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HABERMAS AMONG THE AMERICANS: SOME REFLECTIONS ON THE COMMON LAW

CATHERINE KEMP

In his Translator's Introduction to Jürgen Habermas's Between Facts and Norms, William Rehg notes that one of the challenges facing the English translator is that the theory of law elaborated in this book "deals with two different legal orders," namely, "the American legal system, influenced as it is by the English common-law tradition" and in which "case law has always occupied a central position," and the German civil law. Rehg goes on to say that it is important not to overemphasize these differences, and certainly the fluidity with which the two orders serve the analysis of Between Facts and Norms bears witness to this view. In this essay, I suggest that Habermas's extension of his theory of law to the American system involves challenges not only to translation but also to a descriptive and philosophical account of American law. In particular, the status of customary law in Habermas's theory and its relation to adjudication as he characterizes it do not capture either the nature of the common law or, perhaps more importantly, its influence throughout the American system. This claim has implications for Habermas's description of the relations between adjudication and the American constitutional system and for his account of the nature of American constitutional law.

This essay has two objectives. First, in the essay itself I want to raise some questions about the fit between Habermas’s theory of law and the American system. These questions are intended to suggest lines of inquiry merely and are perforce preliminary. I begin in Part I with an extended review of Habermas’s theory of adjudication, and then turn in Part II to a summary of the place he assigns to custom and to customary law. In Part III, I elicit a picture of the common law to illustrate the hy-

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2. Id. at xxxiv.
3. Id.
4. Rehg notes that since its enactment, the German Civil Code—German private law—has taken into itself the interpretations and adaptations of it made by the judiciary. Id; see also RUDOLPH B. SCHLESINGER ET AL., COMPARATIVE LAW 592 (6th ed. 1998).
hypothesis that although the notion of "a system of customary law" is not appropriate, there is a deeply held and pervasive residue of common law culture in American law—something I will call the 'custom of custom' in adjudication, enactment, and interpretation. Finally, in Part IV, I consider a few implications this attention to the culture of the common law may have for the theory of law presented in *Between Facts and Norms*.

Second, I hope that this discussion will provide American legal scholars with a foothold in their assimilation of the analysis in *Between Facts and Norms* to American jurisprudential debates. This second objective, the work of which lies beyond the present discussion, has its inspiration in my own sense that, absent a compelling picture of the influence of the common law, American jurisprudence misses its familiarly contested territory. Contemporary as well as historical debates about legal truth, certainty, legitimacy, indeterminacy, justice, justification, adjudication, interpretation, federalism, and the relation of law to politics, economic theory, history, et cetera all revolve around issues of adjudication and of decisional law as (analytically) distinct from and related to legislative enactment. Without an integration of the influence of the common law and the "legal theory" Habermas offers us, American jurisprudential concerns, even those that do not make their concern with the common law explicit (and except for a handful of constitutional and political questions), generally lack an entrance point to Habermas's claims about American law.

I. HERCULES' RETROFIT: ADJUDICATION IN THE DISCOURSE THEORY OF LAW

At the beginning of chapter five, Habermas points out that a discourse theory of law must "first of all" prove itself at the level of the legal system "in the narrow sense." Thus considered, the legal system is law insofar as it is engaged in the production and reproduction of law. To account for law in this sense, which always entails grappling with a particular legal order, is the task of "legal theory." Although not exclusively devoted to adjudication, legal theory concerns itself primarily with

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6. See HABERMAS, supra note 1, at 196.

7. See, e.g., id. at 267 (presenting questions raised by Frank Michelman and John Ely in Habermas's discussion of the role of the United States Supreme Court).

8. Id. at 196.

9. This includes all interactions that are not only oriented to law, but are also geared to produce new law and reproduce law as law. To institutionalize the legal system in this sense requires the self application of law in the form of secondary rules that constitute and confer the official powers to make, apply, and implement law. See id. at 195. Habermas distinguishes this from the legal system in the broad sense, which "includes all social communications that refer to law." Id.

10. Id. at 196.
what judges do. At this level, the most important aspect of modern law, namely, the tension between "facticity" and "validity," appears for legal theory as the problem of the rationality of adjudication. This problem is best understood as that of reconciling legal certainty, or fidelity to existing law, with justice, the legitimacy of the application of law in a particular case.

