THE MYTH OF THE CUSTOMARY LAW MERCHANT

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The Middle Ages are alive and well in modern legal writing. Scholars of international business, domestic sales law, conflicts of law, international relations, cyberlaw, sports law, aviation law, economic theory, and legal history, as well as judges and casebook authors have all latched onto the compelling myth of a medieval law merchant.1 This story depicts medieval

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merchants engaged in supra-local commerce as facing a dilemma analogous to that of the modern multi-national company. The merchant seller wished to get his goods to merchant buyers living in other parts of Europe under the feudal jurisdiction of different princes. The lack of applicable feudal or royal commercial law and the difficulty of doing business across borders motivated the merchants to create a customary law that reflected their own best practices. These customs were so efficacious and so desirable that they spread to fairs and markets across Europe, soon maturing into a uniform and universal system of well-defined, binding legal rules shared by all long-distance traders. The merchants developed and maintained control over this

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2 Bernardo M. Cremades & Steven L. Plehn, The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions, 2 B.U. Int'l L.J. 317 (1984) ("Multinational enterprises, the vehicles of much of the world's commerce, are normally associated with particular countries, but are essentially international in character. They are analogous to the medieval merchants whose activities were superimposed on a patchwork of local sovereigns and were hardly amenable to local regulation.").

3 Todd Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 Nw. U.L. Rev. 1551, 1596 (2003) ("because many commercial transactions were, by definition, transnational, it was desirable to have a uniform transnational body of law that did not vary according to the nationalities of the contracting parties."); Johnson, supra note 1, at 1389 ("Nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control. The result of this jurisdictional confusion was the development of a new legal system—Lex Mercatoria."); Benson, supra note 1, at 30-31 (1990) (law merchant provided means to overcome “substantial barriers” to international trade); Leon Trakman, The Law Merchant: The Evolution of Commercial Law 10-11 (1983).

4 Id. at 11 ("The most viable mercantile practice were enforced in the Law Merchant"); Benson, supra note 1, at 32 ("Where conflicts arose, practices that were the most efficient at facilitating commercial interaction supplanted those that were less efficient.").

5 Clive M. Schmidt Hoff's Select Essays on International Trade Law 206 (Chia-Jui Cheng, ed. 1988) (the law merchant "arose in the Middle Ages in the form of the law merchant, a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world from port to port and fair to fair"); Charly Hugo, The Legal Nature of the Uniform Customs and Practice for Documentary Credits: Lex Mercatoria, Custom, or Contracts?, 6 S. Afr. Mercantile L.J. 143, 144-45 (1994) (calling law merchant "in essence custom of a universal nature applied by the special mercantile courts throughout Europe to a special social class—the merchants. In this sense it can be described as law which operated on a supranational level"); Zywicki, supra note 3, at 1593 (calling law merchant a "collection of informal procedures and customary law" that were "nearly universal"); Thomas E. Carbonneau & Marc S. Firestone, Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication, 1 Emory J. Int’l Disp. Resol. 51, 57 (1986) ("Prior to the emergence of modern nation-states, trading transactions were conducted within a largely self-regulatory, customary framework free of any significant national government constraints. These self-imposed rules of commercial conduct and dispute resolution, which became known as the law merchant or lex mercatoria, applied in nearly all regions of Europe."); Gesa Baron, Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?, 15 Arbitration Int’l 115, ___ (1999) ("Its
law by establishing their own mercantile courts staffed by merchant judges whose decisions were enforced by the merchant community through non-legal sanctions that kept their dispute resolution strictly segregated from the local civil jurisdictions. As strong nation-states formed in the early modern period, their governments incorporated this law merchant, or *lex mercatoria*, into their commercial laws to the detriment of the unified and efficient private merchant ordering.

Special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of the mercantile customs; Trakman, *supra* note 1, at 271 (“It is clear that the existence of a Law Merchant was widely known and that it was resorted to by medieval merchants.”); Milgrom, *supra* note 1, at 5 (“by the end of the 11th century, the Law Merchant came to govern most commercial transactions in Europe, providing a uniform set of standards across large numbers of locations”); Bruce Benson, *Law Merchant*, in 2 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 500, 500 (Peter Newman ed., 1998) (law merchant was “the customary law governing European commercial interactions during the medieval period. Despite its customary nature, however, the medieval Law Merchant constituted a true system of law... Virtually every aspect of commercial transactions in Europe was governed for several centuries by this privately produced, privately adjudicated and privately enforced body of law.”).

*See, e.g., Clive M. Schmitthoff’s Select Essays, supra note 5, at 207 (‘The remarkable feature of the old law merchant was that it was developed by the international business community itself and not by lawyers.’); Daniela Caruso, Private Law and State-Making in the Age of Globalization, 39 N.Y.U. J. INT’L L. & POL. 1, 19-20 (2006) (calling law merchant “quintessentially independent from the state both in terms of production and enforcement”); Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CII. J. INT’L L. 621, 629 (2008) (‘These merchant judges resolved disputes among itinerant merchants at regional fairs, markets, towns, and ports—outside the jurisdiction of courts and judges who administered the law of local princes.’); Cremades, *supra* note 2, at 319 (‘The Lex Mercatoria was largely self-enforcing; a party who failed to comply with a merchant court’s decision risked his reputation and could be excluded from trading at the all-important fairs where the merchant courts were located. Parties to a dispute rarely needed the aid of the local sovereign to enforce a merchant court’s decision. The ability of the merchant class to both generate and enforce its own norms of behavior allowed it to achieve a large degree of independence from these local sovereigns.’); Baron, *supra* note 5, at ___ (the law merchant “was developed and promoted by mercantile corporations and the special jurisdication of the mercantile courts, business practice and the special courts of the great markets and fairs [and] recognized the capacity of the merchants to regulate their own affairs through their customs, their usages, and their practices.”); Hardy, *supra* note 1, at 1020-21 (‘Special courts grew up to enforce the Law Merchant. These were merchant courts in every sense: their jurisdiction was that of commercial transactions, and their judges were drawn from the ranks of the merchant class itself on the basis of experience and seniority.’); Trakman, *supra* note 1, at 271 (‘The distinctive feature of the cosmopolitan, medieval Law Merchant was the asserted reliance by merchants on a legal system devised primarily by merchants themselves for the dispensation of justice in disputes among them.’)."

Variously defined by authors as occurring between the sixteenth and nineteenth centuries. See Hugo, *supra* note 5, at 145 (eighteenth and nineteenth centuries as period of dismantling by state law); Cremades, *supra* note 2, at 319-20 (putting nationalization of commercial law in sixteenth century).

*Carboneau, supra* note 5, at 57 (“When geographical territories became autonomous political entities and formed national legal systems, the customary commercial law was absorbed into national law. Variations in substance eventually arose, necessitating a system of choice of law principles to designate a governing national law for resolving transnational
Despite numerous articles by legal historians documenting the many inaccuracies in this story, the myth of the law merchant continues to be frequently and sympathetically cited. The theory holds great symbolic

commercial disputes.”); Cremades, supra note 2, at 319-20 (“Unfortunately, the assimilation of the Lex Mercatoria into separate legal systems rendered it subject to the idiosyncrasies of each nation-state. The Lex Mercatoria ceased to exist as a homogeneous and autonomous body of law.”); Harold J. Berman & Colin Kaufman, The Law of International Commercial Transactions (Lex Mercatoria), 19 HARV. INT’L L.J. 221, 227 (1978) (“As national judges and legislators codified commercial law, it tended to lose its cosmopolitan character and outlook.”)

9 See generally Stephen Sachs, From St. Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant, 21 AM. U. INT’L L. REV. 685 (2006) (demonstrating that English fair courts were not merchant established nor staffed by merchant judges, that these courts did not judge according to a substantive law merchant, and that the rules they expressed were not uniform and universal even within England); Albrecht Cordes, The Search for a Medieval Lex mercatoria, in FROM Lex mercatoria TO COMMERCIAL LAW 53 (Vito Piergiorgio, ed. 2005); Charles Donahue, Jr., Benvenuto Straca’s De Mercatura: Was There a Lex mercatoria in Sixteenth-Century Italy, in FROM LEX mercatoria TO COMMERCIAL LAW 69 (Vito Piergiorgio, ed. 2005); Alain Wuffels, Business Relations Between Merchants in Sixteenth-Century Practice-Orientated Civil Law Literature, in FROM LEX mercatoria TO COMMERCIAL LAW 255 (Vito Piergiorgio, ed. 2005) (showing that merchant custom was local); Charles Donahue, Jr., Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica, 5 CHI. J. INT’L L. 21 (2004) (pointing out that no treaties or codifications of merchant-created customary commercial law seem to have been written by merchants and that the concept of a customary law merchant was unknown to the leading commercial jurist of the sixteenth century); id., Equity in the Courts of Merchants, 72 TIDSSCHRIFT VOOR RECHTSGESCHIEDENIS 1 (2004) (showing that civil courts were able to resolve commercial disputes using the ius commune, the learned Roman and canon laws, rather than any special merchant custom); Emily Kadens, Order within Law, Variety within Custom, 5 CHI. J. INT’L L. 39 (2004) (arguing that commercial law did not develop in isolation from the state); Oliver Volckart & Antje Mangels, Are the Roots of the Modern Lex Mercatoria Really Medieval?, 65 SOUTHERN ECON. J. 427 (1999) (using economic history to demonstrate the no merchant could have formed in the eleventh century); Mary Elizabeth Basile, [JANE FAIR BESTOR, DANIIL R. COQUILLETTE, & CHARLES DONAHUE, JR., LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (1998) (important review of the history of the lex mercatoria theory, demonstration that the English had no concept of a transnational law merchant, and demonstration that law merchant was primarily a procedural concept); JAMES STEVEN ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW 12-20 (1995) (demonstrating that English common law courts were competent to adjudicate commercial disputes); and J.H. Baker, The Law Merchant and the Common Law, 38 CAMBR. L.J. 295 (1979) (debunking the story of the incorporation of the law merchant into the English common law under Mansfield).

power for those modern advocates of private ordering looking to give the underpinning of historical legitimacy to their political and economic theories about how law is and should be made. Yet the *lex mercatoria* example does not, in fact, prove their point that merchant groups can use spontaneously-generated custom to create and enforce bodies of law without the involvement of the state.

On the contrary, to the extent that anything that can be called a “transnational” law merchant ever existed, it was composed of procedural exceptions, contract forms, and legislated solutions rather than customary rules. At no point historically, did the term “law merchant” or anything

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11 Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 L. & CONTEMP. PROBS. 169, 173 (2008) (“‘History’ adds to the symbolic capital of lex mercatoria and confers on it . . . a venerable pedigree . . . . That the mercatorists’ historical imagery persists in spite of these refutations suggests that what matters, for the debate, is not so much what actually happened, but what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present.”). See also, Benson, Enterprise, supra note 1, at 30 (“the ‘Law Merchant,’ effectively shatters the myth that government must define and enforce 'the rules of the game.'”); Leon Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MARITIME L. & COM. 1, 5 (1990) (“The socio-economic features which typified this ancient Law Merchant also constituted the reasons for its subsistence. There was an underlying need to promote trade based upon freedom . . . . Rulers who sought by means of national law to rigidify this free commerce would inhibit the success of exchanges in the market place . . . . The only law which could effectively enhance the activities of merchants under these conditions would be suppletive law, i.e., law which recognized the capacity of merchant to regulate their own affairs through their customs, their usages, and their practices.”); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. INT’L L. & POL. 1, 50-51 (2006) (“Widely practice in the Middle Ages, then buried for a long time under the dominant Westernphilan logic, lex mercatoria is again in vogue. The successful ‘privatization’ of merchants’ disputes rests upon the intuition that when private parties deal with one another across state borders, there are good reasons to depart from state-based rules or courts, and to switch instead to private mechanisms for lawmaking and dispute resolution.”); Carbonneau, supra note 5, at 59 ("Malynes' recognition of the non-national status of the law merchant is significant, illustrating that the interest of the commercial community in a uniform law should not be defeated by national political rivalries or local pride.").
analogous to it denote a uniform and universal substantive *customary* commercial law. Those aspects of merchant practice that arose from custom and could serve as binding rules of decision in courts were either local or confined to commodity-specific trading networks, and judges and litigants understood them as such. By contrast, those merchant-created commercial techniques, such as bills of exchange, partnership structures, and insurance, that judges and treatise writers may have thought to be uniform and generalized originated in contract, not custom. In addition, bankruptcy, long one of the most significant parts of commercial law, and one that early modern commentators believed to belong to the law merchant, arose not from private ordering of any sort but rather from statute.

