

THE DISTINCTIVENESS OF APPELLATE ADJUDICATION

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ABSTRACT

This Article concerns two topics that, I hope to show, are vitally connected. One is the distinctive importance of appellate adjudication in the legal system of United States. The other is the working of entangled concepts in the law. This Article argues that courts engineer entangled legal concepts via appellate adjudication, and it is in this respect appellate adjudication is both crucial and unique, at least in the U.S. legal system. Entangled concepts intertwine description and evaluation. They also facilitate and constrain legal reasoning and legal judgments, in ways that distinguish legal adjudication from pure politics or the implementation of public policy. This article demonstrates more fully what it is for a legal concept to be entangled and how entanglement supplies guidance in adjudication. This Article carefully examines the background to MacPherson v. Buick and Justice Benjamin Cardozo's particular re-engineering of 'negligence' and 'duty', entangled concepts belonging to the same legal taxonomy. This Article also examines how the United States

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Supreme Court has engineered ‘commerce’, itself an entangled concept, in order to show that conceptual engineering of entangled concepts occurs outside the context of state common law. The claims made here apply to appellate adjudication in any area of law. Whether we are dealing with private law, public law, common law, or statutory law, or Constitutional law, the defining feature of appellate adjudication is its continuous engineering and reengineering of entangled legal concepts. The merger of fact and value in these concepts explains both the fertility of appellate adjudication and some of the constraints judges work under when they work with legal concepts that entangle fact and value.

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I. INTRODUCTION

Appellate adjudication in the United States remains a poorly understood practice. People agree that it is not identical to administrative rulemaking or to the legislative process, but they no longer believe that appellate courts discover law rather than make it. Furthermore, too often people associate appellate adjudication with common law and particularly with private law, despite the fact that appellate courts address legal questions that arise from regulations, statutes, and the Constitution itself—all generally regarded as quintessential areas of public, codified law. In order to appreciate the distinctiveness of appellate adjudication, this article

looks to a specific vital function characteristically performed by appellate courts: the engineering of entangled legal concepts.

In entangled concepts, the descriptive and the evaluative are fundamentally interrelated such that when one aspect is reshaped so is the other.¹ This provides a check on the malleability of legal concepts: insofar as one does not wish to disturb the evaluative point of a concept, one cannot unthinkingly modify its descriptive reach, and vice versa. In entangled legal concepts, the descriptive and the evaluative check and balance one another. However, entanglement does allow for the modification or reengineering of entangled legal concepts. As circumstances and values change, appellate courts can put these changes to work to redesign an entangled concept that has become outmoded. If the concept's evaluative point is obsolete, this will drive a modification in its descriptive reach that responds to a revised understanding of the relevant values. Likewise, if the descriptive reach of the concept no longer serves its evaluative point, courts can update the concept's situational range. In either case, though, the aspect of the concept undergoing revision must answer to the other aspect: the descriptive and evaluative cannot be understood or engineered independently of one another.

1. Contemporary philosophers have been reexamining concepts that blend description and evaluation ever since the 1985 publication of Bernard Williams' book *ETHICS AND THE LIMITS OF PHILOSOPHY* (Fontana Press, 1985). Williams contrasted ethically "thick" concepts, which by virtue of being culturally embedded were both "world-guided" and "action-guiding." *Id.* at 140–42, 150–52. Williams' own work had roots in mid-twentieth century work by Philippa Foot and G.E.M. Anscombe, both of whom questioned then current analytic philosophy's insistence upon strict separation of 'is' from 'ought' and 'description' from 'evaluation.' See G.E.M. Anscombe *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1–19 (1958); G.E.M. Anscombe, *On Brute Facts*, 18 *ANALYSIS* 69–72 (1958); Philippa Foot, *Moral Arguments*, LXVII *MIND* 502–13 (1958); Philippa Foot, *Moral Beliefs*, 59 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 83–104 (1958). After the publication of *ETHICS AND THE LIMITS OF PHILOSOPHY*, a number of philosophers explored the relationship of description and evaluation, particularly when seemingly entwined in single concepts. See, e.g., Peter Railton, *Red, Bitter, Good*, in *FACT, VALUES, AND NORMS*, 131–47 (2003); Allan Gibbard and Simon Blackburn, *Morality and Thick Concepts*, 66 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (SUPPLEMENTARY)* 267–99 (1992).

Philosopher Hilary Putnam approached the subject from a different slant than these philosophers in his 2002 book *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* (2004), itself based on his 2000 Rosenthal Lectures. *Id.* at 2. In this Article, I follow Putnam in applying the term "entangled" to concepts that resist reduction to discrete descriptive (fact) and evaluative (value) components. *Id.* at 28.

In publications predating Putnam's popularization of the term "entangled concepts," I referred to such concepts as "blend concepts", arguing for their importance to a conception of objectivity relevant to law. Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 *MICH. L. REV.* 1187 (1993). Very few legal scholars have attended carefully to the significance of concepts that blend or entangle description and evaluation. A recent exception is David Enoch and Kevin Toh, *Legal as a Thick Concept*, in *THE NATURE OF LAW: CONTEMPORARY PERSPECTIVES* (W.J. Waluchow & Stefan Sciaraffa eds. forthcoming), available at <http://ssrn.com/abstract=2122103>.

The idea of entanglement can be difficult to grasp, even though entangled concepts are part of everyday thought as well as in specialized or professional areas of thought. For a preliminary example, let us take a conceptual realm rather removed from the legal. Consider concepts that simultaneously describe and evaluate comedy, e.g. ‘funny’, ‘droll’, ‘wry’, ‘silly’, ‘ridiculous’, ‘wacky’, ‘antic’, ‘absurd’, and ‘witty’. When applied, these concepts pinpoint particular breeds of comedy, each with a distinctive kind of humor deriving from particular settings and characteristics. Together, these concepts comprise a taxonomy of the comedic. When told that that a performance was ‘wry’, one would be surprised to hear that it was a slapstick routine. Of course, there can be innovations in humor. Somebody might create a form of slapstick that is wry or droll, but in order for it to count as slapstick, it would still have to be humorous in the particular way that slapstick is. One cannot simply stipulate that one is performing slapstick. Slapstick is boisterous, rowdy, physical comedy. If that kind of comedy can be wry or witty, then slapstick can be wry or witty. If wryness or wit drives out the distinctive features of slapstick, one may still have comedy or humor, but it will no longer be slapstick.² In comedy, no institutionalized body engineers the concepts that describe and evaluate different kinds. This lack of institutionalized oversight is true of most of our entangled concepts, including ethical ones.

The body of this Article provides an extended analysis of two engineered entangled legal concepts. Such analysis provides the fullest insight into entanglement. What makes entangled legal concepts, and by extension law itself, distinct is that entangled legal concepts do not simply evolve and morph as part of a spontaneous process of development. Judges, with input from lawyers, actively engineer entangled legal concepts, shaping them so that they simultaneously describe and evaluate in one way rather than another. Judges do this by extending or limiting the situations in which entangled legal concepts apply by assigning them to taxonomies shot through with certain values rather than others.

Understanding the specific entanglement in any concept that conjoins description and evaluation requires a tremendous amount of background knowledge—cultural, historical, sociological, anthropological, and

2. Note that even the concept ‘comedic’ is itself entangled. The concepts that fall under its umbrella share both distinctive and evaluative features that make concepts comedic rather than, say, tragic. This resemblance between concepts subsidiary to a more global entangled concept occurs in all species of entangled concepts. So, entangled legal concepts will have in common features derived from ‘legal’—itself an entangled concept.

psychological. Engineering entanglement calls for this knowledge too. The knowledge that enables us to use or understand the concept may now be tacit, but to appreciate judicial engineering we must make explicit the circumstances faced by the original appellate engineer. Through this process, we become more sensitive to today's appellate engineering of concepts, examining more carefully the underlying circumstances that influence how courts entangle description and evaluation within specific legal concepts, making them as discrete as 'slapstick' or 'drollery'. Perhaps counter-intuitively, the only way to appreciate the discreteness and concomitant force of entangled legal concepts is to plunge into the nexus of description and evaluation that structures them, rather than trying to impose upon them a distinction between description and evaluation or examining them out of the context in which they have emerged.

An analogy to another kind of entanglement may help here. In quantum mechanics, entanglement refers to the situation where the state of one object cannot be fully described without considering another.³ This situation exemplifies a quantum state. Quantum states make a complete, simultaneous description of all particles impossible, because describing an aspect of one part of a quantum system changes the description of the other in nondeterministic ways. In order to understand the quantum world, one must understand the relationship between entangled objects. Information about one part of an entangled state is irreducibly partial, so for a fuller picture, the entanglement itself must be appreciated.

When courts engineer entangled concepts, they may start from either the descriptive or the evaluative aspect of the prior version of the concept. But as they develop one facet, the other always comes into play, shifting in response or making it impossible for a court to modify the first facet because such a shift renders the concept unworkable or unconvincing. Conceptual engineering of entangled concepts always involves both the descriptive and the evaluative aspects of such concepts, even when the engineer herself cannot specify in advance precisely how modifying one aspect will affect the other. Conceptual engineering remains an open-

3. As Erwin Schrödinger, the first explorer of entanglement in quantum physics, described it: "When two systems, of which we know the states by their respective representatives, enter into temporary physical interaction due to known forces between them, and when after a time of mutual influence the systems separate again, then they can no longer be described in the same way as before, viz. by endowing each of them with a representative of its own. I would not call that *one* but rather *the* characteristic trait of quantum mechanics, *the one that enforces its entire departure from classical lines of thought*. By the interaction the two representatives [the quantum states] have become entangled." E. Schrödinger, *Discussion of Probability Relations Between Separated Systems*, 31 MATHEMATICAL PROC. CAMBRIDGE PHIL. SOC'Y 555 (1935) (emphasis added).

ended process, neither constrained nor static. To fully understand entangled concepts and how they get engineered calls for a focus on the entanglement that gives these concepts their particular content.

In following sections, this article examines two examples of appellate engineering of entangled legal concepts: first, ‘negligence’ in the litigation that leads to Justice (then Chief Judge) Benjamin Cardozo’s decision in *MacPherson v. Buick*; and second, ‘commerce’ in the line of Supreme Court cases that brought us to last Term’s adjudication⁴ of the question of the facial constitutionality of the individual mandate in the Patient Protection and Affordable Health Care Act.⁵ The in-depth analyses presented below further clarify the nature and workings of entangled concepts and demonstrate how appellate courts engineer, reengineer, and even dismantle them. This engineering is the defining feature of appellate review, whether that review occurs as consideration of common law, a statute, or an agency rule or regulation. The task is vital. Entangled legal concepts serve to simultaneously carve the world descriptively and evaluatively, enabling legal reasoning to proceed as parties navigate the way fact and value intertwine throughout the law. Some concepts engineered by appellate courts appear in statutes and regulations, sometimes because these legislative and administrative materials borrowed them from judicial opinions in the first place, and sometimes because courts become the engineers of concepts that first appeared in a statute, rule, or regulation. Whatever the source of the entangled legal concept, it is by working on it that appellate adjudication differs from other areas of legal process.

