties to use in various areas of law. Private default terms and standard form contracts are analytically equivalent to model acts and uniform private laws, the primary difference being the intended audience. While the former is directed to private parties engaging in contracting, the latter is directed more generally to legislators. All such private law offers the benefits of the considered judgment of non-governmental actors.

As with statutes, the primary purported advantage to private law is clarity. Model acts are drafted by commentators knowledgeable in the field who attempt to delineate every possible anticipated result. Private parties using standard contract default terms are able to tailor such terms to reflect their best understanding of how future disputes should be resolved.

156. See supra note 12.
159. Many of these default rules are embodied in state statutes; others simply become part of private contracts.
160. For example, the web site http://findlaw.com provides standard legal forms. Also, most large law firms have developed standard forms that attorneys can tailor to an individual party's needs.
The argument in favor of a private law system is that it is more likely to reflect societal practice than a system instituted by legislators or judges far removed from practice. Legal rules percolate up through private parties to practitioners to commentators and, finally, to legislators or judges. Legal rules need not be debated or litigated in a legislative or judicial setting; they can simply be written down.

There is no general agreement as to the line of distinction between private and public law. The UCC, sections of the various Restatements, and many model acts all are now public law. Much private law consists simply of proposals aspiring to be public law. If the legislative process is working properly, the legislature will adopt all private law proposals that make society better off; non-adopted proposals by definition are those that would not make society better off. However, if the legislative process is not working properly, advocates of private law that would make society better will face difficulties in persuading legislators to adopt their proposals. Note that these arguments relate to the workings of the democratic process, not to the comparative advantage or disadvantage of private law. To the extent private law consists of proposals to be made statutory law, all of the arguments in Part III.A. apply equally to private law and need not be restated here.

However, much of private law is not directed at legislators. To the extent private law consists of default terms and standard form agreements intended for use by private parties, it is not aspiring to be public law at all. In fact, the rationale for such terms and agreements is that private parties are best able to establish legal rules to govern their daily conduct and that legislatures and courts should respect those decisions and not interfere.

Unfortunately, there are limitations to the ability of private parties to establish such terms and agreements. Private law—like judicial opinions—has the characteristics of a public good and therefore will tend to be underprovided unless subsidized. There are mechanisms for distributing private law to parties in a more efficient manner than a series of individual negotiations (i.e., reinventing the wheel), although these mechanisms are not tailored to, and often do not satisfy, the needs of particular parties, including confidentiality.

Moreover, although private law may serve to guide practice absent a dispute, parties relying on private law provisions nevertheless will need to specify a means of resolving disputes. A major limitation to private law is that private ex ante alternatives do not provide a mechanism for

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161. See HAYEK, supra note 68, at 132.
resolving disputes. Consequently, even parties choosing private law must use either the courts or some means of private adjudication, both of which have drawbacks.\textsuperscript{162}

Another problem with private law is that private parties attempting to specify all of the details associated with future dispute resolution will find it very costly to specify all contingencies. More importantly, they will not necessarily accrue any of the benefits of other parties' similar efforts. As with statutes, the argument here is not a general indictment of private law; it simply indicates when private law is most likely to be useful: when parties can specify all or most contingencies.\textsuperscript{163}

Finally, private law relies on a statute-like, non-narrative method of describing legal rules. For parties who understand and can assess narrative better than boilerplate, private law may not serve its intended purpose.\textsuperscript{164} For such parties, private law may create or leverage inequities. One party may use its advantageous position in information or sophistication to obtain agreement to lengthy or complex terms the other party would not have agreed to if such terms were understood.

Private law may be of great utility, both to the extent it becomes public law and to the extent it specifies methods of dispute resolution. Ultimately, however, the utility of private law will turn on the efficiency and fairness of the means of dispute resolution, and on the ability of the parties to specify contingencies \textit{ex ante} in non-narrative form.

As an alternative, parties may choose not to be subject to either common law or statute-based regimes. They may simply opt out of such regimes by choosing to have any dispute governed by a private dispute resolution mechanism.\textsuperscript{165}

Subject to limited judicial review,\textsuperscript{166} parties to a private contract can decide in advance to adjudicate any disputes in a private regime, generally referred to as Alternative Dispute Resolution (ADR). Parties do so

162. See supra Part II.B and infra Part III.C.
163. Contingencies can be thought of as options, and to the extent option rights are not allocated or specified \textit{ex ante}, disputes based on private law agreements are very difficult to adjudicate.
164. See supra note 13.
166. The standards for judicial review of arbitration determinations are highly restrictive, based on standards such as "arbitrary and capricious," "manifest disregard for the law," and "completely irrational." Harold Brown, Alternative Dispute Resolution Realities and Remedies, 30 SUFFOLK U. L. REV. 743, 762 (1997); see also Carr & Jencks, supra note 71, at 208 n.67 ("In California, it has become virtually impossible to set aside an arbitrator's award because the state legislature amended the state arbitration act to provide that an arbitrator's award stands even where an error exists on the face of the award.").
frequently.\textsuperscript{167} For example, private parties often choose to handle private arbitrations through the American Arbitration Association (AAA), which has been an especially popular venue for parties contracting in areas of rapidly evolving technologies, including computer, patent, trademark, and copyright law.\textsuperscript{168} The Federal Mediation and Conciliation Service (FMCS) and AAA each assist in the selection of arbitrators and provide some additional services, all for a nominal fee.\textsuperscript{169} As an alternative to ADR, parties often agree to mediation.