The reasons for this, the evidence suggests, are threefold. First, contractual forms or statutory processes lent themselves to spreading geographically because they could be easily identified, borrowed, and adopted. Customs, by their nature often under-articulated and flexible, could not. Second, even if merchants carried customs from one town or fair to another, the further local development of the customs through equitable dispute resolution virtually ensured that they would not evolve in a uniform manner in different locations. Third, rather than efficiently representing the will of the community, custom lends itself to bias and rent-seeking, and indeed merchants, despite the romantic notion put forth today of reputational sanctions keeping medieval traders in line,12 were notorious cheats. One of the earliest description of merchants by the monk Alpert of Metz writing in 1020 explains how they would try to defraud their creditors by “persistently denying and immediately swear[ing] to have taken nothing. When one is discovered to have committed public perjury, they maintain that nobody can prove this. When the object is so small that it can be concealed in one hand he uses the other hand to [take the oath] that it does not exist.”13 The complaints about merchants acting in bad faith continued in a steady stream thereafter.14 Perhaps a small, socially-coherent and self-policing group that could use private legislation to threaten renegades with banishment could use custom to help regulate behavior. Outside of these limits, contract and urban legislation proved more effective means to develop commercial law.

The paper begins in Part I by briefly reviewing the rule- and regulation-making world in which medieval merchants lived to demonstrate that we

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14 See, e.g., Sachs, *supra* note 9, at 706 (discussing evidence that merchants appeared repeatedly as defendants in different cases); 1 Leopold Gilliodts-Van Severen, *Cartulaire de l’ancien staple de Bruges* 233 (1904) (complaints of Scottish merchants in 1359 of sharp practices of Bruges merchants); Mathias Mareschal, *Traité des changes et rechanges, licites, et illicites, et moyen de pourvoir aux fraudes des banqueroutes* _. (1625) (complaining of decline of good faith in commerce).
cannot think of medieval commercial law in modern terms of the "state" versus "private ordering." Part II presents the medieval juristic definition of custom to help demonstrate the legally-significant differences in the origins of the various elements of commercial practice and law. Part III follows up on this definition and points out that most of the areas of commerce that early modern commentators thought of as being part of the law merchant evolved from contract or legislation rather than custom. Part IV seeks to explain why custom would have been a poor provider of uniform and universal rules of decision. Lastly, Part V offers evidence that medieval merchants could have completed sales transactions successfully without requiring a legally-exceptional, transnational law merchant.

I. Rule-making in the Middle Ages

Modern mercatorists engage in anachronistic thinking when they contrast optimal commercial rules made by merchants through private ordering and inefficient, intermeddling laws imposed by the nation-state. The medieval reality of rule-making was far less absolute. Consider the example of the town of Bruges. By the late thirteenth century, the town was the most important entrepôt in northern Europe, second in the extent of its commercial significance only to the major cities of northern Italy. Bruges was under the control of the Count of Flanders, who was a feudal vassal of the King of France. The Count’s role in commerce was to grant privileges and protections to the merchant communities who did business in his county so that they could enter the county and trade there without fear for their persons or property. He might also on occasion arbitrate disputes between Bruges and foreign merchant groups. Other than that, he had little role to play in making commercial law. No medieval ruler did. Until the sixteenth century and the beginning of bureaucratic, centralized legislative lawmaking, kings and lords had insufficient power to legislate on private law.

But that does not mean that no public governing bodies exercised legislative and judicial authority over commerce. The aldermen of Bruges, who, like most urban councils, acted as executive, legislator, and judiciary, promulgated extensive regulations controlling all aspects of trade. Between the privileges granted by the Count and the rules imposed by the town aldermen, merchants were narrowly limited in what they could sell, where,

15 Peter Stabel, De gewenste vreemdeling: Italiaanse kooplieden en stedelijke maatschappij in het laat-middeleeuwse Brugge, 4 JAARBOEK VOOR MIDDELEEUWSE GESCHIEDENIS 189, 190 (2001)
16 E.g., 1 Gillijds-van Severen, supra note 14, at 44-45 (charter of countess of Flanders from 1253 granting privileges to German merchants); Kadens, supra note 9.
17 E.g., 1 Gillijds-van Severen, supra note 14, at 53 (Countess of Flanders resolves dispute between merchants of Hamburg and Flanders).
when, and to whom. The aldermanic court also had jurisdiction over disputes between local and foreign or two foreign merchants. To ignore the lawmaking of medieval urban governments because it does not comport with modern notions of the “state” is nonsense. The town aldermen were the state in a world in which most people’s horizons were extremely narrow, in which the gates of towns were closed to unwelcome foreigners, and in which the feudal princes had minimal ability, due to the lack of bureaucracy, to extend the reach of their power into local matters.

In addition to the town regulations, traders were controlled by guilds or the local organization of the nation to which they belonged. The northern Germans who did business in Bruges, for instance, belonged to the Hanseatic League and were governed by the Hansa’s rules, both those sent out to the local offices, called kontors, by the central administration in Lübeck, and by the local governors of each kontor. The reach of the Hansa meant that a member kicked out of the group for truly bad behavior in one town would be forbidden to trade as a Hansa member or to do business with Hansa members in any other town with a Hansa kontor. Since the Count of Flanders granted trading privileges to the Hansa as a group, the banished member had no personal or business protections in Flanders and was therefore at the mercy of outlaws, highwaymen, and unscrupulous dealers.

In Bruges itself, the merchants and those who serviced them, such as brokers and hostellers, belonged to guilds. In the eleventh century, these were fraternal protection organizations, created so that merchants from a town could travel together and fight off bandits on the road or mobs at the markets. As trade developed and towns became more important, the guilds, far from being benevolent agents of free trade, became locally-based monopolistic organizations designed to limit competition and change.

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19 James M. Murray, Bruges, Cradle of Capitalism, 1280-1390, 63-73 (2005) (describing commercial geography of Bruges); 1 Gilliödt-van Severen, supra note 14, at 249 (1362 privileges to merchants of Nuremberg regulating quality of cloth made in Flanders); 6 Leopold Gilliödt-van Severen, Inventaire des chartes de Bruges 5-13 (Bruges, Gaillard, 1871-78) (1470 renewal of charter of staple in Bruges establishing who could sell cloth where and of what sort).

20 1 Gilliödt-van Severen, supra note 14, at 16, 34 (grants of jurisdiction from 1190 and 1238 to aldermen to do justice to merchants local and foreign).

21 3 Konstantin Höhbaum, Hansisches Urkundenbuch 344 (Halle, Verlag der Buchhandlung des Waisenhauses 1882-1886); id. at 56 (ordinance of Hansa merchants over sale of Poperingse cloth from 1347); 1 Gilliödt-van Severen, supra note 14, at 278 (regulations of Hansa kontor in Bruges from 1375).

22 3 Höhbaum, supra note 21, at 77 (letter from Bruges kontor to other kontors in 1350 banning a merchant from Lübeck for going bankrupt contrary to the regulations).

23 Anke Greve, Brokerage and Trade in Medieval Bruges: Regulation and Reality, in International Trade in the Low Countries (14th-16th Centuries): Merchants, Organization, Infrastructure 37, 39 (Peter Stable, Bruno Blondé, & Anke Greve, eds. 2000).

24 Volckart & Mangels, supra note 9, at 437.

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Rather than use the power of the guild to pursue cheaters and benefit trade, however, the guilds permitted and facilitated anti-competitive behaviors, such as price fixing and suing to eliminate product innovations that threatened their exclusive position.\textsuperscript{26}

This is the world in which the law merchant, to the extent that it existed, was formed. The Count granted rights and provided protection. Towns passed laws, some of which by the late twelfth century were written down, and which governed citizens and non-citizens alike unless the latter obtained specific exemptions. Towns also made treaties of privileges with foreign merchants groups. Merchants made contracts, some of which were written down, either using notaries, in private writings, or through the mechanism of non-contentious jurisdiction, in which the parties went before the aldermanic court to record their agreement.\textsuperscript{27} And customs and usages arose. The merchants of a single trading nation, such as the Hansa traders, might have their own customs to be used amongst themselves. The Bruges guild members might have customs governing the members’ interactions. The merchants and shippers of various nations engaged in a particular type of trade—importing French wines, for instance—might have customs specific to that network.\textsuperscript{28} Each town or locality had its own customs. But with the possible exception of the aspirational expectation that merchants were supposed to deal in good faith, we find no evidence of uniform, transnational customs obeyed by all merchants throughout Europe.

The reason for this lacuna is not hard to find if one treats custom as a specific form of lawmaking and not merely as synonymous with “that which merchants do” or with any sort of norm or rule that arises from a source other than the state. Custom as a binding rule was intensely local, dependent upon community assent, and difficult to articulate. These factors meant that custom, unless it was turned into something like contract or legislation, did not lend itself to easy transport from one community to the next.

\section*{II. The definition of custom}

Although mercatorists use the term “custom” to refer loosely to whatever merchants did, we need a clear definition of the word to accurately

\begin{itemize}
\item \textsuperscript{26} \textit{E.g.}, 1 Gilliodts-van Severen, \textit{supra} note 14, at ___ (complaints by foreign merchants of price fixing by merchants in Bruges); Stadsarchief Brugge, Register Civile Sententies 1447-1453, at fol. 56r.-v. (punishing importer of madder not dried according to the guild regulations); \textit{id.} at fol. ___ (punishing seller who sold oil in containers no longer proper under regulations).
\item \textsuperscript{27} \textit{E.g.}, 1 Gilliodts-van Severen, \textit{supra} note 14, at 229 (regulation from 1359 referring to contracts drawn up before aldermen or other sealed letters obligatory).
\item \textsuperscript{28} James W. Shephard, \textit{The Rôles d’Oléron: a lex mercatoria of the Sea?}, in \textit{FROM LEX MERCATORIA TO COMMERCIAL LAW} 207, 212 (Vito Piergiovanni, ed. 2005) (demonstrating that the Rôles were created to regulate the shipping of wine from southwest France to other parts of Europe).
\end{itemize}
understand the historical development of commercial law. Such a definition should permit us to distinguish between rules and business techniques that originated in custom, contract, or statute and thereby to test claims about the purview and limits of spontaneous ordering. The definition of custom offered here is that developed by the medieval Roman law jurists. It focuses on the narrow use of custom as referring to a form of legally-binding rules.

According to the great fourteenth-century jurist, Bartolus of Sassoferato, a custom consisted of a repeat behavior to which the relevant majority of the community has tacitly consented to be bound. This definition requires some unpacking. Custom for medieval jurists was law. Latin, like most European languages besides English, has two words to describe law, and having two words helps avoid confusion when talking about custom as law. The Latin word denoting the general concept of law is “ius,” while the word for enacted law is “lex.” Ius, in the view of the medieval jurists, had at least two components: enacted law (lex) and custom.