Appellate judges can and do radically and consciously engineer and reengineer entangled concepts. No other legal actor effects change at such a foundational level and on such a routine and ongoing basis. Legislatures can, potentially, make sweeping structural changes—e.g., in labor relations or whether gays may be open about their sexual orientation while serving in the military. Furthermore, legislative law is overtly political or stipulative; it need not answer to a conceptual scheme that itself exerts developmental pressure on the concepts that comprise it.⁶ Appellate courts

4. Nat’l Fed. of Indep. Bus. et al. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012).

5. Pub. L. No. 111–148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029.

6. Some legislation, however, is drafted with entangled legal concepts. This type of statute is a natural candidate for the sort of change through appellate adjudication that occurs when law comes straight from adjudication. A full exploration of entangled concepts embedded in statutes and constitutions is beyond the scope of this Article.

shape the law differently. They work concept by concept, and must answer to the constraints imposed by the entangled concepts themselves.

II. ENTANGLEMENT AND AUTOMOBILE MANUFACTURER LIABILITY

In order to clarify and explain entangled concepts, and how in the course of appellate adjudication they can be engineered, I begin with *MacPherson v. Buick*.⁷ When law students study this case, they learn that it stands for the elimination of the privity requirement (the requirement of contractual or quasi-contractual relationship) between an injured plaintiff and a maker of the defective product that injured him or her. For the purposes of the development of the law of products liability, this take-away makes sense. But from the perspective of how New York's highest court reached its conclusion, this future oriented understanding is anachronistic. Looking forward from Cardozo's opinion, rather than backward to its particular underpinnings, misses some significant data important for understanding the engineering of entangled concepts,. Ultimately, that data provides insight into how appellate judges engineer concepts and a much richer understanding of the future effects of Cardozo's engineering in *MacPherson*.

The central accomplishment of *MacPherson* in the context of its own time was the way Cardozo dispensed with two somewhat entangled concepts, 'imminent danger' and 'inherent danger,' so as to better engineer 'negligence', making its entanglement richer and arriving at a concept better suited to a world of emerging mass production.. Dispensing with the privity requirement made way for a full-fledged cause of action in negligence for product-related injuries, and the reason the action was so fully fledged was because of what the concept 'negligence' meant after *MacPherson*.

A. Before *MacPherson*: *Thomas v. Winchester*

Fifty years before *MacPherson*, another New York case, *Thomas v. Winchester*,⁸ first used 'imminent danger' to permit a cause of action in negligence regardless of whether or not privity existed between the injured party and the seller of the harmful product. *Thomas* involved a similar fact pattern and yielded a similar legal outcome as *MacPherson*, yet it failed to introduce a properly engineered entangled concept that could clearly

7. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916).

8. *Thomas v. Winchester*, 6 N.Y. 397 (1852).

identify when to ignore the privity limitation on a negligence action involving a sale of goods. Instead, the Thomas court muddled the concept, which was not clarified until Cardozo's reengineering of 'negligence' and 'duty'. Like MacPherson, Thomas involved a sales chain of distribution that started before the manufacturer and included intermediaries other than the immediate retailer. Winchester was a wholesaler in medicinal herbs in New York City, and had bought out Gilbert, another wholesaler in medicinal herbs located in New York City.⁹ Winchester packaged jars of a medicinal herbal remedy—the product in this case—for distribution to retailers.¹⁰ Some of the herbs put into the jars were manufactured by Winchester on premises; others were bought from outside suppliers.¹¹ Before distribution, Winchester labeled the jars: "prepared by A. Gilbert."¹²

Mary Ann Thomas, the person injured by the extract in question, lived in upstate New York, in the town of Cazenovia, approximately 20 miles southeast from Syracuse and 175 miles northeast from New York City.¹³ She had fallen ill.¹⁴ At the direction of her physician, Thomas's husband purchased what he believed was a medication based on dandelion.¹⁵ He bought it from a local retailer, Dr. Foord, who was a physician and druggist in Cazenovia.¹⁶ Dr. Foord dispensed the medicine from a jar labeled "1/2 lb. dandelion, prepared by A. Gilbert, No. 108, John-street, N.Y."¹⁷ Dr. Foord had purchased this container from James A. Aspinwall, a druggist in New York City.¹⁸ Aspinwall, in turn, had purchased the container of medicine from Winchester.¹⁹ However, the actual extract in the jar was purchased from a supplier and was not manufactured by Winchester or Gilbert personally.²⁰

Upon taking the medicine, Mrs. Thomas suffered "very alarming effects."²¹ This was because the jar did not contain dandelion but in fact

9. *Id.* at 405–06.

10. *Id.*

11. *Id.*

12. *Id.* at 406 ("The jars were labeled in Gilbert's name because he had been previously engaged in the same business on his own account . . . and probably because Gilbert's labels rendered the articles more salable").

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 405.

contained belladonna, a poison.²² In extract form, dandelion and belladonna have similar outward characteristics, but experts can still distinguish them through “careful examination.”²³ Although Mrs. Thomas suffered acutely, she survived. She and her husband sued Winchester, alleging negligence in mistaking belladonna for dandelion.²⁴

At trial Winchester moved for a nonsuit, primarily because “the defendant was the remote vendor of the article in question: and there was no connection, transaction or privity between him and the plaintiffs, or either of them.”²⁵ The reasoning here could not be clearer: since the plaintiff had not dealt directly with the defendant, they were not connected so as to give rise to a duty of care on the defendant’s part. The trial judge rejected the motion for nonsuit and a jury trial followed.²⁶ The jury instructions charged that the jury should find for the plaintiff if they found Winchester to be negligent and the various middlemen not negligent.²⁷ The plaintiff prevailed.

On appeal, the New York Court of Appeals, the state’s highest court, began its analysis by making the question of privity determinative of whether the action could be brought: “If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained.”²⁸ The court began with the analysis of duty stated in *Winterbottom v. Wright*,²⁹ where duty extends only between the parties to the contract and “[m]isfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of . . . negligence.”³⁰ The court implies that negligence that does not naturally and necessarily produce injury in third parties is “not . . . imminently dangerous to human life.”³¹

But the court then immediately relegated Thomas to a different category. Remarking that the “defendant was a dealer in poisonous drugs,” the court pointed out the act of mislabeling belladonna would “natural[ly]

22. *Id.*

23. *Id.* at 406.

24. *Id.* at 405.

25. *Id.* at 406.

26. *Id.* at 407.

27. *Id.*

28. *Id.* at 407–08.

29. 10 Mees. & Welsb. 109.

30. 6 N.Y. at 408.

31. *Id.*

and almost inevitabl[ly]” lead to the death or grave injury “of some person.”³² The concept of ‘imminent danger’ was the linchpin of the court’s reasoning:

In respect to the wrongful . . . character of the negligence complained of, this case differs widely from those put [forth] by the defendant’s counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant’s negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant, to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered?³³

The court made clear that when a defendant creates imminent danger a duty of care arises in tort because of the likelihood of the danger occurring, and that a duty arises regardless of the contractual relation, or lack thereof, between the victim and the one who negligently created the danger. Indeed, the court appreciated that in an established chain of sales, a contractual transaction with somebody other than the victim might be one of the steps that renders the fruition of the harm even more likely. The court stated:

The defendant’s duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant’s contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. . . . The defendant’s contract of sale to Aspinwall does not excuse the wrong done to the

32. *Id.* at 408–09.

33. *Id.* at 409–10.

plaintiffs. It was a part of the means by which the wrong was effected.³⁴

Thus, the *Thomas* court distinguished the basis for contract liability from tort liability for personal injury from a product. The court's reasoning seems to do more than carve out an exception to the privity rule that permits a case to be won on negligence; its basis for holding the defendant liable resembles more of a preliminary theory of strict product liability for an industrialized society. If taken to its logical end, *Thomas v. Winchester* could have had the effect *MacPherson* did. On one reading, the case simply dispenses with the privity requirement as a prerequisite for bringing a negligence suit against a product manufacturer. However, this is not how courts between *Thomas* and *MacPherson* did read the case. Instead, they read *Thomas* as creating a limited exception to the otherwise ongoing assumption that only one in privity with a manufacturer could sue that manufacturer in negligence for compensation for personal injuries.

B. Privity, Sales, Personal Injury

The concept of 'privity' comes from contract law, defined by the dictionary as follows:

[P]rivity 1. The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest <privity of contract>. . . privity of contract. The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.³⁵

Prior to industrial production of complicated products with widespread distribution via various wholesalers and retailers, privity tracked the sort of connections and obligations tort law aimed to capture with negligence. The concept of privity brought to sales an evaluative-descriptive tangle epitomized by the principle of caveat emptor. Caveat emptor—buyer beware—was a mainstay of the traditional common law of sales. It presupposed a world in which the buyer of goods bore the burden of understanding their benefits and risks and deciding whether to purchase them and at what price in light of both. The buyer had an obligation to collect whatever information she needed to arrive at a sensible trade-off.

34. *Id.*

35. BLACK'S LAW DICTIONARY 1320 (9th ed. 2009).

This presupposed that the information about the nature of goods was either obvious to buyers or readily obtainable by them. And this would be the case when the seller of the good was also its maker, because in the course of the sales transaction, the buyer could ask questions or investigate the product. When products were neither complex nor novel, the buyer could rely on his or her own background knowledge to assess the product's safety and likelihood of defect, or at least use that knowledge to query the seller. The buyer was responsible for protecting himself against the risks of an ill-made product, either by refusing to buy it if he detected a defect or bargaining for a lower price if he doubted the soundness of the particular item. If, however, the item was negligently made and the bargain between buyer and seller presupposed that it was not, privity not only permitted the buyer to bring a cause of action, but also required the seller to take responsibility for the faulty item and the injuries it caused. The contractual connection tracked—arguably even gave rise to—the obligation in corrective justice.

With the rise of modern manufacturing and distribution practices, the tangle of facts and values embedded in 'privity' no longer addressed the circumstances of personal injury and the demands of corrective justice. Hence cases like *Thomas v. Winchester*, where the court introduced 'imminent danger' as a way to override the application of the privity requirement on the ground that a manufacturer who made available an imminently dangerous product—e.g., a mislabeled poison—had an obligation in corrective justice to the person who was among those who would foreseeably suffer injury from imbibing the mislabeled medication. But the *Thomas* court did not explicitly dispense with privity, and the concept of privity continued to exert influence on the law of personal injury in New York. If the privity requirement applied, third parties were estopped from bringing actions for negligence. If on the other hand a product that caused an injury could be cast within the concept of imminent danger, the privity requirement fell away. Thus, a third party negligently injured by that product could recover. As a result, contentious cases turned on whether any given product was covered by the concept 'imminently dangerous'. Such cases came up frequently. Litigants debated the status of shop tools steam,³⁶ scaffolding,³⁷ and coffee urns.³⁸ Likewise, the trial court and lower appellate courts in *MacPherson v. Buick* supposed that the

36. *Losee v. Clute*, 51 N.Y. 494 (1873).

37. *Devlin v. Smith*, 89 N.Y. 470 (N.Y. 1882).

38. *Statler v. Ray Mfg. Co.*, 195 N.Y. 478 (1909).

case would turn on whether or not Mr. MacPherson's Buick was imminently dangerous.

Instead, *MacPherson v. Buick* ultimately demonstrated that 'imminently dangerous' was not a concept adequately structured to specify situations where 'privity' was inapt and liability should be found. Similarly, it determined that the concept of imminent danger could not mediate the tension that had arisen between 'privity' and 'negligence,' both entangled concepts themselves. Mr. MacPherson had a contract, and therefore a mutuality of interest in the transaction, with the dealer who sold him his Buick. In turn, the dealer had a similarly structured contract with Buick, the car manufacturer. But privity did not exist between Mr. MacPherson and the manufacturer, who never engaged in a direct transaction. Consequently, MacPherson could not sue the manufacturer. Moreover, despite his serious injuries, he could not sue the dealer who had sold him the car. While he and the dealer did transact directly, the dealer's sale to MacPherson did not involve negligence. If privity controlled, the case was a non-starter, an easy one, and MacPherson would go uncompensated for his losses. If, however, MacPherson could establish that the Buick was negligently made and that a negligently made automobile belonged within the concept of imminently dangerous, he could have succeeded in his action.