Private adjudication is touted as offering certain advantages, especially lower cost, as compared to the other dispute resolution regimes. From an economic perspective, private adjudication is said to avoid the tragedy of the commons problem associated with common law, because all of the costs are internalized to the parties. Courts are publicly funded, but taxpayers do not subsidize alternative forums. Arbitration must create perceived economic efficiencies in some cases; otherwise, it could not compete against subsidized judges.\textsuperscript{170} This phenomenon is not unusual. Profit and non-profit firms coexist within other industries, notwithstanding the tax advantages to non-profit firms.\textsuperscript{171}

In addition to economic benefits, there may be psychological benefits to private adjudication. Recent empirical research in psychology shows that once people are persuaded to participate in private dispute resolution, they tend to prefer such regimes to court.\textsuperscript{172} Accordingly,
many view private adjudication as both efficient and as a kinder, gentler way to resolve disputes.\textsuperscript{173}

However, there are numerous problems associated with these alternatives. First, private adjudication actually may be very costly relative to its benefits. It is difficult to compare directly the costs and benefits of private adjudication and courts, because courts are publicly subsidized and judicial costs and benefits are difficult to specify. However, there are reasons to believe arbitration is quite costly compared to court, especially given that claims of the recent "litigation explosion" and increase in judicial costs in U.S. courts may be exaggerated, if not false.\textsuperscript{174}

Moreover, private adjudication fails to generate the public benefits (e.g., maintaining credibility of a particular legal system, such as patent law) associated with judicial dispute resolution.\textsuperscript{175} Arbitration cannot provide the range of services a judge provides.\textsuperscript{176} Nor will arbitration always occur; for example, if the parties cannot agree on the selection of an arbitrator, they will resort to court. Also, judges must enforce arbitral awards. Even if the value of additional judicial services not available in arbitration cannot be measured precisely, it is clear that they are not trivial. Accordingly, any cost reductions achieved through private adjudication may be at the expense of one or more of the parties. For example, one of the greatest potential benefits of private adjudication is that it avoids the prospect of a jury trial, an event many business executives have little confidence in and seek to avoid. However, the absence of a

\hspace{1cm} but that also engenders feelings of social engagement and involvement. However, once experienced, mediation procedures tend to be evaluated quite positively by the disputing parties, and to produce decisions that the parties are likely to find satisfactory and voluntarily accept.

Tyler, \textit{supra} note 64, at 102.

\textsuperscript{173} See \textit{id}. (stating mediation participants report the procedure favorably).

\textsuperscript{174} See Carr \& Jencks, \textit{supra} note 71, at 201 (stating the number of lawsuits has not increased dramatically).

\textsuperscript{175} See Brown, \textit{supra} note 166, at 760–61 (stating the standard for review of an arbitrator's ruling is manifest error).

\textsuperscript{176} Judge Posner has described these services as follows:

\hspace{1cm} There is, it is true, a good deal of private judging. But an arbitrator or other private judge is hired by the parties to a dispute to resolve that dispute, not to produce the full range of judicial services. The full range includes rulemaking through the issuance of opinions that interpret statutes, common law principles, rules and regulations, and constitutional provisions; the provision of a stand-by dispute-resolution service for people who can't agree on a neutral arbiter; the interposition of a neutral body between the state and the citizen—and the enforcement of arbitration awards, making the public judge a backstop to the private one.

\textit{Posner, supra} note 143, at 114.
jury trial may prejudice one or more parties, depending on the panel or arbitrator chosen to adjudicate the dispute.177

Although arbitration is not a common law system, both parties and arbitrators often attempt to behave as if they were in a common law system, citing precedents and decisions to support their positions.178 However, arbitrators owe little regard to the decisions of other arbitrators, and only a small number of such decisions are published. Those few published arbitration decisions are not representative of other decisions and are difficult for parties to access.179 Common law reasoning in arbitration yields poor results because of the wide variation in arbitration agreements and factual contexts, variation that is not described in detail in individual arbitrations yet may account for different results.180 Of course, there is variation in fact patterns in common law cases, too, but to the extent judges describe this variation in published opinions, parties are able to distinguish among cases.

The selection of an arbitrator is very much *ad hoc*.181 Typically, the

177. See id. at 204. Business people also seem to find judges inexperienced in commercial matters. Judges typically come to the bench as generalists. See Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 *ARIZ. L. REV.* 539, 540–41 (1994); see also supra notes 136–38 and accompanying text. Of judges with business experience, few have knowledge of a wide range of complex commercial practices. In one recent study, more than two-thirds of business executives and in-house counsel disagreed with the following statement: "the legal system generally considers the needs and practices of particular business communities." John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 *HARV. NEGOT. L. REV.* 1, 34–35 (1998). This study quoted one utility company executive as saying:

Judges are trained in the law, not necessarily in the fundamentals of a particular industry or avenue of commerce. They’re coached on fairness and precedent and things like that . . . . For example, we have a number of disputes with people who we transact with in a transmission grid. Well, that’s a very complex engineering-econometric type of consideration where we use those mechanisms. It’s just not the type of thing you want to bring to the courts.

Id. at 32 (citation omitted). Private adjudication can ameliorate these concerns by using industry specialists as adjudicators.

178. *COOPER, supra* note 169, at 232:

For good or ill, however, parties and arbitrators alike frequently refer to previous decisions. Parties usually do so in the hope that previous awards will persuade the arbitrator of the merits of their positions, not because they regard the awards as binding. Arbitrators usually do so to justify their decisions.

179. Each arbitrator therefore owes no more than "due regard" to the decisions of other arbitrators. Nor is there complete publication of awards. Those published form only a small, and not necessarily representative, portion of the whole. Many parties have no convenient access to the publishing services, and many parties forego the use of lawyers who could discover and argue the pertinent precedents.

Id. at 233.