But if custom was ius, it was law of a quite different quality from lex. The latter was imposed top-down, through statutes and the texts of the Roman and canon law. Custom was made bottom-up, by the repeated actions of a specific community. The lawgiver created lex at a particular moment in time by his express consent. The community established custom over time by performing certain actions over and over in such a way as implicitly to indicate that the members had accepted that they must perform such actions. Lex came into force prospectively at the moment of its enactment. Custom, and its binding nature, had to be deduced by looking backward at the behavior of the community.

Custom and lex, therefore, were, in theory, fairly easily distinguished: tacit versus express consent; repeated acts versus a single act of creation; retrospective versus prospective. The real difficulty lay in distinguishing between mere repeat behavior (usage) and repeat behavior to which the community has tacitly consented to be bound (custom). Bartolus pointed out that in common speech the word custom had three meanings. It could be used to describe an act an individual did routinely, what we might more accurately call a habit. Next, it could refer to a practice that some group of people followed, which Bartolus called a usage (“usus seu mos”). For Bartolus, a usage was a “fact” describing behavior, but it was not itself a rule of decision that bound the parties legally. In the third meaning, custom was the law that

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29 Bartolus, Commentarius ad Digestum vetus at Dig 1.3.32, § 6.
30 Id. (“First, therefore, I ask what custom is. And lest we should enter into ambiguity, let it be known that according to the doctors custom is understood to have three meanings. The first is something done from the habits of men … which [sort of] custom also occurs in animals …, and we are not speaking of it here. Second, custom is derived from the acts of many people, and this is called a usage or mores. … Third, custom is derived from the law that results from the usage or mores of many people, and this is what we are talking about here.”) (citations omitted).
resulted from a usage followed by the majority of the people in the community once they had tacitly consented to be bound to perform that usage. In the view of the jurists, only this final category was the province of legal discussion, and only it created a legally-obligatory rule of behavior. Thus, the distinction between usage and custom was that between what people may do and what they must do.

The question of how a non-binding usage was found to be and articulated as a binding custom vexed the medieval jurists, as it does modern scholars. Arguably, the difficulty of determining where usage ends and custom begins is not a problem to be solved but rather a characteristic inherent and unavoidable in the process of bottom-up rulemaking. Although a "usage of something is required for the introduction of a custom," said the jurists, mere repeated acts, even if performed by the entire community, did not suffice to show that a usage was binding. The thirteenth-century French law professor, Jacques de Révigny, used the examples of a mill at which the whole city milled its grain or of the habit of all the men of a city to go on pilgrimage to St. Jacques of Compostela in Spain:

> [I]f they go [on pilgrimage] over the course of ten or twenty years, you must conclude that they therefore may go. I say the same concerning the mill. Everyone has gone to your mill for ten or twenty years. You can conclude that there is therefore a practice that they may go, [but] not that they can be compelled [to go].

In other words, for a usage to become a custom, it must switch from being permissive to being mandatory.

For the jurists, the factor distinguishing usage from custom was the existence in the latter of the tacit consent of the majority of the community. But tacit consent was, by its nature, difficult to prove, and this is where the jurists' theory began to run into significant problems. Many jurists contended that the demonstration of tacit consent required someone to behave contrary

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31 See The Coutumes de Beauvaisis of Philippe de Beaumanoir ¶ 684 (F.R.P. Akehurst trans., 1992) ("the difference which exists between custom and usage is that all custom should be observed, but there are certain usages which would be of no value if someone wished to plead against them and bring the matter to judgment").


33 Jacques de Révigny, Repetitio on Dig 1.3.32, § 4.

34 Id. (citations omitted).

35 Id. at § 2 ("because [something] becomes a statute by the condition of express negotiation among the community about what will be law in the future. But if the people, or the greater part of them, one day tacitly adopt something, it is not a statute, nor is it customary law, unless what is demanded by the introduction of the custom is followed over time. Therefore, I say that "express" or "tacit" is the difference by which a statutes and customs are differentiated.").
to the usage and incur the objection of others.\textsuperscript{36} From that point, assuming that the objection successfully established the binding nature of the custom, the community knew itself to be bound.

This raises a neat issue of temporality in the usage-custom time frame. Custom, as a backward-looking form of law, is only known to exist once the tacit consent is proven, but the tacit consent could have been in place well before it had reason to be demonstrated in response to a contrary act. Thus the moment when a custom is shown to exist is evidence of something that might already have existed for years. The only difference now is that the community knows it must henceforth follow the custom, whereas before, when the practice was, technically, only a usage, they followed it because they felt they may do so. Of course, as long as no one does an act contrary to the practice, it is not necessary to determine whether the behavior is a usage or a custom, because the community is acting unanimously regardless of the actual legal status of the practice.

This definition of custom, though it may be criticized as too limiting and though it certainly (as the jurists realized) has its problems, has two advantages here. First, the jurists’ definition was widely accepted during the Middle Ages as explaining how customs functioned as law. As the learned definition found its way into vernacular discussions of customary law it may even have been familiar to the merchants and to judges in merchant courts.\textsuperscript{37} Second, the definition allows us to separate the merely habitual act, such as using a common form contract, from behavior that the community agrees is binding, such as a legal rule that a thief in the chain of title does not vitiates a good faith purchase for value.\textsuperscript{38}

In other words, just because merchants all opted to use a particular form contract, or just because they all used the same wording in a bill of exchange did not make that form or that wording a custom, in the narrow sense of a legally binding rule. The form and the bill were nothing but business techniques. Just as with modern financial and commercial mechanisms such

\textsuperscript{36} Id. See also BARTOLUS, supra note 29, at Dig 1.3.32, § 6 (“Custom is a certain law instituted by usage, which is recognized as law. This is a good definition, in which by the words, “certain law” is established the difference from that [definition] of custom which is “of fact,” as I have said. By “instituted by usage” is established the difference from the other kinds of law which come from the expression of consent.”) (citations omitted).

\textsuperscript{37} See, e.g., FILIPS WIELANT, PRACTIJE CIVILE, Inleiding, cap. 29, 41 (Van Tsestigh, Antwerp 1573) (“an unwritten law, introduced by usages and acts continually repeated by people or by practitioners, which are publicly followed, without the opposition of the majority of the people, for long enough time to prescribe a custom.”); JEAN BOUTILLIER, SOMME RURALE 3 (Charonas le Caron ed., Paris 1603) (custom is “unwritten law held and kept up in common knowledge [notoriously] that is made equivalent to law by the approbation of the old people of the land, such that no one is seen to do the opposite.”).

\textsuperscript{38} This rule is commonly claimed to have been a creation of the law merchant. LEVIN GOLDSCHMIDT; HANDBUCH DES HANDELSRECHT __ (1891); Berman, supra note 1, at 349. But see Sachs, supra note 9, at 778 (demonstrating that it was not a universally-followed custom).
as derivatives or stock certificates, the forms did not become law unless, for instance, a court or legislator adopted some or all of their constituent parts and made them so.\textsuperscript{39} If a court found that a bill of exchange was invalid because it was missing certain words or that a term should be implied in a contract that lacked it because all contracts of that sort must be assumed to have that provision, then the court was retrospectively finding (or creating) a custom and thus turned the specific contractual language into law. Short of that, the contract language remained a usage that bound no one but the parties no matter how common the particular form had become.\textsuperscript{40}

Custom on the surface looks very similar to implied contract, but the two are distinguishable. Custom and implied contract both depend upon tacit consent, but they differ in the quality and timing of that consent.\textsuperscript{41} In contract, opposing or complementary parties, e.g. buyer and seller, voluntarily agree to be bound to the terms at the moment they make the contract. With a custom, the community has over time tacitly consented to a certain law whether or not they would specifically want that law to apply to their contract. Implied contract assumes the agreement of the parties at a moment of private lawmakers. Custom assumes the agreement of the community established over a period of time.

We can also look at the distinction between custom and contract in a different way. Imagining the first appearance of a behavior, one could ask whether the non-performer could be sued. If the parties had agreed to perform the act in question, then the non-performer might be liable for breach of contract. If the parties were part of a community that had once performed an act in a certain way without specific agreement to do so, then no one would have grounds to sue a non-performer who failed to behave in a way that was only just coming to be introduced. No custom would yet exist to bind the person.

If we take Bartolus’s definition of custom as repeat behavior to which the community has tacitly consented to be bound and apply it to the constituent elements of commercial law, we will see that most of the things that advocates of the law merchant have described as custom are in fact something other

\textsuperscript{39} In principle, a custom community could also make a practice binding by insisting on it and penalizing defectors. One might, for example, imagine a situation in which a contracting party refuses to accept a contract that lacks a certain standard term.

\textsuperscript{40} See Cordes, \textit{supra} note 9, at 62-63 (“As early as the tenth and eleventh centuries, notaries in Genoa and Pisa drew up certain contracts in company law, namely the commenda contracts, in a fully standardized form. Those formulas had most likely proved their practical merit; at the same time all participants must have become acquainted with them and have learned to conduct business using these standardized contract. It is crucial in this context, though, that there is not the slightest hint that a privilege \textit{had} to be granted in a certain way or that a contract \textit{had} to be drafted with those standard formulas. This would have been a precondition for a fixed body of law.”).

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than custom. The next section develops this argument in exploring the origins of several major commercial practices.

II. The origins of commercial law

The use of the term law merchant to refer to a uniform and universal merchant-created customary body of law is an invention of the nineteenth and twentieth centuries. It appears in the famous history of commercial law by the Volksgeist-influenced scholar, Levin Goldschmidt, in nineteenth-century Germany, in the brief, accessible book on the law merchant by William Mitchell in 1904, in the writings about modern transnational law of Berhold Goldman in the 1960s, in the popular survey history of Western law by Harold Berman in 1983, and in the books and articles by the libertarian legal and economic theorists Leon Trakman and Bruce Benson in the 1980s and 1990s. However, these oft-cited works, each relying on the unproven and undocumented assertions made by its forerunners, have not managed to put forth unchallengeable evidence to support their authors’ vision of the law merchant.