Habermas notes that of all the efforts to reconcile these demands, Ronald Dworkin's theory of the "rational reconstruction of the law of the land" is the most promising. In his own work Dworkin assigns this task to an ideal judge he names Hercules, who is not limited in either time or capacity. Hercules' job is to reread—as both activist and preservationist—the "institutional history" of his society in light of the principles (of political morality) it contains in order to render the uniquely right decision in a particular case. For Habermas, the figure of Hercules cutting a lonely path through the thickets of American law serves as the launch pad for his retrofit of the ideal judge "as a member of the interpretation community of legal experts," whose role in adjudication is to instantiate communicatively achieved acceptance of validity claims.

What does this mean? In the rather tortuous synthesis of section 5.3, Habermas preserves two elements of Dworkin's theory: (1) the notion of

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11. See id. at 197. Habermas's rationale for this claim resides in the premise that "all legal communications refer to actionable claims" so that "court decisions provide the perspective from which the legal system is analyzed." Id. at 196–97.

12. The eponymous "facts" and "norms." Modern society, as Habermas sees it, suffers from a splitting apart of traditional law and conventional morality. In pre-modern society, according to this view, law, morality, and ethical life enjoyed a unified foundation in the authority of the Church. With the increasing secularization and pluralization of society in the modern era, these authorities lost their "sacred foundation." Modern law is institutionalized ("facticity") and morality is merely a form of cultural knowledge, so that the "validity" of law is problematic. Habermas characterizes this as a tension immanent to law between facts and norms. See id. at 106–07. Habermas associates pre-modern law with natural law theory. See id. at 199. For an American reflection on this attribution of this tension to law, see Frederic Kellogg, Review Essay, 81 NEWSL. OF THE SOC'Y FOR THE ADVANCEMENT OF AM. PHIL., Oct. 1998, at 14–17.

13. See HABERMAS, supra note 1, at 197.

14. See id. Habermas also characterizes the tension to be reconciled as one between "consistent decisionmaking" and "rational acceptability" and also as between the "certainty" and the "rightness" of law. Id. at 198–99.

15. Id. at 197. Along with Dworkin's theory, Habermas considers "legal hermeneutics", legal realism, and legal positivism. Id. at 197–203.


17. Id. at 120.

18. See id. at 116.

19. On the suggestion of Professor Michelman, Habermas locates the limitations of Dworkin's theory in the monologic character of Hercules' efforts. See HABERMAS, supra note 1, at 224.

20. Cf. William H. Rehg, Translator's Introduction to HABERMAS, supra note 1, at xxxiv (noting Karl Llewellyn's notion of the "bramble bush").

21. HABERMAS, supra note 1, at 224.

22. See id. at 226. For a detailed account of communicative action, see Mitchell Aboulafia, Law Professors Read Habermas, 76 DENY. U. L. REV. 943, 944–45 (1999).
institutional history (as "unproblematic background assumptions") and (2) the personal role of the judge. First, institutional history brings with it both the body of decisional and enacted law in relation to which the judge's decision must be consistent and the democratically-justified norms embedded therein. Second, Habermas's judge is not unlimited in time or capacity like Hercules, but he brings with him a theory of argumentation which takes the place of Hercules' virtuosity. This theory of argumentation is the product of the democratically-justified procedural regulation of the judge. These rules of procedure, according to Habermas, "institutionally carve out an internal space for the free exchange of arguments." The judge, presented with this exchange, adopts an ideal role as an interlocutor in an uncoerced, truth-seeking discussion. This position, as Habermas understands it, entails taking the perspectives of every person involved in and affected by the decision so that the decision is the outcome of an ideal conversation among communicatively ideal participants. The judge's decision is an impartial application of norms to the case at hand. For these reasons, the decision is as far as possible the right one, thereby answering the demand of "validity" in our