180. "Contractual language, evidence of the drafters’ intentions, and the parties’ past practices differ widely. The same words may mean different things in different bargaining relationships. Factual contexts are usually unique." *Id.*

181. *Id.* at 18. The parties may select one arbitrator or select a tripartite panel with one or two
parties do not select the arbitrator until after it is apparent they will not be able to resolve the dispute without recourse to arbitration. Late selection of an arbitrator may be advantageous, because the parties can pick an arbitrator with current and particular expertise related to the dispute. However, late selection inevitably causes delay.

The purported confidentiality benefits of private adjudication may be offset by reductions in fairness and efficiency. Parties involved in private adjudication generally relinquish the right of appeal. There generally is no public record of private proceedings; in fact, many commercial parties prefer private adjudication precisely because it is a way of protecting themselves from negative publicity. This protection may suit both parties, even the winner, who otherwise might have been forced to disclose trade secrets or negative information about its products or services during the proceedings. Moreover, businesses involved in repeated judicial determinations over time risk establishing negative precedents for future cases; because private proceedings are not reported, even an extremely negative result is unlikely to harm future litigation. When cases settle or are adjudicated through a private forum, there is no body of reported cases. To the extent there is public disclosure of pri-

arbitrators selected by each party.

182. Id.
183. In a synthetic common law regime, the parties could both select and constrain an appropriate arbitrator without creating delay.
185. In contrast, legal proceedings in courts are highly publicized, and even relatively low-level proceedings are reported in specialty journals. Important events during the proceedings are reflected quickly in the stock prices of publicly traded participants. In fact, there now exist sophisticated financial instruments allowing private parties not involved in the litigation to bet on the outcome of particular cases. For example, after the Supreme Court held that savings and loan institutions could sue the U.S. government for breach of contract arising out of a governmental change in the accounting treatment of goodwill for regulatory capital purposes, see United States v. Winstar Corp., 518 U.S. 839, 908–10 n.58 (1996), several plaintiffs, including Glendale Federal and California Federal, issued securities, known as Litigation Tracking Warrants, whose return was based on the amount recovered in the suits against the government. See Frank Partnoy, Betting on Suing (1999) (copy on file with author).
186. The securities industry is an appropriate example. This industry created a system of specialist arbitration for both investors and employees, in which arbitrators are required to put their decisions in writing, but are not required to give any reasons. See Bird v. Shearson Lehman/Am. Express, Inc., 926 F.2d 116, 124 (2d Cir. 1991) (Kearse, J., dissenting). Securities arbitration is a hotly disputed topic. The securities industry asserts that the move to arbitration makes everyone better off because of reduced transaction costs. Numerous commentators counter that the securities industry, with its expertise in repeat litigation and vast resources, is taking advantage of individual employees and investors. See, e.g., Margaret A. Jacobs & Michael Siconolfi, Losing Battles: Investors Fare Poorly Fighting Wall Street—And May Do Worse, WALL ST. J., Feb. 8, 1995, at A1 (quoting one observer as saying, "Christians had a better chance against the lions than many investors and employees will have in the climate being created now.").
private proceedings, such information is unlikely to be tracked, memorialized, and stored. 188

Both the courts and Congress seem to have made a decision to divert business cases into arbitration to conserve judicial resources for other types of cases, particularly criminal, family law, and civil rights cases. 189 What is the consequence of having primarily only these non-business cases left in the judicial system? They could be quite serious. Many commentators are concerned that such a practice would split dispute resolution into private courts for the "haves" and public courts for the "have-nots" in the same way many argue public and private schools have been split. 190

Mediation 191 purports to provide benefits not available in a confrontational proceeding, including both court and arbitration. 192 On the other hand, the more mediation is used, the more it erodes whatever preconceptual value exists in dispute resolution by judges or arbitrators. If a large number of "normal" cases are resolved in mediation, then those cases resolved in judicial and arbitral fora may not reflect societal practice. 193 Disputes resolved in mediation typically are resolved confidentially, and therefore other parties are denied all of the benefits associated with public resolution of decisions, including a body of decisions to guide future

188. See Carr & Jencks, supra note 71, at 228 (citing Borzou Daragahi, Environmental ADR: Demand for Arbitration Raises Practical Concerns, N.Y.L.J., Sept. 8, 1994, at 5).

189. See Carr & Jencks, supra note 71, at 213–15 (detailing judicial and legislative efforts to move business cases out of courts into ADR). For example, the Supreme Court has permitted arbitration of federal securities law claims based on contractual choice. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 482–83 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).

190. See Carr & Jencks, supra note 71, at 231–33 (citing numerous commentators). It certainly is the case that the direct cost of judging in private ADR is greater than the cost of judging in a heavily subsidized public judicial system; for example, JAMS rent-a-judges charge fees ranging from $350 to $500 per hour. See Richard C. Reuben, King of the Hill, CAL. LAW., Feb. 1994, at 55. Lisa Bernstein has argued that compulsory ADR reduces the frequency of settlements and increases costs to less wealthy parties. See Lisa Bernstein, Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs, 141 U. PA. L. REV. 2169, 2216–30 (1993).


192. See, e.g., Jonathan R. Harkavy, Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes, 34 WAKE FOREST L. REV. 135, 156 (1999) ("Mediation provides a comfortable forum for all parties and thus is more likely to facilitate a workable resolution to a dispute than a more adversarial process involving rights adjudicated in a formal setting under a fixed set of rules.").

193. Jonathan Harkavy has made this point in the context of sexual harassment dispute resolution: "Mediation may impair the orderly development of a coherent sexual harassment jurisprudence. To the extent that it is successful in resolving large numbers of disputes, the cases left for adjudication may involve such unique factual situations that the resultant body of case law will be shaped—and possibly warped—by mediation's leftovers." Harkavy, supra note 192, at 161.
practice. In this way, mediation poses a more serious and specific version of the general problem posed by the settlement of large numbers of cases.

