The Politics of the Common Law: The Case of the United States

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In this essay I argue that there are two competing theories of the authority of the common law. One theory is based on expertise: the common law has authority because it was created by judges who are deemed experts and are given power to shape the law for this reason. The competing theory of authority is democratic. On this view the authority of the law derives from the fact that it reflects values accepted in the community. These competing views result in different answers to various questions (the relationship between statutes and the common law, the role of the judge etc.) It also leads to very different attitudes towards the idea of a single, transnational common law: generally speaking, the first view is likely to be much more sympathetic to it. I argue that these days English (and Commonwealth) common law are closer to the expertise conception of authority, whereas American law largely adopts the democratic one, a fact that explains the very different attitudes of these legal systems to consulting judicial decisions and scholarship from other common law jurisdictions. But things have not always been this way. About a century ago, American law was much more a participant in the transnational common law than it is today. Based on the notion of biological speciation, I present an informal model of “legal speciation” to explain what it takes to maintain commonality between two legal systems.