

# THE DEATH OF COMMON LAW

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The supremacy in law of statute over judicial decision-making remains in a democracy, in an oligarchy, in a monarchy, and even in a tyranny. Even when a court declares a statute unconstitutional, this relationship between legislature and court is unaltered; the court is merely declaring that the statute is inconsistent with higher legislation. In an age of statutes, both judges and legislators make law, but they do not make it in the same way or even in the same sense. Specifically, judge-made law is subordinate law.

Alan Watson, *The Future of the Common Law Tradition*, 9 DALHOUSIE L.J. 67, 80 (1984).

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## INTRODUCTION

In October 2017, a proposed initiative captioned “The Consumer Right to Privacy Act of 2018” was filed with the Califor-

nia Attorney General for voters' consideration in the November 2018 general election.<sup>1</sup> The filing occurred soon after big business interests had managed to block action by the 2017 California Legislature on Assembly Bill 375, which would have strengthened state laws protecting personal information privacy.<sup>2</sup>

Section 3 of the proposed initiated statute stated its purpose:

[I]t is the purpose and intent of the people of the State of California to further the [California] constitutional right of privacy by giving consumers an effective way to control their personal information, thereby affording better protection for their own privacy and autonomy, by:

- A. Giving California consumers the right to know what categories of personal information a business has collected about them and their children.
- B. Giving California consumers the right to know whether a business has sold this personal information, or disclosed it for a business purpose, and to whom.
- C. Requiring a business to disclose to a California consumer if it sells any of the consumer's personal information and al-

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1. See Letter from Mary Ross to Office of the Attorney General, Initiative Coordinator (Nov. 17, 2017), <https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0039%20%28Consumer%20Privacy%20V2%29.pdf> [https://perma.cc/7836-H9PE] (submitting amendments to the original Initiative Measure No. 17-0039, filed Oct. 12, 2017). For reasons described below, the initiative proposal was withdrawn on June 28, 2018. See *California Consumer Personal Information Disclosure and Sale Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Consumer\\_Personal\\_Information\\_Disclosure\\_and\\_Sale\\_Initiative\\_\(2018\)](https://ballotpedia.org/California_Consumer_Personal_Information_Disclosure_and_Sale_Initiative_(2018)) [https://perma.cc/D6B8-2XUZ] (last visited Mar. 29, 2019); see also Bryan Anderson, *California's new consumer privacy law isn't as sweeping as you might think*, SACRAMENTO BEE (July 5, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article214064999.html> [https://perma.cc/9DJE-HV4M].

2. See Alastair Mactaggart, *This is how Californians take back their privacy*, SACRAMENTO BEE (Sept. 20, 2017, 3:13 PM) <https://www.sacbee.com/opinion/oped/soapbox/article174256331.html> [https://perma.cc/RUZ7-F3BG] (describing motivation for proposed initiative measure). Mr. Mactaggart described himself as a California businessman, father, and the "lead sponsor" of the measure. *Id.* According to public records, he personally contributed \$3.2 million to Californians for Consumer Privacy in support of the initiative. See *Initiatives and Referenda Failed to Qualify*, CAL. FAIR POL. PRAC. COMM'N, <http://www.fppc.ca.gov/transparency/top-contributors/nov-18-gen/initiatives-referenda-failed-to-qualify.html> [https://perma.cc/8S5P-49MV] (last visited Mar. 29, 2019). Top contributors in opposition to the measure included AT&T, Google, Facebook, Comcast, Verizon, Amazon, and Microsoft. *Id.*

lowing a consumer to tell the business to stop selling the consumer's personal information.

D. Preventing a business from denying, changing, or charging more for a service if a California consumer requests information about the business's collection or sale of the consumer's personal information, or refuses to allow the business to sell the consumer's personal information.

E. Requiring businesses to safeguard California consumers' personal information and holding them accountable if such information is compromised as a result of a security breach arising from the business's failure to take reasonable steps to protect the security of consumers' sensitive information.<sup>3</sup>

If approved by voters, the initiated legislation would have added several new sections to the California Civil Code imposing sweeping obligations on certain for-profit businesses operating in the state.<sup>4</sup> In addition, it would have authorized any consumer to sue a business for violating the Act.<sup>5</sup> And it would have authorized state and local prosecutors to file civil actions to recover monetary penalties from business violators.<sup>6</sup>

As might have been expected, the initiative proposal spawned a broad hue and cry from the California business community, prompting opponents to negotiate compromise amendments to Assembly Bill 375.<sup>7</sup> The 2018 California Legislature debated and ultimately enacted the compromise legislation with the unanimous vote of both chambers. Immediately after then-Governor Jerry Brown signed the bill into law,<sup>8</sup> Californians for Consumer Privacy withdrew the initiative proposal.<sup>9</sup>

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3. Initiative Measure No. 17-0039, The California Consumer Privacy Act of 2018, Version 2, § 3.

4. *See id.* § 4.4–4.6.

5. *See id.* § 4.9.

6. *See id.* § 4.10.

7. California Consumer Privacy Act, 2018 Cal. Legis. Serv. Ch. 55 (A.B. 375) (West). The bill had carried over from the 2017 legislative session after business interests blocked its enactment.

8. Then-Governor Brown signed the legislation on June 28, 2018. *Id.* The legislation takes effect on January 1, 2020, on the condition that the November 2018 ballot initiative is withdrawn. *See id.* § 3.

9. Californians for Consumer Privacy, the political action committee sponsor, agreed to withdraw the proposed initiative measure on the same day the Governor signed the compromise legislation. *See* Derek Hawkins, *The Cybersecurity 202: Why California could be the bellwether for the privacy movement*, WASH. POST (June 29,

While the California legislative debate was ongoing, two major global events gave heightened political salience to concerns about personal data privacy. The first was the prominent news story concerning the unauthorized use of more than eighty-six million Facebook clients' personal information by Cambridge Analytica, a British political consulting company, to "microtarget" political advertising for the purpose of influencing voters in the 2016 U.S. presidential election.<sup>10</sup> Mark Zuckerberg, CEO of Facebook, Inc., testified before two congressional committees in April 2018 in response to the scandal.<sup>11</sup> The second was the General Data Protection Regulation (GDPR), which took effect in the European Union's twenty-eight member states on May 25, 2018.<sup>12</sup> The GDPR made sweeping revisions to EU laws pro-

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2018), <https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/06/29/the-cybersecurity-202-why-california-could-be-the-bellwether-for-the-privacy-movement/5b34d50e1b326b3967989d01> [https://perma.cc/P6KG-B7CT].

10. See, e.g., Matthew Weaver, *Social media 'micro-targeting' of voters on the increase, MPs told*, *GUARDIAN* (Jan. 23, 2018, 10:10 AM) <https://www.theguardian.com/media/2018/jan/23/social-media-micro-targeting-of-voters-on-the-increase-mps-told> [https://perma.cc/2TKT-6WXX] (describing evidence regarding "extensive use of behavioural advertising techniques in politics . . . without public awareness or discussion," which may have influenced the outcome of the 2016 Brexit referendum). Not long after news of the scandal broke, Cambridge Analytica ceased business and declared bankruptcy. See, e.g., Nicholas Confessore & Matthew Rosenberg, *Cambridge Analytica to File for Bankruptcy After Misuse of Facebook Data*, *N.Y. TIMES* (May 2, 2018), <https://www.nytimes.com/2018/05/02/us/politics/cambridge-analytica-shut-down.html> [https://nyti.ms/2FBxRk].

11. See Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, *N.Y. TIMES* (Apr. 4, 2018) <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> [https://nyti.ms/2GBQ4Lm] (summarizing key events leading up to Zuckerberg's congressional testimony). In May, Zuckerberg testified before a committee of the European Parliament. See Tony Romm, *European lawmakers told Mark Zuckerberg they could regulate—or break up—Facebook*, *WASH. POST* (May 22, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/05/22/zuckerberg-european-parliament-facebook-testimony> [https://perma.cc/Q5TZ-Z4WM].

12. See generally Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1. Article 99 provides that the Regulation takes effect on May 25, 2018. *Id.* at 87; see *A new era for data protection in the EU: What changes after May 2018*, EUROPEAN COMM'N, [https://ec.europa.eu/commission/sites/beta-political/files/data-protection-factsheet-changes\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/data-protection-factsheet-changes_en.pdf) [https://perma.cc/3JNZ-LEML] (last visited Mar. 29, 2019). See generally *2018 reform of EU data protection rules*, EUROPEAN COMM'N,

protecting data privacy. Global in reach, the new regulations apply to any person, business, or organization—no matter where located—that gathers, processes, manages, or stores the personal data of natural persons located in European Union member states.<sup>13</sup>

These news stories illustrate the rapid globalization of law in a contemporary, ever-changing world. Not until 2018 did we learn that for-profit foreign enterprises gathered massive amounts of personal information about American citizens without authorization, and then used that data to microtarget potential voters with digital content to achieve nefarious purposes—including influencing elections on momentous issues. The California legislative initiative and the compromise legislation that followed reflect the realities of modern lawmaking in response to rapid developments in a global marketplace.

Now imagine, just for a moment, how long it would have taken a common law legal system to meaningfully respond to the many complex and interrelated issues related to global information privacy. Judge-made law develops incrementally over time on a case-by-case basis, offering the time-tested advantages of stability and predictability. On the other hand, the slow pace of common law evolution is ill-suited for the rapidly developing technological world of the twenty-first century and its novel legal issues that demand immediate resolution. By its very nature, the common law judicial process resolves issues at the most granular level based on fact-specific cases and controversies. But the complex legal issues of today call for policy-driven solutions on a global scale. The European Union's GDPR, the California initiative proposal, and California Assembly Bill 375 all reflect legislative attempts to address compelling social and technological issues that affect virtually everyone and every nation. The critical issues of the day simply cannot realistically be resolved by the slow pace of incremental, case-specific, common law adjudication.<sup>14</sup>

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protection/2018-reform-eu-data-protection-rules\_en [https://perma.cc/4ZRX-LRC8] (last visited Mar. 29, 2019).

13. See Justin Jaffe & Laura Hautala, *What the GDPR means for Facebook, the EU, and you*, CNET (May 26, 2018, 8:58 AM), <https://www.cnet.com/how-to/what-gdpr-means-for-facebook-google-the-eu-us-and-you/> [https://perma.cc/9SAS-FSMQ].

14. Cf. Richard A. Posner, *Bentham and Blackstone*, 19 J.L. & ECON. 569, 594 (1976) (referring to English common law rulemaking as “quintessentially incremental,

My premise is that for all practical purposes—whether we like it or not—American common law is dead.<sup>15</sup> Yet the legal academy, by continuing to teach law students primarily common law reasoning tied to subject-matter silos, invented long ago in an unsuccessful effort to “scientize” law,<sup>16</sup> remains root-

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indeed glacial”). Indeed, some American legal scholars have recognized the deficiencies of common law for addressing modern legal issues. *E.g.*, Frank P. Grad, *Legislation in the Law School*, 8 SETON HALL LEGIS. J. 1, 15 (1984).

Legislation is the only purposeful form of lawmaking we know. It is the primary task of the legislative branch of our democratic government. By comparison, the common law is a mere incidental result of the rendering of decisions in individual cases by judges not responsible to a constituency for policy formulation. Thus, if instruction in legislation is to be meaningful, it must deal with the essential task of lawmaking by the legislative branch in our form of government. It is the task of the legislative branch to meet the kinds of public need which can only be resolved by legislation. We have looked to legislation to resolve the emerging contemporary problems that the common law is inherently unable to resolve. The need for general legislation, for legislation of a programmatic and prospective nature, has become more clearly apparent since the turn of the [twentieth] century . . . .

*Id.*

15. At the very least, its death is imminent. As this Article will demonstrate, both jurists and scholars have presaged the demise of American common law. For example, nearly a half-century ago, the Wisconsin Supreme Court rejected an argument that it should exercise its judicial power to recognize pure comparative negligence, contending that the legislature’s 1931 enactment of the “49% rule” precluded it from doing so. *Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 516–17 (Wis. 1970) (“Without passing judgment upon the merits of pure comparative negligence . . . , we think that the legislature is the body best equipped to adopt the change advocated by the appellant.” (citing WIS. STAT. ANN. § 895.045)). The Chief Justice filed a strong dissent, asserting the court’s inherent power to develop tort law notwithstanding the legislature’s “partial repudiation of contributory negligence.” *Id.* at 519 (Hallows, C.J., dissenting). Finding “nothing in [the statute’s] history or in its language which evinces any intent to pre-empt this field of common law,” he warned, “[t]he doctrine of pre-emption applied to common-law areas should rest only on affirmative [legislative] action; otherwise, the death of the common law is near at hand.” *Id.* at 522–23. Soon after, the Wisconsin Legislature amended the statute, but only so far as to allow recovery so long as the plaintiff’s negligence does not exceed the proportion attributed to the defendant (commonly known as the “50% rule”). *See Delvaux v. Vanden Langenberg*, 387 N.W.2d 751, 756, 758 (Wis. 1986) (citing 1971 Wis. Laws 47, but reserving the court’s “inherent common law authority to reconsider matters that stem from judicial creation[, which] has not been eroded by the passage of the comparative negligence act”).

16. *See, e.g.*, Joseph Lavitt, *Leaving Contemporary Legal Taxonomy*, 90 DENV. U. L. REV. 213, 215–16 (2012).

[T]he contemporary doctrinal categories of contract and tort are the product of a relatively recent advent and did not take root in American courts until the latter half of the nineteenth century. Encrusted now like

ed in the common law myth of eighteenth-century Blackstonianism<sup>17</sup> and the “law is science” myth of nineteenth-century Langdellianism.<sup>18</sup> But today’s law students will be tomorrow’s lawyers, who will practice in what legal scholars long ago de-

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barnacles, supposed distinctions between tort and contract law render almost entirely unrecognizable the structure of a system better suited to vindicate the violation of primary rights . . . .”

*Id.* (citing, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 161 (1995) (“Until the late nineteenth century, the dividing line between ‘contract’ and ‘tort’ had never been sharply drawn . . . .”).

17. William Blackstone, an eighteenth-century University of Oxford Professor of English Common Law, published four volumes of *Commentaries* in the late 1760s. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996) (citing DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE* 133–34 (1938)). Blackstone was a strong proponent of “a full-fledged system of common law.” James McCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7, 10 (1965) ((originally published in HARVARD LEGAL ESSAYS (1934)). Before the 1772 publication of the American edition of Blackstone’s *Commentaries*, American colonists had already purchased more than a thousand copies of the English edition, and many more leading American lawyers secured advance subscriptions to the American edition. See Alschuler, *supra*, at 45 (citing LOCKMILLER, *supra*, at 170); see also Randy J. Holland, *Anglo-American Templars: Common Law Crusaders*, 8 DEL. L. REV. 137, 148 (2006) (explaining the popularity of Blackstone among nineteenth-century American lawyers and jurists). Professor Alschuler explained in detail the pervasive influence of Blackstone’s *Commentaries* on the development of American common law and legal thinking. Alschuler, *supra*, at 2, 4–19; see also ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 110–12 (1921) (discussing Blackstone’s influence on American law).

18. See, e.g., ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 92–93 (1998) (discussing Langdell’s perspective that his educational method of studying cases resembled the study of empirical science, in particular evolutionary biology); David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 138–39 (1988) (“[C]ontrary to Christopher Langdell’s claim that law is a science, both judicial thought and American legal scholarship based on that thought fit nearly without exception into the realm of noncumulative or ‘soft’ knowledge.”); Edward A. Purcell, Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1472 (2014) (“Harvard’s dean, Christopher Columbus Langdell, emerged as the leading proponent of this ‘analytical’ [jurisprudence] approach, which also became known to its subsequent critics as ‘Langdellianism,’ ‘conceptualism,’ ‘formalism,’ and eventually ‘mechanical’ jurisprudence”); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 905 (1997) (explaining the “continued hold of the Langdellian paradigm”); see also, e.g., Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 168 (2008) (noting that “the vast majority of [American] law schools modeled their pedagogy—whether directly or indirectly—on the methods of Harvard’s famous Dean from 1870 to 1895, Christopher Columbus Langdell”).



nominated the “age of statutes.”<sup>19</sup> Over the last century, the corpus of American law has expanded to encompass not only statutes but also court rules, state and federal administrative regulations, executive orders, international treaties, supranational conventions, common market legislation, and interstate compacts.<sup>20</sup> Legal academics must stop pretending that we live and work in a common law legal system driven by judge-made law.<sup>21</sup> Otherwise they do a disservice to their students as well

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19. E.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 163 (1982) (describing the role of courts in the “age of statutes”). Roscoe Pound presaged Calabresi in 1908 by declaring the existence of “an industrial community and an age of legislation.” Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908). But unlike Pound, who had anticipated legal developments with pragmatic optimism, Calabresi bemoaned the “statutorification” of law and proposed that judges should be able to disregard statutes they deem inconsistent with the current “legal landscape.” CALABRESI, *supra*, at 1–2. It would not be long before Calabresi drew criticism for his radical proposal. See *infra* notes 298–301 and accompanying text. Calabresi was certainly not the first or even the second legal scholar to recognize the shift from common law to statutes. At the height of the New Deal era, scholars recognized the radical change the legal system had been undergoing since the Industrial Age of the late nineteenth century. See, e.g., Frank E. Horack, Jr., *The Common Law of Legislation*, 23 IOWA L. REV. 41, 45 (1937) (“[T]he lawyer’s function today is not limited to litigation. The understanding of administrative action and the prediction of legislative action are chief responsibilities of many lawyers . . . . To achieve a capacity for legislative prediction the lawyer must organize legislative materials along systems similar to the judicial digests.”). Professor Horack would go on to publish one of the earliest legislation casebooks. See Willard Hurst, *The Content of Courses in Legislation*, 8 UNIV. CHI. L. REV. 280, 280 (1941) (critiquing FRANK E. HORACK, JR., *CASES AND MATERIALS ON LEGISLATION* (1940)).

20. See 2 NORMAN SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 36:7 (7th ed. 2007 & Supp. 2017) (“Interstate compacts are the state counterparts of treaties.”). Indeed, the proliferation of written law in all its forms was noted by scholars more than a half century ago as a motivating rationale for codification. As one scholar observed:

[M]odern law is written law whether it be found in the reported opinion of a court, the words of a statute, the ruling of an administrative agency or the executive order of the president. As the multiplicity of law increases, a demand for orderly presentation begins to be made. Even with its defects, mainly of man himself, the method of codification, newly adapted to our age, with provision for periodic revitalization, still appears to be the most useful tool for the doing of the task of stating the law clearly and concisely that man may know the rules and principles that are to govern his actions.

Ferdinand Fairfax Stone, *A Primer on Codification*, 29 TUL. L. REV. 303, 310 (1955).

21. English scholars have long since acknowledged the same developments in the United Kingdom, as well as the legal academy’s failure to acknowledge that “legislation is the single most important source of law.” David Miers & Alan Page,

as the bench and the bar. Indeed, a significant reason modern legal scholarship goes largely unread is that today's scholars have lost sight of the needs of both jurists and the practicing bar in an increasingly complex and interconnected statutory domain.<sup>22</sup>

One scholar recently observed that “[t]he relationship between positively enacted legislation and uncodified, ‘unwritten’ law is a perennial source of puzzles.”<sup>23</sup> This Article aims to shed light on some of those puzzles, and to urge the legal academy to come to terms with American law *as it is* today, not as it once *might have been* or even as scholars *wish it were*. Part I defines common law and distinguishes it from other sources of law. Part II addresses the evolution of the American legal system to the present day, emphasizing its heavy reliance on statutes, codes, rules, and other positive law. Part III describes the often-misleading taxonomy that comparative law scholars have devised to classify legal systems and explains how it often mis-

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*Teaching Legislation in Law Schools*, 1980 STATUTE L. REV. 23, 28 (underscoring the “pervasiveness of legislation as an instrument of control”).

22. See Willard Hurst, *Legislation as a Field of Legal Research*, 2 HARV. J. ON LEGIS. 3, 3 (1965) (“[C]ompared with the importance which legislative decision making and legislation have in the contemporary legal order, legal education and legal scholarship still fall far short of what they should do in this field . . . . Legal scholarship must adopt new emphases in order to come to grips with these changes in the sources of law.”); see also, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (“The ‘impractical’ scholar . . . produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, . . . judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.”); *id.* at 50, 62 (calling on law schools to hire more “practical” scholars); Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 50 (2015) (“[L]egal scholarship, in its present form, is a massive and unsupportable investment in what benefits a few people in a narrow universe.”); Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 113–26 (2010) (critiquing “impractical law review scholarship”); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1331 (2002) (“Baldly stated, the uncomfortable fact is that too much of the legal scholarship now produced is of too little use to anyone.”). See generally Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2592, 2603–07 (2015) (documenting the disconnect between most legal scholarship and judicial decisionmaking using empirical research). At the time of writing, the author was the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. *Id.* at 2592.

23. Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1691 (2014).

characterizes the ever-changing, cross-fertilizing nature of legal communities. Part IV addresses the entrenchment of common law in the American legal academy, the need for reform, and the beginnings of innovation by a few forward-thinking law schools. Part V briefly concludes, demonstrating that for all practical purposes, American common law is dead.

For the legal academy to claim that the American legal system of today is a common law system is to perpetuate a legal fiction.<sup>24</sup> Recognizing that enacted law has long since become the driving force of modern American law—and reforming legal education accordingly—would better serve law students, attorneys, judges, and ultimately the American people.

### I. DEFINING AND DISTINGUISHING COMMON LAW

Before proceeding with my primary argument, let me clarify what I mean by “common law”—a term often misused and misunderstood, even by members of the American legal acad-

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24. Jeremy Bentham declared a legal fiction “a willful falsehood, having for its object the stealing of legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it.” JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 243 (1838), *quoted in* Paul S. Gillies, *Fictions of Law*, VT. B.J., Spring 2015, at 8, 8. More than a century later, Lon Fuller defined a legal fiction more pragmatically as “a statement propounded with a complete or partial consciousness of its falsity, or a false statement recognized as having utility.” LON FULLER, LEGAL FICTIONS 7 (1967), *quoted in* Gillies, *supra*, at 8. One scholar has speculated that “the very pervasiveness of legal fictions . . . camouflages them and keeps us from seeing and evaluating a phenomenon which permeates our legal culture.” Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 876 (1986). Indeed, with respect to the common law tradition, “legal fictions . . . preserve a notion of continuity with the past, yet . . . help short-circuit attempts to comprehend the complexity behind the assumptions a legal fiction conveys.” *Id.* at 877.

More recently, Professor James Maxeiner has made a compelling (if somewhat hyperbolic) case that the legal profession, the legal academy, and the judiciary together have been responsible for creating and perpetuating the common-law myth beginning in the last quarter of the nineteenth century. *See* James R. Maxeiner, *A Government of Laws Not of Precedents 1776–1876: The Google Challenge to Common Law Myth*, 4 BRIT. J. AM. LEGAL STUD. 137, 140 (2015). But then—Professor Roscoe Pound developed the same argument—more convincingly—over a century ago in his masterful work *Common Law and Legislation*. *See* Pound, *supra* note 19, at 396–402 (concluding, with tongue in cheek, that “this wise and ancient rule of the common law [that statutes in derogation of common law should be strictly construed] is, in substance, an American product of the nineteenth century.”).

emy.<sup>25</sup> Over the centuries the term has developed a multitude of meanings.<sup>26</sup> Professor Morris Cohen, after consulting a variety of lexicographical and historical resources, enumerated six distinct conceptual meanings associated with the term.<sup>27</sup> Summarized, they describe: (1) any community's general or central law, as distinguished from local laws and customs;<sup>28</sup> (2) the centralized body of law developed by the King's bench in England beginning in the twelfth century; (3) English law as developed by the King's ordinary bench, as distinguished from equity law developed by chancery courts and other specialized bodies of law, including admiralty and mercantile law; (4) the "whole law of England," as distinguished from the law of other nations, in particular those that follow the civil law tradition; (5) the rights, powers, prohibitions, and remedies derived from judicial decisions in England and America, as opposed to those derived from enacted statutes; and (6) with respect to the United States, the body of English legal doctrine comprising the foundation of American law and its later development.<sup>29</sup>

Virtually every definition has one feature in common: all distinguish common law from its counterparts by focusing on the

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25. See Bernard F. Deutsch, *Common Law*, 27 JURIST 37, 51 (1967) ("[C]ommon law is a relative term—it means many things to many people.").

26. See Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 LAW LIB. J. 13, 14 (1989) ("It is surprising to discover how the familiar words *the common law* have come to mean so many different things and to be treated in so many different ways."). Other scholars have similarly noted the confusion surrounding the meaning of the term "common law." E.g., Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1444 ("[N]either common law nor 'statutes' are well-specified terms within either the theoretical or the empirical literatures. They are used with different and diffuse meanings. As both types of law come in a wide variety of forms, this lack of definitional clarity contributes to a lack of precision in specifying models and testing hypotheses.").

27. See Cohen, *supra* note 26, at 17–18.

28. This was apparently the earliest meaning of the term, borrowed from canon law. "The phrase 'common law' was borrowed from the canonists in the thirteenth century, meaning, both in its lay and in its ecclesiastical use, general, as opposed to local, law and custom. The use of 'common law' in contrast to 'statute law' [came] later, arising from the circumstance that statutes were rare." Pound, *supra* note 19, at 390 n.1 (citing FREDERICK W. MAITLAND, *CANON LAW IN THE CHURCH OF ENGLAND* 4 (London, Methuen 1898)).

29. Cohen, *supra* note 26, at 18.

primary source of legal authority.<sup>30</sup> Common law relies primarily if not exclusively on written judicial decisions, sometimes known as “judge-made” law. In this Article, “common law” means the legal rights, duties, powers, prohibitions, and remedies derived exclusively from published caselaw—decisions of common law courts in the United States and England.<sup>31</sup> That definition distinguishes common law from the legal rights, duties, powers, prohibitions, and remedies derived from statutory enactments (including but not limited to codes), and other kinds of positive law enacted or adopted by governmental institutions with expressly granted lawmaking power. This defi-

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30. See, e.g., Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 25 (2007) (“The common law, in its ideal, evolves from the decision of individual cases and resultant steady accretion and emendation of decision rules as new situations develop.”); Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT’L L. 1, 40 (2003) (“The core distinction between civil law and common law is their approach to authoritative documents.”). As one English scholar observed:

Much ink has been spilled on the question “what is ‘the common law,’” but for present purposes a brief and familiar answer can be given. The hallmark of a common law system is the importance accorded to the decisions of judges, and in particular appellate judges, as sources of law. So the common law is that part of the law which it is within the province of the courts themselves to establish.

Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 295 (1997); see also Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 75 (2001) (“The common law is a law defined in terms of past judicial decisions . . . [C]ommon law perpetually is in flux, always in a process of further becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation.”). Somewhat less eloquently, a Canadian scholar posited:

[C]ommon law adjudication is viewed as an exercise in principled justification in which the body of previous legal decisions is treated as an authoritative resource of available arguments, analogies, and axioms. Judges are considered to judge best when they distil [sic] the principled spirit of the past and rely upon it to develop the law in response to future demands.

Allan C. Hutchinson, *Work-in-Progress: Evolution and Common Law*, 11 TEX. WESLEYAN L. REV. 253, 254 (2005).

31. Cf., e.g., *The Common Law and Civil Law Traditions* (2010), ROBBINS RELIGIOUS & CIV. L. COLLECTION, SCH. OF L. (BOALT HALL), U.C. BERKELEY, <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLaw-CivilLawTraditions.pdf> [<https://perma.cc/6EW8-KC5E>] (defining “common law” as “generally *uncodified*” and therefore lacking a “comprehensive compilation of legal rules and statutes”; although it relies on “scattered statutes,” common law is “largely based on [judicial] *precedent*”).

inition combines the fifth and sixth meanings enumerated by Professor Cohen.<sup>32</sup>

A. *Law in the American Colonies*

From an historical perspective, “common law” refers to the corpus of English legal doctrine that represents the foundation of law in subnational jurisdictions colonized by English settlers, along with the subsequent development of that body of law.<sup>33</sup> But English common law was never unilaterally imposed on the American Colonies. As one scholar has observed, “[t]he evidence indicates that the British government, in practice, did not play a strong role in enforcing the common law in the colonies,” and “English legal authorities never decided for themselves in theory the extent to which the common law should be enforced.”<sup>34</sup> Certainly “there was no common law in America on 12 May 1607,” when the first permanent English settlement was established.<sup>35</sup> Instead, over time, each colony and later each state decided for itself the extent to which its legal system would adopt English common law as its foundation.<sup>36</sup> Even Blackstone, the venerable defender of English common law, acknowledged that “the common law of England, as such, has no allowance or authority [in the American Colonies].”<sup>37</sup>

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32. See *supra* notes 26–29 and accompanying text.

33. See Cohen, *supra* note 26, at 18 (referring to the English Colonies in pre-revolutionary America).

34. See William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 420 (1968).

35. *Id.* at 395.

36. See *id.* at 401 (“[E]ach colony developed its own legal system.”). Several of the Royal charters, including the Massachusetts Bay Charter of 1629, authorized colonists to adopt laws not repugnant to the laws and statutes (and sometimes customs) of England. See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 791–92 (1951). However, for various reasons, the historical record does not make clear whether any of these provisions were actually enforced or even the extent to which the colonists complied. See *id.* at 793–95.

37. Stoebuck, *supra* note 34, at 418 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*107–08); see also W. Hamilton Bryson, *Introduction*, in *ESSAYS ON LEGAL EDUCATION IN 19TH CENTURY VIRGINIA* 28 (W. Hamilton Bryson ed., 1998) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*105); William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 935–36 (1988) (“Blackstone thought that the common law did not extend to the ‘American plantations.’” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*109)).

In contrast to English common law, positive law played an influential role in American history well before the Revolution.<sup>38</sup> The earliest colonists rejected the “unwritten” constitution of England in favor of their own written “compacts,” which were to become the forerunners of colonial, and later state and federal, constitutions.<sup>39</sup> The Mayflower Compact, which political scientists have analogized to the religious “covenants” adopted by the Protestant dissenters who colonized the northeastern states, made explicit reference to positive law.<sup>40</sup> John Winthrop wrote in 1635 of the colonists’ concerns “that the [colonial] magistrates ‘for want of positive laws, in many cases, might proceed according to their discretions.’”<sup>41</sup>

By 1648, a compilation of Massachusetts law was published that would provide the foundation for later statutory enactments in the Colonies.<sup>42</sup> Although the authors acknowledged that the *Book of the General Lawes and Libertyes* did not represent “a perfect body of laws sufficient to carry on the Government established for future times,” the preface declared it a remark-

38. See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435, 498 (2000) (“Colonial law was, to a striking extent, code law.”).

39. See Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 40 (1990) (“The Declaration of Independence and the statements of fundamental rights, values and commitments found in almost all of our political covenants and compacts stand as the ground upon which the figure of the Constitution is traced.”).

40. The Mayflower Compact reads in part as follows:

We . . . solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.

*Id.* at 25 (quoting The Mayflower Compact).

41. DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 21 (1958) (quoting John Winthrop). “The legislative history of early New England is the story of successive attempts to provide, first, a ‘Magna Charta’ for the inhabitants of Massachusetts Bay Colony and, later, a handy compilation of their laws.” *Id.* Yet Boorstin opined that the colony’s leaders were “not eager to embody its institutions in an all-embracing code.” *Id.*

42. *Id.* at 23; see *THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETS* (1648) [hereinafter 1648 BOOK], <http://puritanism.online.fr/puritanism/sources/lawslibertyes1648.html> [<https://perma.cc/PB2T-NNCW>] (online transcription).

able feat indeed to have produced such a volume in such a short time, especially when compared to the then-incomplete or nonexistent law compilations of either England or the European states, even after centuries of effort.<sup>43</sup>

The 1648 compilation has been described as “the first legal code established by European colonists.”<sup>44</sup> By its own terms, the publication was a true codification of general colonial law, systematically organized and indexed by subject matter for ease of reference, which superseded all previous laws of a comparable nature:

These Lawes which were made successively in divers former years, we have reduced under severall heads in an alphabetically method, that so they might the more readily be found, & that the divers lawes concerning one matter being placed together the scope and intent of the whole and of every of them might the more easily be apprehended: we must confesse we have not been so exact in placing every law under its most proper title as we might, and would have been: the reason was our hasty endeavour to satisfie your longing expectation, and frequent complaints for want of such a volume to be published in print: wherein (upon every occasion) you might readily see the rule which you ought to walke by. And in this (we hope) you will finde satisfaction, by the help of the references under the severall heads, and the Table which we have added in the end. For such lawes and orders as are not of generall concernment we have not put them into this booke, but they remain still in force, and are to be seen in the booke of the Records of the Court, but all generall laws not heer inserted nor mentioned to be still of force are to be accounted repealed.<sup>45</sup>

The *Book* is the well-known product of what one scholar called “the earliest attempt to enact a kind of code” in the Colonies.<sup>46</sup> As the quoted passage reflects, Massachusetts colonists

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43. BOORSTIN, *supra* note 41, at 23 (quoting 1648 BOOK, Preface).

44. *Massachusetts Body of Liberties*, MASS. EXEC. OFFICE FOR ADMIN. & FIN., <http://www.mass.gov/anf/research-and-tech/legal-and-legislative-resources/body-of-liberties.html> [<https://perma.cc/2VAD-3PAP>] (last visited Mar. 29, 2019).

45. 1648 BOOK, *supra* note 42, Preface (addressed “to our beloved brethren and neighbours”). The compilation was revised in 1660 and again in 1672. *Massachusetts Body of Liberties*, *supra* note 44.

46. Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335, 347 (1953) (citing the 1648 BOOK but noting that it was not truly “a codifi-



pressed for codification of colonial law in part as an expression of their concern about royal magistrates wielding arbitrary authority.<sup>47</sup>

Less well known is a remarkable 1661 preamble to an enactment in Jamestown, the earliest permanent English settlement, located on the east coast of what would become colonial Virginia.<sup>48</sup> Its wording reflects many of the features of codification as enumerated and described by comparative law scholars in modern times:<sup>49</sup>

Whereas, the late unhappy distractions causing frequent changes in the government of this country, and those produced soe many alterations in the lawes that the people knew not well what to obey nor the judge what to punish, by which meanes injustice was hardly to bee avoyded, and the just freedome of the people by the incertainty and licentiousness of the lawes hardly to bee preserved. This assembly taking the same into their serious consideration, . . . have by settling the laws diligently endeavored to prevent the like inconveniencies, by causing the whole body of the laws to be reviewed, all unnecessary acts and chiefly such as might keep memory our inforced deviation from his majesties obedience, to be repealed, and expunged, and those that are in force to be brought into one volume, and at least any prejudice might arise by the ignorance of the times from whence those acts were in force, they have added the dates of every act, to the end that courts might rightly administer justice and give sentence according to law for anything happening at any time since any law was in force, and have also endeavored in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence. And

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cation in the modern meaning of the word," suggesting instead that it was akin to a restatement); see also James R. Maxeiner, *Costs of No Codes*, 31 MISS. C. L. REV. 363, 375 (2013) (describing the 1648 BOOK as one example of early American codes).

47. See Lauren Benton & Kathryn Walker, *Law for the Empire: The Common Law in Colonial America and the Problem of Legal Diversity*, 89 CHI.-KENT L. REV. 937, 939 (2014) (discussing Volumes I & II of WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA* (2008 & 2012)).

48. Louis E. Zuckerman, *The Common Law of America*, 53 AM. L. REV. 577, 581 (1919).

49. See *infra* notes 354–59 and accompanying text (describing the features of codification that distinguish it from other methods and forms of legislation).

that the laws made by us are intended by us, but as breife memorialls of that which the capacity of our courts is utterly unable to collect out of such vast volumes . . . .

Be it therefore enacted by the Governor Councill and Burgesses of this Grand Assembly, That all the following laws continued or made by this Assembly shall hereafter be reputed the laws of this country by which all courts of judicature are to proceed in giveing sentence and to which all persons are strictly required to yeild all due obedience, and that all other acts not in this collection mentioned be to all intents and purposes utterly abrogated and repealed unles suite for anything done be commenced when a lawe now repealed was in force, in which case the produceing that law shall excuse any person for doeing anything according to the tenor thereof.<sup>50</sup>

Like the Massachusetts *Book*, the Jamestown preamble reflects the colonists' concerns about the instability of colonial government and the resulting uncertainty of laws by which they would be governed.<sup>51</sup> Those concerns motivated them to simplify and codify in one volume the laws still in force, along with the date of each enactment. Although the preamble professed allegiance to "those excellent and often refined laws of England," the colonists enacted their own laws as "breife memorialls" of English laws that were in "such vast volumes" as to be effectively inaccessible to the colonists and the royal magistrates.<sup>52</sup> The passage reflects the earliest American colonists' desire for a simplified, readily accessible compilation of laws then in force—in effect, a codification. Any laws not included in the volume of codified laws were declared "to all intents and purposes utterly abrogated and repealed."<sup>53</sup>

In the South, a practical problem arose that starkly illustrates colonial Virginians' willingness to deviate from English common law when deemed necessary to suit their needs.<sup>54</sup> Under

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50. Zuckerman, *supra* note 48, at 581–82 (quoting 2 HENING'S STATUTES AT LARGE 41).

51. See Benton & Walker, *supra* note 47, at 939 ("In Virginia, the politics of property created incentives for clear legal rules.").

52. Zuckerman, *supra* note 48, at 581–82 (quoting 2 HENING'S STATUTES AT LARGE 41).

53. *Id.*

54. See Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 560 (2004) ("The issue arose . . . because white men were fathering children with black

the English common law primogeniture system, a child's lineage depended on the father's bloodline, even those born out of wedlock.<sup>55</sup> However, that would have meant that the children of enslaved mothers and slave-owning fathers could claim freedom on the basis of English common law—and some did.<sup>56</sup> The Virginia colonial assembly found a solution by borrowing the civilian law doctrine of *partus sequitur ventrum*, which made the legal status of a “mulatto” child dependent on the mother's legal status.<sup>57</sup> The law was enacted in December 1662, apparently in part to discourage slaveholders from fathering mixed-race children:

WHEREAS some doubts have arrisen whether children got by any Englishman upon a Negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And that if any christian shall committ ffornication with a Negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act.*<sup>58</sup>

Most other colonies (and later states) that relied on the institution of slavery would follow Virginia's example by enacting

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women, creating a pressing social problem as Virginia eased into a society in which blackness meant slavery and whiteness meant freedom.”).

55. PAMELA BARNES CRAIG, *State Law Resources*, in *AMERICAN WOMEN: RESOURCES FROM THE LAW LIBRARY* (Barbara Bavis & Janeen Williams eds., Library of Congress Mar. 19, 2019), <https://guides.loc.gov/american-women-law/state-laws#s-lg-box-wrapper-22569020> [<https://perma.cc/NFY9-PHZP>] (under the heading “Property Law” select “Slavery and Indentured Servants”).

56. See Warren M. Billings, *The Cases of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth-Century Virginia*, 30 WM. & MARY Q. 467, 468–69 (1973) (telling the tale of Elizabeth Key, an enslaved mulatto woman (fathered by white slaveholder Thomas Key, then a member of the colonial assembly), who in 1655 filed a lawsuit seeking her freedom based in part on the English common law rule); *id.* at 472 (“Elizabeth Key's fate suggests a customary practice in some courts of freeing from slavery mulattoes who could prove English paternity. Judges who ruled favorably in these cases evidently rested their decision upon the common law dictum that a child inherited his or her father's condition.”).

57. “ESTEEMED BOOKES OF LAWE” AND THE LEGAL CULTURE OF EARLY VIRGINIA 22 (Warren M. Billings & Brent Tarter eds., 2017).

58. CRAIG, *supra* note 55 (quoting 2 HENING'S STATUTES AT LARGE 170); see Billings, *supra* note 56, at 473 (“The act's preamble demonstrates that litigation like the Elizabeth Key case had caused the Assembly to rectify the inconsistencies regarding the legal use of the word *slave*.”).

similar statutes.<sup>59</sup> One consequence, whether intended or not, was that white slaveholders had a financial incentive to impregnate female slaves (or look the other way when other white men did so) because the offspring simply added to the masters' slave holdings. This and similar laws "would have a profound effect on the continuance of slavery, especially after the slave trade was abolished—and on the future descendants of these women."<sup>60</sup>

As these examples illustrate, even when colonists professed allegiance to the Crown, they were quite willing, when expedient, to deviate from English common law by legislating to address unique local conditions, protect property, or advance economic interests.<sup>61</sup>

Colonial courts were generally established by royal governors, who represented the British Crown.<sup>62</sup> Even chancery

59. CRAIG, *supra* note 55; see THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 47–49 (1996); see also ANNETTE GORDON-REED, THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY 46–47 (2009). Gordon-Reed explains the deeply troubling implications of these and similar statutes for the seven children of Sally Hemings and Thomas Jefferson, as well as other mixed-race children fathered by white slaveholders. The modern concept of rape was unknown with respect to a white slaveholder's conduct with his own female "property," whether or not the sexual relationships were consensual. *Id.*

60. CRAIG, *supra* note 55; see Gillmer, *supra* note 54, at 560–61 ("[T]he rule worked as much to the economic advantage of the planter class as it did to perpetuate white dominance and the patriarchal system, ensuring as it did that slave mothers, no matter who the father, would only give birth to slave children.").

61. See Billings, *supra* note 56, at 473–74 (explaining that overriding English common law by enacting a civil law doctrine "broke with tradition, thereby freeing Virginia lawmakers from the past's restraining influences," illustrating "how the legislators wished to adapt their legal heritage to a new situation"). Indeed, over the last four decades legal scholars have documented the significant influence of colonial slave codes in "provid[ing] the foundation for the initial racial classification system in America." Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 296–97 (2017); see also Billings, *supra*, at 474 ("[T]he [colonial Virginia] laws also became the precedents for future legislation that governed an emerging slave system."); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1773–90 (1995) (discussing origins of "slave law" in the American colonies and enumerating examples). See generally MORRIS, *supra* note 59.

62. See Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 262 (1967) (explaining that throughout most of the seventeenth century, the King had exclusive prerogative to establish courts; in the Colonies, the King's prerogatives were exercised by royal governors, typically authorized by royal charter); see also Hall, *supra* note 36, at 797 n.28 ("One of the most critical legal problems of the times was the question of the maintenance of the royal prerogative in the American colonies[, including] the broad questions of what English

courts, in the handful of colonies where established, were under the control of the royal governors.<sup>63</sup> Not surprisingly, colonial courts were a constant source of complaints to the Crown.<sup>64</sup> Complaints ranged from concerns about delays, irregular procedure, and jury tampering to the lack of qualified judges and court personnel.<sup>65</sup> One complaint even alleged that a royal governor had fraudulently altered court records to contravene the court's opinion.<sup>66</sup>

As the colonial period drew to a close, the Declaration of Independence asserted that "these Colonies . . . are Absolved from all Allegiance to the British Crown," declaring that "all political connection between them and the State of Great Britain is and ought to be totally dissolved."<sup>67</sup> By these emphatic words, the Declaration surely did *not* mean that the colonists would yield their independence to the yoke of English common law made by colonial judges under direct supervision of royal governors, themselves merely extensions of the British Crown.

Indeed, history reveals that one of the many unresolved issues at the time of signing the Declaration was the source of law early American courts would apply to decide legal disputes among the colonists:<sup>68</sup>

Across the colonies, settlers sought to establish clear and written legal rules. Many were anxious to limit the prerogatives of colonial governors or local elites, while most recognized that the absence of established precedents meant that their communities could not rely solely on the slow devel-

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general law was applicable and to what extent acts of parliament governed . . ."); Gordon S. Wood, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 49, 50–51 (2018) (discussing the desire of American colonists at the time of the Revolution to strictly limit royal magistrates' discretion by simplifying and codifying portions of the common law; "Once the legislatures had clarified and written down the laws, then judges would presumably no longer have any justification for following their own inclinations and pleasure in interpreting the law . . .").

63. See *Surrency*, *supra* note 62, at 271.

64. See *id.* at 254.

65. *Id.*

66. *Id.* at 255.

67. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

68. See Hall, *supra* note 36, at 798 (acknowledging the unresolved issue at the time of signing the Declaration as to the applicable law American courts would use to decide disputes).

opment of an indigenous common law . . . . Moreover, as disputes with England arose and recurred, the colonists often sought to defend their claimed rights and prerogatives by appealing to the provisions of their colonial charters. Then, as they gradually recognized the need for increased intercolonial cooperation, they produced a series of charters designed to accomplish that goal [including] the Constitution itself. After Independence, too, they altered their colonial charters or drafted—and frequently redrafted—constitutions for the governments of the individual states. In codifying their laws, appealing to charter rights, and drafting state and national constitutions, [the American colonists] pursued a kind of legal positivist enterprise, seeking to establish formal “sources” of an authoritative law that was known, written, accessible, and clearly settled.<sup>69</sup>

Another scholar observed, “At an early date there seems to have prevailed in every [colonial] settlement a popular demand for codification of the law.”<sup>70</sup>

Not long after the Declaration of Independence was signed, however, Virginia’s colonial assembly enacted an ordinance that would become the foundation for similar statutes in a few other colonies<sup>71</sup> and later many states:<sup>72</sup>

[T]he common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of the colony.<sup>73</sup>

But the majority of the thirteen Colonies enacted reception statutes similar in wording to the original New Jersey Constitution, which declared that “the common law of England, as well

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69. Purcell, *supra* note 18, at 1462–63 (footnotes omitted). Nevertheless, the author added, “Americans never committed to the completeness and exclusivity of written laws.” *Id.* at 1463.

70. Hall, *supra* note 36, at 795.

71. *See id.* at 798. Georgia and Rhode Island enacted reception statutes similar to Virginia’s ordinance, with slight variations. *Id.* at 798 n.32.

72. *Id.* at 798.

73. *Id.* (quoting 9 LAWS OF VIRGINIA 126 (Hening 1821)).

as so much of the statute law, as have been heretofore practiced in this colony" would "remain in force, until they shall be altered by a future law . . ." <sup>74</sup> Compared to Virginia's ordinance, these provisions were more restrictive, essentially incorporating only those aspects of English law that had already been "practiced" in each colony, which of course varied considerably. <sup>75</sup>

Apparently, the codification trend in colonial America ceased by the mid-eighteenth century, perhaps in part because of the increasing influx of lawyers trained in England's common law legal tradition. <sup>76</sup> By then, as English-trained lawyers arrived in the Colonies and the Crown was more apt to set aside colonial legislation as contrary to English law, English common law had achieved enough of a foothold in colonial soil "to withstand the popular hostility to England and anything English . . . which reached its greatest outcry during the Revolutionary War and the post-Revolutionary Period." <sup>77</sup>

#### B. *Post-Revolution Reception Statutes*

After the Revolution, several former colonies enacted statutes or constitutions explicitly adopting English common law, at least in part. <sup>78</sup> Some simply continued pre-Revolutionary War statutes enacted during colonial times. The earliest colonies to do so were South Carolina in 1712 and North Carolina in 1715, both declaring English common law to be in force. <sup>79</sup>

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74. Hall, *supra* note 36, at 799 (quoting N.J. CONST. of 1776, art. XXII). Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, and Pennsylvania followed the approach outlined in the New Jersey Constitution. *Id.*

75. *See id.* at 800.

76. *See* Maxeiner, *supra* note 46, at 375; *see also* Catherine Skinner, *Codification and the Common Law*, 11 EURO. J.L. REFORM 225, 238 (2009) ("Despite some early rudimentary codifying legislation and a political desire to break away from the legal system of the old world, American legal culture was firmly anchored in the English common law tradition by the [nineteenth] century.").

77. Hall, *supra* note 36, at 797.

78. *See id.* at 798–800. The author of a 1921 Carnegie Foundation study of American legal education observed, "It is hardly an exaggeration to say that what we actually took over from England was simply Blackstone." REED, *supra* note 17, at 111.

79. *See* Hall, *supra* note 36, at 796 n.22; *see also* S.C. CODE ANN. § 14-1-50 (originally enacted 1712).

But some states, including Connecticut, never enacted reception statutes or comparable constitutional provisions.<sup>80</sup> Even those that did “received” English common law only to the extent it was deemed suitable to American conditions.<sup>81</sup> A few states even enacted statutes or court rules prohibiting the citation of English legal authorities in state courts.<sup>82</sup> Moreover, neither the federal Constitution nor any congressional enactment ever “received” English common law.<sup>83</sup> One scholar concluded that “there was an incomplete acceptance in [colonial] America of English legal principles, and [the] indigenous law which de-

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80. Connecticut was the only one of the thirteen original Colonies that never adopted a reception statute or any comparable state constitutional provision. See Hall, *supra* note 36, at 800; *id.* at 821–22 (noting that a minority of states west of the Allegheny Mountains followed Connecticut’s practice by leaving it to the courts to decide the scope of the states’ reception of English common law in the absence of controlling legislation). Neither Michigan nor Minnesota enacted any reception statute or constitutional provision, although in each of those states the courts took it upon themselves to adopt English common law without any sort of legislative authority. *Id.* at 802–03.

81. *Id.* at 805; see *Seminole Tribe v. Florida*, 517 U.S. 44, 132, 136–37 (1996) (Souter, J., dissenting); *Van Ness v. Pacard*, 27 U.S. 137, 144 (1829) (“The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.”); see also Hall, *supra* note 36, at 825 (“[F]rom colonial times up to the present day, American jurists have declared that English law bound us only so far as suited or adaptable to our local circumstances.”); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 575–76 (2016).

82. See Hall, *supra* note 36, at 806 (referring to Pennsylvania, New Jersey, and Kentucky statutes and New Hampshire court rules).

83. See Young, *supra* note 81, at 576 (noting that the Framers debated but rejected such a provision; “[n]or is there any federal statute receiving the common law *en masse* into national law . . .”); Zuckerman, *supra* note 48, at 578 (“[O]ur Federal Government has never adopted or promulgated a common law.”); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”); *Wheaton v. Peters*, 33 U.S. 591, 658 (1834) (“It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.”).



veloped in America remained as a significant source of law after the Revolution."<sup>84</sup>

The Framers sought to strike a balance of powers among the three branches of American government, emphasizing Congress's plenary authority to legislate.<sup>85</sup> James Madison, writing about the Constitution's distribution of power among the departments and the need for checks and balances, observed that "[i]n republican government, the legislative authority, necessarily, predominates,"<sup>86</sup> which provided the rationale for dividing Congress into two chambers. The Constitution expressly embodies the principle that the republican legislature is the nation's lawmaker.<sup>87</sup> No evidence exists that the Founders designed the American democracy with the idea that judges and judge-made law would reign supreme. Nor has Congress ever enacted a statute adopting, incorporating, or otherwise endorsing English common law.<sup>88</sup> To the contrary, the nation was founded on the novel premise that the People—through their

84. Hall, *supra* note 36, at 796.

85. Indeed, as one scholar observed in 1836, the U.S. Constitution itself is an exemplar of legislation.

Our Constitution seems to be a happy exemplar of the practicableness and utility of philosophical codification [sic], which ought never to have been understood by any one, as aiming at the exclusion of judicial interpretation, or the just application of the concisely expressed law to numerous facts, and to their infinite combinations and modifications. If a code, of small extent, can be so formed as to embrace within its terms, or obvious spirit, every circumstance that shall arise during the lapse of ages, its authors have proved themselves wise legislators; have conferred on their country a great and lasting benefit; and established in the science of legislation, a truth of the highest importance: and this . . . has been eminently accomplished in the Constitution of these United States.

2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY* 566 (Philadelphia, Thomas, Cowperthwait & Co. 1836).

86. THE FEDERALIST NO. 51, at 253 (James Madison) (Terence Ball ed., 2003).

87. U.S. CONST. art I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); see THE FEDERALIST NO. 73, at 359 (Alexander Hamilton) (Terence Ball ed., 2003) (referring to "[t]he superior weight and influence of the legislative body in a free government"). *But see* Holland, *supra* note 17, at 151–52 ("The commitment of the American legal system to the rule of law and to English common law principles is reflected in the United States Constitution. [Its] underlying spirit . . . is the common law belief expressed to James I by Jamestown founder, Edwin Sandys—that certain fundamental rights are immutable and must not be subordinated to the changing will of the executive or the legislature.").

88. See Young, *supra* note 81, at 576.

elected representatives—would enact the laws by which they would be governed.<sup>89</sup>

The fact that the nation has never been a true “common law” legal system does not mean it qualifies as a civil law system.<sup>90</sup> Without question, the United States federal legal system evolved primarily from a common law heritage and continues in many ways to reflect its cultural origins.<sup>91</sup> What it does mean

89. *E.g.*, THE FEDERALIST NO. 37, at 170 (James Madison) (Terence Ball ed., 2003) (“The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . . .”); THE FEDERALIST NO. 84, at 418 (Alexander Hamilton) (Terence Ball ed., 2003) (noting that the constitutional prohibition on titles of nobility is “the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people”).

Writing about “the scheme of government established by the Constitution of the United States,” one scholar wrote:

The independent sovereign is the state. By the term *sovereign* is meant the person or body of persons within the territory of a state, over whom there is, politically, no superior power. Sovereignty is that ultimate power of governing a people from which there is no appeal and beyond which there is nothing but revolution. In the United States this independent sovereignty rests with the people of the United States . . . . And the sublime declaration of the Constitution is: “We, the People of the United States . . . do ordain and establish this Constitution for the United States of America.”

Charles Willis Needham, *Disappearance of the Educational System of the Inns of Court*, 69 U. PA. L. REV. 201, 236 (1921) (quoting U.S. CONST. pmb.).

90. The terms are by no means dichotomous. Scholars have long noted the oversimplification of the classic taxonomy of legal systems. *See, e.g.*, Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1091 (1999) (identifying several flaws in the traditional classification methodology used in comparative law); *id.* at 1093 (“conventional taxonomies tend to focus on a limited number of comparative variables”); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 10–11 (1997) (critiquing current classifications of legal systems as “largely Euro-American centric” and in need of revision; noting that the comparative law community “has rethought the traditional distinction between common law and civil law by emphasizing similarities rather than differences” and that “the sharp contrast of this traditional distinction among legal systems has been fading”); *see also* Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361, 369 (1913) (explaining that neither common law nor civil law, the two traditional theories, “expresses the whole truth”).

91. *See, e.g.*, Richard K. Neumann, Jr., *Legislation’s Culture*, 119 W. VA. L. REV. 397, 442 (2016) (“Legislatures in common law countries have [traditionally used] fussy, over-conceptualized statute-drafting to subdue courts [from interpreting] statutes to mean what the judges would have voted for if they had been in the legislature themselves.”); *see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 603 (2002)

is that the American legal system has evolved and matured over the last two centuries to the point that it has become *more like* civil law systems than it is *unlike* them.

State and federal constitutions in the United States grant plenary lawmaking power to *legislatures*, not courts. If a written rule of law applies to a legal issue that is properly before a court, it is bound to interpret and enforce the rule of law to resolve the issue, so long as the enactment does not conflict with written constitutional constraints.<sup>92</sup> Such a conflict may occur either because the law conflicts with the substance of the federal or a state constitution, or because the process of its enactment or adoption exceeded the lawmaking power conferred (directly or indirectly) by a written constitution. Nothing in the federal Constitution or any act of Congress expressly authorizes the Supreme Court—or any other federal court, for that matter—to find or create the law of the land.<sup>93</sup> While federal courts

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(quoting one legislative drafter who jokingly explained that the statute-drafter's goal is to "put[] a federal judge into a box with a wall so high he can't get out"); Jane S. Schacter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 SUP. CT. REV. 209, 258 (describing "court-curbing legislation" as a "congressional vehicle for political responses to perceived judicial activism," meaning legislation "designed to modify judicial behavior in various ways").

92. Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 425 (1968) ("If [a statute] is constitutional it governs all cases within its scope, regardless of its wisdom. The very constraint upon a judge to follow the legislative policy in such cases precludes him from even considering alternatives. Only when a case is not governed by a statute is the court free to work out its own solution."); see DOUGLAS E. EDLIN, *JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW* 6–7 (2008).

Just as *stare decisis* requires judges to apply case law, legislative supremacy requires judges to enforce statutes . . . [T]he judicial recognition of legislative authority to enact binding law results in the force of legislative supremacy as a legal constraint and not just as a political fact . . . [A]ttempts to avoid legislative supremacy are merely attempts to reconstitute legislative supremacy, usually through the pretext of statutory interpretation, rather than efforts to meet the doctrine head-on.

EDLIN, *supra*, at 6–7. Edlin argues that judges can supersede binding statutes only if warranted by the "judicial obligation to develop the law." *Id.* at 6.

93. To the contrary, Article I grants to Congress the power to "make all laws . . . necessary and proper for . . . execut[ing] the foregoing powers, and all such other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18; see, e.g., *Dickerson v. United States*, 530 U.S. 428, 440–41 n.6 (2000) (holding that because *Miranda* was grounded in the Constitution, a federal statute governing admissibility of "voluntary" confessions was unconstitutional as authorizing an alternative procedure less effective than the Court-prescribed *Miranda* warning in

have the authority to study and recommend court rules to govern procedure in the federal courts, that authority too is a creature of *statute*—specifically, the Judiciary Acts beginning in 1789.<sup>94</sup> Even today, any procedural rules developed by the federal courts are subject to approval or modification by Congress.<sup>95</sup>

Courts are instrumental in interpreting, construing, and applying written law,<sup>96</sup> and in filling in the “gaps”—the diminishing common law white space on the legal canvas overlaid by the multi-faceted tapestry of local, state, and federal written laws.<sup>97</sup> As American law becomes increasingly associated with

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protecting Fifth Amendment rights). In other words, *Dickerson* did not strike down the federal statute because it *differed* from the prophylactic rule of *Miranda*, but rather because the statutory alternative did not protect arrestees from compelled confessions *at least as effectively* as the *Miranda* warning. *See also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”). The Supreme Court’s power of judicial review is grounded not in common law but in the Constitution itself, which expressly empowers the Court to decide “all cases, in law and equity” arising under the federal Constitution and statutes. *See* U.S. CONST. art. III, § 2.

94. *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73. In 1934, Congress enacted the Rules Enabling Act, now codified at 28 U.S.C. §§ 2071–2077 (2012), which expressly authorized the federal courts to formulate procedural rules. Assuming statutory procedures are followed, rules promulgated by the federal courts have the force of law. *How the Rulemaking Process Works*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [<https://perma.cc/R6KR-9UBP>] (last visited Mar. 29, 2019). The Conference of Senior Circuit Judges, later renamed the Judicial Conference of the United States, was first established in 1922 by congressional enactment. *Governance & the Judicial Conference*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference> [<https://perma.cc/ZP4R-GKE4>] (last visited Mar. 29, 2019); *Judicial Conference of the United States: Members*, FED. JUD. CTR., <https://www.fjc.gov/history/administration/judicial-conference-united-states-members> [<https://perma.cc/2AZR-JNPP>] (last visited Mar. 29, 2019); *see* 28 U.S.C. § 331 (2012) (establishing Judicial Conference of the United States and designating its powers and duties).

95. *See* 28 U.S.C. §§ 2071–2075 (2012) (authorizing United States Judicial Conference to promulgate rules governing federal court procedure, evidence, and bankruptcy cases, subject to amendment or rejection by Congress).

96. *See* Frank Gahan, *The Codification of Law*, 8 TRANSACTIONS GROTIUS SOC’Y 107, 108 (1922) (“Case-law, interpretation, and development cannot be shut out, however skilful [sic] the draughtsman, as the history of the French Code shows.”).

97. *See* J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9, 38 (2017) (“The courts approached early legislation as ‘situational edicts’ overlaying a common

statutes and codes, the courts also have an essential role in harmonizing statutory enactments with one another and with what remains of the diminishing common law background.<sup>98</sup> For example, to what extent does a statute expressly or implicitly supplant its common law forebears?<sup>99</sup> To what extent does a statutory enactment simply restate and clarify a common law rule? To what extent does a statute intentionally address a novel legal issue that judge-made rules are ill-equipped to address on a piecemeal, case-by-case basis? These are precisely the kinds of questions judges must answer as they strive to fulfill their “role to make sense rather than nonsense out of the *corpus juris*.”<sup>100</sup>

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law canvas, and traditional canons of statutory interpretation treated them accordingly.”); Grant Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 466 (1967) (uniform commercial codes “were to be, so to say, engrafted on the parent stock of the common law in the hope that graft and stock would continue, both vital, to grow together”); Andrew Kull, *Common-Law Restitution and the Madoff Liquidation*, 92 B.U. L. REV. 939, 941 (2012) (referring to the “common-law background and its statutory overlay”).

98. See Gilmore, *supra* note 97, at 472 (referring to the discrepancies and self-contradictions in the U.C.C.: “Thus the courts will still have work to do in reconciling the irreconcilable, harmonizing the disharmonies and so on. In this there is nothing surprising: it is what judges are paid to do.”); Traynor, *supra* note 92, at 402 (“The hydraheaded problem is how to synchronize [statutes] with a going system of common law.”); see also Beatson, *supra* note 30, at 313.

It is the task of commentators and judges to realise “the idea of a unified system of judge made and statute law woven into a seamless web by the processes of adjudication.” Given the size of the statute book this is no easy task . . . . The enterprise will require great care if we are not to lose sight of the wood for all the trees. But unless we do so, studying the common law will eventually be like shining an ever brighter light on an ever shrinking object.

*Id.* See generally The Honorable Mr. Justice Scarman, *Codification and Judge-Made Law: A Problem of Coexistence*, 42 IND. L.J. 355 (1967) (discussing the anticipated impact of England’s Law Commission, established in 1965, on English common law).

99. “Where a statute governs, it replaces the common law, although common law principle may, of course, be relevant in interpreting it.” Beatson, *supra* note 30, at 302. *But cf.* Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,114, 10,127 (2008) (“Despite the advent of modern environmental statutes in the 1970s, most common law remedies remain viable and vital, and have been used with significant success over the past three decades.”).

100. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

Although American courts certainly perform a critical role when they presume to declare “what the law is”<sup>101</sup> by interpreting, applying, and harmonizing the law,<sup>102</sup> they no longer purport to make substantive law.<sup>103</sup> If they ever did, it was the re-

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101. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). “It is emphatically the province and duty of the judicial department to say what the law is.” *Id.* But even Chief Justice John Marshall’s premise, often recited in justification of the judicial power of American courts to declare “what the law is,” overstates his point. See, e.g., Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 933 & n.31 (1942) (quoting the *Marbury* passage in support of the “Anglo-American” notion that “the very essence of the judicial office [is] to ascertain and determine what the law is”).

The immediate context of Marshall’s often-quoted statement belies any judicial intent that the Court assumed the power to *create* the law as opposed to deciding *which of two conflicting laws to apply*. Immediately after the quoted phrase, Marshall explained his point clearly: “Those who *apply the rule* to particular cases, must of necessity *expound and interpret that rule*. If two *laws* conflict with each other, the courts must decide on the operation of each.” *Marbury*, 5 U.S. (1 Cranch) at 177 (emphases added). The judicial functions of resolving issues in applying written rules, and resolving conflicts between “laws,” are both perfectly consistent with the approach federal courts could be expected to take in an evolving democracy focused on the “rule of law.” Indeed, *Marbury* held that a federal statute, specifically a provision of the Judiciary Act of 1789, was void because it conflicted with a provision of the written Constitution.

[T]he framers of the [C]onstitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature . . . The [judicial] oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject [by requiring judges to discharge duties consistent with] “the [C]onstitution, and laws of the United States.” . . .

[I]n declaring what shall be the *supreme* law of the land, the [C]onstitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the [C]onstitution, have that rank.

Thus, the particular phraseology of the [C]onstitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the [C]onstitution is void; and that *courts*, as well as other departments, are bound by that instrument.

*Id.* at 179–80. But the principle of judicial review to resolve conflicts between a statute and the Constitution—both examples of *positive* law—is a far cry from assuming judicial power to unilaterally *create* the law itself.

102. One scholar noted, “That a code necessarily needs interpretation does not lessen its accomplishment.” Jeremy M. Miller, *A Comparative Analysis of Codification*, 12 W. ST. U. L. REV. 93, 111 (1984).

103. James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. LEGAL EDUC. 3, 8 (2015) (“[U]nlike the practice of law in the nineteenth and early twentieth centuries, . . . common law developments tend to be interstitial to statutes and regulations rather than part of a steady or uninterrupted flow of judicial decisions.”).

sult of a nascent legal system that declared its independence from the mother country and threw off the shackles of its monarchy, while borrowing English law (both written and unwritten) until such time as Congress and state legislatures could map out America's own course of representative democracy.

### C. *The Myth of American Common Law*

The notion that the United States legal system revolves around a body of common law—meaning “unwritten” judge-made law descended from an amorphous body of English law—is deeply rooted in American jurisprudence.<sup>104</sup> But that

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104. See, e.g., *Murray v. Chicago & N.W. Ry. Co.*, 92 F. 868 (8th Cir. 1899).

For more than a century the federal courts, in the absence of a statute or other obligatory rule of decision, have had recourse to the common law for rules of decision in the trial of causes in those courts, and have, in cases where that law furnished an appropriate rule of decision, rested their judgments upon it. The same may be said of the admiralty law, the law merchant, the principles of equity jurisprudence, and, in a restricted and qualified sense, of the civil law. It never was supposed that the federal courts were denied the privilege of resorting to any or all of these sources of information for the purpose of enlightening their judgment upon any question presented for their determination in the trial of a cause. It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and of applying to their solution and decision any rule of the common law, admiralty law, equity law, or civil law applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made and the process is still going on. A case of first impression, rightly decided to-day, centuries hence will be common law, though not a part of that body of law now called by that name. It was implied in the very act of their creation that the federal courts would appeal to the common law as their guide in cases where it was applicable.

*Id.* at 870; see also Holland, *supra* note 17, at 138 (“[H]istory reflects that the common denominator of the Anglo-American legal system is the English common law. The fundamental principles found in the Magna Carta, 1628 Petition of Right, 1689 English Bill of Rights, United States’ Bill of Rights, and the rights set forth in our respective written and unwritten constitutions all have common law origins.”). *But see* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (recognizing that “the prevailing conception of the common law has changed since 1789”).

[Then,] the accepted conception was of the common law as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.” Now, however, in most

myth has long outlived its useful life.<sup>105</sup> It is high time for the legal academy to acknowledge that the American legal system, like that of nearly every other developed nation in the world, relies almost exclusively on positive law—*written* laws in the form of constitutions, codes, statutes, and rules.<sup>106</sup> And except

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cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.

*Id.* (internal citation omitted).

105. See, e.g., Maxeiner, *supra* note 24, at 140. Indeed, as long ago as 1922, an American legal scholar acknowledged the longstanding myth of English common law:

Every American knows that the common law of England is the common law of the United States. But not every American knows that England has very largely repudiated its common law, and that we today occupy the uncertain position of having adopted a system of laws from England that [has] completely broken down in that country, having been discarded by the English more than fifty years ago. We commonly cite in our courts English laws that would not be accepted in any part of England.

JAMES HANNIBAL CLANCEY, *THE LAW AND ITS SORROWS: AN EXOTERIC OF OUR LEGAL WRONGS* 73 (1922); see Wagner, *supra* note 46, at 339 (noting that by 1953 it was “no longer disputed . . . in England that Parliament has the primary role in law-making, [but] the traditional approach [of courts as primary lawmakers] seems to be dominant in the United States even now”); see also Stone, *supra* note 20, at 305 (“[I]n this day and age the amount of unwritten law is infinitesimal as compared to written law.”); Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936) (“[It is] increasingly our habit to look for the formulation of legal doctrine suited to new situations, not to the courts, as through most of the life of the common law, but to the legislatures, and the primary record of the most important changes in the law in our own time is to be found in the statute books.”).

To illustrate the absurdity of American courts’ undue reliance on English common law, Clancey cited *Rogers v. Brooks*, 30 Ark. 612 (1875). One of the issues on appeal was whether the trial court had erred when it refused to suppress depositions taken on July 4th—Independence Day—over the objection of opposing counsel. The court rejected the argument:

The fourth of July was unknown to the common law as a holliday [sic], and though venerated by the Americans, as a memorable day in their political history, is, perhaps, but little revered by the English, from whom we obtained the common law. It is a legal day (except when it happens to fall on Sunday) for the transaction of all business, unless otherwise provided by statute . . . We have no statute prohibiting the taking of depositions on the fourth of July, though it is not in good taste for litigants to fix upon that day for taking their depositions, unless required by some emergency.

CLANCEY, *supra*, at 629.

106. See George L. Priest, *The Constitutionality of State Tort Reform Legislation and Lochner*, 31 SETON HALL L. REV. 683, 686 (2001) (“[T]he survival of the myth of the sacred common law is somewhat surprising because we have witnessed over the last century so many areas in which legislation at the state or federal level has



for court rules, the written laws that comprise our modern corpus of law are not “made” or even “discovered” by judges.<sup>107</sup> Instead, they are enacted and adopted by various governmental entities that Congress and state legislatures have constitutionally authorized, either directly or indirectly, to “make” the law by legislative delegation of their respective plenary law-making powers.<sup>108</sup> That many jurists and scholars continue to ignore that truth does not make it any less true.<sup>109</sup>

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preempted or displaced common law rules.”). Professor Priest attempted to explain why the myth has persisted:

There is a long and venerable intellectual tradition [in the United States] of regarding the common law as in some way sacred, as autonomous and independent of legislation, not simply in terms of content but in an almost religious sense. Many regard the common law as somehow sacred in contradistinction to political legislation regarded as profane.

*Id.* at 684.

Even England, the progenitor of the common law as that term is generally understood, has long since abandoned the myth. In 1965, Parliament’s enactment of the Law Commissions Act spelled doom for English common law as an insular legal system. The Act established a Law Commission and charged it “to take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, [and] the reduction of the number of such enactments.” Scarman, *supra* note 98, at 356 (quoting Law Commissions Act of 1965, § 3(1)); see Reed Dickerson, *A Note on England’s Law Commission and Its Chairman*, 42 IND. L.J. 369, 369–71 (1967) (describing the establishment and early work of England’s Law Commission). The Chair of the Law Commission predicted that “[t]he English legal world can never be quite the same again: . . . this statute destroyed the fiction of the common law’s isolation from the practice and thinking of other legal systems.” Scarman, *supra* note 98, at 355; see also H.R. Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241, 254–55 (1967) (explaining that the English Law Commission elected to embark on codification by the “instalment system” and explaining the advantages and disadvantages of that approach, noting that “[t]he choice between codification in one piece and codification on the instalment system is somewhat like choosing between having all one’s teeth out in one go or one by one”).

107. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 10 (Amy Guttmann ed., new ed. 2018) (referring to the “uncomfortable relationship of common-law lawmaking to democracy,” which was “one of the principal motivations behind the law-codification movement of the nineteenth century”). Even the procedural rules made by the federal judiciary are subject to final approval, rejection, or modification by Congress. See 28 U.S.C. §§ 2071–2075 (2012); see also *supra* note 95 and accompanying text.

108. *E.g.*, Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 80–81 (2017). “Across the modern regulatory state, national policy decisions increasingly are made by agency officials, notwithstanding the constitutional mandate vesting legislative authority exclusively with Con-

No doubt the myth is also a product of early American lawyers and jurists' heavy reliance on Coke and Blackstone, whose treatises condensing and explaining English common law were fundamental law texts in the first century of the developing United States.<sup>110</sup> Both Englishmen decried early statutory law

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gress . . . Congress today routinely delegates the power to promulgate wide-ranging policy decisions to administrative agencies . . ." *Id.* Since 1984, the Supreme Court has recognized that Congress sometimes *implicitly* delegates law-making and law-interpreting power to administrative agencies. Under the *Chevron* doctrine, Congress does so when it enacts ambiguous statutes together with authorizing legislation designating one or more administrative agencies to issue secondary legislation in the form of regulations. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see *Auer v. Robbins*, 519 U.S. 452 (1997) (deferring to administrative agencies' authority to interpret their own ambiguous regulations). The many scholarly critiques of *Chevron* and its progeny have apparently not yet dissuaded the Supreme Court from invoking administrative deference. *Cf. SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (Gorsuch, J., writing for a 5-4 majority) ("But whether *Chevron* should remain is a question we may leave for another day," suggesting that the Court may be inclined to revisit the doctrine.).

109. *Cf. Barnhizer, supra* note 18, at 131 (explaining that because "American legal scholars take the judicial decision as their primary source, they engage in much the same kind of thinking as judges"). Barnhizer posits that American legal scholars have an "inferiority complex" as "a by-product of the judiciary's approach to knowledge. Judges seek knowledge that is useful, that 'works.' Judicial decisions tend to be limited to 'immediate causes.' Judicial thinking is in many ways a logic of justification rather than intellectual penetration intended to find universal truths." *Id.* at 184.

110. See Alschuler, *supra* note 17, at 5-9 (discussing significant influence of Blackstone's *Commentaries*); Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1, 14-15 (1938) (discussing Coke's *Second Institute* and Blackstone's *Commentaries* as influential in transmitting English common law to colonial America); see also 2 HOFFMAN, *supra* note 85, at xv (urging that "[n]o part of the Course is of more value to the student, than the selected cases in [*Lord Coke's Reports*]"); 2 HOFFMAN, *supra*, at 152 (discussing the "elegance, taste, and genius" distinguishing *Blackstone's Commentaries*, while conceding that "there are some who have questioned its utility"); Bryson, *supra* note 37, at 13-14, 32-33 (noting that the first American edition of Blackstone's *Commentaries*, published in Philadelphia in 1771, was an "immediate success" and became "the foundation of legal education in Virginia from 1775 to 1875"). Bryson explained the popularity of the *Commentaries* for educational purposes:

It was Blackstone's succinct and well-written survey of the entire law of England that made it so attractive as a textbook for law students. It was at the same time an outline and an encyclopedia. It was clearly written and could be read by a beginning law student with relative ease of comprehension in a fairly short period of time. Of course, there were errors here and there and occasional overgeneralizations, but they were relatively few . . . While it was not perfect, it was far better than anything that had gone before. It most certainly aided in the learning of the law and resulted in a better trained bar.

for its complexity and incomprehensibility, and for good reason.<sup>111</sup> Blackstone in particular blamed the lack of professional training for legislative drafters:

[I]t is perfectly amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws; but every man of superior fortune thinks himself *born* a legislator.<sup>112</sup>

English statutes of the time were drafted with little or no punctuation, excruciatingly long sentences, and weak or non-existent structure. Only English barristers could hope to decipher them. English statutes were certainly not laws “for the People” — they were comprehensible only to the elite bench and bar. Although the art of legislative drafting still has far to go in the United States, state and federal legislation in modern America is nothing like England’s enacted law in the eighteenth and nineteenth centuries.<sup>113</sup> As early as 1845, one noted English lawyer observed:

There is apparently a notion amongst amateurs, that legislative language must be intricate and barbarous. Certain antick phrases are apparently thought by them to be essential to law writing. A readiness in the use of ‘nevertheless,’ ‘pro-

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*Id.* at 32.

111. *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES \*10 (“[T]o say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other, courts of justice,) owe their origin[] not to the common law itself, but to innovations that have been made in it by acts of parliament, ‘overladen (as Sir Edward Coke expresses it) with provisoes and additions, and many times [hurriedly] penned or corrected by men of none or very little judgment in law.’”).

112. *Id.* at \*9–10; see David Lieberman, *Blackstone’s Science of Legislation*, 27 J. BRITISH STUD. 117, 120 (1988) (observing that “[f]ew features of the *Commentaries* have suffered such unfortunate neglect as Blackstone’s stated aim that his work should furnish guidance in legislative theory”; charting “the nature and content of this regularly overlooked Blackstonean ‘science of legislation’”).

113. *See, e.g.*, GEORGE COODÉ, ON LEGISLATIVE EXPRESSION: OR, THE LANGUAGE OF THE WRITTEN LAW 68 (London, William Benning & Co. 1845) (describing English statutes of the time as for the most part “an ill-connected mass of ill-expressed provisions,” and proposing a method of legislative drafting to simplify and clarify enacted law).

vided always,' 'it shall and may be lawful, and he is hereby authorised, empowered, and required to,' 'anything in any Acts or Acts to the contrary notwithstanding,' &c. &c., seem to be admitted to constitute the qualification for drawing Acts of Parliament. The merit appears to mount higher in proportion as the author can succeed in including a greater number of limitations, qualifications, conditions, and provisos, between the nominative case and its verb, or any other pair of dependent words. It is, however, a clear mistake to think that this absurd style, prevalent as it is, and much as we sacrifice to adhere to it, has the sanction of authority . . . .

If it could be made to be generally recognised that the essentials of every law are simple, and that their direct expression is the perfection of law writing, the greatest defects of our statute law would cease.<sup>114</sup>

Yet more than 150 years later, legislation and statutory drafting remain a much-neglected element of American legal education.<sup>115</sup>

Positive law is the hallmark of the contemporary American legal system, as it has been for at least the better part of the past century.<sup>116</sup> The common law myth is, and always has been, nothing more than an elaborate, self-serving legal fiction.<sup>117</sup> The perpetuation of the myth has elevated American courts to a level of influence the Framers never anticipated,<sup>118</sup> and it ne-

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114. *Id.* at 67–68.

115. See, e.g., Reed Dickerson, *Legislative Drafting and the Law Schools*, 7 J. LEGAL EDUC. 472, 472 (1955) (“The tender shoots of legislative enlightenment in America barely show above the ground. Whether they will bloom depends, in large part, on what the law schools decide to do about the problem. These facts are significant because they relate not only to legislative drafting but to legal drafting generally.”). For a contemporary effort encouraging more law schools to offer legislative drafting and other legal drafting courses, and offering a unified approach to drafting private and public laws, see RICHARD K. NEUMANN JR. & J. LYN ENTRIKIN, *LEGAL DRAFTING BY DESIGN: A UNIFIED APPROACH* (2018).

116. See Joseph Dolan, *Law School Teaching of Legislation—A Report to the Ford Foundation*, 22 J. LEGAL EDUC. 63, 71 (1969) (“The primary instrument of ordered social change is legislation. But our law schools have, in general, maintained an orientation that the primary body of the law is the common law, and the primary instrument of change is the evolution of common law decisions.”).

117. See Maxeiner, *supra* note 24, at 153.

118. See THE FEDERALIST No. 78 (Alexander Hamilton) (Terence Ball ed., 2003).

[I]n a government in which [the different departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure

gates one of the fundamental principles of our nation: that the law should serve the interests of the People, not the legal profession or the judiciary.

America's complex system of written laws includes state and federal constitutions<sup>119</sup> and statutes; local charters, ordinances, and resolutions; state and federal codes; state and federal rules of court procedure; agency rules and regulations; and executive orders. As our legal system has evolved over the nation's first two-and-a-quarter centuries, our body of law is increasingly represented by positive law—written rules enacted or adopted by governmental entities consistent with state and federal constitutions and statutes. The remaining white space on the canvas of American law that once called on courts to fill the interstices has rapidly diminished, and the trend will most likely continue unabated.<sup>120</sup>

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them. . . . The judiciary . . . may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. . . . [T]he judiciary is beyond comparison the weakest of the three departments of power.

*Id.* at 378. One of the ways the U.S. Constitution constrains federal judicial power is the "case or controversy" prerequisite for federal court jurisdiction. See U.S. CONST. art. III, § 2. At least in theory, the "actual controversy" must continue throughout every phase of the litigation. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). Yet even the "case or controversy" constraint enjoys a considerable degree of elasticity as interpreted by the courts. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) ("The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'").

119. While generally overlooked by the legal academy as a source of fundamental written law, state constitutions were already in place when the federal Constitution was drafted and ratified. By express reference to the States in numerous parts of the Constitution, the Framers made clear that the idea of federalism included a state and federal legal partnership. See Lutz, *supra* note 39, at 22 ("We operate under a constitutional *system*, in the sense of an interlocking set of constitutions.").

120. See Thomas M. Cooley, *Codification*, 20 AM. L. REV. 315, 338 (1886).

There is a reason for codification which grows in force from day to day, and may in time become controlling. This reason is that statutory law is constantly encroaching on the domain of the common law, and taking more and more to itself. Some of the legislation is made necessary in order to provide adequately for new conditions. Some of it is enacted in improvement of the common law, and some of it, though claiming to be improvement, is crude, inconsiderate and harmful. The process of encroachment will continue to go on, perhaps with accelerated speed, until there will be need for consolidating and revising the statutes, and so much of the law will then be found to be in statutory form, that it may be

American lawmakers and courts still have much work to do to systematize and harmonize the many different layers of positive law in our federation that interact in complex and sometimes confounding ways with other sources of law. But the perpetuation of the common law myth distracts lawmakers, judges, and scholars from collaborating on that hard work. Instead, the common law myth encourages courts to strike down, "rewrite," or "construe" statutes to harmonize them with the judiciary's ever-changing and often indeterminate view of substantive constitutional requirements. Indeed, judicial activism, as that term is commonly understood,<sup>121</sup> is a direct result of the common law myth.<sup>122</sup>

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advisable all should be. When the Legislature is satisfied of this, the time for codification will have arrived, if the competent person for the labor is obtainable, or if the Legislature itself has the wisdom to adopt a satisfactory code already prepared. Whether or not that time has already arrived for some States we do not undertake to say.

*Id.* But cf. Gilmore, *supra* note 97, at 472.

In what has now become the American tradition of codification, the [Uniform Commercial] Code incorporates the same form of common law saving clause which was included in the earlier statutes. Even without the saving clause we may assume that the tradition would have imposed itself: the idea that a codifying statute comes not to supersede the common law but to coexist with it has become a part of our heritage, not to be gainsaid.

*Id.*

121. See generally Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441 (2004). While "judicial activism is not a monolithic concept," *id.* at 1476, "[j]udges are labeled judicial activists when they 'legislate from the bench,'" *id.* at 1471.

122. See Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1223 (2009) (observing that "unsupervised judging is inherent in any system that (like ours) leaves certain important decisions exclusively to judges"); see also G. EDWARD WHITE, III-IV THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 785-86 (abridged ed. 1991):

[T]he Marshall Court's cases furnish additional evidence of the impressive discretion of the Justices to function as substantive rulemakers. No Court in American history was freer to make up its own rules of law. No Court had more first impression cases of constitutional interpretation; none had greater opportunities to fashion common law rules; none enjoyed to as great an extent the singular freedom that comes from pressing business and the absence of decisive precedent . . . It is, of course, a puzzle to moderns how judges could simultaneously be granted the discretion to make substantive law and yet not fully be perceived as lawmakers. That puzzle . . . remains rooted in intellectual assumptions we no longer share.

## II. POSITIVE LAW AS PRIMARY LEGAL AUTHORITY

What is the effect of statute on subsequent common law development? How should the common law function in what Dean Calabresi has called the age of the statutes? This is by no means a new question. But it is undoubtedly a difficult one and, although it has been asked a number of times, . . . we have as yet only a very partial set of answers and even those have not made a systemic mark on the application of the law in the courts.

Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 298–99 (1997).

In 1908, Dean Roscoe Pound<sup>123</sup> published an article in the *Harvard Law Review*<sup>124</sup> demonstrating that the “indifference, if not contempt,” courts and lawyers had for the increasing output of legislation was unjustified and contrary to legal history.<sup>125</sup> A full century ago, a majority of the Supreme Court expressly rejected “the dead hand of the common-law rule” when it held that state common law rules of evidence in effect in 1789 no longer governed the competence of witnesses to testify in

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123. At the time the article was published, Pound was a law professor at Northwestern University, having served as dean of the University of Nebraska School of Law, his alma mater, from 1903 to 1907. Two years after the *Harvard Law Review* published his article, he joined the Harvard Law School faculty. In 1916 he was appointed Dean of Harvard Law School, a position he held for more than two decades. Richard W. Smith, *Dean Roscoe Pound*, 44 NEB. L. REV. 1, 2, 3–4 (1965). Dean Pound’s affiliation with Harvard Law School continued until 1954. *Id.* at 3–4.

124. Pound, *supra* note 19.

125. *Id.* at 383. Dean Pound rejected the notion that judicial “antipathy toward legislative innovation is a fundamental common law principle.” *Id.* at 403.

American legislatures have been conspicuously active from the beginning. Moreover, our constitutional polity expressly contemplates a complete separation of legislative from judicial power. And this is in accord with the whole course of legal history. Not only is a doctrine in variance with that polity inapplicable to American conditions, but if it ever was applicable, the reasons for it have ceased and it should be abandoned.

*Id.*; see also HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 203 (London, Macmillan & Co. 2d ed. 1897) (“[A]s the development of Law goes on, the function of the judge is confined within ever narrowing limits; the main source of modifications in legal relations comes to be more and more exclusively the Legislature.”).

federal trial courts.<sup>126</sup> Soon after, Professor Arthur Corbin, the noted Yale contracts scholar, wrote about the case:

It may be surprising to some to see the common law referred to as a “dead hand” and to see it deliberately disregarded by our highest court; but the fact is that the living hand of the present judge does not write like the dead hand of the judges of 1789 or 1851.<sup>127</sup>

In 1921, Benjamin Cardozo bemoaned the isolation of the courts from legislatures, calling for the establishment of a “Ministry of Justice” to study legal developments, issue reports, and make recommendations for improvements.<sup>128</sup> And in

126. *Rosen v. United States*, 245 U.S. 467, 471 (1918) (“Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here . . .”). The “dead hand” rule was the product of the Court’s opinion in *United States v. Reid*, 53 U.S. 361 (1852), holding that the competency of federal court witnesses in criminal trials must be decided based on state evidence rules in force at the time of enacting the Judiciary Act of 1789. *Id.* at 366. The *Rosen* Court’s reasoning turned in part on its analogy from a 1908 federal statute that had removed the disability of witnesses once convicted of perjury. *Rosen*, 245 U.S. at 471 (citing REV. STAT. § 5392, Comp. St. § 10295 (repealed 1909)).

127. Arthur Corbin, *The Dead Hand of the Common Law*, 27 YALE L.J. 668, 670 (1918).

128. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113–14 (1921).

To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.

*Id.* Congress responded in 1922 by establishing the Conference of United States Senior Circuit Judges, which would later become known as the Judicial Conference of the United States. In the states, the judicial council movement of the early twentieth century served the same purpose, and that model survives in many states today. See J. Lyn Entrikin Goering, *The Life and Times of the Kansas Judicial Council*, 78 J. KAN. B. ASS’N, Feb. 2009, at 19, 19 (summarizing the history of the movement and attributing it primarily to Judge Cardozo’s 1921 article); see also Landis, *supra* note 17, at 25 (“Judicial councils exist with the function of acting as



1932, James Landis, who would later succeed Pound as Harvard Law School Dean, observed that “the wide scope of judicial review exercised since the Fourteenth Amendment has . . . generated in the [legal] profession something of contempt for the legislative process.”<sup>129</sup> Landis criticized the judiciary’s disregard for legislation as a “source of ‘common law,’”<sup>130</sup> by which he meant that courts tended to confine their reliance on statutes as rigid rules rather than representing more general legal principles and policies, inaccurately assuming that legal innovations and development of the law were “beyond the scope of legislative power.”<sup>131</sup> This unfortunate judicial attitude, Landis suggested, failed to take into account the advances in the early twentieth century in the professionalization of legislating, including both legislative drafting and deliberation processes.<sup>132</sup>

By the mid-1950s, those advances included, among other things, widespread efforts to compile and consolidate state statutes, the development and adoption of uniform state laws, and the states’ increasing exercise of “police power[s]” by enacting and implementing regulatory legislation.<sup>133</sup> The dramatic

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ministries of justice to call to the attention of the legislature weaknesses in existing judge-made law.”).

129. Landis, *supra* note 17, at 12.

130. *Id.*

131. *Id.* at 13, 15 (“A course of legislation dealing continuously with a series of instances can be made to unfold a principle of action as easily as the sporadic judgments of courts.”); *see also id.* at 14 (“The judgments of legislatures as expressed in statutory rules often represent a wider and more comprehensive grasp of the situation and yet are practically neglected [by courts as a foundation for legal reasoning in analogous cases].”).

132. *Id.* at 13.

[T]he last few decades have seen the steady development of better methods of legislation. Not only has there been progress in the art of draftsmanship, but the growing use of experts and the committee system, itself tending toward an empiric efficiency, has meant much in the advancement of legislative method . . . . Also, there is a growing comprehension that wide modifications have been effected by recent legislation in the structural content of the law . . . . Clearly these factors negative the possibility of relegating the legislative process to the role of mere rule-making . . . .

*Id.*; *see also id.* at 25 (referring to “[e]xpert legislative draftsmen . . . operating to prevent the unfortunate incidents that characterized the legislation of early democratic assemblies”).

133. Sheldon D. Elliott, *The Role of Legislatures in the Development of Substantive Law*, 43 A.B.A. J. 72, 74 (1957).

transformation of American law can be traced to the codification movements of the nineteenth century.<sup>134</sup> The still-developing story of the Age of Positive Law begins there.

A. *Influence of Philosophers Bentham and Austin*

In 1804, after the French Revolution, Napoleon Bonaparte adopted the French Civil Code, which remarkably had been drafted in just four months.<sup>135</sup> It would become the prototype of codification on the European continent and later among developing nations around the globe.<sup>136</sup> Although it was not the earliest of the modern codes,<sup>137</sup> it was undoubtedly the most influential.<sup>138</sup> The first “wave” included not only France, but also Prussia in 1794<sup>139</sup> and Austria in 1811.<sup>140</sup> After considerable push-back from its opponents in other European nations, the second wave of codification included Germany in 1900<sup>141</sup> and

134. Earlier codification reforms in Scandinavia were effected beginning in the late seventeenth century, and less successful efforts were undertaken even in England. See *infra* note 137; see also Wagner, *supra* note 46, at 344 (noting that England’s first codification project was advanced in the early sixteenth century by Henry VIII, and the second in 1614 by Sir Francis Bacon).

135. See James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 460 (1994); Wagner, *supra* note 46, at 342.

136. See, e.g., Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 936 (1982) (“France presents the model of the civil law tradition. It set the pattern with the Napoleonic Code, a format now followed by all civil law jurisdictions.”); Olivier Cachard, *Translating the French Civil Code: Politics, Linguistics and Legislation*, 21 CONN. J. INT’L L. 41, 42 (2005) (“[T]he French Civil Code was the matrix of many other codes, both in Europe and around the world.”); Wagner, *supra* note 46, at 342–43 (listing numerous European and Latin American nations whose codes were modeled after the French Civil Code, as well as Louisiana and Quebec in North America).

137. See Weiss, *supra* note 38, at 453 (crediting Scandinavia for having adopted the earliest of the modern civil codes beginning with Denmark’s code enacted in 1683); accord, Wagner, *supra* note 46, at 341 (honoring Denmark’s code as the “first code in the modern sense of the word”). After Denmark, Norway followed in 1688 and Sweden in 1736. Wagner, *supra*, at 341 (noting that Scandinavia codified the criminal law in the nineteenth century).

138. See, e.g., John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT’L L. 1, 43 (2003) (referring to the French Civil Code as “the premier example of legal codification”); Wagner, *supra* note 46, at 342 (concluding that France was the “first in performing [codification] work in so outstanding a manner as to assure the victory of codification in all civil law jurisdictions”).

139. Wagner, *supra* note 46, at 341 (crediting Frederick the Great).

140. *Id.* at 343.

141. *Id.* (noting that while Germany adopted the code in 1896, it did not take effect until 1900). While the German Civil Code is “radically different in concep-

Switzerland in 1912.<sup>142</sup> From World War II to the end of the twentieth century, more than forty other nations enacted codes.<sup>143</sup> Some, including the French Civil Code, have been revised several times since their initial enactment.<sup>144</sup>

The first wave of modern codification provided a springboard for the first American codification movement,<sup>145</sup> which began around 1820 and lasted for some three decades.<sup>146</sup> A major instigator for that effort was Jeremy Bentham, an English philosopher, jurist, and contemporary of William Blackstone.<sup>147</sup> Bentham has been considered the strongest and most important proponent of codification<sup>148</sup> and perhaps the greatest critic of common law.<sup>149</sup> As a philosopher and social reformer,

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tion," it too has influenced codification in several other nations and thus "has gradually become [the French Civil Code's] chief competitor." Guy Canivet, *French Civil Law Between Past and Revival*, 20 CONN. J. INT'L L. 111, 117 (2004); Stone, *supra* note 20, at 305, 306 (noting that French and German codes have often served as models for other nations' codification efforts).

142. Wagner, *supra* note 46, at 343 (reporting that the Swiss Civil Code was adopted in 1907 and took effect in 1912).

143. Weiss, *supra* note 38, at 454. Weiss offers a comprehensive and well-documented review of the history of codification on the European continent. *See id.* at 448–70.

144. *See, e.g.*, F.H. Lawson, *A Common Law Lawyer Looks at Codification*, 2 INTER-AM. L. REV. 1, 5 (1960); Andre Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 460 (1975–1976).

145. *See* Head, *supra* note 138, at 67–68 (describing French codification as "an immediate and compelling source of inspiration" and "a hard act to follow").

146. CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 69–70 (1981); *see* 2 HOFFMAN, *supra* note 85, at 672–88 (discussing codification movements in Europe and the United States in the first half of the nineteenth century).

147. Bentham was born in 1748 and died in 1832. Blackstone, born in 1723, died in 1780. During the years Bentham studied law at the University of Oxford, Blackstone was among his professors. Posner, *supra* note 14, at 569. When the precocious young Bentham heard Professor Blackstone pontificate about the glories of English common law, "Bentham . . . had listened with a rebel heart." Charles Noble Gregory, *Bentham and the Codifiers*, 13 HARV. L. REV. 344, 344 (1900). Bentham would later become Blackstone's "severest critic." Posner, *supra*, at 569.

148. Weiss, *supra* note 38, at 474–75; *see also* Wagner, *supra* note 46, at 344 (referring to Bentham as the "most famous, although not the wisest representative" of the codification trend "that was accentuated at the end of the eighteenth century").

149. Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 VA. L. REV. 957, 960 (2015) ("As one of history's great haters, Bentham was unrelenting in his hatred of the English legal system, especially its common law design and the lawyers and judges who populated it."); *see also* Frederick N. Judson, *A Modern View of the Law Reforms of Jeremy Bentham*, 10 COLUM. L. REV. 41, 42 (1910) (quoting Bentham as referring to English common law as "fathomless and boundless chaos

Bentham espoused utilitarianism: the best social policy is the one that achieves the “greatest happiness” for the greatest number.<sup>150</sup> But he devoted much of his life to critiquing English common law and advocating for its codification.<sup>151</sup>

Bentham believed, for example, that British subjects who were expected to comply with the law should be able to readily access and understand the laws by which they were governed. The common law of the time was so complex that only lawyers and judges could hope to decipher it. And in any event, published reports were so few in number that judge-made common law and any alterations to it were virtually inaccessible to the average person.<sup>152</sup> On the other hand, codes, if properly drafted and enacted, could be understood by everyone without the need to consult “Judge & Co.,” Bentham’s favorite euphemism for the bench and bar.<sup>153</sup>

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made up of fictions, tautology and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximized delay and denial of justice”). See generally John V. Orth, *Jeremy Bentham: The Common Law’s Severest Critic*, 68 A.B.A. J. 710 (1982).

150. See, e.g., Judson, *supra* note 149, at 41 (“Bentham’s philosophy—that of Utilitarianism, the greatest happiness of the greatest number,—made a profound impression upon the public thought of his own and succeeding generations.”); Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 557 n.88 (1987) (“[Bentham’s] ‘greatest-happiness’ or utility principle posited that ‘the test of sound social policy was whether it promoted the greatest happiness of the greatest number of people.’” (quoting RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 33 (1981))); Kenneth Shuster, *Because of History, Philosophy, the Constitution, Fairness & Need: Why Americans Have a Right to National Health Care*, 10 IND. HEALTH L. REV. 75, 111 (2013) (“‘It is the greatest happiness of the greatest number that is the measure of right and wrong.’” (quoting JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT AND INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 3 (Wilfrid Harrison ed., Oxford Univ. Press 1967) (1776))); see also Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-Being*, 103 IOWA L. REV. 1361, 1371 (2018) (interpreting “greatest happiness” to mean, in contemporary terms, “the highest net increase in subjective well-being” (citing JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, at ccv (London, T. Payne & Son 1789))).

151. See Judson, *supra* note 149, at 41–42; Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 4, 19–22 (2011). Professor Resnick emphasized Bentham’s penchant for “publicity,” *id.* at 5, which might be better understood as the concept of “open government” espoused by proponents of Rule of Law initiatives. See WORLD JUSTICE PROJECT, *infra* note 306.

152. See Hall, *supra* note 36, at 806–07 (noting the scarcity of law reports as one reason early American courts failed to follow English judicial decisions).

153. See H.L.A. Hart, *Bentham and the United States of America*, 19 I.L. & ECON. 547, 565–66 (1976); Resnick, *supra* note 151, at 19–21; Schauer, *supra* note 149, at

His efforts were not limited to reforming English law. Bentham famously wrote to President James Madison in 1811 offering to draft a complete codification of United States law to free the young nation from “the yoke” of English common law.<sup>154</sup> He made the same offer to a number of American states and several other nations.<sup>155</sup> But Bentham’s codification proposals were radical<sup>156</sup> for their time, even eccentric at times.<sup>157</sup> Nevertheless, history remembers him now as the “Father of Legal Positivism.”<sup>158</sup>

John Austin, an English jurist, was a disciple of Bentham’s utilitarian philosophy and positivist jurisprudence.<sup>159</sup> Like Ben-

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964 (noting that Bentham “mocked the bar and the judiciary by using the label ‘Judge & Co.’”). For example, in 1827, Bentham sarcastically observed that “English judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice.” Schauer, *supra*, at 964 n.26 (quoting 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 302 (London, Hunt & Clarke 1827)).

154. Resnik, *supra* note 151, at 20. Madison waited five years before politely declining the offer. See Hart, *supra* note 153, at 565–66. In response to Madison’s long-delayed but courteous letter, Bentham wrote back more than a year later, “subjecting to microscopic examination every evasive word used by Madison.” *Id.* at 566.

155. Resnik, *supra* note 151, at 20.

156. Nathan M. Crvstal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 270 (1979) (observing that “[b]ecause Bentham’s proposals were radical [and] represent[ed] an attack on the legal profession, the bar was practically unanimous in its opposition”); Posner, *supra* note 14, at 599 (“Seeing legislation as the swiftest route to implementation of his reform ideas, [Bentham] proposed to abolish the common law, the natural rights of Englishmen, and the independent judiciary.”).

157. See, e.g., Gregory, *supra* note 147, at 345 (noting that Bentham adhered to “the principle of utility as a test of moral precepts and legislation, [which he applied] with great boldness, and, it may be often said, eccentricity, to all departments of morals, law, and government until his death”); Hart, *supra* note 153, at 565 (“[Bentham’s] enthusiasm for codification had become a passion and his hatred of the uncoded formless ‘uncognoscible’ common law had become very near a mania.”); Wagner, *supra* note 46, at 344 (noting that one English scholar declared Bentham “a curious man, with his complete neglect of all nobler elements of thought and feeling”).

158. Schauer, *supra* note 149, at 960. Yet Bentham never described himself as a positivist. The term was not used in a legal context until the early twentieth century, long after Bentham’s time. *Id.* at 967.

159. See, e.g., Wilfrid E. Rumble, *Divine Law, Utilitarian Ethics, and Positivist Jurisprudence: A Study of the Legal Philosophy of John Austin*, 24 AM. J. JURIS. 139, 145–47 (1979); *id.* at 146 (quoting 1819 letter from Austin to Bentham that “percolates with the language of an ardent disciple”).

tham, he was strongly committed to codification of law<sup>160</sup> and is credited with the founding of analytical jurisprudence.<sup>161</sup> Austin defined the proper scope of jurisprudence as including only positive law—meaning laws of command or duty established by political superiors to govern political inferiors.<sup>162</sup> In Austin’s view, the term excluded the traditional meaning of “natural law” in the sense of the deity’s edicts, and it excluded “positive morality.”<sup>163</sup> In effect, Austin’s positivist jurisprudence narrowed the focus of law’s proper domain to rules derived from and enforceable by a secular political authority (government), as distinguished from the religious connotations of natural law and the societal norms of morality.

Both Bentham’s and Austin’s conceptions of positive law provided the theoretical basis for their advocacy of codification: A “rule of law” is jurisprudentially legitimate and enforceable only if it derives from governing authority (law enacted by one’s political superiors to advance a specific purpose or policy) as distinguished from religious authority or moral approbation.<sup>164</sup> But those same theoretical underpinnings apply

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160. Wagner, *supra* note 46, at 344 (“Austin (1790–1859) was next to gain fame [after Bentham] as an advocate of the reform by statutory enactment of laws regulating human relations.”).

161. Michael Freeman & Patricia Mindus, *Preface* to THE LEGACY OF JOHN AUSTIN’S JURISPRUDENCE, at i, v (Michael Freeman & Patricia Mindus eds., 2013).

162. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1 (London, John Murray 1832). Austin distinguished positive law from natural law—meaning laws given by God to govern man—and positive morality, which distinguishes rules not made by God but rather other human beings (but not political superiors). *Id.* at 2–4; see SEBOK, *supra* note 18, at 23–24, 30–32 (explaining Austin’s classical positivism as developing in reaction to Blackstone’s classical common law theory). The federal Constitution is the preeminent example of positive law. See Needham, *supra* note 89, at 226–27 (“Constitutions are legislation by the sovereign . . . . The people of the United States . . . acting for the entire territory of the United States, may prescribe by their Constitution the form and jurisdiction of every government within the territory. The governments are the creatures of the sovereign.”).

163. AUSTIN, *supra* note 162, at 2–4; Wagner, *supra* note 46, at 343–44 (explaining that England’s common law focused on “[f]undamental law’ which was nothing else than a version of natural law embodied to a great extent in customs [and that] was believed to exist irrespective of any legislative enactments, to be binding on the king, the courts, and the whole society, and to [be] best discoverable by the courts”).

164. See SEBOK, *supra* note 18, at 30–31 (describing the “separability thesis” of Bentham and Austin’s classical positivism, which rejects the concept that law and morals are necessarily connected); Stanley L. Paulson, *Introduction* to HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, at xvii, xxiv (Bonnie

not just to exclusive, complete codifications of the sort Bentham advocated, but also to statutes, rules, treaties, constitutions, or any other “laws” enacted by a superior political authority.

That Bentham himself coined the term “codification”<sup>165</sup> may be one of the reasons for later resistance to the concept by common law jurists and practicing lawyers. Opponents of codification in the United States likely understood the term to mean the radical, absolutist form that Bentham advocated.<sup>166</sup> And no doubt Austin’s disassociation of jurisprudence from natural law and morality alienated nineteenth-century Americans who felt a strong allegiance to common law’s religious and moralistic connotations.<sup>167</sup>

Although England never achieved codification of the sort advocated by Bentham and Austin, Parliament gradually enacted more and more statutes governing specific areas of the law, including the Bills of Exchange Act in 1882 and the Sale of Goods Act in 1894.<sup>168</sup> As the authority of English statutes slowly gained recognition, the nineteenth century witnessed what

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Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992) (1934) (defining “separability thesis” to mean “the separability of law and morality” and describing it as the “antithesis” of the “morality thesis”).

165. Scarman, *supra* note 98, at 357; Weiss, *supra* note 38, at 448 & n.42 (“Jeremy Bentham coined this neologism. The term itself appeared for the first time in June 1815 when Bentham wrote a letter to Tsar Alexander I, in which he distinguished ‘codification’ from normal ‘legislation.’” (citing Letter from Jeremy Bentham to Tsar Alexander I (June 1815), in 8 JEREMY BENTHAM, THE CORRESPONDENCE OF JEREMY BENTHAM 464, 468 (Stephen Conway ed., 1988) (explaining “the case (it may be called) of Codification”)); see Judson, *supra* note 149, at 50 (“The word ‘codification’ was of [Bentham’s] own coinage.”).

166. Cf. Iain Stewart, *Mors Codicis: End of the Age of Codification?*, 27 TUL. EUR. & CIV. L.F. 17, 18–19 (2012) (positing a typology for codification, whose “differences are of degree rather than of kind”). Stewart invited readers to “swim under the mythology that has attached to the [French] Code civil and, through it, to the idea of codification in general.” *Id.* at 37. In a sense, “codification” became the straw man for opponents of legislative supremacy. See Christine Hurt, *The Windfall Myth*, 8 GEO. J.L. & PUB. POL’Y 339, 373 n.108 (2010) (“The ‘straw man’ argument refers to an argument in which the speaker creates an unnamed critic to espouse an idea, then refutes the idea. Many times, the characterization of the straw man’s argument is a simplification or overstatement of real-world criticism.”); Jonathan K. Van Patten, *Skills for Law Students*, 61 S.D. L. REV. 165, 173 n.21 (2016) (“Criticism of a ‘straw man’ is self-serving non[sense].”).

167. See Wagner, *supra* note 46, at 345–46 (referring to the “powerful idea of natural law, in its eighteenth century form, [which] dominated well into the second half of the nineteenth century in the United States”).

168. *Id.* at 344–45.

one scholar called “a victory of the written over the unwritten law.”<sup>169</sup>

### B. American Codification Initiatives

The first of the early American codifiers was Edward Livingston, a New York native with a colorful history who relocated to Louisiana in the early nineteenth century.<sup>170</sup> Livingston was instrumental in drafting the Louisiana Civil Code, which was modelled closely after the French Civil Code but also reflected Spain’s historical influence in what would later become the Louisiana Territory after its purchase from France in 1803.<sup>171</sup> In 1806, the territorial legislature passed a bill that would have formally adopted pre-existing Spanish and Roman laws, but the bill was vetoed.<sup>172</sup> Two years later, the territorial government enacted a codification of existing law known as the Digest of 1808.<sup>173</sup>

The State of Louisiana was admitted to the Union in 1812.<sup>174</sup> A decade later, the Louisiana Legislature appointed three at-

169. *Id.* at 343. As explained later, the term codification has come to mean many things and has taken many different forms. Stewart, *supra* note 166, at 18 (“The name ‘code’ has been given to so many types of legislation that there is little consistency in its use.”). The term “codification” in the legal sense was unknown before the early nineteenth century because Bentham himself coined the term in 1815. Weiss, *supra* note 38, at 448 & n.42; see *supra* note 165 and accompanying text.

170. See Warren M. Billings, *Mixed Jurisdictions and Convergence: The Louisiana Example*, 29 INT’L J. LEGAL INFO. 272, 284 (2001) (describing Livingston’s background in New York before arriving in Louisiana Territory in 1804).

171. See Shael Herman, *The Louisiana Code of Practice (1825): A Civilian Essay Among Anglo-American Sources*, 23 TUL. EUR. & CIV. L.F. 51, 56 (2008) (referring to both French and Spanish influence in the Louisiana Territory, and noting that while “French and Spanish branches of the civilian tradition might have intra-familial differences, their common ancestry in Roman experience made them broadly compatible ‘subtraditions’”); Agustín Parise, *Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation Between Continental European and Common Law Systems*, 27 TUL. EUR. & CIV. L.F. 133, 134 (2012) (“Louisiana was both a French and Spanish colony, where the laws of each empire applied accordingly.”). For a brief overview of Louisiana’s history leading up to 1803, see *id.* at 137–39.

172. Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1, 4–5 (2010).

173. *Id.* at 7.

174. John E. McAuliffe, Jr., *Louisiana’s Legal Legends*, 65 LA. B.J. 391, 391 (2018); see also *id.* at 392 (referring to Edward Livingston as one of Louisiana’s legal legends for “successfully advocat[ing] for preserving the colonial legal system based on Roman civil law even though the legal codes of the rest of the United States were derived from the English system of common law”).



torneys to draft a civil code. Enacted in 1825, the Civil Code expressly retained “Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States.”<sup>175</sup> Edward Livingston was at the forefront of Louisiana’s codification movement and was one of the three attorneys who participated in drafting the Code.<sup>176</sup> But given Louisiana’s somewhat unique heritage as a colony of both Spain and France, its somewhat equivocal adherence to its civil law heritage<sup>177</sup> was not surprising, and most likely its embrace of codification did not influence other territories to consider a similar path.

### 1. *Antebellum Codification Efforts*

Charles M. Cook authored the primary text that comprehensively addresses the increasing interest in codification in America beginning in the early nineteenth century.<sup>178</sup> At that time, debates about the feasibility and merits of codification were widespread.<sup>179</sup> Although none of the early debates or undertakings yielded a codification product, they were nevertheless influential and “set the intellectual stage” for successful efforts later in the century.<sup>180</sup>

As early as 1821, Joseph Story, then a Supreme Court Justice, expressed an interest in codifying common law. In an address to the Suffolk Bar, he “pleaded” for moderate reform, avoiding

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175. Parise, *supra* note 172, at 19 (citing LA. CIV. CODE § 1112 (1825)); see Louis F. del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 19–20 (2010) (describing French and Spanish influences in developing Louisiana’s legal system).

176. Parise, *supra* note 172, at 15. However, Louisiana never enacted the Criminal Code drafted by Livingston. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 191 n.7 (1985) (“Livingston’s penal code for Louisiana was never adopted, despite his success in codifying other fields of law.”).

177. See Ilijana Todorovic, *The Uniqueness of Louisiana’s Legal Heritage: A Historical Perspective*, 65 LA. B.J. 378, 380 (2018) (“While most of Louisiana’s private law retained a civil law orientation that existed during the colonial rule of France and Spain, Louisiana’s public law, criminal law and civil procedures are modeled after Anglo-American common law norms that were brought to the United States from England . . .”).

178. See COOK, *supra* note 146.

179. Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 J. SO. LEGAL HIST. 81, 83 (2003) (citing COOK, *supra* note 146).

180. Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 360 (1999).

the term “codification” to sidestep any perception that he supported the sort of radical reform Bentham had advocated.<sup>181</sup> Two years later, William Sampson spoke to the New York Historical Society advocating for codification, also without using that specific term. Instead, he identified successful codes that had been recently enacted and cited English legal authorities who had supported codification, including Francis Bacon<sup>182</sup> and Matthew Hale.<sup>183</sup> According to Cook, Sampson’s address was widely reported and sparked an intense debate over the idea of codification.<sup>184</sup>

In 1821, the South Carolina Governor asked the Legislature to undertake a comprehensive revision of state law, referring to the French Civil Code as an example of what he had in mind. Later governors repeated the call for reform, and other political leaders joined the effort.<sup>185</sup> But no state code was forthcoming.<sup>186</sup>

In 1825, Henry Wheaton, one of Story’s friends and the third Supreme Court reporter of decisions, was then serving as a New York revisor of statutes.<sup>187</sup> Wheaton had written a letter to Story describing his duties, which amounted to tinkering rather than comprehensive statutory revision. In response, Story urged Wheaton and his fellow revisors to codify the common

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181. Weiss, *supra* note 38, at 501 (“[Justice Story’s concept of] reform would be gradually advanced under legislative authority by first reducing the principles of law to a text and organizing them into a general code.”).

182. *Id.* Francis Bacon was an early proponent of codifying English common law. Jonathan Teasdale, *Codification: A Civil Law Solution to a Common Law Conundrum?*, 19 EURO. J.L. REFORM 247, 249 (2017) (citing FRANCIS BACON, PROPOSITION TOUCHING THE AMENDMENT OF THE LAW (1606)).

183. Weiss, *supra* note 38, at 501 (citing William Sampson, *An Anniversary Discourse Delivered Before the Historical Society of New York, on Saturday, December 6, 1823; Showing the Origin, Progress, Antiquity, Curiosities, and Nature of the Common Law*, in SAMPSON’S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS UPON THE HISTORY OF THE LAW, WITH THE ADDITION OF SEVERAL ESSAYS, TRACTS, AND DOCUMENTS, RELATING TO THE SUBJECT (Washington, Gales & Seaton 1826)).

184. Weiss, *supra* note 38, at 501 (citing COOK, *supra* note 146, at 108–18).

185. *Id.* at 502 & n.338.

186. *Id.* (citing COOK, *supra* note 146, at 130).

187. See Craig Joyce, *Statesman of the Old Republic*, 84 MICH. L. REV. 846, 856 n.48 (1986) (reviewing R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985)).

law, or “at least the part which is most reduced to principles & is of daily extensive application.”<sup>188</sup> He continued,

“I am in favour of a Code . . . because I think it may reduce to certainty, method, & exactness much of the law, already passed by judicial tribunals & thus give to the public the means, with[in] a reasonable compass, of ascertaining their own rights & duties in many of the most interesting concerns of . . . life.” In addition, [Story wrote,] a code might greatly abridge “the labours & exhausting researches of the profession.”<sup>189</sup>

Across the United States after 1830, codification was increasingly the focus of debate by laymen and lawyers alike, perhaps in part as an outgrowth of Jacksonian democracy.<sup>190</sup> Massachusetts was the first state to seriously consider the idea after Louisiana enacted its Civil Code in 1825.<sup>191</sup> Consistent with a resolution adopted by the Legislature seeking to make the law more accessible, the Governor appointed a commission in 1836 to study the possibility of codifying the common law.<sup>192</sup> One of the five appointees was Justice Joseph Story, a native son of Massachusetts.<sup>193</sup>

The commission, chaired by Story, issued a comprehensive report to the Governor in January 1837<sup>194</sup> that generally favored codification,<sup>195</sup> giving “limited endorsement” to the proposal. The report thoughtfully and comprehensively explained the great advantages of codification and responded to many of its opponents’ primary arguments. While concluding that com-

188. *Id.* (quoting Letter from Joseph Story to Henry Wheaton (Oct. 1, 1825), Henry Wheaton Papers).

189. *Id.* (quoting Letter from Joseph Story to Henry Wheaton (Oct. 1, 1825), Henry Wheaton Papers (internal alteration and second omission by Joyce)).

190. Weiss, *supra* note 38, at 502.

191. Morriss, *supra* note 180, at 360; Weiss, *supra* note 38, at 503.

192. Morriss, *supra* note 180, at 360; *see also* Weiss, *supra* note 38, at 503.

193. Joyce, *supra* note 187, at 848–49.

194. Joseph Story et al., *Codification of the Common Law of Massachusetts: Report of the Commissioners Appointed to Consider and Report Upon the Practicability and Expediency of Reducing to a Written and Systematic Code the Common Law of Massachusetts, or Any Part Thereof*, 17 AM. JURIST & L. MAG. 17, 17–51 (1837) [hereinafter Story Commission Report].

195. *See* Joseph Story et al., *Codification of the Common Law*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 698 (William W. Story ed., 1852); *see also* Joyce, *supra* note 187, at 856 n.48; *Report of the Commissioners to the Governor of the Commonwealth of Massachusetts, reprinted in THE GOLDEN AGE OF AMERICAN LAW* 249, 249–56 (Charles M. Haar ed., 1965).

plete codification of the state's common law was not feasible,<sup>196</sup> the report urged that certain parts of the common law could and should be codified: specifically, laws pertaining to personal civil rights, property, and contracts; commercial law; criminal law; and evidence law.<sup>197</sup> The report also described the personnel and other resources the anticipated undertaking would require.<sup>198</sup>

After the report was released, yet another commission was appointed to begin codifying Massachusetts criminal law. Its work was completed in 1841, but state authorities rejected even this small part of the original reform project.<sup>199</sup> Massachusetts elected not to proceed with codification, and the movement in that state ultimately died.<sup>200</sup>

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196. The Report encapsulated its findings as follows:

I. The Commissioners are, in the first place, of opinion, that it is not expedient to attempt the reduction to a Code of the entire body of the common law of Massachusetts, either in its general principles or in the deductions from, or the applications, of those principles, so far as they have been ascertained by judicial decisions, or are incontrovertibly established.

II. The Commissioners are, in the next place, of opinion that it is expedient to reduce to a Code those principles, and details of the common law of Massachusetts in civil cases, which are of daily use and familiar application to the common business of life, and the present state of property and personal rights and contracts, and which are now so far ascertained and established as to admit of a scientific form and arrangement, and are capable of being announced in distinct and determinate propositions. What portions of the common law properly fall under this predicament will be in some measure considered hereafter.

III. The Commissioners are, in the next place, of opinion, that it is expedient to reduce to a Code the common law, as to the definition, trial and punishment of crimes, and the incidents thereto.

IV. The Commissioners are, in the next place, of opinion, that the law of evidence, as applicable both to civil and criminal proceedings, should be reduced to a Code.

Story Commission Report, *supra* note 194, at 33.

197. *See id.*

198. *Id.* at 49–50; *see* Morriss, *supra* note 180, at 361.

199. Weiss, *supra* note 38, at 503.

200. Morriss, *supra* note 180, at 361; Joyce, *supra* note 187, at 856 n.48. One scholar has surmised that Story's report to the Massachusetts Governor, "while presenting excellent reasoned arguments for codification," was actually "an attempt to forestall a general codification in Massachusetts." Andrew P. Morriss, "This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana, 56 MONT. L. REV. 359, 427 n.339 (1995) [hereinafter Morriss (1995)] (quoting DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW 47 (1986)).

Other states toyed in varying degrees with the notion of codification. For example, the 1846 Virginia Legislature formed a commission to review its statutes with an eye to repeal outmoded statutes and point out gaps and contradictions. When the commission's report was presented the next year, the prevailing conclusion was that the civil and penal codes should be unified into a single code. The result was the Legislature's adoption of the Virginia Code in 1849.<sup>201</sup> In 1850, the Alabama Legislature appointed a commission and charged it with organizing its statutes into "proper chapters and sections" within which to organize, condense, and consolidate "all the public laws appertaining to the subject."<sup>202</sup> The report was to be submitted to the Governor for review and any alterations deemed necessary.<sup>203</sup> And during Kentucky's 1849 Constitutional Convention, the issue of codification was debated in response to a proposal to appoint a commission to compile and revise the state's laws. The new Constitution required the General Assembly to appoint two commissions: one to revise and consolidate the civil and criminal statutes, and the other to draft a code of civil and criminal procedure.<sup>204</sup>

But despite the widespread interest in codification, none of these early efforts resulted in a comprehensive codification of state law outside Louisiana. It was New York's codification project that would become the focus of similar initiatives in other states during the second half of the nineteenth century.

## 2. *Field Codes*

The major undertaking in favor of American codification in the nineteenth century was led by David Dudley Field in New York, known "by far [as] the most persuasive and articulate advocate of codification in nineteenth-century America."<sup>205</sup> When the New York Constitution was revised in 1846, it included a provision for the appointment of two commissions—one to reform court procedure and the other to codify the entire

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201. Surrency, *supra* note 179, at 85.

202. *Id.* at 86 (quoting 1850 Ala. Laws (enacted Feb. 5, 1850)).

203. *Id.* The result was the Alabama Code of 1852. *See id.* at 89.

204. *Id.* at 86 (citing KY. CONST. of 1850, art. VII, § 22).

205. Morriss, *supra* note 180, at 357.

body of substantive state law.<sup>206</sup> The saga that followed has a decades-long history.<sup>207</sup> Ultimately, Field's efforts in New York met with mixed success primarily because James C. Carter, a persistent foe of codification and Field's "arch-antagonist,"<sup>208</sup> used his political connections, backed by a spurious defense of the common law,<sup>209</sup> to defeat Field's proposed Civil Code—not just once, but several times.<sup>210</sup>

Because a rich scholarship exists on the influence of David Dudley Field and his codification efforts,<sup>211</sup> a lengthy recitation

206. David Dudley Field, *Codification in the United States*, 1 JURID. REV. 18, 18–19 (1889).

207. See generally, e.g., *id.* at 18–23.

208. Benjamin Kaplan, *David Dudley Field Centenary Essays*, 63 HARV. L. REV. 721, 722 (1950) (book review).

209. See Aniceto Masferrer, *Defense of the Common Law Against Postbellum American Codification: Reasonable and Fallacious Argumentation*, 50 AM. J. LEGAL HIST. 355, 357 (2010).

In order to defend the common law from codification, Carter presented to some extent a disfigured or distorted face of the common law tradition, emphasizing only those aspects which could provide him with the most powerful legal argument against the appealing and increased interest in codifying the American law wholesale. In this regard, the emotional intensity with which that debate developed is apparent, as is the strong personal and political interest of the majority of debaters.

*Id.*

210. E.g., *id.* at 416 ("Despite the paradoxes in Carter's legal theory, he succeeded in persuading the institutional authority (governors) to deny final approval to Field's Code, even after it had already been passed twice by the legislature.").

The most important part of the reform, the Civil Code, passed the House of Assembly four times and both houses twice . . . On the two occasions on which the Civil Code had passed both houses, the governors, influenced by the bar, refused their signatures. When in 1885 and in 1886 the Civil Code was again introduced into the legislature, the opposition, led by Carter, prevailed. Finally, the Civil Code died and the private law of New York remained uncodified.

Weiss, *supra* note 38, at 508.

211. See generally, e.g., DAVID DUDLEY FIELD: CENTENARY ESSAYS (Alison Reppy ed., 1949); Garoupa & Morriss, *supra* note 26, at 1470–93 (discussing insights from the nineteenth-century codification debates from an economic perspective); Shael Herman, *The Fate and Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 421–25 (1996) (discussing Field's codification proposals); Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 174 (2008) (focusing on debates surrounding Field's Civil Code); Morriss, *supra* note 180, at 356 (concentrating on debate provoked by Field's draft codes prepared for New York during the 1860s); Weiss, *supra* note 38, at 503–11 (discussing Field's concept of codification, his proposed codes, and the reasons for the failure of Field's Civil Code in New York); see also Rodolfo Batiza, *Sources of the Field Civil Code: The Civil*

of that history is unnecessary here. Despite the extended controversy his codification projects engendered in New York, they broadly influenced several other states to follow his lead.<sup>212</sup>

Without question, Field's Civil Procedure Code represented the first comprehensive code of its kind other than Louisiana's Civil Code.<sup>213</sup> Better known to historians as the "Field Code,"<sup>214</sup> it would become a model for simplifying and clarifying the archaic minutiae carried over from English common law procedure. Enacted in New York in 1848,<sup>215</sup> it was the prototype for procedural reforms in twenty-four other states by 1870.<sup>216</sup> The Federal Code of Civil Procedure, first adopted in 1938, reflects the substantial and continuing influence of the Field Code well into the twenty-first century.<sup>217</sup>

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*Law Influences on a Common Law Code*, 60 TUL. L. REV. 799, 802 (1986) (examining sources of inspiration for Field's proposed Civil Code).

212. E.g., Field, *supra* note 206, at 21–25; see also Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132–33 (2018) (applying digital text analysis to assess the widespread influence of the Field Code and its emulators).

213. Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 10 (1989).

214. See, e.g., Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 311–13 (1988) (analyzing the influence of the "Field Code" on the Federal Rules of Civil Procedure); *id.* at 317 (citing A. LOOMIS, *HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS* 22 (Little Falls, I.R. & G.G. Stebbins 1879)) (noting that Field's "partial procedural code of 1848 became known as the 'Field Code'").

215. An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State (Code of Procedure), 1848 N.Y. Laws 497 (adopted April 12, 1848, with most provisions taking effect on July 1, 1848).

216. Bone, *supra* note 213, at 10 n.14 ("By 1870, at least twenty-four states had adopted some version of the Field Code [of Civil Procedure]."). One scholar estimated that "some thirty states" eventually adopted Field's Civil Procedure Code. Arthur T. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. DAVIS L. REV. 659, 668 (1998); see also Weiss, *supra* note 38, at 506 (reporting that by 1897, 31 states and territories had adopted civil procedure codes patterned on the Field Code).

217. Weiss, *supra* note 38, at 506 ("In the realm of civil procedure, the idea of codification was successful and has remained successful . . . [T]he next major [codification] reform, the 1938 Federal Rules of Civil Procedure, renewed Field's legacy."). *But cf.* Subrin, *supra* note 214, at 313 ("[I]t is ahistoric and untenable to argue that twentieth-century procedure is only a minor modernization of the Field Code.").