C. *MacPherson v. Buick: Early Stages*

As noted in the Introduction, appreciating a now well-entrenched piece of appellate engineering requires a detailed understanding of the state of affairs prior to the appellate court's accomplishment of that engineering. This section of the article explores how the circumstances and legal status of the case appeared to the lower courts that adjudicated MacPherson's personal injury claim against Buick.

The first round in *MacPherson v. Buick (MacPherson I)* began with a trial that ended at the conclusion of the plaintiff's evidence, when the trial judge granted defendant's motion for a nonsuit.³⁹ The first trial judge ruled that, as a matter of law, MacPherson could not win because his evidence did not establish anything that would exempt his case from the privity limitation. On appeal, MacPherson argued that New York had created an exception to the applicability of 'privity'. Specifically, he argued that if the concept 'inherently dangerous'⁴⁰ extended to a particular product, this

39. *MacPherson v. Buick Motor Co.*, 153 A.D. 474, 474 (N.Y. App. Div. 1912).

40. Although Buick eventually attempts to distinguish between 'inherently dangerous' and

trumped the application of ‘privity’, thereby permitting recovery by third parties for injuries caused by the inherently dangerous product. The New York Supreme Court, Appellate Division, Third Division extensively reviewed the trial record, and decided that the plaintiff had met his burden of proof on the matter of defect in the wheel of the Buick he owned.⁴¹ The reviewing court then spoke to the conceptual matter at stake:

An accident (similar to the one that did happen) in the streets of any city might easily injure many persons other than the immediate occupants of the automobile. An accident at the place in question, the approach to a populous village, a summer resort, in the month of July, when people were accustomed to go to that village as a health resort or for pleasure in considerable numbers, might easily be attended with serious injury to other automobile users of the highway, or persons walking thereon or driving thereon with horses and wagons, so that the use which it was intended that this automobile should be put to was a public use, to be used upon the highways which were open to all the people. The automobile was likely to be used in a city or populous village or upon State roads much frequented by automobile users and other people, and hence the injuries that might be apprehended from manufacturing and selling an insecure vehicle, a vehicle composed of inferior, untested materials, would be to other people as well as to the actual occupants of the car.⁴²

This passage resonates with the reasoning of *Thomas v. Winchester*. The appellate court explicitly introduced a worldview that countered the one of caveat emptor and its associated entangled concepts. At the center of this world was anonymously created risk, “an accident in the streets of any city,” capable of wounding people gathered there and causing “[i]njur[y] [to] many persons other than the immediate occupants of the automobile.”⁴³ The court noted that cities are known gathering places, with attractions that draw people toward potential danger, and this case involved “a populous village, a summer resort, in the month of July, when people were accustomed to go to that village as a health resort or for

‘imminently dangerous’ appliances, the courts use the terms interchangeably and always in the sense of ‘imminently dangerous’ as shaped by *Thomas v. Winchester*.

41. *MacPherson*, 153 A.D. at 476–77.

42. *Id.* at 477–78.

43. *Id.* at 477.

pleasure in considerable numbers.”⁴⁴ The court pictured public streets bustling with people, horses, and wagons; all of whom could be injured by one defective automobile. Such injury would come as no surprise, given the risk created.

With this imagery as preface, the appellate court turned to precedent. It chose *Statler v. Ray Mfg. Co.*⁴⁵ as the definitive case on point. Decided in 1908 by New York’s first level appellate division, *Statler v. Ray* permitted the plaintiff to recover damages for personal injuries caused by a defective commercial coffee urn that exploded, scalding bystanders.⁴⁶ Although one of the bystanders was the purchaser of the urn (and therefore in privity with the seller), the other was not.⁴⁷ The *MacPherson I* court found that the *Statler* court permitted recovery because the urn-manufacturer knew how the urn would be used and the risks it presented.⁴⁸ According to the *MacPherson I* court, *Statler* left open only “the question whether a manufacturer and vendor of such an inherently dangerous appliance as this was may be made liable to a third party” on a theory of negligence.⁴⁹ After a string of cites taken from the *Statler* opinion, the *MacPherson I* court concluded that negligence was an acceptable theory of recovery for damages, and it remanded the case for a new trial, rejecting the original nonsuit.⁵⁰

Following *Statler*, the *MacPherson I* court emphasized the concept of ‘inherent danger’ in deciding that the privity limitation on liability would not apply to an appliance or a machine. The *MacPherson I* court did not explicitly state reasons for this effacement of privity, relying instead on specifying the circumstances under which the automobile was used and the foreseeability—from the manufacturer’s point of view—of injury to third parties if the vehicle were composed of “inferior, untested” materials.⁵¹ Not surprisingly, when the case on remand went to trial, the evidence presented spoke primarily to the question of whether the wooden wheel on Mr. MacPherson’s Buick was made with poor quality wood and to whether the wheel could or should have been inspected by Buick for the quality of the wood in its spokes. The plaintiff also presented evidence as

44. *Id.* at 477.

45. *Statler v. Ray Mfg. Co.*, 125 A.D. 69 (N.Y. App. Div. 1908), *rev’d on other grounds*, 195 N.Y. 478 (1909).

46. *MacPherson*, 153 A.D. at 478.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 478–79.

51. *Id.* at 477–79.

to his damages. The defendant's evidence focused on whether the plaintiff had driven carelessly.

The time and setting of the new trial influenced the findings of fact that became part and parcel of 'negligence' as ultimately re-engineered by Cardozo. In the early 1900s, cars were still relatively uncommon and what may now seem like short distances took hours to travel. MacPherson himself lived and worked in the small Village of Galway,⁵² just over seventeen miles from both Saratoga Springs and Schenectady, which were far larger towns also in upstate New York. A team of horses pulling a carriage travelled at eight to ten miles per hour.⁵³ To put this in perspective, when Mr. MacPherson traveled the seventeen miles to Schenectady to buy his Buick, the journey would have taken roughly two hours by horse and carriage.

At Close Bros., in Schenectady, MacPherson purchased a 1910 Buick Model 10 Runabout, with a four-cylinder, twenty-two and a one-half horsepower engine.⁵⁴ The 1910 Runabout was Buick's first big market success, although automobiles had slowly begun to trickle into the market starting in the mid-1890s.⁵⁵ The Model 10 Runabout hit the market two years after Ford's Model T.⁵⁶ Buick's sales did not exceed 40,000 cars per year until 1910, spurred by the Model 10's popularity.⁵⁷

So, although car sales were picking up at the end of the first decade of the twentieth century, Mr. MacPherson was still something of an early adopter. His business made owning a car particularly attractive to him. At the time of the trial, he had worked for thirty-eight years as a stonemason and gravestone designer as well as a dealer in "monuments" and gravestones.⁵⁸ In order to sell and deliver his work, he needed to travel through a "large range of territory."⁵⁹ After purchasing the car in May, 1910, MacPherson and his son began using it for the monument business.

52. Case on Appeal at 45:16, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), *reprinted in* 1 RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS 15 (William H. Manz ed., 2001).

53. *Timetable for the Wilmington & Weldon Railroad, 1859*, LEARN NC, <http://www.learnnc.org/lp/editions/nchist-antebellum/4828> (last visited Aug. 29, 2012).

54. Case on Appeal, *supra* note 52, at 46: 16.

55. *AACA Museum Collection*, AACA MUSEUM, <http://www.aacamuseum.org/exhibitions/permanent.aspx> (last visited Aug. 29, 2012).

56. Sally H. Clarke, *Unmanageable Risks: MacPherson v. Buick and the Emergence of a Mass Consumer Market*, 23 LAW & HIST. REV. 1 (2005).

57. *The Buick Automobile 1910-1919 & The Buick Motor Car Co.*, AMERICAN-AUTO MOBILES.COM, <http://www.american-automobiles.com/Buick-1910-1919.html> (last visited Aug. 29, 2012).

58. Case on Appeal, *supra* note 52, at 15: 44.

59. *Id.* at 15-16: 44-45.

When winter came, MacPherson stored the car in his barn, where it was dry and protected from the elements.⁶⁰

When spring came, MacPherson resumed use of the automobile, sometimes driving it for days at a time, at others leaving it idle while he worked in his shop. One day that summer, MacPherson drove the car not for business purposes, but to assist a friend, Charles Carr, whose brother, John, needed to go the hospital in Saratoga Springs. John had a serious injury to his hand that, combined with infection, incapacitated him for work on his farm.⁶¹

On the way to Saratoga, after picking up the Carrs, MacPherson stopped at Ballston Spa for gasoline. After this stop, John, who was in pain, sat in the front beside MacPherson, and Charles sat in the rumble seat behind them. After driving a bit, MacPherson felt the “hind end of the machine skid.”⁶² MacPherson testified that he was driving fifteen or sixteen miles per hour at that time. As the car slipped, MacPherson “threw off the power” and attempted to steer out of the skid.⁶³ Having done so, he proceeded to move to the middle of the road and restarted the car, steering to the right side of the road. As MacPherson moved to the right, he heard a crash and felt the rear of the car swerve to the left.⁶⁴ He looked over his shoulder and “saw the end of the machine swing around.”⁶⁵ As the car spun, MacPherson realized that he was heading toward a telegraph pole just a couple of yards away. In an effort to avoid crashing the radiator of the car directly into the pole, MacPherson steered the car away from the pole, and ended up striking it on an angle. The car then swung around the pole and rolled over.⁶⁶

The flip pinned MacPherson face down under the “hind axle of the machine,” with the weight of the axle on his back.⁶⁷ MacPherson asked the others, who he had not yet heard, to get the car off his back. Charles told him he was trying to “lif[t] all he could, but couldn’t stir it.”⁶⁸ Apparently, Charles succeeded, because shortly thereafter, MacPherson was freed. Using his uninjured hand, John Carr had managed to help Charles lift the car, even though John was “in such pain that he didn’t know what he was

60. *Id.* at 16–17: 47–48.

61. *Id.* at 20: 57.

62. *Id.* at 18: 51–52.

63. *Id.* at 18: 53.

64. *Id.* at 19: 54.

65. *Id.*

66. *Id.* at 19: 55–56.

67. *Id.* at 20: 57.