As an example of how the current system of private adjudication generates enormous uncertainty, consider the arbitration of securities employment contracts. Securities firms generally require employees to sign arbitration agreements in order to opt into what the firms regard as a lower-cost option to judicial resolution of employment disputes. In fact, the arbitration of employment claims by securities employees has not always worked out as the employers planned. In several recent cases, New York Stock Exchange arbitration panels have awarded employees multimillion-dollar bonuses even though the employees making the claims had been terminated for cause and notwithstanding the fact that prior practice in the industry was that management awarded such bonuses at its discretion. These arbitrations were not adjudicated based on rules known to either party at the time of contracting; in fact, the rules by definition were contrary to the expectations of at least one of the parties.

Because these arbitration decisions are unpublished and do not bind

194. For example, most mediated settlements of sexual harassment cases are confidential. This confidentiality deprives the public of valuable information needed to answer important questions necessary to parties planning behavior, including: what is the law, who is violating the law, and what are the costs of illegal conduct? Harkavy, supra note 192, at 163. Some scholars have argued that private interest should at least sometimes prevail over the public interests in clarifying legal rules through litigation. See generally Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases), 83 GEO. L.J. 2663 (1995) (arguing that private interests in settling a case should be respected, even when they are outweighed by the public interest in litigating the case).

195. The classic article posing these problems in the context of settlement is Fiss, Against Settlement, supra note 187. In that article, Owen Fiss stated that “[s]ettlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.” Id. at 1075. Fiss argued that certain types of disputes are especially inappropriate for arbitration, including: (1) disputes where one party has disproportionate bargaining power or resources, (2) disputes where settlement is difficult, (3) disputes where parties must be supervised post-judgment, and (4) disputes where parties (and society) need an authoritative interpretation of the law. Fiss’s argument has some relevance to the discussion of derivatives disputes in Part V infra. Derivatives disputes arguably satisfy the first and fourth criteria—often one party has an information or sophistication advantage over the other party, and parties desperately need authoritative interpretation—but may not satisfy the other criteria. In particular, settlement seems to be relatively easy, at least compared to the prospects of costly and continued litigation, and parties typically do not need to be supervised post-judgment. Therefore, some derivatives disputes may be appropriate for arbitration, while others clearly would not be.

196. See Randall Smith, Wall Street Traders, Bankers Who Lost Jobs amid Charges of Wrongdoing Still Get Bonuses, WALL ST. J., July 19, 2000, at C1, C4 (describing awards of $2 million, $2 million, $1.5 million, and $1.44 million). The securities firms involved in these arbitrations were described as “taken aback” and one firm, UBS Securities, sought to vacate an award in New York state court, although New York Supreme Court Justice Carol E. Huff upheld the arbitrator’s award. See id. at C4.
future arbitrators, there is great uncertainty surrounding the arbitration of securities employees' bonus disputes. The result almost certainly will be an increase in the filing of bonus-related claims, some of which no doubt will succeed, many of which will be inconsistent, and all of which will require the additional expenses of lawyer and arbitration fees.

This evidence in the securities firm employee bonus context is anecdotal, but there are general arguments indicating that similar problems will persist in other areas of arbitration. Consider the following hypothetical: first, suppose a judicial regime governs a particular dispute. Every year for ten years there is a contract dispute related to a particular type of contract. In each dispute, $1 million is at stake. Suppose it costs each side $50,000 in legal fees to adjudicate the dispute and it costs another $50,000 for the judge to hear the case. If the facts of each case, each year, are precisely the same, once the first case is decided, then all of the later cases will settle based on the terms of the first case. For example, the judicial decision in the first case might be to split the $1 million equally. Such a decision would mean it would cost a total of $150,000 (the costs of legal and judicial fees in the first case) to resolve ten years of annual contract disputes.

However, if the facts or legal arguments in later cases differ from those in the first case, the cases may not settle. Assume that in each later case the facts differ in such a way that each party believes it is entitled to $600,000, or $100,000 more than was awarded in the first case. Then it is in each party's economic interest to litigate. That means a judge will need to decide all ten cases, at a total cost of $150,000 per case, or $1.5 million. The efficiency of judicial dispute resolution thus turns on the accuracy of the expectations of the parties.

Now, suppose an arbitration regime governs the dispute. Note that arbitration actually increases society's overall costs. If the first case is decided in arbitration, there is no guidance at all for future cases, which would need to be adjudicated even if the later cases were factually similar. In other words, the total cost will be $1.5 million regardless of the accuracy of the expectations of the parties because the parties will not be able to rely on a published opinion. Accordingly, even if the cost of arbitration were substantially less than the cost of judicial review, arbitration might not be preferable.

The use of arbitration may be even more problematic when two commercial parties contract ex ante for its use in a wide range of potential future disputes involving other non-parties. For example, Robert Kenagy has written about an agreement between Whirlpool Corporation
and State Farm Fire and Casualty Company to remove subrogation disputes about damage to State Farm insureds caused by Whirlpool products from court to arbitration. The agreement committed any injured insureds to confidential arbitration with streamlined discovery.

Of course, Whirlpool and State Farm benefit from the agreement. But at whose expense? Future claimants lose the ability to pursue a judicial subrogation remedy if one of Whirlpool’s products harms them (which, as the parties must have known, almost certainly would occur; otherwise, there was no reason for the agreement). These are parties who by definition cannot bargain because it is unknown in advance who, if anyone, will suffer the harms. Nor is the extent of the harms known. This is a classic externality example.

Absent transaction costs, State Farm insureds might bargain for an arbitration agreement if that agreement would result in a lower cost of insurance. Or Whirlpool might be willing to pay insureds enough to compensate for any losses associated with committing to arbitration. In other words, arbitration might, in aggregate, be cheaper and fairer than judicial resolution. But is it likely that such payments would occur (i.e., that agreement would have been reached) when transaction costs are very high? There is no evidence that the value of the Whirlpool/State Farm agreement was included in the price of the insurance contract offered to insureds.