### 3. Other State Codification Initiatives After 1850

Perhaps inspired by Field's success with the New York Code of Civil Procedure, still other states considered the advantages of codification. Georgia, the last established of the original thirteen Colonies, embarked on a major codification project beginning in 1858.<sup>218</sup> After years of work, the Legislature enacted the much-revised Georgia Code to take effect on January 1, 1863. One of its celebrated accomplishments was to ensure that the entire body of state law was "within reach of the people."<sup>219</sup> Georgia is the only one of the original Colonies to have successfully codified its entire body of law.<sup>220</sup> In 1889, Field himself concluded that the Georgia Code "was drawn up with care and precision . . . and, according to all accounts, is working well."<sup>221</sup>

Four other "Western" territories and states were heavily influenced by the codes Field had drafted for New York. In 1866, the Dakota Territory adopted Field's Civil Code in full.<sup>222</sup> California followed by enacting four codes, including Field's Civil Code, in 1872.<sup>223</sup> Finally, Montana adopted four codes in 1895, supplanting the entirety of the state's then-existing body of law.<sup>224</sup>

218. Surrency, *supra* note 179, at 89 (citing Ga. Laws 95 (Nov. 29, 1858)).

219. *Id.* at 91 (quoting Hines Holt et al., *Preface* to CODE OF THE STATE OF GEORGIA vi (1861)). Surrency's article describes Georgia's codification process in detail. See Surrency, *supra* note 179.

220. For a full discussion of the Georgia codification process, see Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178, 178-89 (1930).

221. Field, *supra* note 206, at 19. Field noted that the New York Commissioners were unaware of Georgia's codification work at the time it was underway, "owing, it is supposed, to the breaking out of the Civil War." *Id.*

222. See David Dudley Field, *Codification of the Law*, 2 ALB. L.J. 465, 465 (1870) (crediting Dakota Territory, "one of the youngest, but most vigorous, of our territories" with "the honor of being the first to enact a code of the common law of England"); Morriss (1995), *supra* note 200, at 372-75 (noting that Field's codification efforts first took hold in Dakota Territory and discussing its codification process).

223. Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994) ("[I]n 1872, California had moved to the forefront of American legal reform by becoming one of the first states in the nation to codify its complete body of laws."); Cooley, *supra* note 120, at 317 (noting that California enacted four codes embracing the entirety of state law as it then existed: the Penal Code, the Code of Civil Procedure, the Political Code, and the Civil Code, all in February and March 1872); Morriss (1995), *supra* note 200, at 377 (same).

224. Morriss (1995), *supra* note 200, at 378-97 (describing and critiquing events leading up to the enactment of Montana's four codes in 1895). Over the last two



#### 4. Post–Civil War Codification Movement: 1865–1900

For understandable reasons, the debate over codification stalled during the Civil War, but it resumed in full force after the war was over and Reconstruction began.<sup>225</sup> The literature of the period is replete with books and articles discussing the issue.<sup>226</sup> In the midst of the debate, the American Bar Association was founded in 1878, motivated in part by concerns among the practicing bar about the increasing variations in state law—meaning common law, legislation, and codes.<sup>227</sup>

In 1886, after a spirited debate on the merits of codification and the distinction between codes and statutes, the Governors of the American Bar Association adopted the following resolution on a vote of 58 in favor to 41 against: “The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute.”<sup>228</sup> During the debate that preced-

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decades, some respected Montana scholars have argued that what remains of the 1895 Codes should be repealed. See, e.g., Scott J. Burnham, *Let’s Repeal the Field Code!*, 67 MONT. L. REV. 31, 31–32 (2006) (“The Montana [L]egislature should continue its good work by repealing the remaining Field Civil Code statutes that were enacted in Montana.”); see also Andrew P. Morriss, Scott J. Burnham & James C. Nelson, *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371, 405 (2000) (recording debate among two scholars and a jurist over whether Montana’s Field Codes should be repealed). But see Scott J. Burnham, *Let’s Restore Freedom of Contract to the Montana Code*, 36 MONT. LAW. 27, 27 (Apr. 2011) (explaining why he was “now in the position of advocating that in order to improve Contract Law by permitting more robust freedom of contract, a part of the Field Code should be enacted in Montana”).

225. Morriss (1995), *supra* note 200, at 360–64 (noting that codification was debated across the country (citing COOK, *supra* note 146)).

226. E.g., J. BLEECKER MILLER, *DESTRUCTION OF OUR NATURAL LAW BY CODIFICATION* (New York, H. Cherouny 1882); M.D. Chalmers, *Experiment in Codification*, 2 L.Q. REV. 125, 134 (1886); Cooley, *supra* note 120; Field, *supra* note 206, at 25; David Dudley Field, *Codification—Mr. Field’s Answer to Mr. Carter*, 24 AM. L. REV. 255, 266 (1890); Seaton Gordon, *Codification of the Law*, 3 CAN. L. TIMES 139 (1883); J. Bleecker Miller, *The Fight against the Civil Code*, 2 COUNSELLOR 82, 84 (1892); Martin F. Morris, *The Code System*, 1 WASH. L. EXCH. 65, 67 (1890); *Mr. Dudley Field on the New York Codes*, 31 L. MAG. & L. REV. 112, 117 (1871); A.P. Sprague, *American Codification and the English Judicature Acts*, 5 L. MAG. & REV. 59, 67 (1879); J. Dove Wilson, *Recent Progress of Codification*, 3 JURID. REV. 97 (1891); Note, *Codification*, 1 MANITOBA L.J. 163 (1884); see also Masferrer, *supra* note 211, at 173.

227. See Crystal, *supra* note 156, at 263 (noting that the ABA in 1889 appointed a committee to consider uniformity of state legislation); Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2255–56 (2015) (noting that the ABA appointed a Committee on Uniform State Laws in 1889).

228. *Transactions of the Ninth Annual Meeting of the American Bar Association*, 9 A.B.A. REP. 3, 74 (1886) [hereinafter 1886 ABA Report]. The resolution was offered

ed the vote, one member of the body noted that “every bar association in the country for the last two years has been discussing this subject.”<sup>229</sup> Two years later, the ABA adopted a resolution endorsing the codification of civil and criminal procedure rules for use in federal courts.<sup>230</sup>

Hence the years following the Civil War witnessed renewed and widespread debate about the merits of codification, and prominent members of the American bar weighed in as staunch proponents.

### 5. Uniform Law Commission

In the wake of the great debates over codification in the late nineteenth century, a meeting was held in the late summer of 1892 at Sarasota Springs, New York, by a group that would later become the National Conference on Uniform State Laws, known more informally as the Uniform Law Commission.<sup>231</sup> The purpose was to discuss alternatives by which to achieve some degree of uniformity in state laws, recognizing that the capacity of Congress to unify national law was seriously limited.<sup>232</sup> The group also believed that achieving uniformity by interstate agreements was an “almost insuperable” goal.<sup>233</sup> Certainly the Field Codes and the nationwide debates over codifi-

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by the ABA Committee on Delays and Uncertainty in Judicial Administration, chaired by none other than David Dudley Field. *Id.* at 11. A spirited debate preceded the vote on the resolution. *See id.* at 11–74. Interestingly, just before the final resolution was adopted, a motion was offered to add the following sentence: “This Association does not, however, favor or oppose what is known as codification.” The amendment failed on a 29-49 vote. *Id.* at 73. For a more detailed summary of the ABA’s positions on codification specifically, see Crystal, *supra* note 156, at 261–63.

229. 1886 ABA Report, *supra* note 228, at 38.

230. Crystal, *supra* note 156, at 263 (citing 11 A.B.A. REP. 79 (1888)).

231. Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799, 799 (1992) (citing WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 11 (1991)); Stein, *supra* note 227, at 2255 (“This codification process marked the beginning of the movement toward uniform state laws.”). The meeting was apparently held in conjunction with the annual meeting of the American Bar Association. *See* Crystal, *supra* note 156, at 263.

232. Miller, *supra* note 231, at 799. Seven states were represented at the initial meeting: Delaware, Georgia, Massachusetts, Michigan, New York, New Jersey, and Pennsylvania. Stein, *supra* note 227, at 2256.

233. Miller, *supra* note 231, at 800.

cation were among the factors that instigated the founding of the Commission.<sup>234</sup>

The Commission got right to work on various projects, recommending in its first year of existence uniform laws dealing with a variety of topics, including various issues dealing with wills executed or probated in another state, and a uniform table of weights and measures.<sup>235</sup> The first commercial law proposed for enactment was the Uniform Negotiable Instruments Law in 1896, which was ultimately adopted nationwide.<sup>236</sup> Soon after, Professor Samuel Williston drafted the Uniform Sales Act, initially modelled after England's Sale of Goods Act but later revised considerably.<sup>237</sup>

The organization grew rapidly in the last decade of the nineteenth century, and by 1900, thirty-five states and territories were represented among its membership.<sup>238</sup> In the 125 years of the Commission's existence, its most heralded success has been the Uniform Commercial Code, finally adopted in 1951 after several decades of work.<sup>239</sup>

Although many of the Commission's uniform laws proposed for state enactment bear a striking resemblance to codes,<sup>240</sup> most comparative scholars distinguish them from true codes in the civil law sense. One reason is that most uniform laws do not purport to supplant state common law in the subject area, but rather supplement it. Provisions routinely appear in uniform codes with the effect of preserving state common law (and other relevant laws) while encouraging judges in enacting states to interpret the code with the goal of unifying state law.<sup>241</sup>

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234. Stein, *supra* note 227, at 2255.

235. *Id.* at 2257.

236. *Id.* at 2258. The Law is said to have been modelled after England's 1882 Bills of Exchange Act. Crvstal, *supra* note 156, at 264 n.144; see Francis M. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 123 (1910).

237. Stein, *supra* note 227, at 2263.

238. *Id.* at 2256.

239. *Id.* at 2262 (referring to the Uniform Commercial Code as the "crown jewel" of the Commission's work).

240. See Judson, *supra* note 149, at 53–54 (referring to uniform laws as a form of codification; "Every legislative Act which declares the rule upon a specific subject, thus making a rule of action therein, is in so far codification.").

241. See, e.g., UNIF. PROBATE CODE § 1-103 (UNIF. LAW COMM'N 1969) (amended 2010) ("Unless displaced by the particular provisions of this [Code], the principles of law and equity supplement its provisions."); UNIF. TRUST CODE § 106 (UNIF.

Moreover, the Uniform Law Commission is a private entity lacking government authority. Its influence is therefore heavily dependent on the credibility of its work products and the capacity to communicate effectively through its membership with state legislatures to motivate them to consider enactment. Nevertheless, the work of the Commission has increasingly influenced states to enact more and more statutes over the years that have enhanced, if not guaranteed, comparable statutory enactments across state lines.<sup>242</sup> Professor Karl Llewelyn's leadership in drafting major portions of the Uniform Commercial Code lent credibility to the codification effort, and his intimate familiarity with the German Civil Code no doubt heavily influenced the final product to resemble civil codes on the European continent.<sup>243</sup>

The Uniform Law Commission continues its work today, encouraging states to enact statutes that would have the effect of codifying and unifying state laws in a wide range of subject

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LAW COMM'N 2005) (amended 2010) ("The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.").

242. See, e.g., Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349, 349 (2007) ("Despite initial questions about whether uniformity might best be achieved by federal enactment of the Uniform Commercial Code . . . , its widespread enactment on a state-by-state basis has made it the poster child for the uniform law process."); Eric Stein, *Uniformity and Diversity in A Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081, 1101 (1986) (noting that scholars and practitioners "who provide the principal brain power in drafting uniform laws are at times concerned with the need for systematization of a particularly fragmented field of law," and that "the Conference on Uniform State Laws has scored some significant successes by having its uniform laws widely adopted in state legislatures"); Traynor, *supra* note 92, at 422–23 (discussing the standardizing influence of the Uniform Commercial Code and related uniform laws); cf. Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 331 (2009) (noting that states tend to adopt proposed uniform laws when interstate uniformity appears to serve the goal of efficiency, and questioning whether uniform laws dealing with limited liability companies do so).

243. See, e.g., William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 240, 242 (1995) (discussing Llewelyn's role in drafting the U.C.C. and its resemblance to civilian codes).

areas.<sup>244</sup> More than 170 uniform laws have been proposed by the Commission,<sup>245</sup> and more are under development.<sup>246</sup>

#### 6. *American Law Institute*

The American Law Institute was founded in 1923 by a group of American jurists, lawyers, and academics known as the Committee on the Establishment of a Permanent Organization for the Improvement of the Law.<sup>247</sup> Several members of the Uniform Law Commission took part.<sup>248</sup> Its mission, according to its charter, is “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>249</sup>

The Institute embarked on a plan to “restate” the principles of the common law pertaining to various subjects. It did so in a form that appeared statute-like to many observers, although the proposals themselves were designed to state common law principles in a format that would be suitable for state courts to readily adopt and incorporate by decision into state common law. Some have likened the undertaking to a continuation of the codification reform initiatives that began in the nineteenth century.<sup>250</sup> Others opposed the project as an effort to shore up the common law against attacks by the codification movement.<sup>251</sup>

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244. *About the ULC*, UNIFORM L. COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> [<https://perma.cc/5TBK-YUP2>] (last visited Mar. 29, 2019).

245. *Acts*, UNIFORM L. COMM’N, <http://www.uniformlaws.org/Acts.aspx> [<https://perma.cc/R7F8-ZSCH>] (last visited Mar. 29, 2019).

246. *ULC Project List by Category*, UNIFORM L. COMM’N (July 31, 2017), <http://www.uniformlaws.org/Shared/ProjectsList/ProjectsList.pdf> [<https://perma.cc/8WCA-HYKL>].

247. Crystal, *supra* note 156, at 239 & n.1.

248. Stein, *supra* note 227, at 2263.

249. *About ALI: Creation*, AM. L. INST. (quoting charter), <https://www.ali.org/about-ali/> [<https://perma.cc/Q8KL-X9V9>] (last visited Mar. 29, 2019).

250. *E.g.*, Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 228 (2007) (“[O]thers—both inside and outside the movement—saw the Restatements as a necessary first step toward codification or some other significant reform.”); Crystal, *supra* note 156, at 265 (“The Restatement project, begun in 1923 by the ALI, represents a continuation and modification of the late nineteenth century codification movement.”).

251. *E.g.*, Adams, *supra* note 250, at 226 (“One view of the Restatement movement is that it was an attempt to protect the common law against codification.”).

The American Law Institute has met with substantial criticism over the years, but its continued influence on unifying state common law is undeniable. One scholar thoughtfully summed up the American Law Institute's impact and influence as follows:

The Restatement movement was the outgrowth of a conservative codification movement which developed in the last quarter of the nineteenth century. Although this movement failed to achieve success at the state level because it was opposed by members of the bar who had traditional values, the movement was supported by two new groups in the profession, law professors and corporate lawyers. Those two groups ultimately produced the Restatements, a code like response to the problems of the legal system.<sup>252</sup>

### 7. Demise of Federal Common Law

The United States Supreme Court put a very large nail in the coffin of American common law when it decided *Erie Railroad Co. v. Tompkins*<sup>253</sup> in 1938. The essential holding in that case was consistent with what many scholars had surmised for years: Neither the federal Constitution nor Congress had ever authorized the federal courts to create federal "general" or common law.<sup>254</sup>

*Erie* overruled a nineteenth-century case, *Swift v. Tyson*,<sup>255</sup> authored by Justice Joseph Story. The issue in both cases was whether a federal court, sitting in a diversity case, was required to apply state common law to resolve a legal issue on which the state legislature had not spoken. Interpreting the relevant language in the Judiciary Act of 1789, the *Swift* Court had held that federal courts in that circumstance were bound by state positive law, such as statutes, but not state common law.<sup>256</sup> In the absence of a state statute on point, *Swift* authorized the federal courts to fashion a federal "general" or common law rule

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252. Crystal, *supra* note 156, at 273.

253. 304 U.S. 64 (1938).

254. *Id.* at 78–79; see *supra* notes 62 & 73 and accompanying text.

255. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

256. See *id.* at 12.

to apply, which of course would preempt state common law by virtue of the Supremacy Clause.<sup>257</sup>

Nearly a century later, *Erie* held just the opposite. Its holding required federal courts sitting in diversity to apply state law, whether codified, customary, or common, to resolve issues of state law.<sup>258</sup> The *Erie* holding was a watershed in federal court jurisprudence, eliminating (at least in theory) the federal courts' assumed authority to develop a national common law to apply in the absence of state positive law.<sup>259</sup>

As a result of *Erie's* holding that federal courts had no power to develop their own rules of "general" or common law, the

257. *See id.* at 12–13. Given Story's reputation as at least a lukewarm proponent of codification in the 1830s, it may seem surprising that he would have reasoned as he did in *Swift v. Tyson*. But a closer reading of the opinion suggests that his reasoning in fact may have implicitly supported codification of state law. *See id.* at 18–19. Under Story's reasoning, the word "law" in the Judiciary Act referred only to state *positive law* (or its settled customary equivalent), which would be treated as controlling by federal courts sitting in diversity. Story's reasoning may have been colored by his view favoring codification of state law; the *Swift* holding and its reasoning would have made it much easier for federal courts sitting in diversity to identify and apply relevant state law.

258. *See Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."); *see also* Rules of Decision Act, 28 U.S.C. § 1652 (2012) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

259. Notwithstanding *Erie*, the Supreme Court "has recognized several 'enclaves of federal judge-made law which bind the States.'" *Collins v. Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). Those narrow "enclaves" include foreign affairs, admiralty, lawsuits between states, and some aspects of labor law. *Id.*

At first blush, that observation may appear to contradict the premise that federal common law is essentially dead. But as Justice Thomas has correctly observed, some of those subjects are within the scope of federal court jurisdiction by virtue of *express constitutional or statutory delegations* to the federal judiciary. *Id.*; *see, e.g.*, U.S. CONST. art. III, § 2 (conferring jurisdiction over admiralty and maritime cases; controversies between states; controversies involving foreign states or citizens; and "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties"); *see also, e.g.*, 29 U.S.C. § 185(a), (c) (2012) (conferring jurisdiction to federal courts over alleged violations of collective bargaining agreements). Indeed, with respect to subject matter jurisdiction not expressly delegated to the federal courts, the preemptive authority of their decisions in those areas is "questionable." *Collins*, 138 S. Ct. at 1679 (Thomas, J., concurring); *see also* Scalia, *supra* note 107, at 13 ([I]n the federal courts, . . . with a qualification so small it does not bear mentioning, there is no such thing as common law.").

holding in *Swift* was expressly overruled.<sup>260</sup> While the common law wings of the federal courts were thus severely clipped, the *Erie* holding required federal courts sitting in diversity cases to search for relevant *state* common law in the absence of state positive law on point.<sup>261</sup> For this reason, *Erie* may have had the inadvertent effect of encouraging the continued development of state common law, even while subverting federal common law.

#### 8. *Enactment of United States Code Titles as Positive Law*

Perhaps less influential, but nevertheless significant in the incremental movement toward codification of American law, are the ongoing efforts of the House Office of Law Revision Counsel to revise and consolidate titles of the United States Code for enactment as positive law.<sup>262</sup> The slow process began in 1947.<sup>263</sup> At the time of this writing, fewer than half the total number of United States Code titles have been so enacted, and the process is ongoing.<sup>264</sup>

Until 1875, federal statutes were not organized in any systematic way. Public laws were published chronologically in the *Statutes at Large*, while private laws were not published at all. Researching public laws required tedious hunting through the

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260. *Erie*, 304 U.S. at 79 (expressly disapproving *Swift v. Tyson* as “an unconstitutional assumption of powers by courts of the United States”).

261. *See id.* at 78. *See generally* CHARLES ALAN WRIGHT ET AL., 19 FEDERAL PRACTICE AND PROCEDURE § 4507 (3d ed. 2018).

262. Office of the Law Revision Counsel, *Positive Law Codification*, U.S. HOUSE OF REPRESENTATIVES (explaining the process of enacting titles as positive law and defining that term), <http://uscode.house.gov/codification/legislation.shtml> [<https://perma.cc/E2Z8-B7CL>] (last visited Mar. 29, 2019); *see also* Office of the Law Revision Counsel, *Positive Law Codification in the United States Code*, U.S. HOUSE OF REPRESENTATIVES, [http://uscode.house.gov/codification/positive\\_law\\_codification.pdf](http://uscode.house.gov/codification/positive_law_codification.pdf) [<https://perma.cc/2AUP-BPYM>] (last visited Mar. 29, 2019).

263. Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 137 (2010) (“In 1947, Congress began a new effort to gradually convert the entire Code into positive law.” (citing Act of July 30, 1947, ch. 388, 61 Stat. 633, 638)). The project resulted after multiple errors and omissions were discovered in early codifications of federal statutes, prompting Congress to enact a statute providing that subsequent codifications were merely presumptive evidence of the laws themselves. *See* 1 U.S.C. § 204(a) (2012); *infra* note 270 (quoting § 204(a)).

264. Office of the Law Revision Counsel, *Positive Law Codification*, *supra* note 262. The *Code* for many years had fifty titles, although that number has recently increased to fifty-seven. *See id.*



growing number of *Statutes at Large* volumes, which were neither indexed nor organized by subject matter. Comparable to state session laws, the *Statutes at Large* are simply bound volumes of the public laws enacted by Congress in each two-year session, collected and published in chronological order. The *Statutes at Large* were the sole source for researching federal statutes until 1875, when the first edition of the *Revised Statutes* appeared in print. Congress published the *Revised Statutes* in an effort to consolidate all federal statutes in force as amended through December 1, 1873.<sup>265</sup>

The first version of the *Revised Statutes* was almost immediately criticized as incomplete and possibly unreliable.<sup>266</sup> Complaints were also directed at the arrangement and numbering of the titles, chapters, and sections.<sup>267</sup> A second edition, published in 1877, included enactments after December 1, 1873. Supplements were periodically published in later years.<sup>268</sup>

Not until 1926 was the *United States Code* as we know it today first published in multiple volumes known as titles.<sup>269</sup> The codification was organized by subject matter and contained detailed indices, greatly improving accessibility. Even now, however, the codified version is by law merely *prima facie* evidence of federal law, unless contained in a title that Congress has definitively enacted as positive law.<sup>270</sup> Otherwise, federal laws can be found only in the official *Statutes at Large*.<sup>271</sup>

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265. Margaret Wood, *The Revised Statutes of the United States: Predecessor to the United States Code*, LIBRARY OF CONG. (July 2, 2015) (citing REVISED STATUTES OF 1874), <https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/> [<https://perma.cc/GL39-56VL>].

266. *Summary of Events, The Revised Statutes*, 9 AM. L. REV. 762, 767–68 (1875) [hereinafter *Summary of Events*]; see Tress, *supra* note 263, at 135 (“Numerous complaints about mistakes and omissions in the 1873 Revised Statutes led to the publication of an amended and updated version in 1878.”).

267. *Summary of Events, supra* note 266, at 768 (referring to the arrangement as “inconvenient and clumsy”). The 435-page index to the 1092 pages of revised statutes was also critiqued as untrustworthy and inconvenient. *Id.* Even the typography was criticized as “not positively bad, but . . . by no means well executed, and [it] compares very unfavorably with work of the same kind done for the governments of other countries.” *Id.*

268. See Tress, *supra* note 263, at 136 (“The difficulties with the Revised Statutes seem to have thoroughly dampened congressional enthusiasm for codification.”).

269. See *id.*; see also Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 L. LIBR. J. 545, 550–52 (2009) (explaining history and development of the 1926 Code).

270. See 1 U.S.C. § 204(a) (2012).

Although the *United States Code* is nominally a codification of federal statutes, comparative law scholars would not classify it as a code in the civil law sense of that term. Its length, complexity, and detail, however, certainly reflect that statutes have become ubiquitous in the United States.

### C. *International Treaties, Conventions, and Agreements*

Legal education in the United States has traditionally paid little heed to the role of international treaties and supranational conventions.<sup>272</sup> Yet the federal Constitution expressly incorporates treaties,<sup>273</sup> together with federal statutes, as the supreme law of the land.<sup>274</sup> The twentieth century witnessed a significant

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The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however,* That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

*Id.*

271. See 1 U.S.C. § 112 (2012).

The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

*Id.*

272. "Multilateral conventions and institutions [create] certain reciprocal commitments among nations and [subject] countries to supranational norms that implicate realms traditionally considered to be under purely local control." Amnon Lehari, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 439 (2010). Perhaps the most salient supranational institution in modern times is the European Union. See, e.g., Johannes Saurer, *The Accountability of Supranational Administration: The Case of European Union Agencies*, 24 AM. U. INT'L L. REV. 429, 487 (2009) ("The system of European [Union] administration is undergoing a profound transformation.").

273. "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), *overruled in part on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

274. See U.S. CONST. art. VI.

increase in the number of treaties the United States has joined as a ratifying party.<sup>275</sup> In fact, one scholar, apparently with a wink and a nod to Calabresi's so-called "Age of Statutes," has referred to the twentieth century as the "Age of Multilateral Treaties."<sup>276</sup>

Despite the clear language in Article VI of the Constitution providing that treaties, once ratified by the United States,<sup>277</sup> are just as much part of the supreme law as the Constitution and federal statutes,<sup>278</sup> the Supreme Court has exhibited considerable reluctance to directly enforce them under the prevailing "doctrine of non-self-execution."<sup>279</sup> First recognized by name<sup>280</sup>

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.* (emphasis added). *But cf.* *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (6-3 opinion) (distinguishing "treaties that automatically have effect as domestic law" from "those that—while they constitute international law commitments—do not by themselves function as binding federal law" (citing *Foster*, 27 U.S. (2 Pet.) at 314)). *Medellin* has been called "the Supreme Court's leading non-self-execution decision." Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 *BYU L. REV.* 1639, 1639. Another scholar observed that *Medellin* "contains the most extensive discussion of treaty self-execution in the Court's history." Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 *SUP. CT. REV.* 131, 132.

275. Tim Wu, *Treaties' Domains*, 93 *VA. L. REV.* 571, 646 (2007) (noting the proliferation of international agreements to which the United States became a party beginning in 1939).

276. *Id.* at 630.

277. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

278. *See* Wu, *supra* note 275, at 577.

A first-time reader of the United States Constitution might consider the intended role of treaties in the American system as fairly straightforward. Article VI of the Constitution declares in one breath that valid treaties and statutes are the "supreme Law of the Land." The text suggests a rough equivalence in the legal status of the two, and the simple equivalence view is supported by much, particularly early, Supreme Court writing.

*Id.*

279. *Id.* at 648. "History is littered with treaties with direct language that were nonetheless not enforced by the judiciary for want of Congressional action." *Id.* at 595; *see* Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT'L L.* 51, 90 (2012) ("The courts of the United States are today less willing than at any previous time in history to directly enforce the Article II treaty obligations of the United States through a private right of action."); *see also* John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 *B.C.*

in an opinion for the Court authored by Chief Justice John Marshall in 1829,<sup>281</sup> the non-self-execution doctrine holds that some treaties are not directly enforceable by the federal courts. Specifically, unless a treaty is “self-executing”—meaning that its terms are not contingent on the subsequent enactment of federal legislation—the courts will decline to directly enforce it.<sup>282</sup> The doctrine has been criticized by scholars for years.<sup>283</sup>

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L. REV. 433, 434–36 (2015) (explaining that “the judiciary has taken steps to limit the direct role played by international law in the U.S. legal system,” concluding that the “persistent judicial reluctance to directly enforce international law rules is normatively undesirable,” and proposing codification as a solution); Manley O. Hudson, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers, 1910–1923 Sen. Doc. No. 348, 67th Cong., 4th Sess.*, 37 HARV. L. REV. 790, 790 (1924) (bemoaning the lack of an accessible and authoritative source for international treaties: “Some day the United States must have an adequate and worthy publication of all treaties, together with the necessary documents for understanding them.”).

280. Wu argues that the doctrine was first recognized in *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393 (Pa. Ct. Comm. Pleas 1788). Wu, *supra* note 275, at 578 n.21, 607. Even so, the facts (and the treaty) at issue in that case predated ratification of the federal Constitution on June 21, 1788.

281. *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829) (Marshall, C.J.)).

282. *See id.* at 527 (“A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.”); *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1192 (9th Cir. 2017) (“In simple terms, a self-executing treaty is one that is judicially enforceable upon ratification. In contrast, a non-self-executing treaty requires congressional action via implementing legislation or, in some cases, is addressed to the executive branch.”); U.S. Senator Ted Cruz, *Essay: Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 93 (2014) (distinguishing self-executing treaties, which have the effect of domestic law, from non-self-executing treaties, which by themselves do not have binding effect); Wu, *supra* note 275, at 578 (“‘Self-executing treaties’ become a domestic law of the United States immediately upon ratification. ‘Non-self-executing treaties,’ by contrast, create no domestic law rules [absent legislation] and cannot be directly enforced in American courts.”). Because a non-self-executing treaty is not judicially enforceable, a court will dismiss a claim to enforce it as nonjusticiable. *Republic of Marshall Islands*, 865 F.3d at 1193.

283. *E.g.*, STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., NO. 7-5700, RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 16–17 (2018) (“[T]here is significant scholarly debate regarding the distinction between self-executing and non-self-executing provisions, including the ability of U.S. courts to apply and enforce them . . . . At present, the precise status of non-self-executing treaties in domestic law remains unresolved.” (internal footnotes and citations omitted)); Wu, *supra* note 275, at 573; *id.* at 575 (“[T]he rule of self-execution has been stretched beyond recognition in the twentieth century into a loose doctrine that blocks judicial enforcement of treaties on a seemingly ad hoc basis.”); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (2018).

Over the last century, the nature of international compacts has changed. They are now commonly known as “congressional-executive agreements.”<sup>284</sup> Under this arrangement, the President and both chambers of Congress enact legislation that simultaneously approves the treaty along with implementing statutes, thus avoiding the Article II process requiring the President’s approval subject to ratification by a two-thirds vote of the Senate.<sup>285</sup>

Whether framed as Article II treaties or congressional-executive agreements, bilateral and multi-lateral international agreements have expanded the supreme law of the land well beyond the “Age of Statutes.” Agreements with foreign nations are an increasingly important component of the positive law that governs Americans in the twenty-first century.<sup>286</sup> The fed-

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(1) Treaties made under the authority of the United States are part of the laws of the United States and are supreme over State and local law.

(2) Cases arising under treaties fall within the judicial power of the federal courts.

(3) Treaties create international legal obligations for the United States, and limitations on the domestic enforceability of treaties do not alter the United States’ obligation under international law to comply with relevant treaty provisions.

*Id.* (superseding RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) (defining and distinguishing “non-self-executing” agreement from “international law or international agreements” and providing that “a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation”)).

284. *Wu*, *supra* note 275, at 646, 648.

285. *Id.* at 646. “[T]he congressional-executive agreement is an international agreement made by the President and approved by a simple majority of each House of Congress. It has the status of a treaty as a matter of international law, and the status of a [federal] statute as a matter of domestic law.” Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1626 (2006); see Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1210 & tbl. 1 (2018) (illustrating the “steady and ultimately sharp rise in the number and relative frequency of executive agreements and in their dominant role in U.S. agreement making”); see also CONG. RESEARCH SERV., SEN. COMM. PRINT NO. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 5, 39 tbls. II-1 & II-2, 40–41 (2001) (explaining congressional-executive agreements and detailing the dramatic increase in their use compared to Article II treaties beginning in the late 1930s), <https://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf> [<https://perma.cc/YE7T-DTNR>].