68. *Id.* at 20: 58.

doing.”⁶⁹ MacPherson crawled out, and despite being “dazed . . . more so than [he] knew,” he switched off the engine and hailed some people who had heard the crash from a road nearby.⁷⁰ They took MacPherson and the Carrs to the hospital at Saratoga Springs.⁷¹

MacPherson’s injuries were extensive. He had cuts about his head, his right eye was “torn apart entirely, laid down from the eye brow.” He also had a badly hurt back, his left leg was bruised, especially around the knee and ankle, he had a broken right wrist, and fractured ribs.⁷² He received stitches for a cut beside his right ear and another fourteen stitches elsewhere on his head. Despite the extent of the injuries, MacPherson remained in the hospital for only a few hours.⁷³ He “got a man from the garage to take a machine and carry [him] home.”⁷⁴

MacPherson arrived home with his arm in a sling, his eye dressed but painful, and dressings on the stitches.⁷⁵ The next day he contacted a doctor in Galway, Dr. Parent, who attended MacPherson for 24 days, during which MacPherson was confined to his house.⁷⁶ Dr. Parent visited every day.⁷⁷ At first, MacPherson remained close to bed, even though “the bed was very painful.”⁷⁸ He testified, “I was broken up so I couldn’t stay there. I couldn’t sleep.”⁷⁹ After about a month, MacPherson made it to the porch of his home. On Labor Day, he went to Saratoga Springs to collect the wrecked Buick.⁸⁰

The effects of MacPherson’s injuries lingered. The fractured ribs and broken wrist caused the ‘worst trouble’ for his pain during the winter following the accident.⁸¹ To rehabilitate his hand, MacPherson spent the winter attempting to flex his wrist against the walls and doors of his house and he sawed and split wood to strengthen his arm.⁸² Despite these efforts, at the time of the trial, two years after the accident, MacPherson’s right

69. *Id.* at 20: 58.

70. *Id.* at 21: 60–61.

71. *Id.* at 21: 61.

72. *Id.* at 21: 61, 22: 65.

73. *Id.* at 21: 61–62.

74. *Id.* at 22: 63.

75. *Id.*

76. *Id.* at 22: 63–64.

77. *Id.* at 22: 63.

78. *Id.* at 22: 64.

79. *Id.*

80. *Id.* at 24: 71.

81. *Id.* at 22–23: 65–66.

82. *Id.* at 23: 66–67.

wrist was still stiff. He reported: “[I] [h]aven’t much use of it. The grip is not good. There isn’t much strength in it.”⁸³

MacPherson was right handed and he needed his hand to letter and lay out the work on the monuments and gravestones with which he worked.⁸⁴ At that time, lettering was done either by hand with a chisel and hammer or with a pneumatic tool.⁸⁵ Both methods became extremely difficult for MacPherson. “The effect of using the hammer is very bad in the case of the hand hammer. With the pneumatic tool it is bad, you have to twist your hand so much, that is, the motion of the hand is restricted.”⁸⁶ Eventually, MacPherson recovered sufficiently to be able to grip the hand hammer without his hand cramping too much to hold on to it.⁸⁷

His eyesight was another matter. Although he had worn glasses prior to the accident, his eyesight was fairly good. After the accident, he could no longer find glasses to correct his vision.⁸⁸ His right eye failed quickly, after having been shut and bandaged for two months after the accident.⁸⁹ During this period, vision in MacPherson’s left eye also began to deteriorate, and by the time of the second trial, MacPherson could not “tell people in the middle of street,” and he could not find glasses to correct the problem.⁹⁰

On cross-examination, Buick’s lawyer tried to assert that MacPherson was driving at an unsafe fast speed at the time of the accident. Against this suggestion, MacPherson explained that while on the local road between Galway and Ballston, he “went at an ordinary road gait,”⁹¹ twelve to fourteen miles per hour. Then, when en route to Saratoga Springs from Ballston, the road switched to “good, new macadam,”⁹² but he went no more than twenty to twenty-five miles per hour.⁹³ After the skid that preceded the car’s breakdown, he slowed to fifteen miles an hour. MacPherson’s reference to “road gait” sounds odd to the modern ear. But “gait,” as in a horse’s gait, was still a natural way of speaking of pace in 1913. Horses and wagons were relevant frames of reference for thinking about travel and how to travel safely.

83. *Id.* at 23: 66.

84. *Id.* at 23: 67–68.

85. *Id.* at 23: 68.

86. *Id.* at 23: 68–69.

87. *Id.* at 24: 69.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 31.

92. *Id.*

93. *Id.*

The testimony of John Carr, MacPherson's passenger, also adds to our sense of the relationship between people and cars in upstate New York in 1911. John, a farmer, was twenty-five years old at the time of the accident. He reported that he felt the rear of the car slide when it first skidded. He could not answer whether this was a slight skid or not because, as he explained, "I never rode in [an automobile] very much."⁹⁴ Later, when Buick's counsel tried again to establish that MacPherson was driving too quickly when the accident occurred, John could not speak to the question, saying only "I don't know much about the speed of an automobile. I haven't ridden but three or four times in my life."⁹⁵ He did say that twenty to twenty-five miles per hour was too fast for him and that he knew Macpherson was not driving higher than that speed at the time of the accident because he did not feel that the car was going too fast.⁹⁶

Buick's attorney also questioned Charles Carr, the other passenger, about the events surrounding the accident. Charles was twenty-eight years old at the time, three years older than his brother.⁹⁷ Charles began his testimony by stating he was a farmer, a neighbor of MacPherson. Charles testified that just prior to the accident, he felt the skid to the left, "just as though the car swung to the left slightly, a slight skidding, of the hind part."⁹⁸ Next, as "Mr. MacPherson pulled ahead of the skid," Charles "felt the hind end go down and a sound like wood breaking. . . . It sounded like a lot of wood breaking. . . . I could feel the car lower, the hind end; that was the left hind wheel."⁹⁹ Pressed by Buick's counsel regarding the speed at which MacPherson was driving at the time of the accident, Charles explicitly couches the pace in terms of a horse's speed: "If a horse would go eight miles an hour we wouldn't be moving that fast."¹⁰⁰

Because of the similarities between horse-drawn transportation and automobiles, MacPherson was able to establish the defectiveness of his car's left rear wheel. His attorney did not have to rely solely on Charles Carr's report of the sound of breaking wood. When MacPherson was able to collect his car at Saratoga Springs, the wreckage was incomplete, and had changed hands and location several times. He was, however, able to obtain the remains of the car's wheels, which were later used as exhibits at

94. *Id.* at 40: 119.

95. *Id.* at 42: 123.

96. *Id.* at 42: 123–24.

97. *Id.* at 43: 127.

98. *Id.* at 44: 129.

99. *Id.* at 44: 129–30.

100. *Id.* at 47: 138.

the trial.¹⁰¹ At trial, MacPherson's attorney called upon experienced carriage and wheel makers for their opinions as to the wheels' appropriateness for road travel. Some of the experts had worked on both carriage and automobile wheels.¹⁰² Each had worked at least twenty years in the business; a couple had worked close to forty years.¹⁰³

These tradesmen agreed that the spokes in the wheel were of inferior hickory wood. They explained that they could tell primarily because of the way the spokes snapped squarely off, rather than coming apart and leaving behind "brooming."¹⁰⁴ The witnesses surmised that the wood from which the spokes had been made had not been left to dry or "season" naturally, in the open air.¹⁰⁵ Some thought a kiln had been used, and they explained how kiln drying made the wood brittle and prone to snap.¹⁰⁶ They also explained what they looked for in wood they used to make wheels, how they examined the grain on a spoke to tell its quality.¹⁰⁷ The expert witnesses informed the court that the only way to examine a spoke's quality thoroughly would be to look at the ends and at the side, and that if the side were covered with paint, some would have to be scraped away to make a full examination.¹⁰⁸ If, however, the spoke were coated only in oil, to protect it, it could still be examined.¹⁰⁹

One additional witness testified regarding the testing of automobile parts. Otto Kleinfelder was "an automobile expert by occupation."¹¹⁰ Kleinfelder worked for the Thomas Car Company in Buffalo, where for nine years he was a "tester."¹¹¹ Kleinfelder explained that the Thomas Car Company purchased its wheels from the Salisbury Wheel Company, which delivered the wheels "in their natural wood . . . so that it would give our inspectors a chance to look them over when they were received in the Receiving Department."¹¹² From the receiving department, Kleinfelder

101. *Id.* at 25–26: 74–75.

102. *See id.* at 50: 148 (testimony of George A. Palmer, a thirty-year veteran of the carriage building and repair trade, who had worked on automobile wheels and carriages).

103. *See id.* at 57: 169 (testimony of Adelbert Payne, a carriage builder for twenty-two years). Payne, like Palmer, had worked on both carriage and automobile wheels. *Id.* at 58: 171. *See also id.* at 72: 214 (testimony of James P. Tittlemeore, who testified to having been a carriage maker and general repairer for thirty-eight years).

104. *See id.* at 51: 150–51, 52: 154–55, 53: 156, 59: 175–76.

105. *See id.* at 53: 154–55.

106. *Id.* at 80: 237–39, 81: 240–42.

107. *Id.* at 82: 245, 90: 268–69.

108. *Id.* at 62: 184, 82: 243.

109. *Id.* at 64: 189–90.

110. *Id.* at 92: 275.

111. *Id.* at 92–93: 275–76, 94: 279.

112. *Id.* at 93: 276.

explained, the wheels went to the wheel department, where each one was tested using hydraulic pressure.¹¹³ After the cars were assembled, Thomas Carr gave each one a road test of 80 to 100 miles on rough roads.¹¹⁴ Kleinfelder's testimony established consistency between one auto-maker's testing practices and the information supplied by the wheelmakers' testimony.

The expert witness testimony constitutes the better part of the evidence MacPherson's counsel submitted at trial. Shortly after it was given, the plaintiff rested and the defendant sought a nonsuit. Eight grounds were put forth,¹¹⁵ most significantly the following: Buick noted that it was not in a contractual relationship with MacPherson,¹¹⁶ and that MacPherson had presented no evidence of fraud;¹¹⁷ Buick stressed that even if the car were inherently dangerous, MacPherson was contributorily negligent for not driving more slowly;¹¹⁸ Buick claimed that MacPherson had neither established an automobile manufacturer industry custom of checking for defective wheels nor a feasible way for manufacturers to do so;¹¹⁹ Buick also maintained that "whatever obligation existed by the defendant to the plaintiff, must find its foundation in the fact that the defendant's car was in its nature an article eminently dangerous to life and property,"¹²⁰ and that the plaintiff had not established such a foundation. In short, Buick asserted the privity limitation, claimed that any exception based on imminent danger was moot because of the plaintiff's contributory negligence, and that, at the end of the day, plaintiff had not established any negligence on Buick's part. The court refused to nonsuit the plaintiff and also rejected defendant's motion to direct the jury to find for it.¹²¹

Buick's grounds for its motions indicate its own trial strategy as the proceedings unfolded. To rebut plaintiff's case regarding Buick's negligence in manufacture or inspection, Buick put on experts from academia and the automobile industry, mainly engineers, who attempted to discredit the plaintiff's experts regarding the quality of the hickory in the wheel and the relative ease by which an automobile manufacturer could check that quality.

113. *Id.* at 93: 277.

114. *Id.* at 93: 278.

115. *Id.* at 99: 294–98.

116. *Id.* at 99: 294.

117. *Id.* By well-established precedent, proof of fraud would have defeated the privity limitation.

118. *Id.* at 99: 295.

119. *Id.*

120. *Id.*

121. *Id.* at 100: 298–300.