23. HABERMAS, supra note 1, at 227.
24. "[E]ach participant in a trial, whatever her motives, contributes to a discourse that from the judge's perspective facilitates the search for an impartial judgment. This latter perspective alone, however, is constitutive for grounding the decision." Id. at 231.
25. See id. at 198.
26. "[A] discourse theory [starts] with the assumption that moral reasons enter into law via the democratic procedure of legislation." Id. at 204.
27. See id. at 225.
28. See id. at 234.
29. Id. at 235. Note that by "internal" here, Habermas means internal to the judge. The parties are advancing adversarially-positioned arguments and generally behaving very strategically, but for the judge these appear as a free and uncoerced airing of (almost) all the arguments important to the decision of the case. See id. at 230–31. As an example of such procedural regulation, Habermas cites the German Code of Civil Procedure. See id. at 236–37.
30. This is very difficult to put simply. Here is the passage: "[W]hether norms and values could find the rationally motivated assent of all those affected can be judged only from the intersubjectively enlarged perspective of the first-person plural. This perspective integrates the perspectives of each participant's worldview and self-understanding in a manner that is neither coercive nor distorting." Id. at 228. Further, "interpretations of the individual case, which are formed in light of a coherent system of norms, depend on the communicative form of a discourse [which] allows the perspectives of . . . uninvolved members of the community (represented by an impartial judge) to be transformed into one another." Id. at 229 (emphasis added). The picture here (roughly) is of adversarial, strategic parties flushing out a set of arguments on the matter in question before a judge who, in virtue of his professional obligation, hears and thinks about these arguments as if he were the entire affected community—shorn of coercion and distortion—seeking the right outcome of the case. Because he is taking this position, the decision he renders has the highest chance of being the most right.
31. See id. at 234.
32. Clearly, much remains implicit in this summary. A much less abbreviated although very accessible summary of the theory of communicative action and its application to law can be had in Richard A. Lynch, Distinguishing Between Legal and Moral Norms, 41 PHIL. TODAY 67 (1997). For my purposes here the centrality and the nature of the role of the judge are most important.
tension.\textsuperscript{33} Finally, because this free exchange of arguments takes place against the "unproblematic" background of institutional history, its outcome via the judge's decision preserves as far as possible consistent decision-making—law's "facticity."\textsuperscript{34}

II. FACTICITY: HABERMAS ON CUSTOM AND CUSTOMARY LAW

Habermas defines law as "modern enacted law."\textsuperscript{35} His characterization of law's "facticity"\textsuperscript{36} suggests not only that decisional law is a kind of enactment,\textsuperscript{37} but also that any residuum of a customary tradition in institutional history has itself this status.\textsuperscript{38} Unlike modern enacted law, however, mere customs or conventions have "the organic facticity of inherited forms of life."\textsuperscript{39} This facticity has a kind of "de facto validity," which consists in the fact that a rule or norm is actually acted on and is likely to be accepted by the people to whom it is addressed.\textsuperscript{40} This de facto legitimacy is independent of a belief on the part of the addressees that a rule or norm is legitimate; the degree to which a particular requirement lacks belief in its legitimacy affects the extent to which it is reinforced by "other factors" such as "intimidation, the force of circumstances, custom, and sheer habit."\textsuperscript{41} As we saw in Part I, Habermas's legal theory understands law as the source of the rational acceptability which is the modern form of this legitimacy.\textsuperscript{42} In the transition from pre-modern to modern society, "positive law separated from the customs and habits that were devalued to mere conventions."\textsuperscript{43} This, as I pointed out at the end of Part I, leaves the institutional history as unproblematic background—facticity—for adjudication.\textsuperscript{44}

An existing law is the product of an opaque web of past decisions by the legislature and the judiciary, and it can include traditions of customary law as well. This institutional history of law forms the

\begin{itemize}
\item\textsuperscript{33} See HABERMAS, supra note 1, at 227.
\item See supra note 1, at 227.
\item Id. at 79.
\item Id. at 447; see also Rehg, supra note 20, at xii (discussing the "factual generation, administration, and enforcement" of law). Facticity is what is given, that which can be taken as a fact or collection of things factual. Note that facts here are not legal facts, distinct from law: under this more general notion of facticity, law in its various aspects is itself a fact.
\item A claim common law theorists dispute. See SIMPSON, supra note 5, at 366–70.
\item See, e.g., HABERMAS, supra note 1, at 198.
\item Id. at 20, 30.
\item See id. at 29. Another type of de facto validity attaches to enacted law in virtue of its being backed by threat of sanctions. For Habermas, the facticity of law under this construction is "artificially produced," by contrast with the "organic" character of custom. Id. at 30.
\item Id.
\item See supra notes 29–31 and accompanying text.
\item HABERMAS, supra note 1, at 106.
\item See supra note 32 and accompanying text.
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background of every present-day practice of decision-making. The positivity of law also reflects the contingencies of this original context of emergence.  