Private adjudication is used in business cases, but often for reasons unrelated to the fairness or efficiency of the alternative systems. It is increasingly costly and uncertain and may not serve the public interest because of the external costs to non-parties. Often, it does not even satisfy the businesses opting in without recourse to appeal. Private adjudication is perhaps the worst of several evils.

197. Subrogation has been defined as:
the equitable remedy by which, where the property of one person is used to discharge a duty of another or a lien upon the property of another, under such circumstances that the other will be unjustly enriched by the retention of the benefit thus conferred, the former is placed in the position of the obligee or lienholder.

RESTATEMENT (FIRST) OF SECURITY § 141 cmt. a (1941). In the insurance claims context, subrogation disputes typically occur when an insured seeks recovery from a third party or third-party insurer after the insured’s (first-party) insurer already has paid some compensation to the insured; the first-party insurer then has a subrogation interest in the insured’s recovery against the third party or third-party insurer in the amount paid. See, e.g., Texas Farmers Ins. Co. v. Seals, 948 S.W.2d 532, 532 (Tex. Ct. App. 1997) (describing such a subrogation dispute).


199. Id. at 898. Importantly, the plaintiffs’ bar would be not privy to the arbitration proceedings.

200. See id. (discussing the reduction in costs for both Whirlpool and State Farm, but not the insureds).
IV. SOME ADVANTAGES TO SYNTHETIC COMMON LAW

The four quadrants of Figure 1 are not the only alternatives for generating legal rules and resolving disputes. Any one quadrant could be blended with any other(s), or—more precisely—features from quadrants could be combined to create a blended system of generating legal rules, potentially ameliorating some of the problems in any one system. In Learned Hand’s terms, parties could build their own coral reefs. This Part describes one such blended system in greater detail and explains when and why it likely would obtain advantages over the systems within any particular quadrant.

Here, in greater detail, is how a synthetic common law regime would work. Private synthetic law associations would be established, consisting of experts in individual fields of law, perhaps including law professors. Those associations would publish menus of cases. The cases would involve simplified facts in particular areas of practice and would focus on the issues that, in the judgment of the association (and of parties who would choose that association), most likely would arise in future disputes. The cases could include published state and federal cases, or examples based on such cases, or even stylized versions of such cases with certain facts changed or omitted. Numerous associations would compete for a particular contract. Private parties might simply list, or check a box for, cases they selected to govern disputes under the contract.

The association would then commit to resolve disputes based on those cases. The association might describe, or even commit to, its anticipated mode or process of reasoning in any future dispute. The reputation of the association over time would be based on the extent to which it was able to keep its commitments. The association could incorporate information gleaned from actual cases it adjudicated into new synthetic common law for future parties to choose. Associations would compete for business over time. As with arbitration, courts would have limited review of association judgments.

From the perspective of private parties, synthetic common law would be no more complex ex ante than arbitration. Parties would simply select

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201. These would be for-profit associations, established with a view to earning income both by providing synthetic common law cases ex ante and by adjudicating disputes ex post.
202. Writing synthetic cases would be similar to writing comments on proposed legislation or even final examination questions, areas in which law professors have expertise.
203. Parties might also specify ex ante the cost or rate structure for adjudication, and might list acceptable adjudicators.
204. See supra note 166.
an association to adjudicate their disputes, and then select from that association’s menu of cases a particular set of cases to govern their contract. The association would adjudicate any disputes based on the selected menu of cases and the selected mode of legal reasoning, if applicable.

Note that synthetic common law is a hybrid of common law and the alternatives to common law. It contains some of the public aspects of common law and statutory law (e.g., limited judicial review, real common law cases forming the basis for synthetic cases included on a particular menu), as well as non-governmental aspects of private law and private adjudication (e.g., synthetic common law associations are private entities). Synthetic common law also involves both ex ante and ex post specification of legal rules: the governing legal rules (e.g., cases) are specified ex ante, as they are in statutory and private law, whereas the results in particular cases are decided ex post, as in common law or private adjudication. Synthetic common law draws advantages from each, as described below.

A. Common Law

In certain areas, a synthetic common law regime might better accomplish both of the goals of common law. It could enable a private adjudicator to resolve parties’ disputes in a fair and efficient manner while generating at lower cost a supply of legal rules that reflect social practice.

First, unlike common law, synthetic common law cases need not evolve over time in order to reflect social practice. Advocates of common law laud the case-or-controversy requirement and the purported efficiencies derived from having judges adjudicate only real cases involving real parties with real disputes. It is undeniably true that some filter works to limit those disputes percolating from real disagreements among private actors up to real judicial opinions. But a filter works to limit synthetic cases, too, and that filter does not depend on the potentially abnormal behavior of parties other than the contracting parties. Real cases and controversies are often based on disputes in which parties are behaving in an economically irrational manner. Numerous real cases are litigated because one or more parties misperceive either the probability of recovery, the likelihood of victory, or both. Most importantly, the case-

205. See Figure 1.
or-controversy filter is incredibly costly. The synthetic common law filter costs very little. 206

Synthetic common law likely would be fairer than common law, because it would avoid judicial temptation to create new law. 207 The value of common law rules depends on their consistency (i.e., cases that are consistent with each other) and stability over time (i.e., the “stickiness” of precedent). 208 Synthetic common law, because it is created all at once, is far more likely than common law to be consistent. Moreover, because synthetic common law cases will not change, absent agreement of the parties, during the life of the contract, they are guaranteed to be stable over time.