Buick's first witness was neither a working carriage wheel maker nor an automobile "tester." The witness, W.K. Hatt, described himself and his career as follows:

I am professor of Civil Engineering and director of the laboratory of testing material of Purdue [sic] University at Lafayette, Indiana. I graduated from the University of New Brunswick, in 1887, then from Cornell University, Ithaca, N.Y., in 1891, with the degree of Civil Engineer. . . . The science of applied mechanics deals with motion and action of force and the application of force, respecting the strain and determination of strength.¹²²

Professor Hatt went on to explain at some length that throughout his career he had been involved in a federal government project to identify the grades and strengths of various woods from forests throughout the United States.¹²³ Not surprisingly, this expert disagreed with the plaintiffs' experts as to how best to evaluate whether hickory was suited for purposes of making a car wheel.¹²⁴ Professor Hatt even performed an in-court demonstration of his preferred method: the end of one of the spokes was planed off, and the witness counted the rings per inch, and said that, at least by this measure, the hickory was "first-class mechanical hickory."¹²⁵ Professor Hatt disputed the methods of assessment used by plaintiff's experts, insisting that he knew "of no means of ascertaining the quality of hickory, aside from the rings and the weight."¹²⁶ Professor Hatt then refrained from answering questions about automobile wheels in particular and automobile skids and their effects on wheels, claiming that these matters lay outside his expertise.¹²⁷ Finally, Professor Hatt gave reasons for doubting the usefulness of a hydraulic pressure test on automobile wheels. He claimed that any such test would only be telling if the wheel were subjected to enough pressure to break it during the test.¹²⁸

Upon cross-examination, Professor Hatt denounced the plaintiffs' experts, claiming that one cannot gauge the weight of hickory accurately by hefting it in one's hand.¹²⁹ He also claimed that nobody could, as an expert, "pass judgment, as to whether twelve spokes assembled here, as

122. *Id.* at 101-02: 302-03.

123. *Id.* at 102-04: 303-11.

124. *Id.* at 104-06: 311-17.

125. *Id.* at 108: 321.

126. *Id.* at 109: 326.

127. *Id.* at 112: 333.

128. *Id.* at 119: 354.

129. *Id.* at 122: 365.

this was, that would ordinarily break off as square as these; were sound hickory or fit to be used in spokes.”¹³⁰ After making these assertions, Professor Hatt continued to testify at length under cross-examination, with the primary effect of limiting his opinion so narrowly that it did not address the question of the quality of the wheel at all.

Subsequent defense witnesses focused on the condition of the road at the time of the accident and the speed at which they thought MacPherson was driving. This testimony went on, at some length, to support the contributory negligence theory advanced by the defendant. Defense counsel also returned to the questions of whether automobile companies customarily inspected wheels for the quality of the wood used in their spokes, and whether the manufacturer could reasonably inspect for this.¹³¹

At the close of arguments, each side submitted proposed jury instructions to the court. Buick submitted forty-six charges and MacPherson eighteen, a large enough number for the judge to remark upon.¹³² The thrust of the charges asked the jury to decide whether a negligently constructed automobile was imminently dangerous, and whether or not Buick was negligent for its failure to inspect the wheels it put into its cars. The court specifically refused charges that would have had the jury impose the privity limitation on recovery.¹³³ Buick’s counsel wrangled with the judge for charging that the jury could find that a negligently constructed automobile could be imminently dangerous, and fought for and succeeded in obtaining an instruction that an ordinary automobile was not imminently dangerous.¹³⁴ MacPherson’s lawyer made sure to insist upon the classification of a negligently made automobile as an ‘imminently dangerous’ machine.

The jury awarded MacPherson \$5,000.00 in damages.¹³⁵ After the judge announced the verdict, various post-trial motions were made, including motions by the defendant to set aside the jury verdict, and for a new trial.¹³⁶ The judge rejected these. Moreover, he awarded to the plaintiff an “extra allowance” to cover costs of the trial, in the amount of \$251.25.¹³⁷

130. *Id.* at 123: 365–66.

131. *Id.* at 354: 1059–61

132. *Id.* at 403: 1206.

133. *Id.* at 401: 1202.

134. *Id.* at 401: 1201.

135. *Id.* at 406: 1215

136. *Id.* at 406: 1216–17.

137. *Id.* at 420: 1258–59.

D. MacPherson v. Buick: *En Route to the New York Court of Appeals*

On intermediate appeal, the reviewing court ruled for the plaintiff, rejecting every one of the defendant's contentions.¹³⁸ The appellate court presented the logic of the trial judge's charges simply and elegantly:

The Trial Justice charged the jury, in substance, that the defendant was not liable unless an automobile with a weak wheel was, to the defendant's knowledge, a dangerous machine, in which case the defendant owed the plaintiff the duty to inspect the wheel and see that it was reasonably safe for the uses intended; that if the machine in the condition in which it was put upon the market by the defendant was in itself inherently dangerous, and if the defendant knew that a weak wheel would make it inherently dangerous, then the defendant is chargeable with the knowledge of the defects to the extent that they could be discovered by reasonable inspection and testing.¹³⁹

The intermediate appellate court claimed that even an ordinary person would realize that a car with a weak wheel would be dangerous, thus sustaining the jury charge and verdict that such a car was imminently or inherently dangerous.¹⁴⁰

The intermediate appellate court harkened to a time when people would inspect for themselves the wood in items they purchased. Evoking the natural setting of caveat emptor, the court wrote:

In the old days, a farmer who desired to have wheels made for an ox-cart would be apt to inspect the timber before it was painted, before the wheel was ironed and the defects covered up, in order that he might know what he was buying. . . . An ordinary man, in buying a pitchfork, a golf club, an axe-helve, or an oar for a boat will look at the timber, "heft it", and otherwise endeavor to ascertain whether it is made of a suitable material. He is not satisfied with the fact that he is buying it of a reputable maker. It is not unreasonable to expect that the manufacturer of an automobile will give some attention at least to the material which enters into a wheel which he has purchased for use thereon.¹⁴¹

138. *Id.* at 408: 1221, 435: 1301-03.

139. *Id.* at 432: 1293-94.

140. *Id.* at 433: 1296-97.

141. *Id.* at 433: 1297.

The court analogized the manufacturer to the buyer of yore who had both the obligation and the habit of inspecting raw materials to be used in his goods. As Buick performed no inspection whatsoever, there was no room to debate what kind of inspection would be sufficient under the law, and the jury's verdict was upheld.

In the following excerpt from the court's opinion, note that while the appellate court's opinion begins by discussing the issue of the imminent or inherent dangerousness of an automobile with a weak wheel, its holding does not use the concept of 'imminent danger' at all.

We hold that under the circumstances the defendant owed a duty to all purchasers of its automobiles to make a reasonable inspection and test to ascertain whether the wheels purchased and put in use by it were reasonably fit for the purposes for which it used them, and if it fails to exercise care in that respect that it is responsible for any defect which would have been discovered by reasonable inspection or test.¹⁴²

This holding foreshadows Justice Cardozo's opinion in the final appeal in *MacPherson*. The intermediate appellate court substitutes the language of "reasonable fitness for purpose" for the concept 'imminently dangerous'. Its holding shows that the basis of the manufacturer's duty of care can be better expressed by this language than by employing the concept of 'imminent danger' to classify some products but not others.

Nevertheless, the intermediate appellate court opinion left Buick's counsel in a difficult position. The court supported both the concept of 'imminently dangerous' in the jury charge and the jury's determination that a car with a bum wheel was imminently dangerous. Furthermore, the court had ruled that Buick's total failure to inspect was, as a matter of a law, a violation of the duty of reasonable inspection of an imminently dangerous product. Yet the holding itself was not couched in the concept of 'imminent danger.' In its final appeal to New York's highest court, Buick decided to deemphasize the lower appellate court's holding, ignoring its language of reasonable fitness for purpose, and attacking the plaintiff's case with the traditional concept of 'inherently dangerous.'¹⁴³

142. *Id.* at 435: 1303-04.

143. Brief on Behalf of Appellant, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), reprinted in 1 RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS: DOC NO. 2, *supra* note 52.

Buick maintained that “an automobile is not an inherently dangerous article”¹⁴⁴ and therefore it had no liability “to a third party in simple negligence.”¹⁴⁵ Then it took up the heart of its argument concerning whether being defective did not render the automobile inherently dangerous. This strategy immediately bogged Buick down in an effort to distinguish ‘imminently dangerous’ from ‘inherently dangerous’. Buick argued that the trial court correctly charged the jury that a car “is not an instrumentality inherently, that is, necessarily, intrinsically or *per se* dangerous to human life.”¹⁴⁶ Buick next asserted that inherent danger is not the same as imminent danger, even if some courts used the terms interchangeably.¹⁴⁷ Then Buick delivered its own exposition of the history of manufacturer liability.

According to Buick, the “expansion of Commerce” from the time of the founding of the Union, led courts to attempt “to impose a liability on vendors or manufacturers to third parties or subsequent purchasers.”¹⁴⁸ Indiscriminate imposition of liability would essentially force vendors or manufacturers into a contractual relationship with parties unknown to them, imposing all sorts of onerous duties on vendors and manufacturers, and putting a serious crimp in the further growth of commerce. According to Buick’s brief, the law was able to prevent this undesirable result by creating only two classes of articles whose manufacturers and vendors had obligations of care beyond the privity line.¹⁴⁹ One category covered articles “intended for human consumption” and the other covered “articles inherently dangerous to human life.”¹⁵⁰ Since cars fell into the second category, Buick concentrated on that one, thus eliminating the need for its argument to address the *Thomas v. Winchester* precedent. Buick explained how the classification of inherently dangerous articles gradually grew, eventually including: “large steam boilers, or small steam boilers exposed in public places, highly charged water bottles, and other articles which the common experience of mankind demonstrated to be frequently liable to accident, and to cause injury to persons using them.”¹⁵¹

The brief writers presumably did not realize it, but this is the moment in their argument that reveals the key weakness in the concept of

144. *Id.* at 6.

145. *Id.* at 10.

146. *Id.* at 6.

147. *Id.*

148. *Id.* at 7.

149. *Id.*

150. *Id.*

151. *Id.*

‘inherently dangerous’. The concept is simply too malleable and too much at the mercy of ever-changing circumstances. It lacks a sufficient mesh of the descriptive and the evaluative to permit structured, principled application. If automobiles with defective parts often cause accidents, then those automobiles, by Buick’s own construction of the concept, are ‘inherently dangerous’. Buick’s delineation unintentionally revealed the dispensability of the concept of ‘inherently dangerous’. The important question for deciding the case was whether or not an article is likely to cause injury if negligently made. This is important because it is knowledge of that likelihood which gives rise to the obligation to take reasonable precautions. The ‘inherently dangerous’ standard does not ground a reason for or against obligation, and it has no evaluative bite from the perspective of tort, an area of law concerned precisely with when obligations of care arise. Indeed, having given a construction that would include defective cars, the Buick brief attempts another characterization of the concept of ‘inherently dangerous’: “Articles inherently dangerous to human life are those which in their very nature are calculated to cause harm to mankind. . . . Inherent means inborn, in the article itself.”¹⁵² This sort of effort to confine the concept is doomed to failure. The telos of a carbonated bottle of water, if it has one, is not to harm those who pick it up. But Buick itself concurred with the many courts of the day that had found overcharged bottles to be inherently dangerous.

Buick tried desperately to demonstrate that products with defects should be treated differently than products “intrinsically” harmful to human life. The brief attempted to distinguish the concept of ‘inherently dangerous’ from the concept ‘imminently dangerous,’ arguing that the latter concept covers any article with a defect likely to cause serious injury to somebody else as opposed to those articles with danger “inborn” in themselves. The brief reads: “[I]f it is established than an automobile is not an article inherently dangerous to human life, it must not be said . . . that inherently and imminently have the same legal meaning.”¹⁵³

After this rather cryptic assertion, Buick moved on to restate the rule of privity. Buick repeated that although the law created an exception for inherently dangerous articles, the exception was not applicable in the present suit, just as exceptions based on fraud do not apply. This might seem odd because the plaintiff never alleged fraud against Buick, but Buick used the fraud exception to distinguish cases that seemingly

152. *Id.* at 8.