As facticity, that is, as that in relation to which the communicative activity of adjudication must try to make itself consistent, this background of institutional history is not 'in play' in adjudication. Past decisions are just that, past decisions, yielding—alongside legislation—truths which require the fidelity of subsequent decisions made by judges. For Habermas, to the extent that institutional history may owe some of its content to "traditions of customary law," it is nevertheless not itself customary in nature. Further, because it serves as the background—unquestioned, unproblematic, out-of-play—for the discourse of adjudication, it departs even from Dworkin's notion of the "gravitational" pull of precedent.  

Finally, it is reasonable to infer that Habermas's judge renders decisions that will be logged into the institutional history as that in relation to which subsequent decisions must be consistent. His decision, its context, and the procedural requirements which shape these are not driven by custom and are not themselves customary. As instances of decisional law, they are products of an alternative type of enactment, and take their place beside legislation in the facticity of law.

III. THE 'CUSTOM OF CUSTOM': A HYPOTHESIS ABOUT THE COMMON LAW CULTURE OF AMERICAN LAW  

By way of contrast with Habermas's view of the place of customary and common law as "facticity," in this section I want to be old-fashioned for a moment, and draw a likely conclusion from a typical style of argument. Anglo-American legal theory has in many of its manifestations claimed pride of place for adjudication and then gone on to ground statements about the nature of law on accounts of the nature of adjudication. For this part of the essay, I claim not pride of place but certainly tremendous importance for adjudication. Then I elicit a picture of adjudication in the American system which suggests that judges decide cases in a customarily-delimited and custom-based context, a picture of adjudication which departs substantially from Habermas's. Finally I consider the thesis that the character of common law adjudication as it appears in this picture pervades and distinguishes American constitutional law as well.  

A. Adjudication and the Common Law in the American System  

In response to Realist, formalist, positivist, and natural law accounts of adjudication and of the common law, various legal theorists of different periods have held out for an account of the common law as a kind of

45. HABERMAS, supra note 1, at 198.  
46. See DWORKIN, supra note 16, at 115.
(perhaps highly systematized) customary law. This would, it seems, have a corollary in the claim that adjudication in jurisdictions heavily influenced and pervaded by a common law culture owes its peculiar nature at least in part to the demands of rendering decisions in ways consonant with that culture; that is, common law adjudication is significantly—if residually—a customary and a custom-based activity. As I noted above in Rehg’s remarks about the challenges of translation, American law is heavily influenced and pervaded by the common law. This means that the work of courts is essential and that the culture of adjudication affects nearly every aspect of law, which is to say that American law in all its aspects places significant reliance on customary and/or custom-based forms and practices. For my purposes here, the relevant aspects of customary law are its simultaneously stable and provisional or tentative character—common law rules can be ‘in play’ long after they are settled—and the fact that there is implied in practices or customs a kind of “emergent consensus” about a particular kind of controversy.

The peculiar character of the common law has been described by many in the history of legal theory, from Blackstone to Holmes. Most focus on the nature of case law, the doctrine of stare decisis, and the role of the judge. Others focus on the customary (as distinct from the enacted) aspect of the common law, which in a nutshell runs something like this: law is “a system of customary law” consisting of two parts: first, a collection of practices “regularly observed” by a group for a long period of time where this history of regular observance is regarded by the group as the reason the practice is proper. These practices are the “customs” of customary law. Second, alongside these practices there exist “complex theoretical notions which both serve to explain and [to] justify the past practice” and to guide future conduct. The common law is not (contra Legal Formalism) reducible to these propositions, rather, law as a sys-

48. See SCHLESINGER, supra note 4, at 644–47 (reviewing the differences between common law and civil law jurisdictions and their corollaries in differences in adjudication).
49. See also id.
50. See HABERMAS, supra note 1, at 196 (establishing the rationale for his focus on adjudication by stating that “all legal communications refer to actionable claims”). See generally HART & SACKS, supra note 47 (arguing for centrality of adjudication and the mutual dependence of statutory and decisional law).
52. See generally WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1765).
53. See, e.g., Oliver Wendell Holmes, Codes, and the Arrangement of the Law, 5 AM. L. Rev. 1 (1870).
54. See Simpson, supra note 5, at 375.
55. Id. at 374.
56. Id. at 376.
57. See id.
tem of customary law "consists of a body of practices observed and ideas received." In this picture, what is customary about the common law is the reliance for "time whereof the memory of man runneth not to the contrary" on particular means of resolving disputes or ordering situations and on certain statements of these means as rationales for this reliance.