Thus, synthetic common law could achieve one of the primary aims of the common law: “enabling private actors, within limits, to determine before they enter into a transaction the legal rules—including the ‘new’ legal rules—that will govern the transaction if a dispute should arise.” 209 Private actors need a replicable process so they will not be insecure in planning future actions. 210 To the extent common law is not replicable, as it often is not, it cannot achieve this aim. In contrast, synthetic common law by definition is replicable because the rules selected by the parties cannot change during the life of the contract, regardless of the views of particular judges. Synthetic common law eliminates the possibility that prospective overrulings 211 or transformative 212 rulings by judges will change the law relevant to any dispute between the parties. It avoids the difficulty of overruling or overturning a decision, which in a common law regime requires a judge to construct an elaborate justification. 213 In contrast, under synthetic common law, private parties can avoid a bad case simply by not checking that particular box.

Melvin Eisenberg, one of the leading scholars of common law, has summed up his view of the common law as follows: “What then does the

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206 In a competitive market for synthetic common law organizations, one organization is unlikely to have market power. The marginal cost of synthetic common law is likely to be low; it involves only a few people spending a relatively small amount of time writing cases.

207 See Eisenberg, supra note 3, at 35 (discussing the problem of judges creating new legal rights after the event relevant to the dispute).

208 See id. at 44, 47 (discussing two models of comprehending the common law that emphasize consistency and stability).

209 Id. at 11.

210 See id. at 48 (discussing the role of stare decisis in promoting reliance on past decisions to plan future actions).

211 See id. at 127–32 (describing judicial decisions affecting transactions comparable to the one being adjudicated that occurred before the decision but remain open to legal challenge).

212 See id. at 132 (describing judicial process of transforming cases, including the example of Justice Cardozo’s radical reconstruction of precedents to reach a particular result).

213 See id. at 104–45 (discussing overruling and other methods of overturning).
common law consist of? It consists of the rules that would be generated at the present moment by application of the institutional principles of adjudication." 214 By this definition, synthetic common law arguably is superior to common law. Synthetic common law cases always are created "at the present moment"—the moment when the contract is executed, when the parties are determining what rights should govern any future disputes—whereas common law cases may not reflect the expectations of the parties at that crucial time.

Synthetic common law avoids the tragedy of the commons critique of common law, because the (very low) costs are internalized by the parties. To the extent there is a public goods problem in a synthetic common law regime, it is likely to be far less serious than the problem under common law. It would cost drafters creating synthetic cases only a fraction of the costs of litigating similar cases.

Scholars who advocate regulatory competition should prefer synthetic common law, because it adds competing options to parties who currently can only choose which state (or federal) law to have govern their contract. The number of competing synthetic common law regimes is virtually unlimited. Competition among synthetic common law associations would eliminate problems associated with the common law mode of legal reasoning. 215 Successful associations would develop reputations for deciding cases using a particular mode of reasoning; they might even advertise a particular type of legal reasoning methodology (e.g., "reason like Holmes would have," "err on the side of stability and consistency," "decide our case like Dworkin believes judges decide cases"). Alternatively, private parties could request particular modes of reasoning, and only associations agreeing in advance to provide such modes would obtain their business.

Scholars who abhor regulatory competition nevertheless need to recognize the possibility of synthetic common law regimes and explain why parties should not adopt them. Even if choice of law is a race to the bottom, choice of synthetic law might not be, because to the extent there is information asymmetry or other market failure leading to unfair bargains in choice of law, synthetic common law levels the playing field by laying bare in narrative form the effects of particular contractual provisions.

To the extent the justification for common law is its evolutionary process, synthetic common law better takes advantage of that process. Synthetic cases can evolve over time; the major difference is a certain

214. Id. at 154.
amount of "genetic engineering" taking place while the first regime is created.

Synthetic common law also could generate a superior body of legal rules. Although ardent legal positivists may not agree that synthetic common law is composed of actual legal rules, the argument that synthetic common law is based on such rules is much stronger than the corresponding argument for common law. 216 Common law-style rules (including synthetic common law rules) enjoy their status as "law" not because they are posited sets of rules, but because parties continue to accept them. Such acceptance is more likely in a synthetic common law regime, which necessarily requires that parties approve applicable legal rules, than it is in a traditional common law regime, which limits choices to existing regimes and does not require that parties make an explicit choice about particular cases that will govern a dispute. Although the common law is said to "lack[] an authoritative authentic text" 217 and "to develop and apply principles that have never been committed to any authentic form of words," 218 synthetic common law carries greater weight as text because the parties explicitly agree to the words contained in the cases specified in advance; under common law, the legal rules in the cases are specified ex post.

To the extent common law is flexible, synthetic law is at least as flexible. The parties could choose whatever cases they would like to include in a particular contract, including existing common law cases. The parties could specify the process of adjudication, including "sticky" adherence to precedent, and could even indicate how they would like a judge to reason.

Whereas common law in the United States now performs poorly in generating a public record of legal rules, for the various reasons analyzed in Part II.B.2., synthetic common law guarantees an adequate number of on-point cases. If the parties do not believe the cases cover a specific point, they can change or add a case. Many of the arguments offered in favor of common law adjudication depend on the assumption that a large number and wide variety of opinions will be published. 219 Synthetic common law achieves this assumed objective better than common law does.

216. See supra Part II.B.
217. Simpson, supra note 80, at 16.
218. FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 249 (3d ed. 1911).
219. Many pro-common law arguments depend upon the publication of opinions. See id. at 42.
Similarly, common law may be uncertain if parties are able to construct large numbers of plausible rules from a given precedent. Precedents often follow unstable, “jagged” paths, zigging and zagging until a judge or commentator is able to synthesize the results in existing cases. This synthesis typically requires explaining the cases while recognizing the prior legal rule. A synthetic common law regime would simply clarify the cases to eliminate such ambiguity.