Unquestionably, the phrase lex mercatoria and others like it, such as ius mercatorum (“right of merchants”) and usus mercatorum (“practice of merchants”), have existed since the Middle Ages. But no one has demonstrated a pre-modern belief that such terms referred to a transnational substantive customary law. Quite the contrary, references to the law, right, or custom of merchants made between approximately the eleventh and sixteenth centuries signified most commonly special rules of procedures or proof, and less often fair court jurisdiction, location-specific market privileges granted to merchants by lords, or location- or trade-specific ways of doing business that may or may not have risen to the level of binding customary rules. At least one scholar has argued persuasively that

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42 See Hatzimihail, supra note 11, at 178 (“[t]he key legal concept in Schmitthoff’s story of medieval lex mercatoria is custom”).
43 See notes 1, 3, 5 supra.
44 See, e.g., Donahue, Medieval and Early Modern, supra note 9, at 27; Cordes, supra note 9, at 57-58, 62.
45 Basile, supra note 9, at 128; Sachs, supra note 9, at 788.
46 Cordes, supra note 9, at 57-58; Baker, supra note 9, at 300.
47 Basile, supra note 9, at 52-53 (quoting manuscript Common Pleas opinion from 1296 speaking of the jurisdiction of law merchant at fair courts).
48 Cordes, supra note 9, at 62.
49 A 1278 case from Southampton provides an apt illustration of the early uses of the phrase lex mercatoria. The buyer claimed that the seller had falsely sold him wool of substandard quality. The record mentioned the law merchant in three senses. First, the king ordered two judges to inquire into the matter so that “swift and competent amends thereof [may] be made according to the law merchant.” Second, the plaintiff, making his complaint, explains that although he had “in good faith and according to the custom [of merchants] handed them to [the
references to the law merchant may have been no more than a tropic expression of the vague perception that those people involved in long-distance trade—merchants\textsuperscript{51}—had procedural or evidentiary requirements and business practices that differed from those of local tradesmen and retailers.\textsuperscript{52}

Unfortunately for the mercatorists’ story, during the medieval heyday of private compilations of local and regional custom, not a single one of the many literate and civically involved merchants of Europe appears to have attempted to write down a list or explanation of merchant customs.\textsuperscript{53} And merchants did write. In the fourteenth century the Florentine merchant Francesco Balducci Pegolotti wrote a lengthy merchant manual.\textsuperscript{54} He spent pages discussing such practical matters as weights and measures, currency exchange, and bills of exchange, but nowhere does he mention a single custom about the sale of goods. When John Browne, of Bristol, wrote a small handbook of instruction for his son in the late sixteenth century, he gave guidance on the measure of cloth, the value of money, the making of bills of lading, insurance, letters of obligation and other documents. But as for advice about buying and selling, he wrote only that his son should ask around to find out how things are done locally and to follow the local laws and customs.\textsuperscript{55} Around 1643, the Antwerp company Van Colen-de Groote produced an internal handbook for its

\textsuperscript{51} Until about the sixteenth century and continuing in some places until the eighteenth, the word merchant referred to long-distance traders and not to local retailers. It is also in this sense that the modern advocates of the lex mercatoria seem to use the term.

\textsuperscript{52} Sachs, supra note 8, at 694, 780, 788 (“Within [the fair court records of] St. Ives, the use of the phrase ‘secundum legem mercatoriam’ did not invoke a specific body of substantive principles . . . but rather referred indefinitely to whatever principles might be appropriate in the case, according to a mixture of local custom and contemporary notions of fair dealing”); Baker, supra note 9, at 316.

\textsuperscript{53} Donahue, Medieval and Early Modern, supra note 9, at 28.

\textsuperscript{54} Francesco Balducci Pegolotti, La Pratica della Mercatura (Allan Evans ed., Medieval Academy 1936).

\textsuperscript{55} [John B]rowne, The Marchants Avizo 2, 4 (London, Richard Field 1589) (“before you enterprise any thing, doe you after courteous and gentle manner aske counsel, either of some Marchant in the Ship, or your Hoste, or of some English man: how you are to deale about your wares, both touching the landing it, the customing it, the selling it, the receaving of your moneyes, the buying of any wares againe . . . [W]hen you be in the country of Spaine or else where . . . leame what be their civill laws and customes, and be carefull to keepe them”).
merchants. Once again, the manual spent pages on merchandise quality, weights and measures, and exchange but included not a word about sales customs.

The seventeenth-century English merchant author, Gerard Malynes, was among the first to use the term law merchant (lex mercatoria in Latin) to denote the substantive rules governing long-distance commerce. Based on the content of his book, Consuetudo vel lex mercatoria, by law merchant Malynes meant rules concerning weights and measures and the exchange of money, monetary instruments (particularly letters of credit and bills of exchange), suretyship and agency, maritime commercial law, banking and usury, bankruptcy, and arbitration and merchant courts. While Malynes had an evident interest in sales, which he called one of the “three Essentiaall Parts of Traffickes,” he barely touched upon it in his treatise. The closest he came with regard to the law of sales to the sort of extensive cataloguing of concrete rules that he provided for monetary instruments, maritime law, agency, and the rest was a page-long description of a sample contract for the sale of cloth between an English and a Dutch merchant, a sentence about the warranty of merchantability, a few sentences about limitations on damages, two paragraphs of examples of payment terms in contracts concerning the West Indies trade, and a page-long description of how futures contracts worked. Notably, in referring to the law of merchant contracts he repeatedly cited not custom but the civilian—that is, medieval and early modern Roman law—jurists.

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56 Jean Denieué, Koopmansleerboeken van de 16e en 17e eeuwen in handschrift (1941).
57 Gerard Malynes, Consuetudo vel lex mercatoria, or The Ancient Law-Merchant (London, Adam Islip 1622); Basile, supra note 9, at (asserting that Malynes was among the first to use “lex mercatoria” to denote substantive merchant law).
58 Malynes, supra note 57, page 3 of the unpaginated dedicatory epistle “To the Courteous Reader” (italics omitted).
59 Id. at 378-424.
60 E.g., Id. at 121-22 (procedure in maritime suits); 134-41 (charter-parties and freigthing rules); 146-56, 159-66, 197-99 (maritime insurance rules), 175-82 (abridged version of the 1614 Hanseatic sea laws), etc.
61 Id. at 111-19 (detailed rules about factors and agents).
62 Id. at 124.
63 Id. at 125.
64 Id. at 127.
65 Id. at 129-30.
66 Id. at 203-04.
67 See, e.g., Id. at 92 (“The Civilians . . . do admit that a man may sell deerer unto an expert man, than unto a simple man”); 127 (“it will not be impertinent to note the observations and opinions of Civilians concerning Merchants Contracts, which they have distinguished to be Solemne, Publike or Private . . . to the end all controversies may bee avoided in the said Merchants Contracts. The Civilians writing, De Contractibus Mercatorum, or of Merchants Contracts make many distinctions . . .”); 128 (“The penalties or forefeitures upon any Contract . . . are consequently much approoved by all Civilians, and by their Law allowed.”); 128 (“To enter
This typology of merchant law as including the rules of the various subjects of commercial law except contracts of sale would remain consistent for centuries. The earliest national commercial code, the French code of 1673, included nothing on sales but a great deal on monetary instruments, bankruptcy, merchant court jurisdiction, and partnership. In 1718, Giles Jacob’s *Lex mercatoria, or the Merchant’s Companion* spent all of its three hundred pages on maritime commerce, factors, partnership, and international commercial treaties. The five hundred pages Wyndham Beawes devoted to law in his 1752 *Lex mercatoria reditiva* concerned, again, maritime commerce, insurance, arbitration, banking, bills and notes, brokers, and bankruptcy. He also added one and a half pages of basic contract law, which mentioned nothing specific to long-distance trade.

Yet what should be obvious upon reflection is that, while sales law may well have been created through custom, bills, bankruptcy, partnership, insurance and the other aspects of commercial law considered synonymous with the law merchant could not. Instead, they must have been the result of deliberate contracting or legislation—both of which required express consent given at a particular moment in time and intended to have prospective force.

Consider, for instance, the quintessential category of the law merchant: bills of exchange. No other aspect of the historical commercial law seems to fit better the mythical law merchant image of universal, merchant-created rules. Bills of exchange grew out of commercial practice and eventually came to be employed (more or less) uniformly all across Europe. Neither the Roman law nor the existing customary law had anything similar. In addition,
bills of exchange fulfilled the criteria commonly associated with custom. The transactors interacted repeatedly and in the same fashion over a long period of time; the transactions were reciprocal because merchants would at different times have been debtors and creditors; the transactors were for quite a long time basically of a homogeneous social status; and they faced strong social sanctions against default given the importance of good faith and reputation for determining creditworthiness in this society.71

According to the definition of custom offered above, merchants would have established their customs through repeated action to which nearly everyone involved tacitly consented to be bound. The key is tacit consent. While no evidence exists of the precise invention of bills of exchange, and while we know that it evolved from similar types of contracts, we can imagine the moment of invention as some merchants complained to each other about the danger and difficulty of moving their money (all in silver or gold coins) from one place to another. When Tomaso in Genoa mentioned to Giuseppe that he needed to send money to Jacques in Marseille to pay for some silk, Giuseppe had an idea. "Listen," he said, "Carlo in Marseille owes me about that much money. If you give me the money you want to send to Jacques, I will give you a letter to send to Jacques telling him to go to Carlo and have him pay the money he owes me to Jacques instead. That way, both the debts are paid." How could such a transaction have arisen without the transactors explicitly laying out the rules of their deal? They could not have achieved their end through repeat behavior to which they tacitly consented. In other words, the bill of exchange transaction grew out of contract, not custom.

The same is true for many areas of commercial law. Marine insurance, for instance, would have originated when parties expressly decided to transfer the risk of a sea voyage through insurance, and the various forms of partnership and proto-corporations invented in the pre-modern era would have originated when parties agreed to divide up labor and capital in different ways. Such transactions required non-simultaneous cooperative behavior in which the transactors would want to know in advance the terms to which they had agreed. Such cooperation would be extremely difficult to achieve without ex ante express consent. Thus, where cooperation is necessary, contract (or legislation) is the more likely source of the rule.

Sometimes contract could not solve problems any better than custom could, and in such cases, merchants encouraged local governments to pass statutes. The prime example is the bankruptcy statutes that appeared in the

northern Italian towns in the Middle Ages. Debt collection mechanisms did not have to be legislated. In medieval northern Europe, the practice developed that creditors of an insolvent debtor had the right to swoop in and take possession of as much of the debtor’s property as they could lay their hands on, up to the amount of their debt, first-come, first-served regardless of any priorities. This had obvious disadvantages, as the best connected, most powerful, and most informed creditors could seize all of the debtor’s estate and leave nothing left for the bulk of the creditors.

Consequently, all across Europe between the thirteenth and sixteenth centuries, as commerce became more sophisticated and the use of credit spread, governments instituted recognizably modern bankruptcy systems that enforced creditor collective action. Tacit consent was not going to solve the problem, because the creditors could be anywhere and would not necessarily be repeat players or even be able to identify each other, and because they were unlikely to acquiesce silently to giving up their right to grab what might be significant assets. Contract would not work either because early modern bankruptcy was involuntary. The creditors put the debtor into bankruptcy, so the debtor would have no ability to contract ex ante for pro-rata distribution in the event of insolvency.

It could be objected that this distinction between contract and custom and even between local statute and custom is a mere semantic quibble. Does the category of origination make any difference when the impetus for the rule came from the merchants rather than the state? It did not in the Middle Ages. Even where, strictly speaking, the practice originated in contract or statute, the medieval perception of custom was such a powerful regulator of behavior that the belief that “we must do it this way because we have always done it this way” could obscure the past existence of a single, law-creative moment and create the assumption of a custom in existence from “time immemorial.” For example, in his thirteenth-century collection of the customary law of the Beauvaisis in France, the county’s bailli, or administrator and chief judge, Philippe de Beaumanoir, describes the “custom” that a “wife takes in dower half of all the inherited real property legally possessed by her husband on the day of the marriage.” Only later does he mention that this custom was not a custom at all, but rather “began in a law of good king Philip [Augustus], king of France. . . . And he ordered this law to be observed in the whole kingdom of France. And before this law of King Philip, no woman had anything in dower except what had been agreed on at the marriage.” In the intervening sixty or

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73 Johnson bankruptcy
74 1 Tito Masi, Del fallimento e della bancarotta 13-14 (Bologna, Monti 1883); 1 Agostino Ramella, Trattato del fallimento 25 (1903).
75 Id. at 26-27; Hilaire, supra note 72, at 308-09.
76 Beaumanoir, supra note 31, at ¶ 430.
77 Id. at ¶ 445.
so years between the promulgation of the statute and Beaumanoir’s collection, the populace had forgotten about the origin of the rule in statute and had come to take possession of it as their age-old custom. But the modern law merchant story is not being told in a world in which longstanding tradition substitutes for enacted law. The mercatorists’ purpose in raising the example is to prove that groups can regulate themselves through custom without the interference of the state in order to have support for their policy prescriptions that 1) private ordering is better than state ordering and 2) state ordering crowds out the space for private ordering. But the trade of the Middle Ages does not make this point. Medieval merchants developed commercial techniques—which are not themselves law—through contract notwithstanding the plethora of laws and regulations that hemmed them in on every side. These were not customs created to fill in a vacuum left by the absence of state law. These were common contracts created to fill a business need, such as moving money, establishing partnerships, or insuring ships. Such contracts, and the environment in which they were made, are no different in kind from the contracts and business and financial techniques created today in the shadow of state law. Medieval traders did not require a transnational customary law merchant to do their business.