As Hart and Sacks point out in The Legal Process, a simple equation of the common law with custom does not take sufficient account of its operation as an independent force in the law and, in particular, is not suited to a rapidly changing legal system. Hart and Sacks see custom as one dynamic among several at play in the American legal system. It is nonetheless a vital and contemporary feature of American law—how, then, does it work?

In a recent treatment of the relevance of American Pragmatism to the contemporary debates over legal indeterminacy, Frederic Kellogg elicits a picture of Oliver Wendell Holmes's theory of law which does justice to the variety and rate of growth in American law. Two features of Holmes's legal theory concern us here: his notion of "successive approximation" and the element of consensus he assigns to rules which emerge in the common law. "Successive approximation" is the process by which the packages of problems, responses, patterns, standards, principles, values, and choices come to be reflected in the body of cases from which rules emerge and then are "sifted" until a general rule 'takes shape.' Referring to Holmes's own account, Kellogg considers the example of new rules in tort for traffic cases:

58. Id.
59. Id. at 375 (quoting Blackstone) (citations omitted).
60. HART & SACKS, supra note 47, at 435.
61. Id. at 427.
62. Id. at 429.
63. See, e.g., id. at 435 (presenting an account of adjudication when custom is unhelpful).
64. Id.
65. See Kellogg, supra note 51, at 28. Kellogg says that "Legal indeterminacy might be viewed as the residue from, or, more accurately, the impression we get from... the judiciary's periodically concentrated experience with the tentativeness inherent in the enterprise of social ordering." Id. He suggests that for Holmes legal indeterminacy is "episodic" and has its origin not in some aspect of the law, as H.L.A. Hart and the Legal Realists would have it, but rather in the patterns and standards of conduct which emerge in experience and are then taken up into law.
66. Id. at 24–25 (arguing that Holmes borrows this notion either directly or indirectly from Charles Sanders Peirce).
67. See id. at 29.
68. Ethical principles and values, as well as choices involving policy, are not introduced into rules through the medium of law. Rather they are implicated both in the development of standards of conduct, which are in turn reflected in the decisions of cases in a given area of liability, and in the development of the consensus from which the rule eventually emerges. See id. at 32.
69. See id. at 24–25.
The common law begins, just like scientific inquiry, with an external problem—say, the invention of the wheel leads to the invention of the carriage and thence, to the emergence of traffic, traffic accidents, and the problem of resolving claims of people injured in traffic accidents. Traffic cases, although long familiar and settled by rules, were once original matters and initially resulted in little more than a bunch of decisions, tentatively offered as a set of hypotheses as to how like situations should be resolved.\footnote{Id.}

According to Holmes, this bunch of cases yields a general rule only very slowly:

It is only after a series of determinations on the same subject-matter, that it becomes necessary to “reconcile the cases,” as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape.\footnote{Id. at 27–28. (explaining that “[o]nly after becoming implicated in standards established through practical experience, reflected in (and to some extent affected by) multiple fact-based judicial determinations, are rules abstracted from experience by judges”); see also Simpson, supra note 5, at 367–68 (stating that “[t]he notion that the common law consists of rules which are the product of a series of acts of legislation . . . by judges . . . cannot be made to work . . . because common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception. [Judges’ actions create precedents, but creating a precedent is not the same thing as laying down the law.” (emphasis added))).}

The rule which emerges is not enacted by the judiciary, it is instead a reflection of “developments external to law” of patterns and standards of conduct evolving through “repeated experience with particular disputes.”\footnote{Id. at 27–28. (explaining that “[o]nly after becoming implicated in standards established through practical experience, reflected in (and to some extent affected by) multiple fact-based judicial determinations, are rules abstracted from experience by judges”); see also Simpson, supra note 5, at 367–68 (stating that “[t]he notion that the common law consists of rules which are the product of a series of acts of legislation . . . by judges . . . cannot be made to work . . . because common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception. [Judges’ actions create precedents, but creating a precedent is not the same thing as laying down the law.” (emphasis added))).}