286. *E.g.*, Bradley, *supra* note 274, at 162–63 (“In the modern era, both statutes and treaties have proliferated, and . . . treaties are often the vehicle for broad-based legislative efforts. These developments mean . . . that statutes and treaties are much more likely to overlap with one another and to express potentially dif-

eral courts' reluctance to enforce them is most likely symptomatic of the "judicial jealousy" first theorized by Roscoe Pound in 1908 as the underlying rationale for courts' reluctance to acknowledge the expanding role of statutes (and other positive law) in modern times.<sup>287</sup>

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ferent policy choices."); Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1107 (2001) (noting the "rise of numerous legal systems outside of, and above, the national ones" in the second half of the twentieth century; "Since the founding of the United Nations, international law has developed into a complex legal regime with rulemaking bodies, a multitude of written provisions, a court, and enforcement mechanisms . . ."); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 921 (2004) (examining "the depth and breadth of the influence of self-executing treaties in the modern U.S. legal system"); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1956 (1999) ("We live in a world of treaties. Today, treaties regulate aspects of politics, economics, and law that affect the everyday lives of many Americans."); Ernest A. Young, *Treaties as "Part of Our Law,"* 88 TEX. L. REV. 91, 141 (2009) ("The line between foreign and domestic affairs is becoming increasingly difficult to draw in a globalized world, and treaties in particular are coming to look more like domestic regulatory statutes in their institutional structure, substantive concerns, and impact on the domestic legal system.").

Perhaps the most striking observation that emerges from a comprehensive examination is the sheer number of existing self-executing treaties. The number of treaties that contain self-executing provisions is now over four hundred (even excluding treaties with Native American tribes). Moreover, many of these treaties are multilateral and thus may apply to dozens of countries. Equally remarkable is their substantive law coverage. Self-executing treaties now address such diverse fields as commercial law, criminal law, property law, tax law, civil procedure, administrative law, and family law.

Van Alstine, *supra*, at 921–22.

287. Pound, *supra* note 19, at 387–88 (speculating that "judicial jealousy of the [codification] reform movement" was the true reason for the unjustifiable "proposition that statutes in derogation of the common law are to be construed strictly," which "assumes that legislation is something to be deprecated," an attitude he considered "wholly inapplicable to and out of place in American law of today"); see Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 268 (1961) (referring to the "discredited maxim that statutes in derogation of the common law should be strictly construed," which "expresses an attitude of hostility to an innovating statutory purpose"); see also Scalia, *supra* note 107, at 29 ("The rule that statutes in derogation of the common law will be narrowly construed seems like a sheer judicial power-grab."). Perhaps judges resent the intrusion of treaties into foreign relations matters that courts have become accustomed to resolving. *But cf. infra* note 318 (citing recent scholarship explaining the declining scope of federal common law in the area of foreign relations).

*D. The Age of Positive Law*

In 1982, while a member of the Yale law faculty, Professor Guido Calabresi, who would later serve on the Second Circuit Court of Appeals, published a provocative book that bemoaned the proliferation of legislation. In particular, he complained about the “statutorification” of American law over time and the proliferation of old statutes still in place that (in his opinion) no longer made sense in the modern world.<sup>288</sup> Calabresi proposed that the judiciary should exercise the authority to disregard black-letter laws that had become outmoded and out of step with what judges viewed as the contemporary “legal fabric” of the law.<sup>289</sup> Calabresi called for a “legislative-judicial collo-

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288. CALABRESI, *supra* note 19, at 1–7. For a similar viewpoint about the proliferation of statutes in Australia, see S.J.C. Wise, “Disfigured by Statute,” 7 AMPLA BULL. 183, 186 (1988) (bemoaning the proliferation of statutes, not only for expanding the “number of words that have the force and standing of law” but also for their “incomprehensibility”). *But cf.* DAVID M. WRIGHT, COMMON LAW IN THE AGE OF STATUTES: THE EQUITY OF THE STATUTE (2015) (acknowledging the increasing influence of statutes in Australia’s inherited common law system; addressing the possibility that its statutory regime may render irrelevant significant parts of traditional law of contract, tort, and equity).

289. CALABRESI, *supra* note 19, at 82. *But see* Brudney, *supra* note 103, at 9 (criticizing the legal academy’s “failure to appreciate that legislatures and agencies function as lawmaking enterprises in ways that are methodologically distinct from courts—distinct but not therefore unprincipled or dishonorable.”).

Judge Posner recently articulated an interpretive doctrine not far off the mark of Calabresi’s radical theory. Judge Posner added a concurring opinion to the Seventh Circuit’s *en banc* decision holding that Title VII of the Civil Rights Act barred discrimination “on the basis of sex” against homosexuals. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 352–59 (7th Cir. 2017) (Posner, J., concurring). Posner suggested that the majority could have reached the same result in a more “straightforward” way by resorting to “judicial interpretive updating”—a strategy he considered appropriate given the long interval between the 1964 enactment of Title VII and the date the court “reinterpre[t]ed” and applied it. *Id.* at 353. *But see* Reed Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773, 779–80 (1987).

[One] result of the [judiciary’s] lack of communicative understanding is the widespread notion that lexicographical change can affect the meaning of existing statutes. Where lexicographical change happens to produce a meaning more congenial to a current social objective, the notion is highly appealing. The trouble is that lexicographical change usually results from forces only marginally subject to human control. Thus, permitting it to affect the handling of existing statutes is often to substitute the blind forces of social drift for the considered views, however adequate, of a democratically selected body constitutionally authorized to affect the future. The textual integrity of a constitutionally authorized statute can only be preserved by adhering to the connotations it generated at the time of its enactment.

quy,"<sup>290</sup> which he believed would necessarily result if courts were to give the legislature an opportunity to take a "second look" at enactments that the courts deemed ill-advised and difficult to reconcile with precedent and other components of the "legal fabric."<sup>291</sup>

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*Id.* As Dickerson observed (notably without mentioning Calabresi's theory), Judge Posner failed to acknowledge that Congress has plenary legislative power. U.S. CONST. art. I.

Far from disregarding Title VII since its original enactment, Congress has amended it over the years. *E.g.*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. §§ 2000e, 2000e-2 (2012)) (amending Title VII to expressly bar discrimination on the basis of pregnancy). Directly relevant to the interpretive issue presented in *Ivy*, Congress has more than once considered proposed legislation that would have amended Title VII to expressly prohibit discrimination based on a person's sexual orientation or gender identity. *See, e.g.*, Employment Non-Discrimination Act, S.815, 113th Cong. (2013). The Senate passed the bill in 2013, but it failed to clear the House before the end of the session. *See* S. Rept. No. 113-105, *The Employment Non-Discrimination Act of 2013*, 113th Cong., 1st Sess. (Sept. 12, 2013); *see also* S.815—*The Employment Non-Discrimination Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/815> [<https://perma.cc/D9V2-M5BJ>] (last visited Mar. 29, 2019).

As Professor Dickerson pointed out, the notion that federal courts might assume authority to amend longstanding, constitutionally sound legislation by "judicial interpretive updating" raises the same troubling concerns about democratic norms as did Calabresi's radical proposals in 1982. That is especially so in light of unsuccessful congressional efforts to amend the statutory text to accomplish the same laudable social purpose.

290. CALABRESI, *supra* note 19, at 42. The first two-thirds of Calabresi's lengthy proposal attempted to explain why other solutions would not accomplish his purpose. *Id.* at 8–80 (discussing various alternatives to remedy his perceived problems with obsolescent statutes); *id.* at 7 (declaring that "none of these [alternative] approaches is satisfactory").

But Calabresi failed to acknowledge the significant developments following Judge Cardozo's 1921 article calling for a "ministry of justice" to bridge the institutional divide between legislatures and courts. *See* Cardozo, *supra* note 128 and accompanying text. For example, Cardozo's article provided the impetus for Congress to establish the forerunner of what is now the United States Judicial Conference (along with circuit judicial councils), and for state legislatures to establish judicial councils. Long before 1982, both innovations provided a formal institutional mechanism for legislative-judicial discussions and joint projects to resolve issues relevant to improving the operation of the legal system. *See supra* note 133. Calabresi failed to acknowledge the judicial council movement and its positive influence in encouraging dialogue between the judicial and legislative branches. Instead, he dismissed the contributions of what he called "law review commissions" with a passing reference to Cardozo's "justly celebrated article that took some thirteen years to bear fruit." CALABRESI, *supra* note 19, at 63–64.

291. CALABRESI, *supra* note 19, at 136. Ironically, Jeremy Bentham, the great proponent of statutes and codification, called for a similar process by which courts might refer issues to the legislature when no clear answer was apparent from the codified statutes. *See* Xiaobo Zhai, *Bentham on the Interpretation of Laws*, 38 J. LEGAL



But the underlying theme of Calabresi's 1982 text was more suggestive of what Dean Roscoe Pound had long before called "judicial jealousy"<sup>292</sup> than a serious attempt to propose a workable methodology for "rebalancing" America's reliance on statutory enactments in favor of judge-made law.<sup>293</sup> Professor Grant Gilmore, writing in 1967, had acknowledged the "museum aspect of codification," a term he used to describe the natural tendency of codes to recreate and preserve their forebear laws. Gilmore saw nothing objectionable about that trait of codes; indeed, he thought it "not without charm" to have "lovingly preserved" the nineteenth-century rules that were already obsolete in 1900, six years before the Uniform Sales Act was proposed.<sup>294</sup> In fact, Gilmore acknowledged that the true function of codification is "to reduce the past to order and certainty—and thus, to abolish it."<sup>295</sup>

The future will, by and large, take care of itself—if the courts won't, the legislatures will do whatever may be necessary. A well-drafted codifying statute can greatly simplify this process [of legal evolution]. If the codifiers can perceive a unifying principle which underlies a surface diversity . . . the resulting simplification will be dramatic. The statute provides a new starting point from which further exploration can be

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HIST. 282, 282 (2017) (explaining one of Bentham's three primary theses underlying his theory of statutory interpretation: when a law can be interpreted in different ways, "the authoritative interpreter ought to be the sovereign legislature").

292. Pound, *supra* note 19, at 387–88.

293. *But see* Pierson v. Ray, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law. It cannot be presumed that the common law is the perfection of reason, is superior to statutory law . . . , and that the legislature always changes law for the worse.").

294. Gilmore, *supra* note 97, at 473. "We may confidently expect that these Code innovations will, like their Victorian predecessors, lose interest as new and unexpected issues become the focus of future litigation." *Id.* at 474; *see also id.* at 474–75 ("The problems of living with the [Uniform Commercial] Code will, as in the past, to a considerable degree solve themselves as new issues appear with respect to which the Code's positive provisions will, increasingly, have little relevance."); *see also* Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1028 & nn.1–2 (1975) [hereinafter Gilmore (1975)] (describing the Negotiable Instruments Law (1896) and the Uniform Sales Act (1906) as two of the first uniform laws promulgated by the National Conference of Commissioners on Uniform State Laws, then under the auspices of the American Bar Association).

295. Gilmore, *supra* note 97, at 476 & n.30 (citing Joseph Story, *On the Progress of Jurisprudence* (1821), in MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 195, at 198, 238).

undertaken. The law will continue to evolve; new issues will appear in litigation; the statute will in time be buried under an accumulation of cases; the flood of cases will once again threaten to overwhelm us. The time will have come for another round of codification, in the course of which the recodifiers will point out that the old statutes were obsolescent, if not obsolete, when they were drafted. As indeed they were. If they had not been, they would have done a considerable amount of harm instead of, by way of simplification, a modest amount of good.<sup>296</sup>

More recently, Professor Alan Watson has acknowledged that the primary distinction between common law and civil law systems rests not on the balance between judge-made law and statutory law, but rather on the primary *source* of law.<sup>297</sup> He has also pointed out some of the serious flaws in the reasoning underlying Calabresi's radical proposal for reform.<sup>298</sup> In particular, Calabresi's proposal failed to acknowledge the fundamental difference between legislative lawmaking, which operates generally and looks to the future, and case-by-case issue resolution, which "makes law" incrementally in a retrospective manner to solve legal disputes that arose sometime in the not-too-distant past.<sup>299</sup> Judge-made law has never been, and in fact by

296. *Id.* at 476–77.

297. See Alan Watson, *The Future of the Common Law Tradition*, 9 DALHOUSIE L.J. 67, 70 (1984). Watson's central premise is sound: In comparing civil law and common law legal systems, he observed that "the rules of substantive law that are accepted are of less importance than the attitude taken toward, and the relative importance of, the sources of law." *Id.* at 74.

298. *Id.* at 78, 80–81, 84; see also Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for A Statutory Age*, 57 N.Y.U. L. REV. 1126, 1172 (1982) (criticizing Calabresi's proposal as reflecting the "uniquely American penchant . . . to devote enormous creative energies to the study and practice of the courts, with comparatively little attention paid to product and potential of the legislature"); Edward J. Imwinkelried, *A More Modest Proposal Than A Common Law for the Age of Statutes: Greater Reliance in Statutory Interpretation on the Concept of Interpretative Intention*, 68 ALB. L. REV. 949, 963–64 (2005) (criticizing Calabresi's proposal as "problematic" with respect to the doctrine of legislative supremacy).

299. See Watson, *supra* note 297, at 80. "Calabresi, who wished that the courts would, in certain circumstances, be able to overrule statutes even without declaring them unconstitutional . . . misconceive[d] the relationship between lawmaking by statute and lawmaking by judicial decision, a relationship . . . inherent in the nature of legislation and precedent." *Id.*; see also *id.* at 109 ("[T]he judge's concern is concrete individual justice, while the legislator's concern is with the enactment of general policies." (citing J. MAYDA, FRANCOIS GÉNY AND MODERN JURISPRUDENCE 83–84 (1978))); Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 763 (2012) ("Adjudication is inherently backward-looking. It

definition could not be, a legal method that anticipates complex social and economic problems and seeks to resolve them beforehand. Legislative frameworks, on the other hand, reach broadly into the future, anticipating legal issues and providing broad-based roadmaps for resolving them.<sup>300</sup>

Although Professor Watson agreed with Calabresi's call for legal reform in an age of statutes, Watson recognized that true reform must begin with statutory lawmaking to enable "rational judging," meaning judicial interpretation and application of statutory law.

The starting point for radical reform of the common law systems must lie in a new approach to statute-making that will ensure that statute law is kept up to date and relatively certain. In addition to enabling judges to reach decisions rationally, this scheme should reduce the ambiguity of the law and reduce the case load of judges.<sup>301</sup>

Watson also predicted in 1984 that the "shared common law tradition" would eventually come to an end, albeit incrementally:

I think that we should not be so pessimistic about the demise of the shared common law tradition. For satisfactory lawmaking in the common law systems, drastic reform of the sources of law is needed, a reform that will also end the shared common law tradition. Reform will come, but I am almost sure that it will not be drastic. Law exists and flourishes not only in the practical world, but also at the level of ideas, as part of culture . . . . Finally, the means for creating law are more deeply embedded in the culture than are the individual rules.<sup>302</sup>

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addresses past events, and it does so primarily in light of previously existing law."); Wistrich, *supra*, at 781 (observing that "common law decision-making proceeds incrementally and typically is retroactive [while] statutory change, though more difficult to achieve, can be avulsive, and usually operates entirely prospectively. A statute can erase in a day legal doctrine that required centuries to evolve.").

300. Some significant examples include married women's statutes, workers' compensation statutes, the Social Security Act, mandatory no-fault automobile liability insurance statutes, copyright and patent statutes, and tax statutes.

301. Watson, *supra* note 297, at 83.

302. *Id.* at 85. Professor Gilmore made a similar prediction in 1967. "[By 1900, w]e had traveled a considerable distance along the road which has led us from what was conceived as essentially a common law system, somewhat eroded by statu[t]es, to what we have come to think of as essentially a statutory system in

Long before 1982, when then-Professor Calabresi described modern American law as having entered the “age of statutes,”<sup>303</sup> other scholars had acknowledged the primacy of statutes and other positive law as legal authority. Three quarters of a century earlier, Roscoe Pound questioned the disdain with which judges, lawyers, and scholars then regarded legislation.<sup>304</sup> In 1965, one author declared, “It is time for the legal profession to recognize the central place of statutes and of executive or administrative determinations in the modern legal order.”<sup>305</sup> Indeed, if the United States legal system truly adheres to the “Rule of Law” ideal, how can it be otherwise?<sup>306</sup>

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which the few remaining common law enclaves are no doubt destined to be gradually absorbed.” Gilmore, *supra* note 97, at 461.

303. CALABRESI, *supra* note 19, at 163.

304. Pound, *supra* note 19, at 383–84.

Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed. Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of lawmaking. We see in legislation the more direct and accurate expression of the general will.

*Id.* at 406 (citations omitted).

305. Hurst, *supra* note 22, at 3.

306. A common refrain in political discourse is that the United States is governed by “the Rule of Law, not of men.” See Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT’L L. 293, 296, 299 (2009). The phrase has been attributed to Aristotle. *Id.* at 297 (citing FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 162 (1960)). Several scholars have observed that “Rule of Law” is an inherently elastic concept. *Id.* at 296 (“The phrase has become chameleon-like, taking on whatever shade of meaning best fits the author’s purpose.”); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 169 (2018) (referring to the term as a “stretchy jurisprudential concept”). But “[a]t its core, the rule of law requires adherence to validly enacted law.” Rubenstein, *supra*, at 169 (citing FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72–73 (1944)).

The so-called “Rule of Law Index,” devised by the ABA-sponsored World Justice Project, identifies “four universal principles” defining the term: (1) accountability of both government and private actors, (2) just laws (meaning laws that are “clear, publicized, stable, and just; are applied evenly; and protect fundamental rights”); (3) open government (meaning that the “processes by which laws are enacted, administered, and enforced are accessible, fair, and efficient”); and (4) accessible, impartial dispute resolution. WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2017–2018*, at 11 (2018), [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf) [<https://perma.cc/5FA3-5FKP>]. The most recent report ranks the United States nineteenth of thirty-five “high-income” nations in the Rule of Law Index. *Id.* at 6–7, 29, 153. See generally Juan Carlos Botero, *The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide*, N.Y. ST. B.J., Jan. 2018, at 30.

We should bury the myth once and for all that America remains a “common law” legal system.

There is no turning back to the days when the unwritten common law, together with uncodified state and federal statutes drafted without professional assistance, required common people who had legal disputes to hire lawyers to navigate the maze of court reports and the mishmash of uncodified positive law.<sup>307</sup> In our nation’s first century, no West key number system existed to organize the growing body of judge-made law by subject matter. Nor, until the 1870s, did Shepard’s citators exist.<sup>308</sup> The earliest court “reports” were the product of private “reporters” who transcribed their own notes of judicial proceedings.<sup>309</sup> Statutes were accessible only in the form of session laws, chronological piles of individual laws enacted each legislative session and bound into books, often without subject-matter indices. Before the Field Codes of the mid-1800s,<sup>310</sup> no

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307. See Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39, 41 (1934).

308. Frank Shepard first introduced his innovative product in 1873 in the form of notations identifying overruling cases that were printed on gummed paper, which were cut apart and affixed directly onto the published opinion in the print reporters. Years later, when Shepard began publishing his notations in print volumes, they would become known as *Shepard’s Citators*. Laura C. Dabney, *Citators: Past, Present, and Future*, LEGAL REF. SERVS. Q. 165, 166–67 (2008); see also Patti Ogden, *Mastering the Lawless Science of our Law: A Story of Legal Citation Indexes*, 85 L. LIBR. J. 1, 27–28 & n.116 (1993) (noting uncertainty in the literature whether Shepard’s first citators were issued in 1873 or 1875).

309. See Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT L. REV. 263, 264–65 (1998) (explaining rationale of early American case reports as countering “the potentially destructive effects of post-Revolutionary legal ideology,” including “persistent calls for codification of the common law”); see also *id.* at 273 (speculating that “in the particular environment of the early Republic, print [reports] helped fortify the claim of American decisional law to being ‘common’ at a time when the traditional meaning of that component of ‘common law’ had been undermined by the break with England”). Duffey credits the development of official print reports in the early nineteenth century as enabling American common law not only to “protect itself against the codifiers, but also to establish conditions under which courts could exercise more power than common law courts ever had before . . . Administered in a form resembling statute, judicial legislation was easier to swallow.” *Id.* at 275.

310. Herman, *supra* note 211, at 422; Roscoe Pound, *The Great Lawyer in History*, 3 HASTINGS L.J. 1, 8 (1951) (explaining why the Field Codes, while adding strength to the codification movement, were unsuccessful because by then “the common law was thoroughly received and well established and was able to resist it”); see also Williston, *supra* note 307, at 39–40 (describing Field’s proposed codes as the “most ambitious attempt” made to codify American law, and criticizing objections to the codification effort by Field’s primary New York opponent, James C. Carter).

statutory codes, organized by subject matter, existed in this country.<sup>311</sup> In short, positive law was inaccessible, even to lawyers and judges, and reports of judicial proceedings were generally not much better.

Curiously, Calabresi identified a problem with outdated statutes but failed to give fair consideration to a legislative solution,<sup>312</sup> perhaps because many judges (and even some scholars) perceive that any legislative solution would threaten judicial supremacy.<sup>313</sup> Indeed, the most significant benefit of

311. Gilmore, *supra* note 97, at 465–66 & n.5 (referring to the Field Codes, drafted in the 1850s for New York, as having been “very much in the European or civil law tradition”; giving examples and noting that statutes codifying commercial law were “statutes of a type we had not theretofore known”).

312. See Samuel Estreicher, *Judicial Nullification: Guido Calabresi’s Uncommon Common Law for A Statutory Age*, 57 N.Y.U. L. REV. 1126, 1173 (1982) (“Statutory obsolescence, if a problem, has only one real cure that is consistent with the legal topography: legislative reform.”). Calabresi devoted just ten pages to possible “legislative responses” to his perceived statutory obsolescence problem. But his analysis of legislative alternatives was shallow at best, and much of the discussion reflected a startling lack of understanding about the inner workings of legislatures and the process of legislative deliberation. See CALABRESI, *supra* note 19, at 59–68.

313. Richard A. Posner, *Statutory Interpretation—In the Classroom and the Courtroom*, 50 U. CHI. L. REV. 800, 821–22 (1983) [hereinafter Posner (1983)]. Judge Posner, in characteristically pithy but insightful prose, spotted the underlying theme of Calabresi’s work soon after its 1982 publication. He explained, perhaps a bit tongue-in-cheek,

Professor Calabresi has done us a service by bringing out into the open what are after all the secret thoughts not only of many modern legal academics but of some modern judges . . . [H]e has also helped us understand why there is today a revival of “strict constructionism,” [which] contrary to a widespread impression, . . . is not a formula for ensuring fidelity to legislative intent. It is almost the opposite. It is the lineal descendant of the canon that statutes in derogation of common law are to be strictly construed and, like that canon, was used in nineteenth-century England to emasculate social welfare legislation.

To construe a statute strictly is to limit its scope and lifespan—to make Congress work twice as hard to produce the same effect . . . I know of no principled, nonpolitical basis for a court to adopt the view that Congress is legislating too much and ought therefore to be reined in by having its statutes construed strictly. [S]uch a view would be a form of judicial activism because it would cut down the power of the legislative branch; and at this moment in history, we do not need more judicial activism.

*Id.*; see also Schacter, *supra* note 91, at 214 (distinguishing critiques against judicial supremacy, which focus “principally on finality (i.e., that judges wrongly claim final authority to bind other actors, especially other branches of government),” from critiques against judicial activism, which focus “on how courts interpret the law (i.e., that judges inject their substantive preferences and decide questions that ought to be left to political determination)”).

undertaking a deliberative codification process is that the body of law is “scientifically examined . . . . Obsolete law is removed, efficient rules substituted for inefficient.”<sup>314</sup> One primary goal of codification is to make the law more understandable, not only to lawyers and judges, but to anyone who may be affected by it.<sup>315</sup> As one scholar noted in 1984, most jurisdictions have codified their laws in response to problems associated with “a plethora of unmasterable, idiosyncratic, sometimes irreconcilable cases.”<sup>316</sup> Yet instead, Calabresi’s proposed solution would have vastly expanded judicial power to effectively legislate by repealing and “updating” statutes in a manner directly contra-

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314. Gahan, *supra* note 96, at 111–12; *see also* Stone, *supra* note 20, at 304. Stone explained:

Perhaps the most frequent statements of the problem for the solution of which codification has been proposed consist in pointing out that laws are not all of a single period of time or even of a single age; that old laws no longer used are still unrepealed; that laws have been amended so frequently as to be difficult either to find or understand; that rules have become so encrusted by exceptions as to be misleading; that sometimes laws are not all of a single language or manner of speech; that laws of diverse subject matter are often mixed together without guide or proper reference; that laws on the same subject often reflect the diverse economic and social philosophies of the different decades in which they were enacted. This all adds up to the single statement that the law has become confused and, in some cases, unintelligible, not only to the ordinary man who is held accountable for following it, but also to the legislator, judge and lawyer. It is at this point that the reformers begin to propose codification.

*Id.* Yet Calabresi never considered codification; nor did he give serious consideration to any other kind of legislatively driven law reform as a possible remedy for outdated statutes. Nor did he acknowledge the English Law Commissions, established in 1965 to do for English law what he complained was needed for American law. Of course, codification or consolidation of American statutes would have threatened the concept of judicial supremacy, which was perhaps the unstated motivating force behind his proposed judicial remedies for what he derisively called the “statutorification” of American law. *See* CALABRESI, *supra* note 19, at 1, 79.

315. Stone, *supra* note 20, at 304. “[T]he task [of codification] is always the same [regardless of what motivates it], namely, to state the law clearly and concisely so that man may know the rules and principles which are to govern his actions.” *Id.* The litany of problems Stone enumerated in 1955 for which codification is often the proposed solution reads like a concise version of Calabresi’s many complaints a full generation later about “statutorification.” *See id.* (listing, among others, “that old laws no longer used are still unrepealed; that laws have been amended so frequently as to be difficult either to find or understand; that rules have become so encrusted by exceptions as to be misleading; . . . that the law has become confused and, in some cases, unintelligible”).

316. Miller, *supra* note 102, at 94.

ry to the Constitution's prescribed method for lawmaking—bicameral deliberation and agreement, subject to Presidential veto and congressional override.<sup>317</sup>

By now, in the early twenty-first century, the “common law tradition” has come to an end—or at the very least, the end of American common law is most certainly near at hand.<sup>318</sup> Watson was correct that reform in statutory lawmaking in the United States has not been “drastic,” but it certainly has been both continuous and significant. The fact that the legal academy has largely ignored the significance of these developments reflects the entrenched nature of legal education in the United States and its reluctance to hire law faculty with significant or even minimal experience in statutory lawmaking.<sup>319</sup>

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317. U.S. CONST. art. I; see *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

[A]n exercise of legislative power [is] subject to the standards prescribed in Article I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps.

To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.

*Id.* at 957–58. Of course, “judicial legislation” in general, and Calabresi's proposal in particular, are entirely inconsistent with these clear procedural constitutional requirements.

318. See Scalia, *supra* note 107, at 13 (“We live in an age of legislation, and most new law is statutory law.”). A few narrow exceptions arguably remain, such as the “federal common law” of foreign relations. However, even in that arena, the domain of common law has continued to shrink. Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 *GEO. L.J.* 1825, 1826 (2018).

Foreign relations is often described as one of the best established and most legitimate enclaves of federal common law, but its overall scope and effect have been declining for decades. Issues that were once characterized as federal common law are increasingly resolved based on statutes, the Constitution, or actions by the President. The shrinking of common law in the area of foreign affairs forms part of some broader trends in foreign relations and constitutional law . . . .

*Id.*; see also *id.* at 1854–55 (“[I]n its current and very limited form, [the federal common law of foreign relations] is best understood and best legitimated as fundamentally interstitial, limited largely by federal statutes but also by international law and stare decisis, all of which minimize potential constitutional objections.”).

319. See Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 *WASH. U. L. REV.* 699, 702 (2010) (reporting that fewer than five percent of the most prestigious law school faculties have any experience working for a legislative institution); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 *COLUM. L. REV.* 807, 809 (2014) (referring to the “legal academy's relative inexperience in the area of congressional lawmaking”); *id.* at 811 (“Be-



## III. GENERAL ATTRIBUTES OF MAJOR WESTERN LEGAL SYSTEMS

The developing field of comparative law<sup>320</sup> traditionally focused on classifying nation-states into a limited number of legal systems or families.<sup>321</sup> The field has been criticized as methodologically underdeveloped<sup>322</sup> and Western-centric,<sup>323</sup> and for failing to acknowledge the increasingly “transnational” nature of law and legal systems.<sup>324</sup> Nevertheless, the primary classifi-

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cause legal scholars do not fully understand the realities and complexities of the legislative process, they have underdeveloped or incorrect theories about legislatures.”); *see also infra* Part IV, addressing the need for reforms in legal education; *cf.* Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 679 (1999) (noting the minimal attention the legal academy devotes to scholarship on legislative institutions); *id.* at 687 (suggesting a research agenda “for legal scholars who want to break away from the court-centrism of our discipline by working to increase the attention paid to the state and federal legislative processes”).

320. The practice of comparing and contrasting legal traditions is rooted in ancient history. *See* Walther Hug, *The History of Comparative Law*, 45 HARV. L. REV. 1027, 1029–70 (1932). Comparativists generally agree, however, that comparative law as a modern field of scholarly legal study originated in 1900 with the Paris International Congress of Comparative Law. *See* David S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 872 (2001) (referring to the 1900 Paris Congress as “defining”); Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043, 1049 (2012) (“It was not until the 1900 International Congress on Comparative Law (Congrès international de droit comparé) in Paris that taxonomies of legal systems would be elevated to a central feature of comparative law as the science that it aspired to become.”).

321. *See* Garoupa & Morriss, *supra* note 26, at 1493–94 (“In fact, the original understanding of common- and civil-law legal families referred to the rules regulating private law (contract, torts, and property).”); David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 232 (2016) (noting that the traditionally accepted comparative law taxonomies apply to private law, and calling for development of a suitable taxonomy that encompasses constitutional and other public law).

322. *See* Chodosh, *supra* note 90, at 1128.

323. *See, e.g.,* Mattei, *supra* note 90, at 19.

324. *See, e.g.,* Arthur T. von Mehren, *The Rise of Transnational Legal Practice and the Task of Comparative Law*, 75 TUL. L. REV. 1215, 1216 (2001) (observing that “the once predominant belief in uniqueness as a characteristic of legal systems has lost ground to the belief in convergence”).

In the course of the last half century, the context in which comparative work is undertaken has changed in significant respects. The enormous growth in cross-border and intersystem activity, the far greater economic and political importance of emerging societies, and the greatly increased efforts to facilitate and structure international economic and commercial activity have reshaped old problems and raised new ones for comparatists.

*Id.* at 1218–19; *see also* Ronald J. Krotoszynski, Jr., *Linnaean Taxonomy and Globalized Law*, 115 MICH. L. REV. 865, 866 (2017) (“[T]o understand the globalization of law, both in the United States and abroad, one must first make a serious effort to iden-

cation of legal systems has become well-entrenched in comparative law as well as legal thinking generally.