Furthermore, to the extent that some aspects of what writers in early modern England called the law merchant did become uniform and universal across Europe, we need to distinguish which aspects of commerce those were and why those, and not others, could spread. For this purpose the distinction between contract, statute, and custom is vital. Contract terms were simple to borrow. Merchant A learned about an innovative way of transferring funds or establishing an agency relationship created by Merchant B, and he duplicated the terms. Perhaps he even used the same notary who drew up the first document. Contract form books existed in the Middle Ages just as they do now. New terms that came to be added to the contract by innovative parties could similarly spread through imitation.

The contract of marine insurance offers an apt example. Italian merchants evolved insurance contracts from earlier forms of risk-shifting contracts during the fourteenth century.\(^78\) They then carried that contract with them to other parts of Europe so that by the mid-fifteenth century the technique had become widely known.\(^79\) At first, the Italians retained control over the insurance industry, even in foreign cities. Until the 1540s, for instance, Italians wrote all insurance policies issued in London, and they drafted the contracts in Italian. By the late 1540s, the English began to underwrite policies themselves, first using the old Italian contracts and then,

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\(^{78}\) J. P. Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, 5-7 (1998).

\(^{79}\) Id. at 7.
in the following decade, translating them into English.\textsuperscript{80} At first, the English policies repeated their Italian predecessors, but the English observed the innovations introduced in the Antwerp insurance market, and by the 1570s English policies had adopted Antwerp rules by taking over the different clauses from Antwerp-issued policies.\textsuperscript{81}

Similarly, every bankruptcy law established in northern Europe during the sixteenth century relied on the statutory systems created in the late medieval northern Italian towns, and those towns adapted the law created during the Roman Empire.\textsuperscript{82} Each urban or national statute altered the rules somewhat to reflect local preferences or perhaps attempts to improve upon what went before. Nonetheless, once again the pattern of borrowing is clear. The Italian laws were written.\textsuperscript{83} The organization of the bankruptcy process could be observed by foreign merchants and explained by those involved in it, and that information could be carried to other parts of Europe.\textsuperscript{84} This sort of legal borrowing has happened repeatedly throughout Western history.

True custom functioned differently. It arose organically and existed for a period of time. It became tradition. Everyone knew, or thought they knew, what behavior it mandated. But, as the next section will discuss, such supposed knowledge did not mean that the customs were easily portable. One important medieval example of the complexity inherent in transplanting custom was the exporting of town laws from a mother town to daughter towns in Germany and eastern Europe. The daughter towns might have been settled by emigrants from the mother town, or the daughter might simply have elected to borrow the mother’s law. The mother law was customary and often unwritten. When the daughter town had a legal problem it could not solve, it sent the question to the lay judges of the mother for a ruling.\textsuperscript{85} This created a difficult situation for the daughter, which in theory could not know its law until a dispute arose. The fact that when the mother towns wrote down their law the motivation was often the adoption of its laws by a daughter demonstrates an understanding of the problem of delimiting the

\begin{itemize}
\item \textsuperscript{82} Dave De ruysscher, \textit{Designing the Limits of Creditworthiness: Insolvency in Antwerp Bankruptcy Legislation and Practice (16th-17th Centuries)}, 76 Tijdschrift voor Rechts geschiedenis 307, 308, 311 (2008).
\item \textsuperscript{83} See, e.g., Strangers and the bankruptcy laws (ca. 1580) (National Archives, SP 12/146 f. 232) (English merchants comparing English bankruptcy law to Dutch and Flemish bankruptcy law).
\item \textsuperscript{84} \textit{John Dawson}, \textit{Oracles of the Law} 163-64 (1968).
\end{itemize}
boundaries of oral custom and thus of keeping it uniform from place to place.\textsuperscript{86}

\textbf{IV. The disunity of custom}

Merchants established customs and usages in the Middle Ages, and on occasion litigants pleaded specific, substantive customs in court as a rule of decision. But when pleading, disputants alleged the custom of a particular place or trade rather than a universal custom of merchants.\textsuperscript{87} This could represent the medieval perception that custom belonged to the community that created it.\textsuperscript{88} And this perception could reflect a reality that customs that arose locally or within a network of repeat players could not spread and remain uniform. To make this argument, this section offers a simple typology of custom ranging from those that are most rule-like through those that are under-articulated to “imaginary” customs that are created only at the moment of dispute resolution. The aim is to demonstrate that binding rules made from behavior are often unstable until they take on the characteristics of enacted law,\textsuperscript{89} in particular being put into writing and declared by a competent authority to be the law.\textsuperscript{90}

Some customs, albeit probably a limited subset, may have had such clearly defined limits that a single formula could express the totality of the rule. An example might be the baker’s dozen. It stands for the custom that in the sale of rolls, twelve means thirteen. This custom would be easy to define and easy to police, and as such could not only have great stability and staying power but also great portability. It could, in other words, theoretically become uniform and universal.

But note two caveats. First, the formulation of the custom as a general rule could mask variations at a deeper level. For example, in some towns a

\textsuperscript{86} Alan Watson, Sources of Law, Legal Change, and Ambiguity 33-36 (1984)

\textsuperscript{87} Wijffels, supra note 9, at 255-57, 265; Baker, supra note 9, at 319.

\textsuperscript{88} Donald R. Kelley, "Second Nature": The Idea of Custom in European Law, Society, and Culture, in The Transmission of Culture in Early Modern Europe 131, 137 (Anthony Grafton & Ann Blair, eds. 1990). In Belgium, for instance, in the sixteenth century, the Emperor ordered the customs to be consolidated, written, and promulgated. Six hundred local customs were abrogated in favor of consolidated regional customs, leaving 96 to be fully homologated, while another 832 were merely reduced to writing. This should remind us that custom was a form of law that only worked in communities of limited size.

\textsuperscript{89} See 2 Johannes Phoensen, De Wissel-Style tot Amsterdam 121 (Amsterdam, Andries van Damme and Joannes Ratelband 1711) (Frankfurt exchange ordinance of 1667 complaining of instability of existing customs).

\textsuperscript{90} This is not to accept the Austrian view that custom only becomes law once it is declared by a court. While it is clear that custom had a close relationship with adjudication in the pre-modern period, the process of making law in the Middle Ages in particular is too complex and subtle to fit into neat positivist categories. Trying to explain how custom functioned as law is a matter that requires further research. One thoughtful essay is Lloyd Benfield, The Nature of Customary Law in the Manor Courts of Medieval England, 31 Comp. Stud. Soc. & Hist. 514 (1989).
baker’s dozen might be thirteen no matter what, while in others the custom might evolve that a baker’s dozen is thirteen unless the rolls are particularly large, then it is twelve. This type of superficial similarity hiding subsurface differences has been found in the supposedly universal maritime law of medieval Europe.91

The second caveat is that, despite the fact that it might be a simple matter for a community of bakers to establish such an unambiguous custom, some evidence suggests that it was difficult to make even well-defined customs universal. One telling case arose in Paris in 1628. A bill of exchange would specify that it was payable on a certain number of days after presentation, or it would say that it was to be paid on sight.92 However, “on sight” came routinely to mean payable only after a prescribed grace period of several days. A dispute concerning the number of days of grace on a sight bill came before the royal court of the Châtelet of Paris. One party claimed that these so-called “days of grace” lasted ten days and the other that they lasted eight.

To resolve the dispute, the court first:

heard out several notable burghers and bankers, together with the masters and officers of the six guilds of merchants93 of the town of Paris about the form and usage that they were accustomed to follow in the protest of letters of exchange and the time in which the protest must be made. These were all unanimous that until then the usage had been that the letters of exchange were protested in eight or ten days after their maturity, but that the said time had not yet been limited by any ordinance, and all the said burghers, bankers, and officers of the six guilds requested the court, in judging the suit, to regulate and prescribe the time within which the protest of letters of exchange must be made for the good and utility of commerce.94

91 Cordes, supra note 9, at 66-67.

92 Bills could also be paid at a certain usance—the customary time it took to travel from the place the bill was drawn to the place it was to be paid.

93 A perhaps imperfect translation of the “Gardes de six Corps des Marchands.” See 2 JACQUES SAVARY DES BRUSONS, Dictionnaire universel de commerce 211 (1723) s.v. Garde.


la Cour après avoir entendu plusieurs notables Bourgeois & Banquiers, ensemble les Maîtres, & Gardes des six Corps des Marchands de la Ville de Paris . . . sur la forme & l’usage qu’ils avoient accoutumé de garder aux protests des lettres de change, et le temps dans lequel le protest se devoit faire . . . lequels auroient tous unanimité dit que juisques alors l’usage avoit été, que les lettres de change avoient été protestées dans les huit ou dix jours après l’échéance d’icelles, quoique ledit temps n’eût encore été limité par aucune Ordonnance, & tous lesdits Bourgeois, Banquiers, & Gardes des six Corps, auroient requis la Cour en jugant le Procès vouloir régler & prescrire le temps dans lequel les protests des letters de change se devroient faire pour le bien & utilité du Commerce. La Cour, dis-je, auroit ordonné par cette Arrêt, que tous porteurs de letters de change en cette Ville de Paris, seroient tenus de faire le protest d’icelles dans les dix jours d’échéance de lettres de change . . .
The court picked ten days and ruled accordingly.95

If the custom of having days of grace was efficient (as the mercatorists would argue, since merchants created it),96 and if it was easy to articulate and therefore to borrow, then why did the custom not become unified, even within the same city? The answer may be that the customs evolved in independent trading networks. The members of each network were unaware that other networks had different rules. Disputes surfaced as trade opened up and members began trading across networks. As no one knew of the other groups’ rules, they had no reason to think to resolve the difference in advance.97

The situation becomes far more complicated in customs that lack well-defined boundaries. The hypothetical example here is the custom that seller delivers. Assume that a dispute arose between Buyer and Seller about whether the town had a custom that Seller would deliver. For the purposes of this hypothetical, we must understand that the parties had no oral or written contractual term about delivery and that the question of a delivery custom had never explicitly arisen before in this community. Consequently, the only evidence that a custom that seller delivers existed was repeated behavior (delivery) by many of the sellers in the community.

Given the jurists’ distinction between usages that one may do and customs that one must do, the parties to this dispute could not know ex ante whether the norm “seller delivers” was binding. Any resolution of that question would have to await a dispute when a seller refused to deliver and

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95 A later case came before the Parlement of Paris in 1642 concerning when to begin counting the days of grace. The court took advice from merchants and decided that the days of grace began the day after the bill was presented for payment. 1 SAVARY, supra note 94, at 166. Counting disputes seem to have arisen often. In seventeenth-century France, disputes arose over the length of the customary “usance” period—the number of days before payment of a bill of exchange payable “at usance” was due—the question at issue was whether the month-long usance lasted twenty-eight days or depended upon the length of the specific month when the bill was drawn. SAVARY, supra note 94, at 150; BORNIER, supra note 94, at 248. The same question arose in England, see Baker, supra note 9, at 312 (in a case from 1542, the jury “found a special verdict setting out two immemorial customs of merchants: first, that ‘usance’ means at the end of one month after the making of the bill”). In a sixteenth-century English insurance dispute, the dispute concerned how to count a month for the purpose of a twelve-month-long insurance policy. According to the common law, a month lasted 28 days, and some insurers followed that rule. But others claimed that according to merchant custom, a year-long policy should last a calendar year. Ibbetson, supra note 80, at 302.