Once settled, rules can come into conflict. For Holmes, rules which conflict define “poles” between which there is a clear distinction so that as subsequent cases “cluster” around the poles and begin to approach each other, the distinction becomes less clear:

\[T\]he determinations are made one way or the other on a very slight preponderance of feeling rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. . . . \[I\]t is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty.\footnote{Kellogg, supra note 51, at 28 (quoting Holmes).}

Controversies arise in life outside the law, around which patterns and later standards of conduct emerge. When these situations with all of their aspects end up in court, adjudication is that process via which a kind of provisional or emergent, if ultimately inveterate, consensus of practice or
custom emerges. These practices in turn influence the shape and course of adjudication and of its subsequent results, still with the same tentative and yet stable character. Taken together these aspects give us Holmes’s model of the common law:

Law is given content (1) by the character of urgent controvers[ies] that require resolution, and find their way into the courts; (2) by the tendency of repetition to engender both accepted practices and standards of conduct; and (3) by emergent consensus, not dominated by any single judge, or even judges as a class, but including juries and many actors outside the legal process who are engaged in the activities which generate both patterns of conduct and controversy: farmers, drivers, ship captains, bailors and bailees, landowners and tenants.\footnote{Id. at 29 (emphasis added); see also Simpson, supra note 5, at 374–75 (discussing the effect of the repetition).}

In this picture, law’s pedigree in the operation of custom and of custom-based forms does more than appear in the institutional history as a “contingen[cy] of the original context of emergence,”\footnote{HABERMAS, supra note 1, at 198.} as Habermas would have it. These customs and customary forms have the kind of force Habermas accords to the “de facto legitimacy” of convention and intimidation, not simply as contents of the ‘unproblematic background’ for adjudication.\footnote{See id. at 29; see also supra notes 39–40 and accompanying text.} The common law and its residual presence in American law permits and sustains forms and practices which have neither the character of “mutual recognition” nor the legitimacy of democratically-derived norms, which for Habermas are the matter applied in adjudication.\footnote{See HABERMAS, supra note 1, at 235.} Law is perhaps a kind of “transmission belt,”\footnote{Id. at 76; see also id. at 448 (stating that “[L]aw functions as a kind of ‘transmission belt’ that picks up structures of mutual recognition that are familiar from face-to-face interactions and transmits these, in abstract but binding form, to the anonymous, systematically mediated interaction among strangers”).} but of conventions attended merely by “de facto legitimacy” rather than democratic norms. American law is in this sense “pre-modern” under Habermas’s description: the separation of positive law and custom or convention Habermas attributes to modern law\footnote{See id. at 106.} does not characterize the American system.

B. Constitutional Law in a Common Law Context

It is a commonplace of American constitutional law scholarship that the U.S. Constitution can be understood as a ‘superstatute’ and, on the other side, that it is nothing of the sort. Construed as a statute, the Constitution fits neatly under the umbrella of ‘enacted law.’ Certainly the Constitution is a kind of enactment, in some sense; just as certainly this characterization does not capture its peculiarity of its life and importance in the American system.
In *Constitutional Fate*, Bobbitt elaborates a theory of the Constitution which suggests that the legitimacy of certain conventional types of arguments is antecedent to, rather than founded upon, a theory of the Constitution. Bobbitt claims that constitutional law is the relation of these conventional forms of arguments. He ties the identity of the American people to the particular set of conventional forms which make up legitimate constitutional argument: "[the conventions] could be different, but . . . then we would be different." How have these conventions emerged as essential aspects of our constitutional system? In what sense, if any, are they still conventional? That is, why should we suppose that American constitutional law is still affected and pervaded by these conventions?

Bobbitt's answer is that the initial forms of constitutional argument have their origin in decisions made by the Framers, decisions which in effect made the state a subject matter for the common law. Previously, in the English system, the common law was addressed to relations among private persons (torts, property) and between private persons and the state (common law crimes). The state was the source, not a subject, of the common law. In framing the Constitution the drafters reversed this relationship: the people became the source of the law, and the state became part of the subject matter. This entailed applying common law forms—types of argument and certain processes—against the state. These common law forms—conventions—are the source of the forms of constitutional argument.