In difficult areas of commercial law, where some cases may seem irreconcilable even after years of legal commentary, parties using synthetic common law could reconcile such difficult cases simply by deleting problematic sections. Hard cases may be useful, even fun for law professors and students, but private parties likely will not find the intellectual challenge of such precedents, as originally written, to be worth their commercial while. In common law cases, a party often must show that the rule of a precedent is not in conflict with a particular decision. In a synthetic common law regime, there is no such need, and consequently synthetic common law regimes can avoid costs related to such showings. If a particular passage in a case seems troubling or confusing, the parties could simply delete it.

The key point is that synthetic common law provides information that both (1) is not reflected in current precedent and may contradict precedent, and (2) would not with certainty lead every judge to the principle articulated by the parties. Synthetic common law would not require parties to specify all contingencies, or to list the many possible iterations of changes in a variable. Rather, synthetic common law would ask the parties to articulate the cases they would want a future adjudicator to use in a future dispute about some, but not all, facts that the parties anticipated. Of course, common law judges can reason based on hypothetical facts or cases, but synthetic common law is preferable to common law reasoning from hypotheticals, because the parties can specify the

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220. EISENBERG, supra note 3, at 63.
221. Examples of such synthesis have involved major figures in law. For example, the reliance principle in contract law was first explicitly formulated in Section 90 of the Restatement (First) of Contracts, authored principally by Samuel Williston; the modern principle of unconscionability was first formulated in Article 2 of the UCC, authored principally by Karl Llewellyn; and the principle of strict product liability was first explicitly formulated in Section 401A of the Restatement (Second) of Torts, authored principally by William Prosser. See id. at 78–79 (describing justifications for each example).
222. See id. at 61, 64, 97 (discussing the various approaches taken in establishing the rule of precedent and the difficulties that derive from these inconsistent approaches).
223. Id. at 62.
224. See id. at 86.
relevant hypotheticals *ex ante* and need not attempt to anticipate a judge’s reasoning.\(^{225}\)

I am not saying that synthetic common law *always* will be superior to common law. In fact, it might be superior only in particular areas of law. In the vast majority of cases, both synthetic common law and common law are largely irrelevant, because most parties do not know the law and instead make plans implicitly, not explicitly (i.e., they do not consider specific legal consequences).\(^ {226}\) Synthetic common law, to the extent it is more specific than common law, may alarm one of the parties and thereby “queer the deal.” Many aspects of contracting are uncertain *ex ante* and therefore cannot be specified in words, whether those words are contract terms or fake cases.\(^ {227}\) Synthetic common law may not carry the authority of the “rule of law,”\(^ {228}\) not only because it would be privately administered, but also because it assumes there is not a fixed rule of law *ex ante*. Notwithstanding these flaws, my argument is that for some parties synthetic common law could be fairer and more efficient than common law.

**B. Statutory Law**

Second, a synthetic common law regime could be superior to a statutory regime. To the extent statutory law is inferior to common law, as a number of recent studies have indicated, synthetic common law should provide the same types of economic benefits as common law. Societies with a history of common law (e.g., the United States and England) would find it relatively easy to shift to synthetic common law in certain areas without a loss of economic benefits.\(^ {229}\)

In at least some cases, a synthetic common law system would achieve the primary purported advantage of statutes: clarity. If the applicable statute *is* clear, there would be no need for synthetic common law, and the parties would not choose to use it. However, the reality is that many statutes are unclear or limited, and require interpretation through hypotheticals or some other form of adjudication. If a statute is not clear, private parties could specify in fake cases how the judges of their imagination would resolve the ambiguities. Cases could include excerpts of

\(^{225}\) See *id.* at 99.

\(^{226}\) See *id.* at 157.

\(^{227}\) See *id.* at 158 (asserting, without justification, that “[t]he greater part of the common law, although not certain, is nevertheless sufficiently determinate for planning purposes”).

\(^{228}\) See F.A. Hayek, *The Road to Serfdom* 72 (1944) (describing importance of government “being bound by rules fixed and announced beforehand”).

\(^{229}\) See supra note 12.
the relevant statutes, existing or proposed, if such inclusion would make the cases clearer. Consequently, synthetic cases could achieve, at minimum, that level of clarity already achieved by a statute.

In addition, synthetic common law could achieve some of the benefits of democratically selected statutes. The information impounded in a set of synthetic common law cases is more likely to reflect the expectations of the parties than any statute. None of the noise associated with the legislative process pollutes the legal rules in synthetic common law. Because the cases more likely reflect the parties' expectations, they are more likely to be fair and efficient.

Synthetic common law also avoids the problem of statutes reflecting the popular will of a prior electorate, not the current one. In areas where technologies are rapidly changing, synthetic common law can change, too. Alternatively, parties can anticipate change and build it into cases.

In at least some instances, private parties will be able to assess contingencies relevant to future disputes in individual cases better than legislators. Although legislators are democratically elected, they may have been elected by parties with different interests and preferences than the contracting parties. Synthetic common law avoids the public choice and interest group pressures of legislation. Cases are influenced only by the choices of the parties and the availability of synthetic common law regimes.

Synthetic common law may not be superior to statutes in every area, or even in very many areas. In some areas of practice, the democratic process works effectively, and statutory rules will best reflect overall societal preferences. In relatively simple contracts, statutes may be reasonably clear, and developing synthetic common law may be too costly.

Finally, to the extent narrative is important to assist parties in understanding the legal rules governing their contract, synthetic common law has obvious advantages. Statutes may enable parties with superior information to obtain an advantage in bargaining. The narrative aspects of synthetic common law might help to level the playing field for disadvantaged parties. For evenly matched parties, explaining the legal rules governing their contract in narrative form may improve their ability to specify contingencies ex ante, a wealth-improving result.