153. *Id.* at 9.

permitted recovery based on the danger presented by a defective product. Essentially, Buick argued that all the precedents that override privity fall into either the ‘inherently dangerous’ classification (which does not include defective products) or the ‘fraud’ exception (which allows third-party recovery in the event of defect but only if the manufacturer knowingly passed off the defective product). Buick’s brief provides pages of authority from state courts (including New York), federal courts, and treatise writers all allegedly in support of these two classifications being the only classification that trump privity, and which confines ‘inherently dangerous’ products to a short list, including boilers, charged water bottles, drugs, and medicines.¹⁵⁴

Finally, in section three of its brief, Buick squarely addressed the contention it anticipated from MacPherson—namely, that the law treats imminently dangerous defective products in the same way as it treats inherently dangerous objects in that both kinds escape the privity limitation. Buick’s brief called this “the crucial point.”¹⁵⁵ Buick argued that there were two distinct concepts in play. ‘Inherent danger’ gives rise to the privity exception and does not apply to automobiles, whereas ‘imminent danger’ does not give rise to the privity exception. Thus, regardless of whether a defective automobile is imminently dangerous, the plaintiff in this case has no cause of action against the manufacturer because they were not in privity.

Buick relied heavily on a case that arose in New York federal court around the same time as *MacPherson v. Buick*. That case, *Cadillac v. Johnson*,¹⁵⁶ was a negligence action based on facts very similar to *MacPherson*: a defective wheel made with hickory spokes gave way and plaintiff-driver suffered serious injuries.¹⁵⁷ The jury returned a verdict for the plaintiff, which the defendant appealed. The appellate court rejected the idea that a consumer could recover at common law for simple negligence.¹⁵⁸ In its decision, the Second Circuit went out of its way to reject the intermediate appellate New York decision in *MacPherson*, avowing, “We are not persuaded to the contrary by the decision in *MacPherson v. Buick Motor Co.*”¹⁵⁹ When Buick briefed the New York State Court of Appeals, it relied on *Cadillac* as authority for the

154. *Id.* at 36–49.

155. *Id.* at 50.

156. *Cadillac Motor Car Co. v. Johnson*, 221 F. 801 (2d. Cir. 1915).

157. *Id.* at 802.

158. *Id.*

159. *Id.* at 804 (citing intermediate appeal in *MacPherson*, 160 App. Div. 55, 145 N.Y. Supp. 462 (1914)).

proposition that a plaintiff could not recover in a simple negligence action against a manufacturer unless a contractual relation between the parties existed.¹⁶⁰

According to Buick, the *MacPherson* trial court erred by using the words “imminently” and “inherently” interchangeably in its jury charge.¹⁶¹ The brief argued that, in any event, whether an article belongs under one heading or the other is a question of law, not fact, and should not be left to a jury to decide.¹⁶² The brief then goes on to reiterate its theory on the distinction between inherently dangerous articles, imminently dangerous articles, and the role of fraud in overcoming the privity limitation.¹⁶³

MacPherson’s brief to the New York Court of Appeals presents the procedural history of the case, including the theory of the plaintiff’s case, and then narrates the events of the accident and the testimony provided by the experts.¹⁶⁴ The brief also highlights a fact less prominently discussed at trial:

The defendant published a catalogue and in a double page picture under the words ‘The Home of the Buick Motor Company’ showed the factories of the Imperial Wheel Company, which made the wheel, and of the Weston-Mott Company which made the Buick axles.¹⁶⁵

While only a side note, the observation highlights the close relationship between manufacturers and parts suppliers, common both then and now.

MacPherson’s brief, like Buick’s, addresses the ‘inherent’/‘imminent’ danger issue, although in a far different manner. First the MacPherson brief argues that “[a]n automobile, propelled by explosive gases, certified and put out, as here conceded, to run at a speed of fifty miles an hour, to be managed by whomsoever may purchase it, is a machine inherently dangerous.”¹⁶⁶ The MacPherson brief notes that there are authorities to the contrary. It explicitly casts the case as an opportunity to settle the question, and to decide that a defective automobile is inherently dangerous. Then, the brief rather grandly states, “Let us begin without any

160. Brief on Behalf of Appellant, *supra* note 143, at 9, 50.

161. *Id.* at 55.

162. *Id.* at 55–56.

163. *Id.* at 56–63. Buick’s brief concludes with a lengthy criticism of the trial court’s decision to permit plaintiff’s experts to testify as to the quality of the wood used in the wheels and the feasibility of inspecting automobile wheels. *Id.* at 63.

164. Respondent’s Brief, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), *reprinted in* 1 RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS: DOC. NO. 3, *supra* note 52.

165. *Id.* at 12.

166. *Id.* at 16.

juggling over definitions,”¹⁶⁷ yet then immediately defines “inherently” as “inseparably” and “imminently” as “threateningly.”¹⁶⁸ Based on these assertions, MacPherson’s brief claims it is “common knowledge” that an automobile in motion is inherently dangerous.¹⁶⁹

The same malleability of the concepts ‘inherent’ and ‘imminent’ that plagued Buick’s brief plagued the respondent’s. Therefore, MacPherson’s counsel chose to use ‘inherently dangerous’ as the right concept to cover an automobile. The brief makes an interesting move in support of this contention. It claims that an automobile is much more like a locomotive than a wagon.¹⁷⁰ The automobile and the locomotive go at far greater speeds than a wagon, and in their construction they are both more complex than a wagon. A license is required to run a locomotive and to drive a car, while none is needed to operate a wagon.¹⁷¹ In short, the automobile, like the locomotive, is a modern industrial machine, and the features that signify the dangerousness of locomotive also apply to the automobile.¹⁷² After providing precedential support for this characterization of an automobile, the MacPherson brief takes up the privity issue. As a step toward conceptual engineering, the brief likens an automobile to a locomotive in very particular ways. It supplies some firm descriptive footing for thinking about the nature of the risk at stake and how tort law does and ought to evaluate that risk.

According to MacPherson’s brief, the privity requirement is merely technical when it comes to manufacturing chains, and if applied would lead to circuitous pleading and interpleading between consumers, manufacturers, and suppliers. The brief now begins to bear all the hallmarks of legal realist argument. Specifically, it rejects form over substantive justice, calls for the need for American courts to simplify proceedings to accomplish this goal, and suggests the courts adopt a public welfare justification for removing the privity limitation barring a plaintiff like MacPherson from bringing suit against a manufacturer. Finally, the brief makes the evaluative point that informs the emerging re-engineered concept of negligence:

Surely one should not be maimed for life because of negligence in the construction of an automobile he has purchased, without

167. *Id.*

168. *Id.*

169. *Id.* at 17.

170. *Id.*

171. *Id.*

172. *Id.*

liability and satisfaction somewhere. Modern notions of decency cannot tolerate such a result as that. And if there is to be sure satisfaction it can hardly fail to attach to the manufacturer. The local automobile dealer, I think it may be accepted as a matter of common knowledge, although there are occasional exceptions, is usually of insufficient means to respond in damages to an amount sufficient to insure compensation to one injured. Either the manufacturer must be held liable in such case, or those maimed under such circumstances must abandon any thought of satisfaction for their injuries. Nor should the intermediate dealer be held. He is without fault—actual fault.¹⁷³

Note that the evaluation is embedded in circumstantial or factual context. It is an evaluation of responsibility, an assessment of obligation. Decency imposes upon the party who makes the cars the obligation to compensate for injuries inflicted by a negligently constructed one. There is the recognition that evaluations are not timeless; modern notions of decency are in play. Finally, the evaluation evinces a proto-Calabresian pragmatism, as it is sensitive to those who can realistically afford to take on the obligation now recognized.¹⁷⁴

Buick, the appellant, submitted a short reply brief to the Court of Appeals.¹⁷⁵ This brief revolved almost entirely around the ‘inherently dangerous’/‘imminently dangerous’ distinction, insisting upon the fact of the distinction, that the case had been tried under the plaintiff’s concession that an automobile is not inherently dangerous, and that MacPherson’s brief to the Court of Appeals was an illicit attempt to change its theory of the case.¹⁷⁶ The reply brief then once more goes through the litany of cases, insisting that each be interpreted so as to support Buick’s case.

173. *Id.* at 23–24.

174. The MacPherson brief’s treatment of one significant precedent merits attention. The brief writer very effectively uses the entangled concept ‘trap’ the *Devlin* court used to justify ignoring the privity requirement. In *Devlin v. Smith*, 89 N. Y. 470 (1882), workers who climbed upon scaffolding erected by another business were killed and seriously injured when the scaffolding collapsed due to negligent construction. The workers’ employer was in privity with the scaffold builder, but the workers themselves were not. The *Devlin* court applied the concept of a ‘trap’ to characterize the dangerously tall and faultily constructed scaffold. ‘Trap’ covers not only a confined space or a restraint on movement; the concept extends to any situation that involves hidden danger, risky to the justifiedly unsuspecting. The danger depends on the facts about the space or the restraint. In *Devlin*, the fifty foot scaffolding created a non-obvious risk of collapse. The MacPherson brief to the New York Court of Appeals relies on *Devlin* to characterize the negligently defective automobile as also a trap, “imperiling the life of any person who might go in it.” Respondent’s Brief, *supra* note 164, at 26.

175. Appellant’s Reply Brief, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), *reprinted in* 1 RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS: DOC. NO. 4, *supra* note 52.

176. *Id.* at 5.

E. *MacPherson v. Buick: Justice Cardozo*

In *MacPherson v. Buick II*, Justice Cardozo's opinion for the majority is conspicuously short compared with the lengthy briefs submitted to the New York Court of Appeals. Cardozo indicates at the start of the opinion that the plaintiff at trial, MacPherson, will prevail, when Cardozo quotes *Thomas v. Winchester*: "The defendant's negligence . . . put human life in imminent danger."¹⁷⁷ What was not apparent was the way Cardozo would reach this result, discarding 'imminent danger'—an unsuccessful entangled concept—in favor of reengineering a more reliable entangled concept, 'negligence'.

Cardozo's opinion never referenced the 'inherent danger'/'imminent danger' distinction to which the defendant devoted so much attention during all phases of the trial. After some discussion of *Thomas*, which Cardozo read to stand for the proposition that where "danger is to be foreseen, there is a duty to avoid injury,"¹⁷⁸ Cardozo declared the case "a landmark of the law."¹⁷⁹ He then turned immediately to the line of cases that the attorneys and courts had been discussing throughout the proceedings in *MacPherson*. For each case, he showed that the courts are always applying the principle that where there is a danger to be foreseen, there is a duty to avoid injury. Sometimes it is applied more appropriately, sometimes less, sometimes more generously, sometimes less; nevertheless, the same principle is always applied. He concedes that *Devlin v. Smith* and *Statler v. Ray*, the most recent cases, may "have extended the rule of *Thomas v. Winchester*."¹⁸⁰ Exercising the prerogative of a jurisdiction's highest court, Cardozo states, "If so, this court is committed to the extension."¹⁸¹

Cardozo's factual summaries always emphasize the foreseeable risk of injury to persons even if they were not the immediate purchaser of the item. This is appellate engineering at its clearest. Through a recapitulation of cases everybody thinks relevant to the one at hand, Cardozo gives examples of the entanglement of the phenomenon of commercial distribution and the obligation that arises from being the creator of known and foreseeable risk in that context.