The emergence and falling away of legitimate forms of argument are, in Bobbitt's picture, contingent, that is, they depend upon the type and urgency of problems which arise and upon a series of choices we make in addressing them. Their origin is partly customary or conventional,
lying as it does in the forms of the common law, and their new life as forms of constitutional argument is also, according to Bobbitt, entirely conventional. 87 Constitutional adjudication transpires in a context of a "competition of arguments," 88 but unlike Habermas's "free exchange" of arguments, 89 this competition is constrained by conventional limits on the set of legitimate arguments, something which would take constitutional adjudication in Bobbitt's account out from under at least the ideal form of Habermas's notion of adjudication. 90 Finally, the six forms of argument taken together can come into conflict in a particular case, and do not by themselves guarantee particular outcomes. 91 In Bobbitt's theory of the Constitution, legitimate forms of argument do not yield single right answers. 92 However, they are thereby no less legitimate. 93

According to Bobbitt, "the very functioning of the argumentative modes works to insure that there is consensus among those persons operating within the conventions." 94 Central both to Holmes's and to Bobbitt's theory of adjudication is the notion of consensus embedded in custom or convention. This supposition is vitally and persistently controversial in American jurisprudence. Objections range themselves under two general heads, on the one hand arguing that this consensus is fictional and that law is a cover for social dissensus 95 or, on the other, granting that it exists and arguing that it relies on a kind of uncritical complacency by a mystified and distracted populace. 96 Critics see ideological maneuvering in the place of this "emergent consensus"; defenders defend the consensus as an aspect of the "rule of law." 97

In this very controversy, however, we can see the importance of the residue of common law culture, what I will call here the 'custom of custom,' in the American constitutional system and in American adjudica-

87. See id. at 8.
88. Id. at 233.
89. HABERMAS, supra note 1, at 235.
90. See id. at 30. So that, for example, it is a matter of convention in Bobbitt's account that arguments based on religion or kinship are not legitimate. See BOBBITT, supra note 80, at 6. For Habermas, the irrelevance of these kinds of arguments is instead a matter of the separation of positive law from life-world forms in the modern world. See HABERMAS, supra note 1, at 106.
91. See supra notes 8-34 and accompanying text. Habermas's judge, Hercules, J. after the retro-fit with a theory of legal argumentation, would push beyond the limits of the available conventional forms (which show up merely as contents of the facticity of the relevant institutional history) to a communicatively-achieved decision about the rights of the parties. Bobbitt's judge relies on a specialized form of conscience to resolve incommensurable conclusions from the particular argument-forms. See generally PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).
92. See BOBBITT, supra note 91.
93. On the distinction between legitimacy and justification, see id.
94. Id. at 245.
96. See id. at 589-91.
97. For a recent treatment of these controversies, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997).
tion in general. Even if one disputes a claim to an actual moral or political consensus behind conventional or customary forms, one may nevertheless grant that in the American system there exists some kind of consensus—however undesirable—in the very functioning of such conventions or customs. Or, if one disputes even this claim to a de facto or weak consensus in constitutional and common law forms, one must concede that the object of one’s critique is the resistance that these forms and practices have to social movements or to social criticism. In both of these objections as well as in the counterarguments advanced by those who defend the notion of consensus, the residual culture of customary and common law forms and processes is essential. This residue has a status in American law today that the requirement of a wax seal for important documents possessed in the time long after the widespread illiteracy contemporaneous with the Norman conquest—the basis of the requirement of the seals—had disappeared. Common law forms and the elaboration through custom they carry with them are themselves now customary in American law: judges resort to and refine them and innovate on their terms, legislative and other enactments are invariably subject to interpretation and elaboration on these terms, and they shape and influence the drafting of enacted law. Even on a critical reading of theories of American adjudication and constitutional law, the ‘custom of custom’—the customary residue of conventional forms—is an element which must be taken into account in any theoretical treatment of American law.

**IV. IMPLICATIONS OF THE CULTURE OF CUSTOM FOR A DISCOURSE THEORY OF LAW**

Construed as it is in *Between Facts and Norms* as a modern legal system, American law in Habermas’s picture does not appear with this, its most important and enduring aspect, namely, the residue of the culture of the common law or as I have called it here, the ‘custom of custom’. The central problem of modern legal theory for Habermas, viz. the tension between facticity and validity, appears only upon the separation between positive law and life-world forms that arrives with modernity. This separation is not realized in the American legal system. The culture of the common law that pervades and supports so much of the adjudication, enactment, and application of American law renders the attribution of such a separation premature. On this argument, the theory of law presented in *Between Facts and Norms* confronts several difficulties in its application to the American system, which I will only enumerate here.