Notably, the comparativists' classifications of the world's legal systems are not immutable. Indeed, the two twentieth-century German scholars credited with developing a well-accepted taxonomy for global legal systems cautioned that the classifications they had devised were likely to change over time.<sup>325</sup> They explicitly acknowledged that "the division of the world's legal systems into families, especially the attribution of a system to a particular family, is susceptible to alteration as a result of legislation or other events, and can therefore be only temporary."<sup>326</sup> A central thesis of this Article is that the United States legal system has evolved and matured over the last two centuries to the point that its continued classification as a "common law" legal system is simply a mischaracterization.

#### A. Legal System Taxonomy

Over the past century, comparative law scholars have developed various nomenclatures for classifying legal systems.<sup>327</sup> Worldwide, the most commonly accepted taxonomy classifies the major legal systems as civil law, common law, or socialist law, perhaps with a "residual" category for legal systems that

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tify and classify different types of interactions among and between domestic and international legal systems—including, but not limited to, the transplantation of legal rules and ideas among and between local legal systems."); Reimann, *supra* note 286, at 1106, 1112 (describing "the traditional concept of twentieth-century comparative law" as "the study of national legal systems, their laws, and virtually nothing else," and calling for comparativists to acknowledge the "transnational sphere").

325. Pargendler, *supra* note 320, at 1056 (referring to German scholars Konrad Zweigert and Hein Kötz).

326. *Id.* (quoting KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 64 (Tony Weir trans., 2d ed. 1987)).

327. See Mattei, *supra* note 90, at 7–8 (explaining comparative lawyers' efforts in "classifying families of legal systems" based on the conviction that "some deep-rooted characteristics shared by a number of legal orders transcend the differences between systems belonging to a particular family," but cautioning that "taxonomy is not an end in itself"); Pargendler, *supra* note 320, at 1047–60 (offering a comprehensive historical overview of the evolution of legal system taxonomies and acknowledging critiques of the traditional civil law–common law distinction). Professor Pargendler posited that the "principal driving force" for the recent scholarly critique of the classic dichotomy between civil and common law systems "is the widespread perception that the rise of the European Union and pressure for legal convergence in a globalized world have rendered legal family distinctions increasingly outmoded." *Id.* at 1044.

do not easily fit one of the other groupings.<sup>328</sup> The major “Western legal traditions” are common law, often denominated Anglo-American law; and civil law, otherwise known as the “Continental” or Romano-Germanic tradition.<sup>329</sup> For that reason, this Article focuses on the attributes of these two legal traditions as a framework for assessing the place of the contemporary American legal system within it.

B. *Attributes of the Common Law Tradition*

Scholars have variously identified the essential features of common law legal systems as compared to civil law systems characteristic of the European Continent and much of Latin America. Although no scholarly consensus exists, most would probably agree with the following enumeration of elements that generally differentiate common law from civil law legal systems.<sup>330</sup>

First, in common law systems, judicial decisions are the primary source of controlling law,<sup>331</sup> while statutes and codes are

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328. Mattei, *supra* note 90, at 8 (citing RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS* (10th ed. 1992)); Pargendler, *supra* note 320, at 1053 (citing David’s “celebrated book” published in 1962 that divided the world into three families: Romano-Germanic, Common Law, and Socialist Law). Two German comparativists developed a more detailed taxonomy of “styles” that took into account a nation’s history, legal sources, ideology, mode of thought, and distinctive institutions. Pargendler, *supra*, at 1055–60 & tbl. 1 (summarizing the historical development of legal system taxonomies and citing KONRAD ZWEIGERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS* (1969)).

329. Charles C. Jalloh, *Does Living by the Sword Mean Dying by the Sword?*, 117 *PENN ST. L. REV.* 707, 721 (2013); Weiss, *supra* note 38, at 438 (“In a process called macro-comparison, comparativists traditionally distinguish common-law from civil-law systems[, referring] to the legal systems on the European continent derived from Roman law on one hand (civil law) and those derived from Anglo-American law on the other (common law).”). Weiss, however, noted that “[t]his distinction, based on the differences in historical development, has become less convincing over the course of time. Various studies have shown that the European *ius commune* and the English common law were not as radically distinct as has been historically suggested.” *Id.*

330. *But see supra* notes 327–29 and accompanying text (identifying deficiencies and oversimplification of the classic common law–civil law taxonomy); *see also* Weiss, *supra* note 38, at 438.

331. Beatson, *supra* note 30, at 295 (“The hallmark of a common law system is the importance accorded to the decisions of judges, and in particular appellate judges, as sources of law.”); Ernest Bruncken, *Common Law and Statutes*, 29 *YALE L.J.* 516, 516 (1919) (“In the common-law countries, the customary law, defined and developed by the courts, is the foundation on which the legal edifice is

secondary.<sup>332</sup> Because *stare decisis* and statutory precedent constrain judicial decision making,<sup>333</sup> innovations are rare and law changes incrementally.<sup>334</sup> In contrast, most judicial decisions in civil law nations do not bind any other court,<sup>335</sup> although they do serve as highly persuasive legal authority.<sup>336</sup> Common law

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reared. All statutes, large and small, whether called codes or not, are but modifications of the customary law and must be interpreted with a constant regard to this underlying foundation.”).

332. Weiss, *supra* note 38, at 491 (“Unlike on the Continent, precedent was the primary source [in England], and the statutes were supplementary.”); cf. Neil Duxbury, *Custom as Law in English Law*, 76 CAMBRIDGE L.J. 337, 341 (2017) (“Precedent and statute are the main sources of English law.”).

333. An English scholar has recently observed, however, that the notion of binding precedent “emerge[d] late in the history of common law.” Duxbury, *supra* note 332, at 341. Until relatively recently, a line of judicial decisions was treated as merely *evidence* of the law, not the law itself. *Id.* at 341–42 n.23. Thus, caselaw was persuasive but not binding authority; not until the nineteenth century were English courts “properly equipped” to develop the law based on “the principle that like cases should be treated alike.” *Id.* at 341.

334. Bruncken, *supra* note 331, at 517 (referring to *stare decisis* as the “binding nature of precedent,” which is inherently “incompatib[le] . . . with making a statute the statement of jural principles independently of preëxisting law”). While *stare decisis* lends certainty and predictability to the law, its downside is the grinding inertia that renders common law impotent to address rapid sociological and technological change. See, e.g., Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1312–13 (2000) (questioning whether the slow pace of common law tort litigation is realistically capable of protecting data privacy). “Common law lawmaking is ordinarily both gradual and slow. Although the rare judicial opinion can inspire widespread and rapid endorsement, the litigation process is protracted and resource intensive, and typically yields only incremental change.” *Id.* at 1313; see also Beatson, *supra* note 30, at 295 (“The [common law] system is built on precedent, and centres on individual decisions and building up its principles by a gradual accretion from case to case.”); cf. David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 914 (2015) (advocating scrapping the “widespread legislative and executive incursions into the tort system . . . in favor of . . . the common law method [of making] incremental adjustments to the procedural, substantive, and remedial law of our civil justice system”).

335. Duxbury, *supra* note 332, at 341.

336. See Lawson, *supra* note 144, at 4 (referring to European continental law).

No decision of a court is binding on any other court; it is even possible for an inferior court to overrule a decision of a higher court. But in fact, as decisions have come to be efficiently reported, they have come to enjoy very high persuasive authority. Those of the [French] Cour de Cassation are in practice almost as binding as those of any court in a common law country. Thus, to differentiate between code countries and case law countries [with respect to judicial precedent] is in practice quite false.

*Id.*

reasoning relies primarily on analogizing from caselaw,<sup>337</sup> while judges are generally reluctant to analogize from statutory text.<sup>338</sup> And in the United States (but not in England), courts at all levels review statutes for constitutionality.<sup>339</sup> Since 1920, civil law systems have increasingly recognized judicial power to review statutory enactments for constitutionality, but those

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337. See Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century*, 8 TUL. EUR. & CIV. L.F. 63, 67 (1993) (“[T]he common lawyer regards precedent as a soil from which predictability is mined, and *stare decisis* as its visible sign. Hence, a common lawyer will develop intellectual vertigo when the precedents, his traditional source of stability, yield no helpful guidelines . . .”).

338. Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 473 (1962) (“[Common law] courts are more reluctant, almost to a point of abstention, about reasoning by analogy from a statute or extending its principle to situations not dealt with explicitly or by clear implication in the statutory formulation.”); see also Beatson, *supra* note 30, at 303, 312 (proposing development of common law in an age of statutes by use of judicial analogy from statutory principles). *But see supra* note 126 and accompanying text (discussing *Rosen v. United States*, 245 U.S. 467, 471–72 (1918), as an example of legal reasoning by analogy from related statutes). See generally Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554 (1982).

339. Justice Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 583 (1993).

The American, or “diffuse,” system of judicial review relies upon the constituent pieces of the ordinary judicial system to engage in judicial review. In the United States, any lower court may make a decision regarding the constitutionality of both legislation and administrative action, or the conformity of a lower law to a statutory mandate.

*Id.* Yet Great Britain has never recognized any form of constitutional review of statutes. See *id.* at 577. In 2005, Parliament enacted the Constitutional Reform Act, which established the Supreme Court of the United Kingdom effective October 1, 2009. See generally Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543 (2014) (describing the history leading up to the Constitutional Reform Act 2005 and its ramifications). However, the court is not the sort of constitutional court that other continental nations have established, and it lacks the power to consider challenges to Parliament’s authority to enact legislation. Michael Skold, Note, *The Reform Act’s Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?*, 39 CONN. L. REV. 2149, 2156 (2007); Lady Hale, Deputy President of the Supreme Court, *The UK Supreme Court in the United Kingdom Constitution: Inaugural Lecture at the Institute for Legal and Constitutional Research*, U.K. SUP. CT. (Oct. 8, 2015), <https://www.supremecourt.uk/docs/speech-151008.pdf> [<https://perma.cc/38CW-M9XP>]. Lady Brenda Hale was appointed President of the UK Supreme Court effective September 2017. *Biographies of the Justices: Lady Hale*, U.K. SUP. CT., <https://www.supremecourt.uk/about/biographies-of-the-justices.html> [<https://perma.cc/Q8MZ-9BBT>] (last visited Mar. 29, 2019).

that do typically limit that authority to specialized constitutional courts.<sup>340</sup>

Additionally, court proceedings in common law systems are typically adversarial in nature, rather than inquisitorial proceedings generally characteristic of civil law systems.<sup>341</sup> And common law judges are appointed or elected to the bench after years of law practice experience, while in civil law systems, relatively inexperienced law graduates are typically selected for training as career judges.<sup>342</sup>

Furthermore, statutes in common law systems tend to be detailed, specific, and concrete relative to the broad, general, and abstract principles embodied in civil law codes.<sup>343</sup> Moreover, courts in common law jurisdictions often interpret statutes with respect to common law, and statutory enactments were historically presumed to supplement common law rather than

340. See, e.g., Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 44–46 (2007) (describing the development of specialized constitutional courts in civil law jurisdictions).

341. E.g., Koch, *supra* note 30, at 37 (“Civil law judicial decision-making is supported by the ‘inquisitorial’ procedures. The basic strategy of this procedural model is judicial control, in contrast to the ‘adversary’ system, which bestows control upon the lawyers.”).

342. E.g., del Duca & Levasseur, *supra* note 175, at 15 (“Most civil law countries assign fact finding to professional career judges.”); Koch, *supra* note 30, at 37.

Civil law judges are part of the civil service. Judges enter a career of judging and advance through the judicial hierarchy. They are educated and trained to be judges. In particular, their education and training equips them to work with language and to engage in the rational and scientific finding of the law. They then gain experience as judges . . . Their training and experience creates an elite, if anonymous, corps of adjudicators.

*Id.* (footnotes and citations omitted); Utter & Lundsgaard, *supra* note 339, at 569 (noting that “[m]any civil-law judges are career judges who entered the judiciary immediately following their legal education” and therefore often lack “legal and practical experience”).

343. See, e.g., Herman, *supra* note 337, at 72.

To the civilian, the legal rule is designed to operate at an optimum level of abstraction. This level may be seen as a point of equilibrium between the broad generality of the ordering legal principle and the extreme particularity of the concrete resolution of an individual dispute. A rule too general is over inclusive and cannot provide practical guidance of sufficient predictability; a rule too particular is too exclusive, and leads to rigidity, and obsolescence.

*Id.*; Neumann, *supra* note 91, at 442 (referring to “fussy” legislation characteristic of common law legal systems); see also *supra* notes 313–22 and accompanying text (describing features of codification in detail).

alter or supplant it.<sup>344</sup> Common law reasoning is typically inductive based on case-by-case synthesis and evolution of legal rules, as compared to deductive reasoning based on syllogistic application of codified laws to facts.<sup>345</sup>

### C. *Attributes of the Civil Law Tradition*

Codification is the most commonly cited feature characteristic of the civil law tradition.<sup>346</sup> Speaking generally, codification is nothing more than “a method for the formulation of written law as opposed to unwritten [judge-made] law.”<sup>347</sup> Further, codification is not unique to the civil law tradition; common law nations and states have increasingly made use of the method as well.<sup>348</sup>

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344. See Bruncken, *supra* note 331, at 519 (citing *Arthur v. Bokenham*, 11 MOD. 148, 150 (1708, Eng. C.P.); SUTHERLAND, STATUTORY CONSTRUCTION § 290 (1891)). As Bruncken interprets the rule, “whether the application is rigid or liberal, the very existence of the maxim implies that the courts will look upon the statute, not as upon an isolated piece of lawmaking, but as becoming an integral part of the whole body of the law, as soon as it is enacted.” *Id.* at 520; see also Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1091 (1987) (explaining that statutes are interpreted in light of common law principles); Traynor, *supra* note 92, at 402 (“A statute may be a fat code or a thin paragraph or a starveling sentence. It may cast a heavy shadow on the common law or a light one, or it may idly plane until some incident sends it careening into action. The hydraheaded problem is how to synchronize the unguided missiles launched by legislatures with a going system of common law.”).

345. E.g., Bergel, *supra* note 344, at 1089 (“[C]ommon law systems do not resort to a deductive reasoning imposed by the civil law systems on the basis of legislative principles . . .”).

346. Beatson, *supra* note 30, at 295 (“[C]ivilian systems are essentially codified legislative systems and owe their inspiration to the principles of the Napoleonic codes. In such systems judicial decisions are not primary sources of law but only a gloss on the law in the legislative code.”); see Weiss, *supra* note 38, at 448 (observing that “[e]ver since comparativists have tried to distinguish the world’s two main legal systems, common law and civil law, codification has been one of the distinguishing features”). The term was introduced into the English language by Jeremy Bentham, an English philosopher who was perhaps history’s greatest proponent of codification. See Scarman, *supra* note 98, at 357; Weiss, *supra*, at 474 (identifying Jeremy Bentham as “the strongest advocate of codification”); see also *supra* notes 147–58 and accompanying text (discussing Bentham’s influence as a proponent of codification).

347. Stone, *supra* note 20, at 303; see Bergel, *supra* note 344, at 1097 (“[C]odification constitutes one of the essential methods of nomology, or legislative drafting. Its principal methods are thus closely linked to the development of legal systems and civilizations.”).

348. E.g., Stone, *supra* note 20, at 310 (“All too frequently, codification is linked in thought with the civil law[,] and we forget the great and increasing use that the common law jurisdictions have made and are making of this method.”). As Stone

The United States and many of the fifty states within it generally refer to statutory compilations as “codes,” and the products of the Uniform Law Commission carry the same designation. Although similar in appearance, most American codes are not cut of the same cloth as “true codes” in the form known to civil law systems.<sup>349</sup> Nevertheless, “[i]n its broadest sense, a code is a compendium of laws, a body or corpus of legal provisions relating to a particular matter.”<sup>350</sup>

All codes are statutes, but not all statutes are codes. One English proponent of codification explained the difference this way:

A code is an end and a beginning. Unlike a statute, which is superimposed upon the common law like a ship floating on the water, a code supersedes the common law, excluding all reference (except on very special grounds) to any source of law other than itself. It is because it writes *finis* to the old

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observed, both the Uniform Law Commission and the American Law Institute to some extent reflect codification efforts. *Id.* Indeed, “there is no one, single, inescapably right approach to codification, and [if] it is believed that the method used does not produce the desired result then constructive advice should be given rather than a show of righteous indignation that the method has been profaned.” *Id.* Others have noted that “[t]here are a great number of codes in the United States but they are mostly devised as mere compilations.” Bergel, *supra* note 344, at 1091.

Their main goal is to list written rules, put them in order and make them easy to find. American codes bring together the rules of law in force in a specific field, but generally do not have the goals of establishing a basis for the development of the law or regulating an entire subject matter, since the common law remains in existence and all statutes must be interpreted in light of its principles.

*Id.*

349. Bergel, *supra* note 344, at 1073–74 (distinguishing “true codes” from “compendiums derived from previous cases destined to supplement custom”). The 1804 French Civil Code, consisting of “thirty-six separate statutes and gathered together in one single code,” was “an essential legislative monument which was to have a great influence in the world.” *Id.* at 1074. Bergel defined a “true code” as comprising “systematic and innovative constructions of a body of written rules relating to one or several defined matters, founded on a logical coherence and constituting a basis for the growth of law in a given domain.” *Id.* at 1075–76. The key features of a true code are deliberate structuring, including “internal partitioning [that] rests upon divisions and sub-divisions which follow a certain hierarchy,” and clarity of expression, including “precise legal terminology.” *Id.* at 1084–88 (elaborating on both features); see also Maxeiner, *supra* note 46, at 364–65 (making the case that “true codes” are “rare or nonexistent” in the United States).

350. Bergel, *supra* note 344, at 1073.



and permits a new start . . . that a code is the given solution when extensive changes in a legal system are required.<sup>351</sup>

Compared to codes, statutes are less abstract with a “relatively restricted scope.”<sup>352</sup> In a common law system, the “codification” process often has the purpose of restating or reformulating rules derived from caselaw, without disregarding principles of either the common law or equity. The products of codification continue to be interpreted within the frame of reference of pre-existing law rather than the legislative purpose or policy that motivated the enactment. “Thus, they have as their main objective the identification and classification of preexisting rules, not the construction of a new and coherent system.”<sup>353</sup>

Codification as a method has several characteristics that distinguish it from other lawmaking methods.<sup>354</sup> First, it is by definition written law.<sup>355</sup> Second, codification is characterized by some kind of systematic organization, which may take various forms.<sup>356</sup> Third, the concept of codification implies that the en-

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351. Hahlo, *supra* note 106, at 243. “There is much the legislature can do by interstitial legislation. But if the whole conceptual framework of a legal system is to be reshaped there may be no choice but to resort to codification.” *Id.* at 245.

A code is not just a large statute[;] it is a different species of law, demanding different techniques, and these techniques have to be learnt by the legal profession. Even where a rule of the common law is merely restated, the fact that it is now laid down in writing and forms part of a system of interrelated rules[] affects its meaning and scope.

*Id.* at 253.

352. *Id.* at 252.

353. Bergel, *supra* note 344, at 1076, 1089–90. Bergel refers to the common law meaning of codification as *formal codification* as distinguished from the continental European style of *traditional substantive codification*. *Id.*

354. Professor Stone emphasized that codification is simply a method that reflects nothing about either the merit or deficiency of the outcome. Stone, *supra* note 20, at 303. “Not all codified law is good law, and, conversely, not all codified law is bad. Being a method, the value to be attached to [codification] depends on the usefulness which it is found to have in the accomplishment of a given task.” *Id.*; see also H.R. Hahlo, *Codifying the Common Law: Protracted Gestation*, 38 MOD. L. REV. 23, 30 (1975) (“There is nothing to show that a non-codified system of law has some mystic qualities which render it inherently superior to a codified one. But neither is there anything to show that a codified system of law is inherently superior to a non-codified one.”).

355. Stone, *supra* note 20, at 305.

356. *Id.*; Bergel, *supra* note 344, at 1081 (“[A] code is characterized by a specific content and a particular systematization.”). “Thus, a good code must lay down dispositions broad enough to be able to regulate various real situations, without thereby wandering away from the realities that it must govern and venturing into

tire body of law is considered altogether “as a single fabric” or unitary “corpus,” rather than piecemeal,<sup>357</sup> although the relevant “corpus” may be subject-matter specific. Fourth, successful codification requires participation by experts such as practicing lawyers, jurists, and academics.<sup>358</sup> Finally, the product of codification is necessarily binding on the courts.<sup>359</sup>

The term “codification,” like the term “common law,” carries numerous meanings.<sup>360</sup> In the continental or civil law sense of the term, the product of codification, once enacted, replaces not only “existing legislation, but also the common law and equity governing the topic,” although not always with the same level of detail.<sup>361</sup> In the United States, the term is often used more loosely to refer to the process of consolidation, which “merely re-enacts in one statute the contents of many pre-existing statutes with only such alterations as are absolutely necessary in order to produce a coherent whole,” with no conscious intent to alter the substance of the law.<sup>362</sup> For example, the process long underway by Congress to enact individual titles of the

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purely theoretical statements. A good code is thus characterized mainly by its systematization.” *Id.* at 1083.

357. Stone, *supra* note 20, at 305–06. Stone observed that systematic codifications often include definitions and rules of construction and interpretation to enhance uniformity in application. “Some of the more ardent devotees of codification compare a well drafted code to a symphony with its motifs and its careful development of basic themes.” *Id.* at 306; cf. Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1277 (1947) (analogizing statutory interpretation to a musical performer’s interpretation of a musical score).

358. Stone, *supra* note 20, at 306.

359. *Id.* Justice Scarman identified what he considered three essential characteristics of a code: First, a code is enacted into law. Second, a code comprehensively covers the subject matter within its scope. Third, a code is the exclusive source of law pertaining to the subject matter. Scarman, *supra* note 98, at 358. These three features appear comparable to Stone’s first, third, and fifth essential elements of codification. See Stone, *supra* note 20, at 305–06.

360. Lawson, *supra* note 144, at 1 (“Codification . . . has been used in many senses.”); Weiss, *supra* note 38, at 449 (noting the existence of “dozens of definitions and explications of codification in the legal literature”).

361. Lawson, *supra* note 144, at 1.

362. *Id.* “No conscious change of law is intended and all that happens is a partial clearing up of the statute book.” *Id.*

*United States Code* as “positive law”<sup>363</sup> amounts not to codification in the civil law sense but rather consolidation.

History reveals two primary motives for a nation to embark on codification. First is a general perception that the mass of legal materials has become disorganized and in need of general “tidying up.” Second is a desire to unify the law of a nation formerly subdivided, either geographically or politically, into separate legal systems. Both motivations share a common theme of uniting a body of “disunited law.”<sup>364</sup>

Both the processes and products of codification can vary.<sup>365</sup> Some are relatively detailed, such as the German Code; others are more general and abstract, like the French Civil Code.<sup>366</sup>

363. Office of the Law Revision Counsel, *Positive Law Codification*, *supra* note 262; see also Office of the Law Revision Counsel, *Positive Law Codification in the United States Code*, *supra* note 262; *supra* notes 262–64 and accompanying text.

364. Lawson, *supra* note 144, at 1. In 1960, Lawson, then an Oxford University Professor of Comparative Law, observed,

[T]he United States [was then] in a position not very unlike that of France before the Revolution of 1789. There is great variety in the laws of the various states and in some respects the variety causes great difficulties of a practical kind, especially in parts of commercial law and in the law of marriage and divorce. [T]he need for unification . . . lies at the back of the movement to unify commercial law in the Uniform Commercial Code.

*Id.* at 1–2. The problem, of course, is that unlike France, the United States is a federation of sovereign states, each with reserved constitutional powers. See U.S. CONST. amend. X. State-by-state variations in both statutory and common law are inherent in a federation; thus, complete codification and unification of American law in the nature of the French Civil Code could not be reconciled with the Constitution.

365. See Head, *supra* note 138, at 5–6 & nn.6–7 (defining “codification” and “code” and citing numerous sources for the terms’ various accepted meanings); Lawson, *supra* note 144, at 2 (comparing the approaches and styles of the German, French, and Swiss codes); Stewart, *supra* note 166, at 47 (“[E]ven the name ‘code’ itself is only loosely attached to any particular legislative form . . .”); Stone, *supra* note 20, at 310 (“[T]here is no one, single, inescapably right approach to codification . . .”).

366. The French Civil Code reflects three fundamental legal principles: (1) a code should be “complete in its field”; (2) it should be drafted in “relatively general principles rather than in detailed rules”; and (3) its principles should “fit together logically as a coherent whole . . . based on experience.” Tunc, *supra* note 144, at 459–61. The French Civil Code is generally viewed as the prototype of the civil law codes. See, e.g., Aldisert, *supra* note 136, at 936 (“France presents the model of the civil law tradition. It set the pattern with the Napoleonic Code, a format now followed by all civil law jurisdictions.”); Cachard, *supra* note 136, at 42 (“[T]he French Civil Code was the matrix of many other codes, both in Europe and around the world.”); Wagner, *supra* note 46, at 340 (“France [took] the lead in the codification movement which conquered all continental Europe and swept the world in the course of the nineteenth century.”).

Some are more comprehensive than others.<sup>367</sup> Some codes are longer than others in terms of the number of articles or paragraphs.<sup>368</sup> And the process of codifying one area of the law, such as contracts, need not cover every possible subtopic if the existing law is considered adequate.<sup>369</sup>

American scholars often assume that civil law relies solely on the code and no other source of law. But that is not an accurate assessment. Continental law has traditionally relied heavily on academic commentaries and preparatory materials as interpretive aids. And over the last several decades, published judicial decisions have become highly persuasive authorities as well.<sup>370</sup>

The perception that codes are inflexible and unchangeable is also a myth.<sup>371</sup> For example, the French and German Codes have each been amended numerous times.<sup>372</sup> In fact, one scholar has observed that

the code systems have one great advantage [in facilitating amendments]. Under them the judge can always go back to the words of the code for an authentic statement of fundamental principle, whereas a common law judge must often feel that if he does not hang on to prevailing case law he is at sea. Conversely, it may be more difficult to modify first principles under a code than under a common law system, but on the whole this does not seem to have occurred.<sup>373</sup>

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367. For example, the French Civil Code left the general body of administrative law uncodified. Lawson, *supra* note 144, at 3; *see also* Stewart, *supra* note 166, at 24 (“The [French] Code civil codified only one area of the law, albeit a huge area. A few other major areas were covered by other codes (all of which have now been replaced): criminal law, commercial law, criminal procedure and civil procedure.”).

368. Lawson, *supra* note 144, at 3.

369. *Id.*

370. *See id.* at 4; *supra* note 336 and accompanying text.

371. Lawson, *supra* note 144, at 4–5. “[T]he code is only a statute like any other statute and can be altered just as easily.” *Id.* at 5.

372. *Id.*; *see* Garoupa & Morriss, *supra* note 26, at 1489 (noting that the French Civil Code’s survival for over 300 years through multiple French constitutions testifies to its adaptability, as does the survival of the 1896 German Civil Code).

373. Lawson, *supra* note 144, at 5. The perception that “first principles” are somehow entrenched in common law (as opposed to written federal and state constitutions) may help explain American judges’ historical viewpoint that legislation must expressly and clearly convey an intent to override common law, which in turn explains the characteristic detail and complexity of statutory enactments in the United States. *See supra* note 91.

Thus, contrary to the perception of some Anglo-American legal scholars,<sup>374</sup> codes are by no means “unbending.”<sup>375</sup> Traditional civil codes are often updated, expanded, reformed, and even replaced to accommodate new ideas, norms, and techniques.<sup>376</sup>

Table 1 summarizes the primary features that distinguish common law from civil law legal systems.

**Table 1: Distinguishing Attributes of Common Law and Civil Law Systems**

Attribute	Common Law	Civil Law
<b>Primary Source of Law</b>	“Unwritten”; judicial decisions, particularly appellate caselaw	“Written”; enacted Codes
<b>Constraints on Judicial Discretion</b>	<i>Stare decisis</i> ; binding judicial precedent (in the same jurisdiction); case or controversy (federal courts)	Enacted codes; judicial decisions (persuasive but never binding) merely “gloss” codified law
<b>Legal Development</b>	Incremental; case-by-case; statutes considered interstitial	Code adoption and amendment; gap-filling by judicial application of codes
<b>Dispute Resolution</b>	Jury or bench trial; reasoned opinion and judgment	Court judgment with concise explanation citing relevant codes

374. See, e.g., Garoupa & Morriss, *supra* note 26, at 1484–88 (evaluating the relative adaptability of civil codes and common law and concluding that any apparent advantages of common law flexibility are likely offset by judicial reluctance to abandon precedent; “adaptability . . . represents a tradeoff with uncertainty”).

375. Bergel, *supra* note 344, at 1080; see Garoupa & Morriss, *supra* note 26, at 1489 (citing French and German Civil Codes as examples).

376. Bergel, *supra* note 344, at 1080 (explaining that traditional civil codes are frequently amended, although the range of modifications has varied among code jurisdictions).

<b>Fact-finding</b>	Adversarial	Inquisitorial
<b>Judicial Officers</b>	Neutral; independent; law practice experience	Civil servants; career appointees
<b>Appellate review</b>	Diffuse review; all courts empowered to review statutes for constitutionality	Centralized constitutional review; limited to special constitutional courts (traditionally not permitted by ordinary courts)
<b>Legal Reasoning</b>	Inductive; judges analogize from case to case, comparing facts to reach consistent decisions; less likely to analogize from related statutes	Deductive; judges reason syllogistically by applying codes to facts, analogizing from code text to fill gaps
<b>Structure and scope of statutory enactments</b>	Generally unsystematized, often ad hoc; many statutes and codes include "savings clauses" by which they supplement and coexist with common law	Systematic, comprehensive codification of entire subject, superseding prior statutes and judicial interpretations
<b>Form of Statutes and Codes</b>	Concrete, specific, detailed; less accessible but easier to apply on a case-by-case basis	Abstract, expressed as broad principles; more accessible but more difficult to apply to specific cases

#### D. *Mixed Legal Systems*

The two major Western legal system classifications—common law and civil law—are not mutually exclusive. Contemporary scholars of comparative law have recognized the notion of "mixed" legal systems.<sup>377</sup> For example, comparativists consider Louisiana, the single United States jurisdiction that

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377. See Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 16–18 (2003) (observing the resurgence of the theory of mixed legal systems among international and comparative law scholars beginning in the 1990s, and positing reasons, including the "growing internationalization of law" and "the expansion and growing integration of the European Union," with its potential to "draw together and integrate the rules of common law and civil law").

has retained its civil law heritage, to be a “mixed jurisdiction.”<sup>378</sup> In addition, the mixed legal system classification has been applied to nations around the world, including Scotland, the Philippines, Malta, Sri Lanka, and South Africa, among others.<sup>379</sup>

Comparative law scholars have not agreed on the essential attributes of a mixed legal system, or even an accepted definition.<sup>380</sup> Generally, however, comparative law scholars tend to assign the classification to jurisdictions that have a long legal tradition but, for one reason or another, a different legal system has “inva[ded]” in a way that has “endangered” or otherwise modified that tradition.<sup>381</sup> The classification suggests that change occurs as a result of some externality, rather than internal forces by which a legal system naturally evolves over time.