177. *MacPherson v. Buick Motor Co.*, 217 NY 382, 382 (1916).

178. *Id.* at 385.

179. *Id.*

180. *Id.* at 387.

181. *Id.*

Cardozo relied on English authority to clarify how of the concept of ‘duty’ would be restructured in the context of manufactured goods. He found in *Heaven v. Pender*, penned by Lord Esher, a conception of duty that sets aside the privity limitation:

Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as the condition or manner of supplying such thing.¹⁸²

Cardozo noted that Lord Esher’s associates did not unanimously adopt his views and that Lord Esher may not even be offering accepted law in England. Instead, Cardozo quotes Lord Esher because he stated the “tests and standards of [New York] law.”¹⁸³ Cardozo then announced the holding of his opinion:

We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.¹⁸⁴

Cardozo’s holding accomplishes two things. First, he abolishes the privity limitation. Second, he abolishes the need for the concepts of ‘imminent danger’ and ‘inherent danger’. Rather than try to shore up either or both, he dispenses with the pair in favor of engineering negligence’s duty of care with a focus on foreseeable, knowable risk.

Cardozo himself could not have foreseen how his engineering of ‘negligence’ in *MacPherson* would eventually lead to the concept’s

182. *Id.* at 388 (quoting *Heaven v. Pender*, L. R. [11 Q. B. D.] 503).

183. *Id.* at 389.

184. *Id.*

demise in deciding liability for manufacturing defects. Future courts would do to ‘negligence’ what Cardozo did to ‘privity’. After Cardozo’s opinion, judges in California and New Jersey engineered and used more apt entangled concepts to replace ‘negligence’ as a conceptual tool for considering manufacturer liability for product defects. They were able to introduce principles of liability without fault precisely because Cardozo had engineered ‘negligence’, by clearly intertwining the descriptive and evaluative features of the modern manufacturing system and the relationship of injurers to victims, to establish that a duty of care extended from the former to the latter. By the 1950s and 1960s, courts realized that this very entanglement called for a shift from manufacturer liability based on ‘negligence’ to one that did not require a showing of manufacturer fault.

III. ENTANGLEMENT, ‘COMMERCE’, ‘TAX’, AND THE AFFORDABLE HEALTH CARE ACT

In 2010, the Patient Protection and Affordable Care Act (‘ACA’)¹⁸⁵ became law. The Act requires various measures from states, insurance providers, and individuals, as well as the federal government, in order to ensure much wider access to health care insurance, and thus to affordable health care. The measures range from insisting that insurance companies extend coverage to people with ‘preexisting conditions’ to mandating that, with some exceptions, individuals purchase health insurance or remit a payment with their federal income tax return (the ‘Individual Mandate’).

My aim is not to undertake a full analysis of the ACA or the legal and political reaction it has provoked, rather, I will review the opinions in the recent Supreme Court case¹⁸⁶ where the Court decided that the Individual Mandate is not unconstitutional. This case gives us a timely example of how the Supreme Court engineers entangled constitutional concepts, just as other appellate courts law courts engineer entangled common law concepts. A brief consideration of Supreme Court decisions related to the Commerce Clause demonstrates how an appellate court, here the Supreme Court, engineers concepts horizontally over time as well as vertically through adjudication of a single dispute. The majority and minority opinions in the ACA also illustrate competing constructions of the entangled legal concept ‘commerce’, and how that competition can yield results that surprise those focused on the particular case, but are perhaps

185. Pub. L. No. 11-148, 123 Stat. 119.

186. Nat’l Fed. of Indep. Bus. et al. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012).

less surprising when considered from the vantage point of the larger appellate judicial practice of engineering entangled concepts.

A. *Glance at the Prior Engineering of ‘Commerce’*

The Commerce Clause¹⁸⁷ of the United States Constitution has always received judicial attention. The United States Supreme Court has engineered and re-engineered the concept of commerce, as introduced in the U.S. Constitution, which has then been used repeatedly by Congress as the basis for enacting national law. Starting with *Gibbons v. Ogdon*,¹⁸⁸ one of the earliest adjudications under the Commerce Clause, Chief Justice Marshall implicitly realized that the concept of commerce as used in the Constitution demanded engineering, specifically engineering keyed to the entangled nature of the concept as a United States constitutional legal concept. In *Gibbons*, Marshall worked with the public welfare values—the collective benefit—American federalism attaches to a single regulatory authority and the establishment of a national market, respectively, and the empirical role of aquatic navigation as it bore on those values to develop the legal concept of commerce. His engineering led him to decide that Congress could regulate all commercial aquatic navigation, even if the facts of a particular case involve a specific location upon those waters within a single state. Marshall wrote:

The subject to be regulated is commerce; and our constitution [sic] being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to

187. U.S. CONST. art. I, § 8, cl. 3.

188. 22 U.S. 1 (1824).

prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.¹⁸⁹

Marshall then devotes much of his opinion to explaining that the concept of commerce includes commercial navigation, relying on the framers' understanding of commerce in a federated United States and their reasons for granting power over commerce among the states to the federal government.¹⁹⁰ In this way, he articulates, explains, and engineers the already entangled concept of commerce as it appears in the United States Constitution, identifying much of the mixture of evaluative and empirical factors that have animated the Supreme Court's re-engineering of commerce to the present day.

In the late nineteenth and early twentieth centuries, the Supreme Court attempted to engineer the concept of 'commerce' by creating a principled line between the concepts 'local' and 'interstate' or between 'direct' and 'indirect' effects on interstate commerce.¹⁹¹ These efforts to rely on subsidiary entangled concepts suffered from problems similar to those that plagued the term 'inherently dangerous'. When Congress tried to regulate wages and hours or child labor, the Court did not look to the national commercial implications of these matters, but instead relied on intuitions about what they thought was 'local' or what counted as a 'direct' effect on commerce.¹⁹² In an effort to pin down descriptive reach without careful attention to evaluative concerns, the Court's formal categories tended to look both unprincipled and detached from the empirical realities of modern markets and modern government.

The New Deal famously changed the Court's approach to engineering 'commerce'. After President Franklin D. Roosevelt's court-packing threat,¹⁹³ the Court reexamined the nature of a national market regulated by a single authority in a modern economy. Starting with *NLRB v. Jones & Laughlin Steel*,¹⁹⁴ the Court recognized the interdependence of labor

189. *Id.* at 189–90.

190. *Id.* at 190–96.

191. *See, e.g.,* *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–51 (1935). *See also* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).

192. *See, e.g., E.C. Knight*, 156 U.S. at 42–43.

193. *See Roosevelt's "Court Packing" Plan*, JUDICIARY.SENATE.GOV, <http://www.judiciary.senate.gov/about/history/CourtPacking.cfm> (last visited Sept. 2, 2012) (describing the Supreme Court's original invalidation of New Deal legislation, President Franklin Delano Roosevelt's effort to change the composition of the Court to ensure justices more sympathetic to such legislation, and the Court's ultimate shift in its treatment of legislation directed toward revitalizing the U.S. economy in light of the Great Depression and the circumstances that led to it).

194. 301 U.S. 1 (1937).

relations at one location and the entire national supply chain involved in steel production spread throughout the country.¹⁹⁵ Once the Court covered this sort of interdependence with the concept of ‘commerce’, the Court upheld a variety of Congressional actions. Of special note is *Wickard v. Fillburn*,¹⁹⁶ where a single farmer exceeding the allotted acreage permissible for him to farm was penalized under the Agricultural Adjustment Act of 1938. Wickard contended that his activity had virtually no effect on interstate commerce because he was raising wheat for his own consumptions on the extra acreage; thus he was not involved in commerce, let alone interstate commerce.¹⁹⁷ Without considering the Court’s previous engineering of ‘commerce’, Wickard’s position may seem plausible. But the Supreme Court upheld the Agricultural Adjustment Act of 1938 as applied to Wickard. The Court recognized that concept of ‘commerce’ extended to national markets and that some noncommercial, intrastate activity could, in the aggregate, substantially affect national markets.¹⁹⁸ Note that the Court did not rule that Wickard’s cultivation of wheat for personal consumption was itself commerce; the concept does not expand in that direction.¹⁹⁹ Rather, the Court decided that the connection between that activity and commerce gave sufficiently substantial reason to Congress to regulate Wickard in the service of interstate commerce.²⁰⁰

In *Wickard*, the Court used values borne of American federalism to expand federal power. But, values rooted in American federalism can also tilt toward protecting states from encroachments by the federal government. In *Lopez v. United States*²⁰¹ and then in *Morrison v. United States*,²⁰² the Court struck down federal criminal statutes that regulated, respectively, gun possession near schools and domestic violence against women. In both cases, the Court based its invalidation of the respective statutes on federalism values. The Court rejected the claim that ‘commerce’ could be defined so broadly as to reach these two areas of conduct, not because they do not affect national markets, but because the conduct in question seemed to the court to fall squarely within traditional jurisdiction of the states in their exercise of their police powers.²⁰³ The

195. *Id.* at 34–42.

196. 317 U.S. 111 (1942).

197. *Id.* at 119.

198. *Id.* at 127–28.

199. *Id.*

200. *Id.*

201. 514 U.S. 549 (1995).

202. 529 U.S. 598 (2000).

203. *Id.* at 645.

Court insisted that dual-sovereignty values of federalism, according to which neither the central government nor the states should wholly swallow the other's authority, demanded protection of the sphere in which the states exert police power to the exclusion of Congressional action.²⁰⁴ For present purposes, the point is to note that just as the Court has used the entanglement of federalism values and circumstances of specific cases to engineer 'commerce' in a way that undergirds broad federal power so too it has used entanglement to engineer 'commerce' to deny such support. As in *Wickard*, the *Lopez* and *Morrison* Courts re-engineered boundaries of 'commerce' by attending to the intermeshed values and facts involved in the concept and the circumstances of the case.

B. The ACA and the Constitutionality of the Individual Mandate

The original lawsuits over the constitutionality of the ACA seemed to set the stage for another precedent-setting engineering of the constitutional concept of commerce. Detractors introduced a distinction novel to Commerce Clause jurisprudence, the activity/inactivity distinction, as the basis for shaping the concept of commerce to exclude the federal government from in any way requiring individuals to purchase health insurance. Supporters relied on a more conventional economic understanding of markets to shape the concept of commerce to take account of the particularly glaring and pernicious risks of free-riding and moral hazard when it comes to health insurance and health care and that encompasses a requirement that individuals obtain health insurance.

In *National Federation of Independent Business v. Sebelius*,²⁰⁵ the ACA case that reached the Supreme Court, the Court upheld the constitutionality of the individual mandate. The Court's opinion, penned by Chief Justice Roberts, denied the mandate's constitutionality under the Commerce Clause, but upheld its constitutionality under the Taxing Power, maintaining that Congress may tax those who do not purchase health insurance, so long as that tax does not amount to a fine.²⁰⁶ Five justices agreed on both holdings, but a different set of four agreed on each. The four justices who joined the Chief Justice's opinion for the Court agreed that the mandate could be regarded as a tax within Congress' authority to impose, but they also endorsed a concept of commerce that would have

204. *Lopez*, 514 U.S. at 577, 580.

205. 132 S. Ct. 2566.

206. *Id.* at 2594–600.

supported upholding the mandate on Commerce Clause grounds as well.²⁰⁷ Four dissenting justices rejected the treatment of the mandate as a tax, insisting that the constitutionality of the measure depended solely on its legitimacy under the Commerce Clause, which they denied.²⁰⁸ From a precedential perspective, therefore, *National Federation* does not provide a definitive engineering of ‘commerce’. It does, however, include two rival engineering efforts.