96 Lisa Bernstein found the same phenomenon in her study of the writing of industry regulations in the late nineteenth and early twentieth centuries. Disputes proliferated as trade became more national, and when the industry members sat down to draft national rules, they discovered that each region had different practices. Bernstein, supra note 71, at 719, 721, 724, 725-26, 727.
the community objected, perhaps in the form of non-legal sanctions, perhaps in the form of a lawsuit.

If Buyer brought suit, medieval courts had well-established rules about the proof of custom. This usually involved polling representatives of the community, either through the interrogation of expert witnesses or through the use of a jury-like mechanism called a *turba*. In the *enquête par turbe*, or investigation by jury, a group, traditionally composed of ten leading men, was told the custom claimed and called upon to “report faithfully what they know and believe and see to be the use concerning that custom.”

Even if every expert witness consulted in the case at hand believed that a norm existed that seller delivers, their articulation of the precise contours of that rules would depend both upon the framing of the question and their own experience of the behavior. Assume that the question of first impression before the court is whether a Seller, who manufacturers leather goods, must deliver to a Buyer who lives just outside the town. Ten merchants were consulted on the question. Merchant A might believe that all sellers in the town had to deliver but only within ten blocks of seller’s shop, because that was as far as A had ever delivered. Merchant B might believe that the seller had to deliver if the goods cost above a certain amount, because that reflected his experience. Merchant C might believe that sellers delivered if convenient, because that is what he assumed sellers did. Merchant D might believe that sellers had to deliver within the town walls only, because he had never heard of anyone being asked to do otherwise. Merchant E might believe that shoemakers, like him, had to deliver but other sorts of leatherworkers did not. And so on down the line.

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99 See gloss at Dig. 47.10.7.5 (gloss reading: “A turbe is made up of ten men”). A *turbe* could be composed of laypeople, merchants, or even lawyers, depending upon the situation. E.g., 1 Phoensen, *supra* note 89, at 7-9 (second part, numbering restarted) (turbe from 1663 composed of ten lawyers practicing before the city court concerning protesting of bills).

100 Ch.-V. Langlois, *Textes relatifs à l'histoire du Parlement depuis les origines jusqu’en 1311*, 79 # 58 (Picard 1888) (ordinance of the King of France from 1270 establishing the procedure of a *turba*).

A custom is investigated in this manner. Many wise men, above suspicion, shall be called together. After they have been assembled, the custom will be put before them by the mouth of one among them, and it will be given to them in writing. After it has been proposed, they will swear that they will speak and report faithfully what they know and believe and see to be the use concerning that custom. After the oath has been sworn, they will take themselves to the side, and they will deliberate, and they will report on their deliberation. And they will say among whom they saw that custom, and in which case, and at what place, and if it had been adjudicated, and under what circumstances. And they will set it all down in writing and hand it over to the court closed and sealed with the seals of the inquisitors. And they will explain the cause of their decision in the *turba*.
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The experts articulated the rule, if they considered a rule to exist, as they understood it from their own experience. Customs, by their nature, arise from repeating a common behavior. But how do the members of the community know whether the common behavior reflects the full limits of the custom? As Hayek explained,

[t]he process of a gradual articulation in words of what had long been an established practice must have been a slow and complex one. The first fumbling attempts to express in words what most obeyed in practice would usually not succeed in expressing only, or exhausting all of, what the individuals did in fact take into account in the determination of their actions. The unarticulated rules will therefore usually contain both more and less than what the verbal formula succeeds in expressing.101

In other words, if the experts polled were asked only whether a seller had to deliver to a buyer located within the city walls, does the custom “seller delivers” mean delivery exclusively in town, or delivery anywhere, or delivery anywhere close to town, etc.?102 In articulating their experience of the behavior and claiming that as a custom, the experts created a rule that may not previously have existed in precisely the articulated form.103

Because medieval custom was oral, realized through behavior, and reliant on memory, it tended to evolve as the decision-makers permitted their memories and judgment to be swayed by biases or equitable concerns. “That something was customary was a backward-looking reason for a forward-looking result. . . . [T]he aim in practically every result was to achieve consistency with the past at the same time as getting the result which was thought to be right.”104 Thus custom that was open-ended rather than rule-like could easily evolve over time as the community decided whether or not to impose sanctions based upon factors unrelated to an offender’s failure to perform the usage correctly. Jurors could “remember” the custom in different ways under the influence of the passage of time, self-serving ends, sympathy or antipathy for the parties in a case, or some sense of fairness, compassion, or righteous indignation.105

103 Hayek, supra note 101, at 78 (“The process of articulation will thus sometimes in effect, though not in intention, produce new rules.”)
104 David Ibbetson, Custom in Medieval Law, in THE NATURE OF CUSTOMARY LAW 174-75 (Amanda Perreau-Saussine & James Bernard Murphy, eds. 2007).
105 See J.A. Barnes, History in a Changing Society, 11 RHODES-LIVINGSTON J. 1, 5-6 (1951) (concerning adjudication in an African customary-law tribal court):

[Ngoni tribal] courts have continually to deal with new situations and to make decisions which are unprecedented. This is done under the guise of drawing attention to some good Ngoni custom which has been neglected. Thus for example a man came to court saying that he was always quarreling with his wife and that he wished to divorce
Medieval judges were apparently not unaware of custom’s malleability and the fallability of memory. At the conclusion of his huge thirteenth-century collection of the laws of the Beauvaisis, Philip de Beaumanoir wrote:

I have arrived at the end of what I undertook in my heart to do, that is to write a book on the customs of Beauvais. And since the truth is that customs come to an end because of young jurors who do not know the old customs, so that in the future the opposite of what we have put into this book will be observed to happen, we pray to all to excuse us, for when we wrote the book, we wrote as far as we could what was enforced or should have been done ordinarily in Beauvais; and the corruption of the time to come should not bring us into ill repute, or be blamed on our book.

Furthermore, as a form of law, custom had important limits. It could not, for instance, apply to the unusual situation, because that situation would occur too infrequently to form a custom. Furthermore, one could not solve the unusual situation by reasoning by analogy from an agreed customary behavior, for the custom required tacit consent and extending the custom by analogy would be, essentially, an act of lawmaking independent of the consent of the community.

Custom also permitted gaps to remain that became apparent only when a dispute arose or a community undertook to write its custom down. In


107 Beaumanoir, supra note 76 at ¶ 1982. See also, Ibbetson, supra note 80, at 305 (discussing custom concerning life insurance that changed in the twenty years after a compilation of insurance customs was written in London in the late sixteenth century).

108 Ibbetson, supra note 80, at 301; Kelley, supra note 88, at 141 (“As Eusèbe Laurière observed in the seventeenth century, only ‘where the crops are showing’ could customary law protect possession.”). But see 1 Simon Groenewegen van der Made, A Treatise on the Laws Abrogated and no Longer in Use in Holland and Neighboring Regions 10 (B. Beinart trans., 1974) (writing in 1649 that “a custom altering the Civil Law can be extended to analogous cases and to similar instances much more readily today than was formerly the case in the times of the Romans; because the Civil Law which was given over a thousand years ago, and furthermore to Romans, and which was only generally received by us, contains many particular rules which suited the Roman state more than they suit our state, and to which for that reason the direct simplicity of our mores is frequently averse; so that a statute or custom of today which deviates from the written (Roman) law is not on that account alone oppressive or odious, but often though contrary to the written law is nevertheless also founded on legal principle, and on that principle, according to the opinion of all the commentators, it is applied also to other similar cases.”).

1331, the jurors at an English manor court, being asked about which party had greater right to property according to the customs of the manor, responded that "they do not know, because this situation never occurred among them." The author of a seventeenth-century merchant manual provides another example of a gap in custom. The text described what appears to have been a famous dispute in 1673 over how long a bearer had to present a sight bill after it had been negotiated to him. A certain bearer took a bill to the payor, only to find that the payor, who had held the money for many months in anticipation of paying the bill, was now a prisoner of war and stripped of his possessions. The merchants consulted in the litigation could not agree on which side bore the risk in such situation. Some felt that the drawer was liable because the bill was payable on a certain number of days' sight, leaving the bearer the choice when to present it. Others believed that, given the fact that the payor had been ready to pay, the bearer delayed at his own risk. Apparently no custom existed to resolve the issue, though it is difficult to believe that it had never arisen before.

Faced with a gap in the custom, disputants, experts, and jurors could take one of two paths. They could admit that no custom existed, or they could create a custom. While courts or jurors might acknowledge that they are not following a recognized custom, they were not likely to admit to creating a new one, especially since they might have done so unwittingly. On the other hand, the parties claiming a custom where none existed could simply be seeking rents. A fascinating manuscript from the late sixteenth century illuminates how this might have worked.

The manuscript is anonymous. It is a polemic against the use of custom to interpret the standard form contracts used in the London insurance industry of the time. When a loss occurs, and the policyholder or the

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110 Select Cases in Manorial Courts, 1250-1550, 133 (Selden Society vol. 114, L.R. Poos & Lloyd Bonfield, eds. 1998).

111 This account comes from Jacques Depuis de la Serra's L'art des lettres de changes, reprinted in 1 Savary, supra note 94, after page 856, on the separately-paginated pages 20-21, chapter 6, numbers 5-14. Also mentioned by Anonymous in Vandenberghe, supra note 134, at 65-67, who says that the 1673 French commercial code should have included a rule dealing with this situation. See also 2 Poosen, supra note 89, at 141 (Danzig exchange ordinance of 1701 lamenting "the absences which are found in the laws and statutes which have been made on this subject [such gaps having] been used as a pretext or excuse for the irregular procedures that have arisen"). In a similar situation, writing about fifty years earlier, Gerard Malynes recounted a disagreement that arose at a fair in Germany over whether a by-stander could unwittingly become surety for a buyer. He explained that, "[t]he opinion of Merchants was demanded, wherein there was great diversity." This forced the court to turn to the civil law. 1 Gerard Malynes, Consuetudo, vel Lex Mercatoria: or, the Ancient Law-Merchant 69 (London, J. Redmayne, 3d ed. 1686).

112 Ibbetson, supra note 104, at 168-69 ("Behind the guise of their finding of the custom [the jury] would, perhaps unwittingly, have been creating it, in exactly the same way as a common law judge finding an applying a rule would be engaged in an incremental exercise of law creation."

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underwriters believe some ambiguity will arise about the obligation to pay, they each obtain what the author calls a “perrera.” A “parere” is a French bastardization of the Italian “mi pare,” (“it seems to me”), and it referred to advisory opinions given by leading merchants, commercial courts, and later commercial lawyers in business disputes. The manuscript author, however, uses the term differently. For him a perrera is a statement of a supposed custom. As he describes the process, each party, worried about litigation, would write up a statement of the custom he proposed, with a description of the facts of the case but altering the names to disguise the perrera’s origins. The perrera’s creator then gave the paper to a friend, the more respected the better, and the friend attested that he was of the opinion that the custom was as stated. The friend passed the paper on to another friend, who did the same thing, and so on. The perrera was then passed along to a broker, hopefully a foreigner because that obfuscated the trail better, and the broker would also attest to the custom and then “gettetl xl or lx hands or more thereunto, Englishmen and strangers.” If the perrera’s creator was lucky, some of the signatories would include his insurers, who signed against their interest.