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98. See id. at 2.


100. See HABERMAS, supra note 1, at 106.
First, as we can see in a comparison of Habermas's view of what judges do with the picture of the American judge drawn in Part III, adjudication in American law, shot through as it is with customary forms and processes, is something altogether unlike the communicatively committed justice of *Between Facts and Norms*. Second, the results of the efforts of Habermas's judge have a status as outcomes which is very different from that of the products of the American judge: decisions in American courts contribute to the elaboration and interpretation-accretion of statutes and lines of case law in the incremental, circumstantial, and open-ended way suggested by Holmes' story of the emergence of rules. New decisions take on the dual status of settled and tentative possessed by the earlier decisions which shaped the subsequent outcomes in turn. The decisions of Habermas's judge, on the other hand, join the body of enacted and vestigially traditional "web" of institutional history in relation to which, as facticity, subsequent decisions must be consistent. His decision in a particular case becomes part of the inert content of that institutional history, inert, that is, in the sense that as an elaboration of existing law it is finished, complete, so it can serve to inform—but not in any organic or uncontrolled fashion to shape—the deliberative processes of subsequent judges communicatively constrained.

Third, this construction of existing law as "facticity" in relation to which the "validity" of law is in tension and to both of which adjudication is a reconciliation leaves the dynamic, as well as the emergent, variety in existing law out of the picture altogether. The "web" is "opaque," that is, although the peculiarity of the origin of a particular part of the institutional history may be apparent in that history, it is not permitted in its peculiarity to affect judicial outcomes differently than other types of institutional history. For Habermas's judge, facticity is a homogeneous constraint, without variety or even "gravitational force" in its effect on outcomes. Further, casting all of existing law as facticity and setting it in tension in modern legal systems with "validity" or legitimacy is to overlook—quite rightly, given Habermas's picture of the emergence of the modern from the pre-modern world—the legitimacy of, for example, common law forms and processes, that is, of customary law. Nevertheless, it is arguable that the legitimacy of the results of adjudication in the American system is neither a modern "validity" nor a reconciliation-based communicative legitimacy but rather the de facto legitimacy Habermas assigns to traditional customary or otherwise circumstantial law.

Fourth, the location of the legitimacy of judicial outcomes in the American system with the 'custom of custom' as I have suggested here

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101. See supra notes 47–79 and accompanying text.
102. See supra notes 8–34 and accompanying text.
103. HABERMAS, supra note 1, at 198.
104. DWORKIN, supra note 16, at 115.
poses problems for the relationship Habermas would draw between democracy and the rule of law. In particular, the role of the U.S. Constitution in the application of this part of the theory to American law is rendered problematic by the alternate view, suggested in Part III.B, that the Constitution itself is steeped in and relies substantially on common law forms and processes. Further complication is introduced by the permeation of legislative processes by vestigial common law form. To the extent that such a system cannot be said to be rational, American constitutional law falls outside the view of this relationship. That is, it is unlikely that we would say of the American constitutional system "that there is a conceptual or internal relation, and not simply a historically contingent association, between the rule of law and democracy." Philip Bobbitt's view of the very nature of the Constitution and of constitutional law suggests—at least in the first instance—quite the opposite.

Finally, a review of contemporary American jurisprudential debates cannot be complete, or on target, without some sense of the stakes involved in the (celebrated or reviled) tenacity with which the 'custom of custom' or the residual culture of common law forms and processes pervade and sustain American law in all its parts and aspects. On this point, as with the four which precede it, I would emphasize the following distinction for American readers of Professor Habermas's legal theory: if *Between Facts and Norms* is intended as regards American law as a descriptive account, it does well to note the role of common law culture in the law itself, and of controversies attendant upon it in American legal scholarship. If, on the other hand, the theory is prescriptive or hortatory in its aim, I would suggest that it needs to be refocused for the American context to take account of this most important aspect.

105. Because judicial decision making is bound to law and legal statutes, the rationality of adjudication depends on the legitimacy of existing law. This legitimacy hinges in turn on the rationality of a legislative process that, under the conditions of the constitutional separation of powers, is not at the disposal of agencies responsible for the administration of justice. 

106. *Id.* at 449.

107. *See supra* Part III.B.