First, consider Justice Ginsberg’s defense of the individual mandate as a constitutionally permitted regulation of interstate commerce. Her point of departure is 1937, when the Supreme Court first “recognized Congress’ large authority to set the Nation’s course in the economic and social welfare realm.”²⁰⁹ The circumstances and welfare outlook of that era inform Ginsberg’s engineering of ‘commerce’. She notes at the outset that the 1937 Court defended “Congress’ efforts to regulate the national economy in the interest of those who labor to sustain it.”²¹⁰ This observation immediately entangles individual welfare and regulation of the national economy. The needs of individual laborers and the very existence of a nationwide market-economy must be considered jointly. Such an economy cannot exist without protecting the welfare of individual laborers, and it is through the work of healthy, financially secure individuals that a national economy thrives.

Ginsberg then turns to what she regards as the relevant current circumstances facing Congress when passing the ACA by describing the magnitude and extent of the “national market for health-care products and services.”²¹¹ Next, she details the ways in which this market differs from others markets by demonstrating how an individual’s decision not to purchase health insurance has affirmative ramifications that echo across the national market for health-care products and services.²¹² Then she takes up the empirical matter of why the states, acting in their individual capacity, cannot solve the national problems of free-riding and unfair cost-

207. *Id.* at 2609 (Ginsburg, J., concurring). Justice Ginsburg also questioned the necessity of rejecting the Government’s commerce power argument, given that the mandate could be upheld under the taxing power. *Id.* at 2627. This argument was summarily rejected by Chief Justice Roberts in his lead opinion. *Id.* at 2600–01. The opinions in the case also address the Anti-Injunction Act and the ACA provisions expanding Medicaid, but these issues are beyond the scope of the current discussion.

208. *Id.* at 2642.

209. *Id.* at 2609.

210. *Id.*

211. *Id.*

212. *Id.* at 2609–12. See also Transcript of Oral Argument at 5, Dep’t of Health and Human Serv. v. Florida (2012) (No. 11-398), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

shifting in the market for health-care products and services. She explains that any state that tries health-care market reform on its own makes itself unduly attractive to the unhealthy, setting off a cycle of increasing premiums and taxes likely to provoke healthier people to exit the state, an exit that would, in turn, further hike premiums and taxes.²¹³

Ginsberg sees the health-care market as national in scope and its market failures as necessitating nation-wide solutions. She maintains that the measures the ACA adopts—guaranteed issue of insurance, community rating, and the individual mandate—are necessarily interrelated so as to specifically target problems that arise because of the nature of health care as it is provided in this country and the collective action problem faced by the separate States who might attempt reform.²¹⁴ Under Ginsberg’s engineering, the constitutional concept of ‘commerce’ encompasses a complex interplay of market forces all bearing on individual welfare. Congressionally authorized federal intervention at any stage thus qualifies as a legitimate regulation of commerce.

This conception of ‘commerce’ is in contrast with Chief Justice Roberts’ approach. Roberts opens his opinion for the Court with an extended discussion of state sovereignty and the limited powers of the federal government.²¹⁵ He leads with quotations from the Marshall Court of the first quarter of the 19th century.²¹⁶ Against that background, Roberts takes up the issues posed in the case itself. When he turns to the constitutionality of the individual mandate, he acknowledges the market failures that have plagued the national health-care market.²¹⁷ But despite this recognition, he rejects the individual mandate as an appropriate exercise of power under the Commerce Clause on the ground that the individual mandate does not regulate “commercial activity,” but instead tries to “create” it by compelling individuals to buy health insurance.²¹⁸

In Roberts’ view, the world that follows from a concept of commerce that permits Congress to call upon individuals to buy health insurance is a world in which Congress could force individuals to purchase any good or service whatsoever.²¹⁹ Roberts casts a Ginsberg-like version of ‘commerce’ as one that cannot distinguish between different markets

213. 132 S. Ct. at 2612.

214. *Id.* at 2614–15.

215. *Id.* at 2577–80.

216. *Id.* at 2577.

217. *Id.* at 2585.

218. *Id.* at 2587.

219. *Id.* at 2589.

depending on the nature of the good or service traded.²²⁰ Thus, according to Roberts, that concept of commerce would license Congress to supplant the individual states as the sovereigns with “police powers,” the authority to act in the interests of citizens and residents’ welfare.²²¹ Moreover, Roberts insists upon the constitutional unacceptability of any engineering of ‘commerce’ that does not clearly and definitively respect state sovereignty and the states as the repository of police powers. He states: “The Commerce Clause is not a general license to regulate an individual from cradle to grave Any police power to regulate individuals as such . . . remains vested in the States.”²²² Where Ginsberg engineers ‘commerce’ to highlight the necessity for national intervention in national markets, Roberts would prefer to engineer ‘commerce’ to minimize the reach of the federal government, making sure to interpose the states.

Although Roberts rejects Ginsberg’s engineering of ‘commerce’, he does not conclude that Congress has no constitutionally enumerated power that authorizes the specific Congressional regulation in question, the individual mandate. Instead, Roberts examines the Constitution’s granting to the federal Congress the power “To lay and collect taxes . . . to . . . provide for . . . the general welfare of the United States.”²²³

The ACA never calls the payment to the government for failure to purchase health insurance a “tax.” The four justices, who would have ruled the individual mandate unconstitutional, consider this choice of language to forestall any further consideration of whether the payment is, nevertheless, a tax.²²⁴ But the Chief Justice grasps the difference between a label and a concept, and argues for asking “whether the shared responsibility payment falls within Congress’s taxing power, ‘[d]isregarding the designation of the exaction, and viewing its substance and application.’”²²⁵ The label does not determine the concept in play; rather, the evidence for which concept best covers the payment relates to what it involves empirically and purposefully. Entanglement guides conceptual engineering.

Roberts describes looking beyond the choice of word as a “functional” approach.²²⁶ He considers another Supreme Court case where the Court looked to “practical characteristics” to decide that a payment labeled a

220. *Id.*

221. *Id.* at 2591.

222. *Id.*

223. U.S. CONST. art. I, § 8, cl. 1.

224. 132 S. Ct. at 2650–55.

225. *Id.* at 2595 (quoting *United States v. Constantine*, 296 U.S. 287, 294 (1935)).

226. *Id.*

“tax” was, conceptually speaking, actually a penalty.²²⁷ Robert’s exploration of the ‘tax’/‘penalty’ distinction displays sensitivity to how empirical and evaluative overtones inextricably inform one another in each concept. He considers enforcement and collection methods, whether the payment presupposes intentional wrongdoing, and whether classic criminal sanctions or measures are involved.²²⁸ These considerations, brought to bear on the “shared responsibility payment,” bring it within the scope of ‘tax’ rather than ‘penalty’.²²⁹ Roberts insists that, “[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful.”²³⁰ The payment to be collected by the IRS from those who do not purchase health insurance lacks the coercive, stigmatizing flavor of criminal punishments; one can lawfully choose to make the payment rather than buy insurance.

The turn to ‘tax’ made it possible for the Chief Justice to find common ground with four of his colleagues, despite their sharp rejection of his treatment of ‘commerce.’ The concept of commerce proved to be too fraught with competing views of the relevant factual-evaluative considerations for that concept to lend itself to an agreed-upon engineering. Consequently, *National Federation* teaches us something important about entangled legal concepts: they come in sets or clusters. When one concept cannot be engineered to garner sufficient judicial endorsement, this can pave the way for another entangled concept to come into play, a concept that at first may not have seemed to be important to deciding a case. The ACA case illustrates what can happen when one entangled concept comes to lend itself to being engineered in radically different ways, specifically when judicial users of the concept understand the mesh of fact and value so differently that it drives them to see the same measure as clearly within or clearly outside the boundaries of ‘commerce’. When judges are not able to agree on how to further engineer the entanglement, the concept gets sidelined, and the decision in the case forces the use and further engineering of another concept entirely, in this case ‘tax’.

Having used the *MacPherson* litigation to illustrate how state appellate courts engineer entangled concepts within a single case involving the common law, this article aims in this discussion to illustrate how the

227. *Id.* at 2595–98.

228. *Id.*

229. *Id.* at 2596–96.

230. *Id.* at 2596–97.

Supreme Court acts similarly while engineering, over time, entangled concepts featured in the Constitutional text. This has circumscribed my analysis of the decision and opinions in *National Federation*. A more comprehensive study would examine later twentieth century civil rights cases decided under the Commerce Clause and would explore other instances of federal judicial conceptual engineering of ‘tax’. The current analysis shows that both the state appellate courts and the U.S. Supreme Court recognize and utilize entanglement when engineering legal concepts. Sensitivity to and engagement with entanglement to achieve practicable legal concepts is the hallmark of appellate adjudication in the United States, whether the adjudication concerns constitutional law or common law.

IV. CONCLUSION

Quantum mechanics represented a departure from classical physics because quantum mechanics forced recognition of entanglement in the physical world. Similarly, appreciating how courts attend, and must attend, to description and evaluation when they discard or rework legal concepts, points legal analysis away from the more traditional commitment to a fact/value divide held by analytic philosophers and some jurisprudential scholars. Schrodinger maintained that we can understand the physical world more fully (if not definitely) when we accept the phenomenon of entanglement rather than trying to root our knowledge in an understanding of entangled objects behaving in isolation from one another. Analogously, this article maintains that we can better understand the law if we accept that legal concepts entangle fact and value, and root our analysis of law in examining specific entanglements engineered by courts over time.

Continually applying and engineering entangled legal concepts, appellate courts exercise great legal power. Appellate adjudication structures simultaneously our perception and our evaluation of circumstances. With entangled concepts, appellate courts taxonomize the landscape of our disputes. In turn, these taxonomies decide the issues at stake. While the concepts and taxonomies impose internal constraints on what can be done with them, or done persuasively, the engineer can structure and restructure both concepts and taxonomies, thereby making powerful differences in how cases get resolved. For Buick, the decision in *MacPherson* meant a transformation in its business model. A relatively fledgling industry had to bear either the costs of improving safety or paying damages in negligence. For drivers, cars got safer but also more expensive. Supreme Court decisions about ‘commerce’ order relations

between states, the federal legislature, and citizens, an ordering that influences almost every aspect of life in the United States.

Despite the call for and the need for law students to learn to deal with all sorts of legal processes and materials, appellate cases have proven to be an enduring part of the law school curriculum. Understanding appellate adjudication as the engineering of entangled legal concepts both explains and justifies this staying power. Coming to understand how entangled legal concepts are engineered, even explicitly engaging in reverse engineering, is not only an intriguing intellectual exercise, it is also instruction in a craft, perhaps even an art, uniquely performed by lawyers. Furthermore, because of the tendency of entangled legal concepts to migrate between statutes and cases, lawyers working with the former have as much need to understand the nature and inner workings of entangled concepts as do lawyers who deal more with latter. Indeed, an appreciation of the ubiquity of entangled legal concepts in legal materials might help us transcend the pedagogical dichotomy between teaching statutes, which is often equated with public law, and cases, which is often equated with private law. Appellate courts engineer entangled legal concepts used in both arenas. What this article accomplishes is sufficient to suggest that a focus on cases, or a certain kind of focus on them, is not just a holdover from a worn out tradition in legal pedagogy, but is, rather, a necessary part of understanding the American legal system and thereby American law.