“Now when the matter cometh to arbitrement both parties sheweth their perreras, the one being repugnant to the other, yet diverse assurers hands to both.” The arbitrators considered the signatures and selected the perrera signed by the merchants and brokers they respected more. They were also influenced by the wealth of the disputants. According to the manuscript author, they would favor the position of the underwriters, who were usually richer and who did business with them more often. As the author writes, the arbitrators went by the rule, “do for me and I will do for thee.”

To make matters worse, these claimed customs were not necessarily real. The perreras never explained or justified their assertions, and none of the people who signed the papers would “dare swear the same is true.” Yet the custom set out in the winning perrera “of force must be credited and also forthwith prescribed for an order or custom whereby men must be judged,” even though the custom was a fabrication “devised or drawn forth of uncertain heads whereof perchance the same was never or but a small time before recorded.” If the signatories were individually questioned about the supposed custom, “they will be found of diverse opinions according to the

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113 A Note Shewinge the Maner of a Devise Called a Perrera (undated) (British Library, Add. MS 48020, fol. 348r).
114 2 Savary, supra note 94, at second page of unpaginated preface to 1688 edition.
115 Note Shewinge the Maner of a Devise Called a Perrera, supra note 113, at fol. 348r.
116 Id. at 348r-v.
117 Id. at 348v. (spelling and punctuation adjusted).
118 Id. (spelling modernized).
119 Id. (spelling modernized).
120 Id. (spelling modernized).
discretion of the party.” Yet once the arbitrators or court have decided on
the perreras, the ruling established the existence of the custom.

This manuscript is clearly polemical, and courts could insist on the proof
of custom and even investigate into the existence of customs claimed by the
parties. But a custom, though asserted as firmly fixed by a litigant, could
still be controversial. For instance, in 1315 an English plaintiff claimed that
the law merchant concerning the distrain of a foreign merchant’s goods was
the same “in all and every fair throughout the whole realm.” The defendant
disagreed, and the court was forced to call an inquest of merchants from four
major towns across the country. Despite the plaintiff’s argument, a few
decades earlier, the renowned thirteenth-century treatise about the law
merchant that has so often been held up as proof of the existence of a
systematic lex mercatoria had admitted that attachment of merchants goods
was done “in such different ways in different parts [of the kingdom] that no
one at all was able to know or to learn the process of mercantile law in this
respect.”

Similarly, in a sixteenth century case, a seller proffered a turba of eleven
experts to prove that where a fraudulent buyer had transferred the goods to a
third party, “the ancient Antwerp custom, often confirmed by judicial
decisions, [held that] an unpaid seller could attach and reclaim the goods sold
whether in possession of the buyer or of a third party, when the former had
run away immediately or shortly after having obtained the transfer of the
goods.” The transferee, by contrast, produced six lawyers to attest that “in
the case of a fugitive buyer, the seller was to enjoy priority in being
reposessed only if the goods were found among the buyer’s merchandise, but
not if they had meanwhile been transferred with a title to a third party.” The
lawyer giving an advisory opinion on behalf of the defrauded seller
opined that the turba should be followed because it conformed with the
learned law.

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121 Id. (spelling modernized).
122 Id. (spelling modernized).
123 Wiffels, supra note 9, at 268, 274.
124 2 Select Cases Concerning the Law Merchant supra note 50, at 87.
125 Id. at 88.
126 Basile, supra note 9, at 9 (part two). Concerning the polemical use of the Lex mercatoria
treatise, see id. at 129 sqq. Stephen Sachs has similarly shown how many of the rules claimed
since the nineteenth century to evidence a uniform and universal law merchant varied from
place to place. Sachs, supra note 9, at 788.
127 Wiffels, supra note 9, at 270 (internal quotation marks removed).
128 Id. (internal quotation marks removed).
129 Id. Cf. Gilliots-van Severen, supra note 14, at 594 (Hansa merchants in Bruges can get
restitution of goods even if they were sold in open market); id. at _ (legislat ing rule for Bruges
that thief in the chain of title cannot pass title when goods sold on the open market).
This is the background against which must be understood the repeated injunction in merchant manuals and the writings of learned jurists that commercial courts should decide cases ex aequo et bono.\footnote{Traisman, supra note 3, at 12.} Judges and arbitrators might do equity not only when no rule of decision controlled but also when the parties asserted the existence of a custom. Even if the decision-maker considered itself bound by such assertion, it might in reality be creating law more often than merely finding it.

The result of the instability of custom is that merchants sometimes had good reason to want legislation. A statute could resolve the confusion that arose when the lack of a single superior solution allowed competing customs to come into being. The process of creating the legislation could fill in gaps and resolve longstanding uncertainties.\footnote{For example, in 1676, an Amsterdam merchant and highly respected and often-quoted expert on bills of exchange named Johannes Phoonen, listed ten unresolved issues in the law of bills as they related to bankruptcy and then commented:}

To prevent these and similar and hundreds of other questions, disputes, and inconveniences that arise in exchange that I could list and describe, it is only necessary to make a precise order and regulation based on which everyone could regulate and guide themselves, written with knowledge, ordained, and legislated. For it is astonishing and to be complained about that, in this city, which is assuredly the leading commercial and exchange locale in the whole world, no badly-needed ordinance, required and useful to prevent disputes, exists but only a few orders and regulations established from time to time.

The early modern regulation of bills of exchange provides evidence that in these sorts of situations merchants themselves would call for legislation. The preambles of numerous seventeenth-century statutes relate that the rules

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\textit{Draft: please do not quote}

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were made because “diverse merchants and businessmen of this town . . .
requested that we establish a positive ordinance concerning exchange in
the manner of many other places of commerce, for the advancement of commerce
and to prevent disorders, disputes, and suits, which arise too often.”133 Most
of the regulations concerned coordinating rules dealing primarily with the
acceptance and protest of bills. These included the question of how long a
payor had to pay on a bill after presentation and the length of time a payee
had to seek payment of a protested letter of exchange from the drawer and
from endorsers up the chain.

Of course, this legislation might merely reflect the law merchant story of
governments taking over commercial law. It might also be nothing more than
rentseeking or regulatory capture by the most powerful merchants. The
context of the statutes, however, suggests neither drove the merchants’ desire
to have their sovereign or courts legislate such rules. First, as merchants
acted variously as payors and payees, a rule that benefited debtors would
disadvantage those same people when they were creditors. Thus no single,
coherent group had a readily apparent interest in joining together to seek
rents and either try to get regulation or to influence the choice of the rule.

Second, the specific content of coordinating rules was meaningless to the
lawgiver. As long as a rule existed that kept commerce flowing and disputes
out of court, the government neither cared about, nor necessarily had the
power to insist on, the content of the rule.134 In addition, many of these
exchange statutes came from city governments, and in most major trading
towns the merchant class controlled, entirely or in part, the city council. For
instance, the government of Amsterdam, to name one of the most extreme
towns, was throughout the seventeenth century dominated by business

133 2 PHOENKEN, supra note 89, 219 (reprinting statute of Breslau of 1672); id. at 121
(Frankfurt exchange statute of 1667 explaining that, “both for ourselves and for the good of the
many good and honest merchants who have requested this of us, we have decided to
pronounce a stable regulation, on which everyone can base themselves in the future, on
the subject of letters of exchange drawn on this city, whether during the fairs or at other times”).

134 The simple fact that a law was on the books in this period did not mean that the
sovereign had the power to enforce it. For example, the 1673 French commercial code banned
compound interest, which French merchants commonly charged. 19 ISAMBERT, supra note 68, at
101 (title 6, art. 2). Lest this example be used to reinforce the claim that commercial laws were
ruinous to commercial practice, note the response of one early commentator to this provision:
“This article is entirely contrary to the usage of the exchange of Lyon, and when, in litigation,
one wished to allege the rule in this article, the court ignores it.” ANDRE VANDENBOSSCHE,
CONTRIBUTION À L’HISTOIRE DES SOURCES DU DROIT COMMERCIAL: UN COMMENTAIRE MANUSCRIT DE
L’ORDONNANCE DE MARS 1673, 10 (1976). This critical commentary comes from an anonymous
manuscript work (“Anonymous”) that its editor dates to 1678-1686. The identity of the author
of the Anonymous presents an interesting puzzle. He was, from all appearances, a Roman-law
trained lawyer with an extensive knowledge of commercial practice. Vandenbossche expresses
the belief that the author was a practicing attorney. Id. at 9.
interests. Such men had no reason to pass legislation antithetical either to their own businesses or to that of their social and commercial associates.

The instability of custom, and the difficulty of proving it, may also have been an important reason that courts of appeals throughout continental Europe, and even trial courts in the Italian cities, looked to Roman and canon law (\textit{ius commune}) rather than merchant custom in resolving commercial disputes. They did not do so simply from a prejudice against custom, for in certain other areas of law, such as real property and inheritance where customs were more stable and earlier put into writing, courts did apply the local law. But for mercantile cases, the judges often found it easier to turn to the sophisticated and usually adequate rules of the Roman law.

In sum, custom is a slippery concept on which to base behavior. Prior to a dispute, the distinction between custom and usage would be unclear, so merchants would not know whether their performance was merely cooperative or actually binding. Once they learned, through the resolution of a dispute, that they were bound, they still faced the reality that certain kinds of customs changed. Over time, the natural evolution of the community's behavior or court decisions introducing variations might alter the contours of the custom. Thus, even if a custom could be transplanted from one community to another and perhaps start out the same, the two versions did not necessarily remain identical. This argues against the existence during the Middle Ages of a \textit{lex mercatoria} composed of uniform and universal merchant customs.


\footnote{136 See, e.g., the comment made by François Hotman in the \textit{Antitribonian ou discours d'un grand et renomme iurisconsulte de nostre temps} 36-37 (1603):

\begin{quote}
Let us now pose the case that some good and excellent spirit in our France had been able by his great and continuous work to acquire a knowledge [of the Roman law] . . . , and that with this knowledge alone and without the knowledge of French practice, he presents himself in the palace or other court of this kingdom. What he sees there would be almost as new and strange as if he had arrived in the new world among the American savages. Because there he will only hear the jargon of cottagers and under-cottagers, the rights of feudal lords, of high and low justice, of \textit{retraits lignager} . . . or ground rents, of seisin and disseisin . . . of customary dowry, of community property, and other similar matters that will be new and strange to him, as if he had not spent a day of his life speaking of the law.
\end{quote}

\footnote{137 See, e.g., Wijffels, \textit{supra} note 9 (providing numerous examples of cases resolved on the learned laws). E.g., the decisions of the Genoese Rota, the premier merchant court in Europe, whose opinions were cited by other courts as authoritative, used Roman law. \textit{Marcus Antonius Bellonus, Decisiones Rotae Genoae de mercatur}a (3d. ed., Frankfurt, M. Lechlerum 1592).}

\footnote{138 A similar effect can be seen in the common law of the various states.}
V. The unnecessary law merchant

The law merchant story rests on the assumption that medieval merchants needed a body of transnational or anational law in order to permit cross-border trade, which would otherwise have been impossible. One scholar has gone so far as to claim that the law merchant was necessary because few conflicts of law rules existed prior to the emergence of modern nation-states in the seventeenth century.139 Without attempting to write a voluminous history of pre-modern commerce, this section points to four factors that demonstrate the falsity of these ahistorical presuppositions undergirding the law merchant myth. First, contracting was largely done face-to-face, meaning it was clear what law governed the contract. Second, towns had well-developed choice of law rules. Third, arbitrators were selected from the residences of the disputants and therefore could apply local customs as necessary. Fourth, merchants used brokers and other intermediaries who knew the laws of the town.