C. Private Law

Third, a synthetic common law regime also may be superior to a regime of model acts and private law. Model acts suffer from the same weaknesses as statutes. The only true difference between a model act and a statute is that a model act front-loads most of the work onto com-
mentators who consider various proposals carefully before the legislative process begins. Model acts take force only when adopted as statutes.

Private law avoids some of these problems, because it derives its authority from the fact that the parties agree to include it in their contracts. Private law has expanded greatly in recent years, due in part to the recent arguments of law and economics scholars that private law is efficient. To some extent, existing private law regimes offer the same advantages of synthetic common law.\(^{230}\)

There are, however, several differences between private law and synthetic common law, and these differences highlight the reasons why synthetic common law would be superior in particular cases. Private law is essentially private statutory law and therefore suffers from a lack of clarity and completeness. It is very difficult to specify in advance the variety of factors relevant to any future dispute. Clarity is just as elusive in complex contracts as it is in complex statutes. Private law does not obtain any benefits of analogical reasoning.

Why can lawyers and other parties not create private default terms with sufficient specificity? As noted above, private default terms and standard form contracts are analytically equivalent to model acts and uniform private laws, the primary difference being the intended audience. While the former is directed to private parties engaging in contracting, the latter is directed more generally to legislators. All such private law offers the benefits of considered judgment of non-governmental actors.

Moreover, although private law may serve to guide practice absent a dispute, the parties will need to specify the means of resolving a dispute. The choices are courts or private adjudication, each based on the language in the private law. Therefore, even if private parties can draft an ideal private contract, they are subject to the interpretation of a judge or arbitrator in a future case. More likely, the parties will not be able to, or even attempt to, specify all contingencies. Even the various Restatements of the Laws include short case examples explaining how particular statutory provisions would work in practice.

For parties who prefer narrative to contract terms, private law may be inferior to synthetic common law. Synthetic common law is more likely to level the playing field between parties, especially for consumers and purchasers who do not read contracts because the costs of reading them exceed the benefits. Synthetic cases are less costly (i.e., painful) to

\(^{230}\) One difference between the regimes is that private contract terms typically do not refer to an adjudication association, although there is no principled reason why they could not be enforced by private associations in the same way synthetic common law would be.
read and may generate additional benefits if parties are able to understand and intuit their implications more easily than they would be able to formulate hypotheticals based on contract language, even if a contract were clear. If contracts were written in terms of synthetic cases, the bargain over contract terms might be more party-to-party than lawyer-to-lawyer.

As a result, lawyers may have a vested interest in supporting private law over synthetic common law. Contract lawyers have been trained in, and have acquired, a particular skill: drafting complex contracts that specify many often-related contingencies. This is difficult work. Many non-lawyers find such contracts difficult to read and would find them impossible to draft. However, few contract lawyers have developed the skill of writing or interpreting synthetic cases. Even if synthetic common law were superior to private law, lawyers might oppose the synthetic regime for self-interested reasons.

D. Private Adjudication

Fourth, a synthetic common law regime could capture many of the benefits of private dispute resolution while avoiding many of its costs. First, a synthetic common law regime is essentially a form of private adjudication. The major differences are increased competition among regimes, and the addition of synthetic cases. Therefore, synthetic common law would achieve many of the benefits of existing forms of private adjudication.

Synthetic common law could avoid some of the problems associated with the private nature of ADR and mediation. All of the synthetic cases would be known to the parties. To the extent parties valued additional decisions, they could pressure associations to include those real decisions in future menus of cases. Nevertheless, there would be some externality costs to non-parties, although those costs might not be as high to the extent non-parties learn of the contractual arrangement and read the synthetic cases.

Most importantly, synthetic common law would avoid the arbitrary nature of private adjudication. There are few constraints on private adjudicators, and they are notoriously difficult to predict. In some areas, arbitration has not reflected the ex ante understandings of the contracting parties.  

231. See supra note 196 and accompanying text (discussing securities arbitration bonus awards that conflicted with expectations).
Finally, to the extent parties prefer private adjudication to court because of the psychological benefits, as some studies have indicated, synthetic common law also could achieve those results. In fact, parties might even achieve some satisfaction *ex ante* from expressing in narrative form their expectations regarding future disputes. Moreover, private adjudication creates an adverse selection problem for judicial opinions, because as normal cases are resolved in arbitration or mediation, the body of disputes available to judges writing published opinions is not representative. Because parties involved in a synthetic common law regime have expressed their views about future cases *ex ante*, they may be less likely to perceive that a court would adjudicate their case differently, thereby avoiding the adverse selection problem. To the extent the problem continues, because parties contracting in a synthetic common law regime rely on synthetic cases, not judicial opinions, the problem will not be relevant.

V. CONCLUSION

In areas of rapidly evolving technology, it is increasingly difficult for either public or private entities to specify useful legal rules *ex ante*. In addition, as the cost of resolving disputes increases, it is more difficult for judges or arbitrators to resolve disputes in a fair and efficient manner *ex post*. A synthetic common law regime captures the *ex ante* advantages associated with statutes while preserving the flexibility associated with *ex post* adjudication.

In this Article, I have attempted to set forth enough general principles and arguments to guide scholars in areas of rapidly evolving technology to make use of the synthetic common law idea. As society shifts to more synthesized experiences and virtual realities, it is tempting to stick by what is authentic and real. Real common law will always have a place in modern society, just as some people always will prefer organic food, natural fur clothing, antediluvian housing, and interacting with human beings rather than computers. But in some segments of society, the cost of holding fast to reality based on subjective or uncertain belief is too great. In those areas, it is time to consider abandoning the reality of law.

232. See, e.g., Tyler, *supra* note 64, at 102.
233. Likely candidates for a synthetic common law regime include finance, telecommunications, intellectual property, computer law, the Internet, and perhaps commercial or corporate law.