From the beginning of the so-called commercial revolution in the eleventh century through the early modern era, commerce was normally done face to face. During the high Middle Ages, merchants traveled to fairs, markets, and towns to meet with buyers, bringing their goods with them.140 Later, some merchants might be sedentary, but they hired a local agent or sent a factor out to live in foreign towns and act on their behalf.141 The merchants conducted their trade in well-defined commercial spaces: the cloth hall for cloth sales, the spice market for spices, the wool staple (the town that had the monopoly on wool sales) for wool.142 Often, though not always, the buyer had the opportunity to inspect the goods before purchasing. If he did not, it was assumed that he would inspect them very soon after the sale and some city laws limited his rights to reject nonconforming goods after a certain time.143

In other words, medieval commerce did not consist of a seller in one country selling the prospect of future goods to a buyer in another. Merchants may have crossed national borders to make sales, but contracts did not. The locus of the contract was almost always clear, and the medieval conflict of laws rule was lex loci contractus—the law of the place where the contract was

139 Filip de Ly, International Business Law and Lex Mercatoria 15 (1991) (“Schmitthoff notes that in the period before the seventeenth century, there were hardly any conflict rules relating to transnational commercial transactions. The absence of conflict rules should, according to Schmitthoff, be explained by the existence of the law merchant, a cosmopolitan mercantile law based upon customs and applied to transnational disputes by the market tribunals of the various European trade centers.”)

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142 Murray, supra note 19, at 73.

143 Gilliets-van Severen, supra note 14, at 137 (privileges granted to Spanish merchants in 1366 by Count of Flanders limiting right of return after inspection).
made controls.144 We see this rule expressed in urban legislation. For instance, in the privilege granted by Bruges to the Hansa merchants, the town established the rule that in contracts made between Hansa merchants, they could choose to be governed by their own law and have their disputes heard by the Hansa governors. But in transactions between a Hansa merchant and a non-Hansa merchant, the laws and customs of Bruges controlled and the aldermanic court had jurisdiction.145

Determining the locus of the contract became even easier when merchants made written contracts. In the south, these were often drawn up by notaries and could be long and detailed.146 In the north, they were short and often authenticated by being attested before the town aldermen sitting as a court. In some cases, the content of the contract would be recorded in the court’s register.147 In both scenarios, the written document was absolute proof of the contract and could be used as evidence in a summary proceeding before the local court, applying local law.148

Local courts might be asked to hear disputes about contracts made elsewhere, and the same rule held: lex loci contractus.149 The parties could plead the law or custom of the place of contracting, and the court would often—though not always—respect it.150 Where courts were not competent to decide on the governing law, a common solution was to appoint arbitrators from the disputants’ nations.151 The arbitrators’ decision would be read into the court record and approved and homologated by the court.152 Since one reason for using arbitrators from the same town or country as the parties was that they could be presumed to know any relevant customs from the parties’ places of residence, the arbitrators had no need to apply a transnational law merchant.

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144 Wijffels, supra note 9, at 269 n.35. See also 1 Gilliotts-van Severen, supra note 14, at 45 (1904) (“charter of privilege granted by the Countess of Flanders to the German merchants in 1253 ordering that disputes be resolved “secundum legem loci” and that in all matters not addressed in the privilege the custom and law of the county would control”).
145 See, e.g., id. at 212 (regulations of English merchants’ contracts in 1350); 222 (regulation of Venetians in 1358).
146 ENRIKO BENZA, HISTOIRE DU CONTRAT D’ASSURANCE AU MOYEN ÂGE 31-32 (Paris, Ancienne Librarie Thorin et Fils 1897).
147 This is a system called non-contentious jurisdiction. The registers of the aldermanic court of Bruges are full of examples of contracts being read into the record as a means of creating formal evidence of their terms.
148 GUILLAUME DES MAREZ, LE LETTRE DE FORÉ À YPRES AU XIIIIE SIECLE. CONTRIBUTION À L’ETUDE DES PAPIERS DE CRÉDIT 12-13 (1901).
149 Wijffels, supra note 9, at 256-58.
150 See, e.g., 1 Gilliotts-van Severen, supra note 14, at 618-19, 643-44 (finding custom of Spanish shippers exists but choosing not to apply it).
151 Id. at
152 See, e.g., Stadsarchief Brugge, Register Civile Sententien 1477-53, fol. 62v.-63r. (arbitration decision in Italian and translated orally by one of the arbitrators into French to be read into the record).
The answer to the question how foreign merchants would know the local laws is surprisingly simple. Many towns required foreigners to use a certified broker when concluding transactions.\footnote{Katherine Ryerson, The Art of the Deal: Intermediaries of Trade in Medieval Montpellier 92-94, 178 (2002) (Bruges forbid foreigners to engage in retail trade and required them to use brokers for wholesale trade; Prato forbid sales of cloth not organized by a local broker); \textit{1 GILLIOTDS-VAN SEVEREN, supra} note 14, at 81 (charter of 1293 granted by Count Guy of Flanders to brokers of Bruges ordering that no foreigner or citizen of the town could buy or sell merchandise with have a broker with them).} “One can never value highly enough the role of brokers of all sorts.”\footnote{1 V. Vasquez de Prada, Lettres Marchandes d’Anvers 68 ("On n’estimera jamais assez haut le rôle des courtiers de toutes sortes.").} Brokers facilitated transactions in towns in which merchants from many nations gathered.\footnote{J.A. Van Houtte, Makelaars en warden de Brugge van de 13e to de 16e eeuw, 5 Bijdragen voor de Geschiedenis der Nederlanden 1, 1 (1950).} They were experts on the market; they knew the local customs,\footnote{1 GILLIOTDS-VAN SEVEREN, supra note 14, at 247 (privileges granted to merchants of Nurembergh by towns of Ghent, Bruges, and Ypres in 1362, including the provision that “gheen makelare makelaerde hebben zal, zonder de ghene die over den coop of coopmanscepe wesen zal”).} the gossip, and the rulings of the courts; they knew where to find sellers with goods to sell and buyers who wanted to buy them; they knew about the reputation and creditworthiness of the traders doing business in town.\footnote{Greve, supra note 23, at 42; Van Houtte, supra note 155, at 1.} And brokers were expected serve as expert witnesses in court, testifying to the transaction and its terms.\footnote{Id. at 28; Greve, supra note 23, at 43.} They could even act as attorneys for absent merchants.\footnote{Van Houtte, supra note 155, at 23-25.} In Arras, France, brokers had the right to sit as judges in commercial disputes.\footnote{Id. at 28 n.1.} Thus brokers not only knew the laws and customs, but they also helped create them.

In some towns brokers worked for hostellers.\footnote{Id. at 12; Greve, supra note 23, at 42.} While in Italy foreign merchants had to live in compounds, in many northern cities they were not segregated.\footnote{Stabel, supra note 15, at 198.} Instead, they found rooms in hostels, and the hosteller became their warehouseman, local guide, credit reference, surety, newsmonger, and sometimes agent.\footnote{Murray, supra note 19, at 73 (hosteller’s business “depended on the collection and exchange of trade information”).} The hostellers thus had an incentive to ensure that foreign merchants knew the ways of the town and succeeded in conducting their business there effectively.

Alongside brokers and hostellers were other intermediaries, such as the notaries who drew up contracts. When the merchants of Ypres attended the fairs of Champagne in the thirteenth century, they took the town secretary with them. He could draw up the contracts and letters obligatory, which were
then officialized by the town aldermen upon the merchants’ return. This ensured that the law of Ypres, not the law of Champagne or some hypothetical law of the fair, controlled.\textsuperscript{164} In medieval Bruges, foreign notaries, and by the fifteenth century also their Flemish counterparts, set up business in the center of town.\textsuperscript{165} These were not mere passers-by, but rather long-term residents whose profession it was to know the local law as well as the law of the foreign nations represented by their clients.

Merchants, too, occasionally settled for long periods in foreign towns. Sometimes they even became citizens. These merchants served as middlemen, communicating across cultures and customs and helping their countrymen navigate local laws and mores.\textsuperscript{166} Given all these adjuncts to trade, foreign merchants, who might remain in a town for months during the pendency of a fair and return there regularly each year, had plenty of avenues by which to learn whatever local laws and customs governed the contracts they made. They did not require a law merchant in order to conduct trade.

Finally, it is possible that our modern assumption that commercial disputes needed to be resolved by legal rules of decision is inaccurate for the Middle Ages. The evidence of records of judicial and arbitral opinions is slim, late, and difficult to analyze. But in the opinions that we have, from courts that are not applying the learned laws as a matter of course,\textsuperscript{167} the judicial and arbitral decisions nearly always discuss only the facts of the case and the outcome without stating a rule of decision.\textsuperscript{168} In customary legal systems, disputes seem to turn most frequently on questions of fact rather than questions of law.\textsuperscript{169} For example, the records of the court of the alderman of Bruges rarely give any glimpse of the rules of decision, providing only the facts and the outcome but not the analysis.\textsuperscript{170} From what the records permit us to see, the majority of commercial disputes centered on issues such as “he owes me money, and he did not pay,” or “he sent me nonconforming goods,” or “those goods are mine, and I have the documents to prove it.” In many instances, the resolution was probably just a matter of examining the

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\textsuperscript{164} Des Marez, supra note 148, at _.

\textsuperscript{165} Murray, supra note 19, at _.

\textsuperscript{166} Stabel, supra note 15, at 189, 199.

\textsuperscript{167} The Rota of Genoa, the most respected commercial court of the late Middle Ages and early modern era, is an example of a court applying almost exclusively \textit{ius commune} to resolve commercial disputes.

\textsuperscript{168} Ibbetson, supra note 104, at 168 (discussing English opinions). This pattern holds true for the records of the opinions of the aldermen of Bruges in the fifteenth century and for the opinions of the judges of the commercial court of Lyon in the seventeenth century.


\textsuperscript{170} Where the rule of decision can be deduced it is usually because one of the parties plead a custom or statute. \textit{See, e.g.}, SAB, Register Civile Sententies 1447-1453, at (pleading custom of shippers in Spain), \textit{id}. 1477-1453 (Aug. 28, 1448) at 56r.-v. (pleading charter of the jurors of madder).
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evidence, hearing the statements of the parties, questioning witnesses and experts, and deciding who had the more convincing story. Law would not necessarily have come into the case at all.

**Conclusion**

The purpose of this paper has not been to disprove the existence of a medieval law merchant. The purpose was rather to demonstrate that modern assumptions that such a law merchant established uniform and universal commercial custom must be incorrect, unless the meaning of the word custom is extended to cover such legally-distinct concepts as contracts and urban statutes. The message to advocates of a modern *lex mercatoria*, then, is that uniform and universal commercial rules do not develop from spontaneous, custom. Commercial innovations commonly arise from contract, and merchants can contract despite the existence of national commercial legislation. Furthermore, legislation was historically anything but the unabated evil it is now occasionally portrayed as. In many instances, governments legislated, sometimes at the request of merchants, precisely because the merchants could not come to agreement through contract or custom. By contrast, where custom did serve to incubate binding rules, those rules were normally local because they often too imprecise and too network-dependent to spread and remain the same. Finally, customs did not even exist every instance in which they were claimed. The under-articulated nature of custom permitted witnesses and experts, knowingly or not, to engage in their own acts of lawmakers.