#### *E. Convergence*

Some comparative law scholars believe that legal systems inevitably converge and become more alike as a direct result of globalization and other cross-fertilizing influences.<sup>382</sup> Certainly the increasing influence of supranational institutions such as the European Union, the United Nations, and the Council of Europe has caused Western nations to adapt their legal systems accordingly. The twenty-first century has witnessed dramatic

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378. “[D]espite the national drive for uniformity of law, Louisiana stubbornly remains the classic example of a mixed legal system up to the present day.” Weiss, *supra* note 38, at 500–01. For a comprehensive historical overview of Louisiana’s “eclectic” tradition, see Parise, *supra* note 171, at 164 & n.331 (noting that many consider Louisiana a “traditional mixed jurisdiction” because the civil law system, while predominant, is no longer “pure, and the influence of the common law is sensed” (citing Vernon Valentine Palmer, *Introduction to LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* 3, 4 (Vernon Valentine Palmer ed., 1999))). In fact, the first Louisiana Constitution in 1812 specifically prohibited the legislature from adopting any “system or code of laws” by general reference. LA. CONST. art. IV, § 11 (1812); see Hall, *supra* note 36, at 804–05 (citing LA. CONST. of 1812, art IX, § 11, *renumbered*, LA. CONST. art. III, § 18). In 1937, one scholar declared that Louisiana had become a common-law state, which promptly drew the protests of several other academics. Hall, *supra*, at 805, 805 nn.73–74.

379. Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in *MIXED JURISDICTIONS WORLDWIDE* 3, 27–28, 628 (Vernon Valentine Palmer ed., 2d ed. 2012). See generally SUE FARRAN ET AL., *A STUDY OF MIXED LEGAL SYSTEMS, ENDANGERED, ENTRENCHED OR BLENDED* (2017).

380. See FARRAN ET AL., *supra* note 379, at 241–43; Palmer, *supra* note 378, at 7.

381. FARRAN ET AL., *supra* note 379, at 4–5.

382. See von Mehren, *supra* note 324, at 1215 & n.2 (citing examples).

technological developments yielding almost instantaneous global telecommunications. All of these influences are likely to lead to ever-greater convergence among disparate legal systems and traditions.<sup>383</sup>

In 1934, Professor Samuel Williston predicted that the time would come when the United States, like France and Germany, would adopt a code. At that time, the American Law Institute was embarking on an effort to “frame the rules” that had developed over time in the United States in a manner that would allow for their continued development. At the same time, it sought to offer a set of rules that state courts might adopt and thus incrementally help to unify the great variety of state common law.<sup>384</sup> But Williston recognized that the earlier codification efforts of the Uniform Law Commission and the American Law Institute’s *Restatement* projects were simply developmental steps in the evolution of the still relatively youthful American legal system toward further unification of the law.

Williston readily acknowledged the disadvantages of codification, but he embraced the natural evolution in that direction primarily because of the massive increase in published judicial opinions. He observed that the continued proliferation of judge-made law created uncertainty at a time when commercial and industrial development demanded just the opposite. And judge-made law had the significant disadvantage of inaccessibility to laymen.<sup>385</sup>

It has been the history of law in every other civilized country that after customary or common law has developed to a certain degree, or for a long period of years, and become unwieldy, a Code has followed. Most of the world today is living under Codes . . . ; and when a Code has once been adopted, they never go back.

Whether it be in fifty or one hundred or two hundred years, my own belief is that we shall repeat the history of

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383. See Jeffrey L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 WIS. INT’L L.J. 1, 3 (1996) (explaining reasons why “the common law and civil law worlds appear to be getting closer together rather than farther apart”).

384. Williston, *supra* note 307, at 41; see *supra* notes 247–52 and accompanying text (discussing influence of American Law Institute).

385. Williston, *supra* note 307, at 39–40. Williston dryly observed that Field and Carter’s debate in New York over whether written laws were preferable to judge-made law was beside the point. “[T]he question is not one of perfection against imperfection. It is rather a choice between two evils.” *Id.* at 40.



other countries; and if we are going to do so, it is highly desirable that we should have something that will be a good Code.<sup>386</sup>

Decades later, in 1960, an English law professor also observed the tendency of civil law and common law systems to converge.<sup>387</sup> A quarter-century ago, an article co-authored by a jurist and a legal scholar recognized the continuing influence of the two major Western legal traditions on one another.<sup>388</sup> In the European Union, for example, member nations had been gradually establishing specialized constitutional courts with the authority to review legislative enactments.

At the same time the civil-law systems have been moving toward forms of constitutional control of legislation, the common-law nations have been moving toward more extensively codified legal systems. In these ways, the two legal systems are beginning to converge. The traditional authority and independence of the common-law judge has been reduced in recent years by the introduction of broad and comprehensive legislation in those nations that adhere to the common-law system. The common-law judge is now called upon to exercise his or her authority more and more often in cases of statutory construction and less frequently in cases of explicit judicial lawmaking. This shift in focus is likely to be accompanied by an increasing judicial deference to the legislature and diminution of the ability of the common-law judge to interpose his or her authority against the will of the majority.<sup>389</sup>

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386. *Id.* at 41.

387. See Lawson, *supra* note 144, at 6 (“[T]here is much to be said for the view that the methods of French and English law are not very wide apart.”). More generally, “[i]f a code becomes old, . . . , even if it is amended from time to time, it may ultimately produce a type of law which is not very different from a common law system.” *Id.* Many civil law nations have embarked on recodification efforts of various kinds, recognizing “the obsolescence in various degrees of the early 19th-century codification,” and these efforts have often reflected “more eclecticism” by incorporating comparative law perspectives and the influence of supranational jurisdictions such as the European Union. Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. TRANSNAT’L L. & POL’Y 163, 175–77 (2001); see also Bergel, *supra* note 344, at 1087 (“In almost every civilian jurisdiction, important reforms of the codes have been successfully undertaken.”).

388. Utter & Lundsgaard, *supra* note 339, at 581.

389. *Id.*

Over the last century, other scholars have similarly recognized the trend of convergence, underscoring the increasingly indistinct boundaries between common law and civil law legal systems.<sup>390</sup>

F. *The Diminishing Sphere of American Common Law*

American law is increasingly expressed in statutes, codes, administrative rules, court rules, and other positive law.<sup>391</sup> In the twenty-first century, the primacy of enacted law as the controlling source of legal authority in the United States stands in stark contrast to the nineteenth century, when judicial decisions took center stage as the primary source of law.<sup>392</sup> Two important developments are primarily responsible for the shift from “unwritten” caselaw to “written” statutes, codes, and regulations as the primary sources of American law. The first is the professionalization of legislatures, in particular the addition of nonpartisan legislative staff. The second is the rise of the so-called “administrative state” since the New Deal era.

1. *Legislative Reforms*

In the nineteenth century, the members of both Congress and state legislatures were largely “citizen legislators” whose public service was ancillary to their primary occupations. Legisla-

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390. See Eleanor Healy-Birt, *The Laws of Codes and Cases: A Comparative Analysis between Civil Law and Common Law*, 2013 BRISTOL L. REV. 109, 109–12 (“The distinction between civil and common law legal sources is not as clear-cut as is classically portrayed.” (citing numerous examples illustrating convergence of the two legal traditions)); Judson, *supra* note 149, at 54 (“It is obvious that in recent years these two great systems of law have been brought into closer relations.”); M.N. Marchenko, *Convergence of Romano-Germanic and Anglo-Saxon Law: Methods and Typologies*, 5 J. COMP. L. 211, 211–12 (2010) (noting prevailing view by Western scholars in recent years that the differences between common law and civil law systems are more a matter of form than substance). *But see* Healy-Birt, *supra*, at 114 (“The importance of traditional sources of law in each system is still fundamental, and informs practitioners’ attitudes to the creation and application of law to such an extent that convergence between the two traditions is no more likely today than it was one hundred years ago.”).

391. Wistrich, *supra* note 299, at 752 (“[T]he roles of statutes, treaties, and administrative regulations have expanded, while the roles of constitutional text and the common law have shrunk.”).

392. *Id.* (“The overall trend is clear: in lawmaking of every sort, and in the relative proportions in which the methods of lawmaking are employed, the role of the past is waning, and the role of the future is waxing. The common law has been dethroned, and statutes, treaties, and regulations have been enthroned in its place.”).

tive staff were essentially nonexistent,<sup>393</sup> and legislatures convened for short sessions, often every other year. Beginning in 1919, Congress established a legislative drafting service and authorized two professional draftsmen, one to be appointed by each chamber's leadership, to provide drafting services.<sup>394</sup> By the mid-1930s, several state legislatures had established non-partisan staff agencies, sometimes known as "legislative reference bureaus."<sup>395</sup> In addition, the judicial council movement was well underway, which facilitated dialogue between the legislative and judicial branches regarding necessary improvements in the law, and national organizations had emerged to strengthen the legislative process.<sup>396</sup>

Today, Congress and many state legislatures are supported year-round by professional nonpartisan staff, including lawyers, sometimes known as "Revisors of Statutes," who prepare bills at the request of legislators or legislative committees and

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393. See Pound, *supra* note 310, at 8 (attributing English common law's endurance in America in part to the "premature and crude codification during the legislative reform movement which came to an end about 1875").

394. *Final Report of the Special Committee on Legislative Drafting*, 46 A.B.A. REP. 410, 410 ¶ 4 (1921) (describing the process of establishing the first congressional legislative drafting service and reporting on its influence in "raising legislative drafting to a recognized branch of legal science"); see *infra* note 493 (describing 1918 appointment of two Columbia law professors to provide drafting assistance to Congress, who would become the forerunners of the Office of Legislative Counsel); see also Revenue Act of 1918, Pub. L. No. 65-254, § 1303, 40 Stat. 1141 (codified as amended at 2 U.S.C. §§ 271, 281 (2012)) (establishing first congressional Legislative Drafting Service to "aid in drafting public bills and resolutions or amendments thereto on the request of any committee of either House of Congress"). The Special Committee's report referred to the service as "corresponding to the office of the Parliamentary Counsel to the Treasury of England." *Final Report of the Special Committee on Legislative Drafting*, *supra*, at 410, ¶ 4. Appendix C to the Committee's Report compiled extensive resource materials for the development of a legislative drafting manual. *Id.* at 417-60.

395. John H. Wigmore, *Recent Phases of Contemporary Legislative Proposals*, 15 ILL. L. REV. 141, 148 (1920) (acknowledging "gradual establishment of legislative reference bureaus in the States").

396. E.g., Horack, *supra* note 19, at 44 & nn.15-16. The National Conference of State Legislatures was established in 1975, the successor to three predecessor organizations. *About Us*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/aboutus.aspx> [<https://perma.cc/X8JT-VFEH>] (last visited Mar. 29, 2019). The Council of State Governments was established in 1933 to serve all three branches of state government. *About*, COUNCIL ST. GOV'TS, <https://www.csg.org/about/default.aspx> [<https://perma.cc/46E3-BKMC>] (last visited Mar. 29, 2019).

who codify and annotate statutes once enacted.<sup>397</sup> Moreover, virtually every state legislature's professional drafters have adopted manuals or conventions that have significantly improved the nature and quality of legislation in the United States.<sup>398</sup> And unlike the "citizen legislatures" that were common in the seventeenth and eighteenth centuries, Congress and many state legislatures meet much more regularly in modern times, in some cases almost continuously in legislative sessions lasting several months.<sup>399</sup> For these and other reasons, the legislative branch of government at both the federal and state levels has undergone major reforms since the early days of the American republic.<sup>400</sup>

## 2. Rise of the Administrative State

Beginning with the industrial revolution in the late nineteenth century, the United States government entered a new era by establishing administrative agencies with broad regula-

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397. In 1952, Professor Harry W. Jones evaluated developments in state and federal legislative drafting services and their influence on the quality of legislative products. Harry W. Jones, *Bill-Drafting Services in Congress and the State Legislatures*, 65 HARV. L. REV. 441 (1952). He urged state legislatures to establish bill-drafting staff divisions composed of lawyers: "No other step could do as much to improve the clarity, consistency and predictability of American law as would the creation of a really excellent drafting office in every state." *Id.* at 451.

398. See *Bill Drafting Manuals*, NAT'L CONF. ST. LEGISLATURES (Apr. 3, 2018), <http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx> [<https://perma.cc/WPP6-6FPP>]. For an evaluation of legislative drafting manuals from an international perspective, see Helen Xanthaki, *Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?*, 4 LEGISPRUDENCE 111 (2010).

399. See, e.g., Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839, 855–56 (2018) ("In the state legislative context, researchers have focused on four factors as indicators of professionalism: 'the amount of staff and other forms of support, length of session, turnover, and level of compensation.'" (quoting David L. Solars, *Institutional Roles and State Legislator Compensation: Success for the Reform Movement?*, 19 LEGIS. STUD. Q. 507, 508 (1994))); see also *Full and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 14, 2017), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> [<https://perma.cc/776A-B752>] ("To measure the capacity of legislatures, it's important to consider the amount of time legislators spend on the job, the amount they are compensated and the size of the legislature's staff.").

400. Shobe, *supra* note 319, at 810 (examining how the legislative drafting process has evolved and improved since the mid-1970s to "arrive at the practice of modern drafting" and explaining how those advances should influence statutory interpretation).

tory powers.<sup>401</sup> The New Deal era of the 1930s further entrenched what some observers have derisively called the “headless fourth branch of government.”<sup>402</sup> Given the complexities of the modern era, administrative agencies at both federal and state levels issue regulations that have the form, force, and effect of positive law.<sup>403</sup>

In civil law systems, regulations issued by administrative agencies are often classified as “secondary” or “subordinate” legislation, as distinguished from primary legislation enacted by the legislative or parliamentary body.<sup>404</sup> But regardless of nomenclature, administrative rules and regulations in the United States represent a massive body of positive law generated largely since the late nineteenth century.

### 3. *Legislative Overlays on “Private” Common Law*

Over the last century and a half, the proliferation of statutes, court rules, and administrative regulations in the United States has effectively superseded the common law canvas. As one scholar observed, “the core of pure common law doctrine continues to shrink[,] and as it does the need to understand how the common law process works in a world where it is surrounded by statutes increases.”<sup>405</sup> Another acknowledged that

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401. See Kim, *supra* note 108, at 80–81.

402. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (quoting PRESIDENT’S COMM. ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 30 (1937)); see also Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190 (2011) (“Whether we like it or not, government administration is everywhere. The Constitution vests the ‘executive Power’ of the United States in the president. The executive branch exercises that power by administering the laws that Congress enacts, and those laws are numerous.”).

403. See, e.g., Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 I. LEGAL ANAL. 121, 121 (2016) (noting that “administrative law is . . . positive law, with highly developed procedures, precedents, doctrines, and institutions for crafting and enforcing its commands”).

404. See, e.g., Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 6 n.5, 72 (2014) (equating the American term “rulemaking” to “secondary legislation issued by agencies (both cabinet departments and independent agencies) under authority delegated to them by statute, or, as in France, by the French Constitution itself”).

405. Beatson, *supra* note 30, at 301. “Nevertheless psychologically, if not statistically, statutes can still appear to many lawyers as exceptions rather than the rule.” *Id.* Some might call this psychological phenomenon “denial.” See Pierre

"[p]rivate law subjects like tort, contract, and property are traditionally understood to be at the core of the common law tradition, yet statutes increasingly intersect with these bodies of doctrine."<sup>406</sup> This section offers examples of statutory frameworks that have supplanted significant components of American private law<sup>407</sup> that were traditionally governed by judge-made law.

*a. Torts*

Torts might be considered the last bastion of American common law, although torts are not immune from either legislative innovation or override.<sup>408</sup> Early state legislatures enacted "reception statutes" by which English common law was "received" as of a specified date as part of state law. Many reception statutes then delegated the power to state courts to continue to develop the "received" law consistent with the state's public policy. "These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries."<sup>409</sup> Thus, even tort law in the United States is arguably a creature of statute.

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Schlag, *Politics and Denial*, 22 CARDOZO L. REV. 1135, 1143–44 & n.18 (2001) ("[L]aw is, in part, a discourse of denial."; discussing good and bad aspects of the "ethically unflattering realm labeled 'denial' . . . depend[ing] on the identity of its object, context, or source").

406. Pojanowski, *supra* note 23, at 1691 (giving examples); see also Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1123 (arguing that over the last three decades of the twentieth century, "a large-scale—though piecemeal—codification of the common law has occurred"; of the traditional common law subjects, "only the law of torts remains uncodified"); Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803, 804 (1984) ("Areas of the law such as torts, property, and contracts have been influenced increasingly by legislation.").

407. See Randy E. Barnett, *Four Senses of the Public Law-Private Law Distinction, Foreword to the "Symposium on the Limits of Public Law,"* 9 HARV. J.L. & PUB. POL'Y 267, 271 (1986). "Private law subjects . . . include contract, torts, property, corporations, agency and partnership, trusts and estates, and remedies—subjects defining the enforceable duties that all individuals owe to one another." *Id.*

408. John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1271 (2008) ("[S]tatutes figure in tort law in all sorts of ways. Indeed, it is difficult to think of an aspect of tort law that has not been touched by statutory law."). Goldberg lists as one "half-truth" that tort law is common law. *Id.* at 1276.

409. Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745, 746–47 (1997).

At the turn of the twentieth century, workers' compensation acts displaced a large segment of tort law pertaining to injuries in the workplace.<sup>410</sup> Congress and many state legislatures enacted tort claims acts, which abrogated common law sovereign immunity.<sup>411</sup> The comparative negligence doctrine is largely a legislative innovation.<sup>412</sup> Recreational use statutes enacted in many states modified common law premises liability, in part to encourage private landowners to make their property available for public use.<sup>413</sup> Wrongful death actions were not recognized at common law; they are strictly creatures of statute.<sup>414</sup> Statutes

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410. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 69–72 (1967) (describing reasons for enactment and rapid proliferation of state workers' compensation statutes between 1910 and 1920, which fundamentally altered traditional methods for remediating on-the-job injuries by precluding common law adjudication of civil liability for workplace accidents).

411. Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 767 (2008) ("Sovereign immunity is a judge-made doctrine in its very origins, and its reinvention in recent years has been almost exclusively driven by the judiciary."); *id.* at 771–72 (explaining that one aspect of sovereign immunity applicable to suits in the sovereign's own courts derived from English common law); Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 529 (2008) ("Under the doctrine of federal sovereign immunity as it has evolved in Supreme Court jurisprudence over the past 200 years, the amenability of the federal government to legal action in court turns upon consent by the government, expressed through legislation enacted by a democratically elected congress.").

412. *E.g.*, David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 414 (1985) (noting that most states have adopted comparative negligence by statute).

413. *E.g.*, Paul A. Svoboda, *Protecting Visitors to National Recreation Areas Under the Federal Tort Claims Act*, 84 COLUM. L. REV. 1792, 1798–800 (1984) ("The enactment of recreational use statutes by the vast majority of states has significantly altered standards of [common law] landowner liability [by] substantially limit[ing] the liability of those [private] landowners who make their premises available to the public for recreational purposes[,] primarily to encourage [them] to open their lands to the public . . ."); *see also* Michael S. Carroll, Dan Connaughton & J.O. Spengler, *Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation*, 17 J. LEGAL ASPECTS SPORT 163, 164 (2007) (explaining history of recreational use statutes, some form of which have been enacted in all fifty states beginning with Virginia in 1950; other states followed after 1965 when the Council of State Governments proposed model legislation to limit landowner liability to recreational users).

414. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1052 (1965) ("[T]he denial of a cause of action to one person for the wrongful death of another is a common-law limitation . . ."). Malone speculated that the origin of the common law rule was the merger doctrine, "since discarded, that where a cause of action disclosed the commission of a felony the civil action was merged

of limitation, and more recently statutes of repose, have long cabined the right to recover damages in tort.<sup>415</sup> No-fault automobile liability insurance statutes enacted in the mid-twentieth century largely obviated the need to litigate negligence claims for automobile accidents.<sup>416</sup> And the enactment of statutes conferring property rights to married women, which significantly altered English common law, also drove changes in a number of common law tort principles, including a husband's liability for torts committed by his wife.<sup>417</sup> All of these legislative developments in tort law show that even this last domain of the common law is increasingly governed by statute.

Legislatures have developed and shaped the common law of torts in many other ways. For example, beginning in the early twentieth century, state legislatures enacted statutes to provide a civil remedy for invasion of privacy.<sup>418</sup> In part to deter acts of

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into the criminal wrong." *Id.* at 1055. At common law, homicide was considered both a criminal and a civil wrong. *Id.*

415. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454–55 (1997).

Statutes of limitation are an important feature of the legal landscape. Virtually every country has them. Their direct antecedents can be traced back for centuries, and some sorts of time limits have been enforced for thousands of years . . . . The limitation system is the product of the interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely, on their substantive merits.

*Id.* Statutes of repose were enacted largely in response to creative judicial interpretations of statutes of limitation such as the "discovery rule," which delayed accrual of an action until the plaintiff knew or should have known that the injury was traceable to the commission of a tort. *See, e.g.,* Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALT. L. REV. 119, 128 (2014) ("Recognizing [the impact of discovery rules], state legislatures began to enact 'statutes of repose' to provide a finite time limit on defendants' potential liability.").

416. *See, e.g.,* Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 310–14 (2018) (outlining the development of no-fault automobile insurance, its early successes, and the possible reasons it has fallen out of favor).

417. Landis, *supra* note 17, at 16–17. "There has been general recognition that the married women's acts embodied principles which were of wider import than the statutes in terms expressed and thus necessitated remoulding common-law doctrines to fit the statutory aims." *Id.* at 17; *see* Traynor, *supra* note 92, at 403 (noting that "for many centuries judges have been accommodating statutes to the common law openly or indirectly, expansively or warily").

418. *E.g.,* N.Y. CIV. RIGHTS LAW §§ 50, 51 (originally enacted 1903); *see also* *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), in which the New York Court of Appeals rejected a claim for invasion of privacy by misappropriation.



race discrimination, Congress created a federal statutory tort action for violation of a person's constitutionally protected civil rights by a perpetrator acting under color of state law.<sup>419</sup> Legislatures have enacted a multitude of statutory duties that, if violated, support a claim for damages.<sup>420</sup> Nearly two decades ago, one scholar observed, "In a world of pervasive legislative activity, it may be a rare case where one of the parties cannot assert some legislative enactment in support of their [tort] claim or defense."<sup>421</sup> Not surprisingly, some of the legislative activity during the twentieth century to alternatively develop and constrain tort law was met with judicial resistance.<sup>422</sup>

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tion of a young woman's likeness for advertising purposes without her consent; the New York General Assembly promptly responded to the public outcry by prospectively legislating a tort remedy. See generally Victoria Prussen Spears, *The Case That Started It All: Roberson v. The Rochester Folding Box Company*, 3 PRIVACY & DATA SECURITY L.J. 1043 (2008). For a comprehensive analysis and critique of the many federal and state statutes enacted to protect privacy, see Elizabeth D. De Armond, *A Dearth of Remedies*, 113 PENN ST. L. REV. 1 (2008).

419. See 42 U.S.C. §§ 1983–1988 (2012).

420. Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781, 782 (1990) ("Statutory duty cases are hybrids involving both the legislative and judicial branches."); Keeton, *supra* note 338, at 473 (explaining that "tort law has depended heavily on applications of statutes beyond their letter" such as by grounding civil liability on violations of criminal statutes "in the context of negligence per se and related doctrines," suggesting that "the legal system is not confronted with an either-or choice between decisional and statutory creativity for solution of emerging problems").

421. Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 814 (2000). Indeed, Professor Perlman, then Chancellor of the University of Nebraska, concluded that "courts in formulating applicable legal rules of tort liability should assimilate policies reflected in legislation." *Id.* at 864. As noted above, judicial reasoning by analogy from statutes, recognized by the United States Supreme Court as early as 1918, is one feature of civil law systems. *Supra* notes 55, 77 and accompanying text.

422. See, e.g., Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688, 692 (2001) ("[F]undamental disrespect for the separation of powers doctrine . . . occurs when majorities of some state supreme courts nullify [tort reform] legislative action that has a clear, coherent and rational basis."); see also Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1503 (2009) (addressing "the increasingly complicated and dynamic relationship between state legislatures, Congress, and state and federal courts in the area of tort law"); Scalia, *supra* note 107, at 112 (criticizing judicial resort to constitutional doctrine to set aside statutes as representing "the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures"); John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1160 (2005) ("Under the guise of judicial review, state courts have all too often

b. *Contracts*

As with tort law, statutes have significantly intervened in the common law of contracts, particularly over the last century.<sup>423</sup> The most obvious example of statutory constraints on the enforcement of contracts was the English Statute of Frauds, the last of a series of parliamentary enactments designed to address matters formerly thought beyond the scope of legislative innovation.<sup>424</sup> “There had never been such sweeping legislative intrusion upon common law of contract—nor would there be anything to equal or exceed it until the twentieth century.”<sup>425</sup>

The Industrial Age of the late nineteenth century instigated additional statutory constraints on freedom of contract. The labor movement ushered in an era of statutory protections for workers.<sup>426</sup> The rapid development of commercial law demanded uniformity across state lines, which led to the formation of the Uniform Law Commission and its effort to propose model legislation for state enactment to facilitate interstate commerce.<sup>427</sup> In particular, the Uniform Commercial

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used state constitutional provisions to interfere with experiments in public policy that over time have come to be widely respected.”).

423. See Kevin M. Teeven, *A History of Legislation Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35, 79–80 (1994) (“[D]ue recognition should be given to the significant role played by legislatures in shaping the law of contract [over the past eight centuries].”).

424. *Id.* at 54–55.

425. *Id.*

426. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1132 (1989) (“The labor movement of the 1880’s and early 1890’s embraced what was, by contemporary standards, a bold program for government regulation of the wage contract and working conditions. Its central goal was to legislate a shorter work day.”). Professor Forbath comprehensively discussed judicial resistance to the labor movement, which courts expressed by striking down numerous statutes. *Id.* at 1133.

Judicial review was the most visible and dramatic fashion in which courts curtailed labor’s ability to use [statutory] laws to redress asymmetries of power in the employment relationship. By the turn of the century state and federal courts had invalidated roughly sixty labor laws. During the 1880’s and 1890’s courts were far more likely than not to strike down the very laws that labor sought most avidly. For workers, judicial review—the invalidation of labor laws under the language of “liberty of contract” and “property rights”—became both evidence and symbol of the intractability of the American state from the perspective of labor reform.

*Id.* (footnotes and citations omitted).

427. John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN. ST. L. REV. 119, 141 (2009) (“The American commercial law codification movement began in earnest in 1892 with the creation by the American Bar Associ-

Code, the Commission's flagship codification project, has been adopted in some form in all fifty states and has substantially supplanted the influence of common law in domestic commercial transactions.<sup>428</sup> The United Nations Convention on Contracts for the International Sale of Goods (CISG), the international counterpart of the U.C.C., has had a similarly unifying effect for international commercial law.<sup>429</sup>

Beyond the labor movement of the late 1800s, substantial statutory constraints have also been imposed on employment contracts.<sup>430</sup> The Fair Labor Standards Act of 1938, the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 each altered the common law doctrine of employment at will.<sup>431</sup>

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ation . . . of the National Conference of Commissioners on Uniform State Laws . . . . Of course, the need for codification in the United States was obvious.”).

428. See, e.g., Gilmore, *supra* note 97, at 466 (“Thus in most of the country by 1920, and in many states as early as the 1900’s, we had a codified law of sales, negotiable instruments, documents of title and security transfer . . . . These statutes were, truly, codifying statutes of a type we had not theretofore known.”); Murillo, *supra* note 387, at 170 (“[T]he United States, despite its common law tradition, has a substantial segment of its law of contracts that is currently regulated under the provisions of the Uniform Commercial Code . . . . American contract law has been greatly influenced by the provisions of the U.C.C.”). As Gilmore noted, however, the American codification broke with the civil law tradition in an important respect “by making it expressly clear that our codifying statutes were not designed to be, and were not to be taken as, exclusive statements of all the law, past, present and future.” Gilmore, *supra*, at 466.

429. One scholar has referred to the CISG in the following glowing terms:

This stunningly successful treaty sought to “contribute to the removal of legal barriers in . . . and promote the development of international trade” and has been described as “arguably the greatest legislative achievement aimed at harmonizing the international law of sales,” enjoying “widespread acceptance as the governing law of contracts for international trade.”

Amir Shachmurove, *Here Lions Roam: CISG As the Measure of a Claim’s Value and Validity and a Debtor’s Dischargeability*, 34 EMORY BANKR. DEV. J. 461, 486 (2018) (footnotes and citations omitted).

430. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 655 (2000) (“Numerous statutes protect employees from discharge at the whim of their employers.”).

431. See, e.g., Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 208 (2010) (“Over . . . the past 100 years, particularly during the second half of the century, a wide raft of federally-enacted legislative wrongful discharge schemes have been put in place, which are fundamentally at odds with the common law conception of employment-at-will and serve to limit a firm’s ability to otherwise freely terminate employees.”).

Numerous states have enacted comparable statutes, as well as others regulating the terms of noncompetition agreements between employer and employee.<sup>432</sup>

Although freedom of contract is an important legal principle of American law, it is not absolute. The courts have upheld many different kinds of statutory constraints on contracts.<sup>433</sup>

*c. Property*

The third major category of “private” common law is property, historically the most deeply entrenched of all in English common law. Yet even here, statutes have superseded common law in significant ways.

Perhaps the most significant was the widespread departure from common law rules prohibiting married women from owning property in their own names, beginning in the mid-nineteenth century. At common law, the property rights of married woman were severely limited.<sup>434</sup> Under the common law principle of coverture,<sup>435</sup> any real property owned by a woman at the time of her marriage became subject to her husband’s absolute management and control; similarly, her personal property was exclusively within his dominion as soon as he took possession of it.<sup>436</sup> New York was the first state to enact

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432. Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 120–22 (2008) (citing state restraint of trade statutes in California and North Dakota, as well as specific statutes restricting or barring enforcement of noncompete agreements in California and Colorado).

433. See, e.g., David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 103 (2013) (noting that states’ authority to regulate the subject matter of contracts has long been recognized as a matter of public policy); *id.* at 57–58 (acknowledging the “tension . . . between the right of an individual to possess the faculty to contract versus the right of a government to restrict the scope of or even the parties to certain, specified contracts”).

434. E.g., 5 WILLISTON ON CONTRACTS § 11:5 (4th ed. 2018) (“[T]he property rights of married women at common law were very limited until the enactment of liberalizing statutes, commonly referred to as married women’s property acts, passed by the states beginning in the middle of the 19th century.”).

435. E.g., Hon. Richard A. Dollinger, *Judicial Intervention: The Judges Who Paved the Road to Seneca Falls in 1848*, 12 JUD. NOTICE 4, 5 (2017) (defining coverture as “the centuries-old English common law rule that dictated that when a woman married, her husband acquired the right to all her property. The husband could pledge the property to creditors, sell it or otherwise dispose of it . . . [U]nder coverture, a married woman was ‘civilly dead.’” (citation omitted)).

436. Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1361 (1983).

a married women's property statute in 1848, but it applied only to women who married after its effective date.<sup>437</sup> It would be 1860 before New York enacted a statute giving married women the right to control their own earnings and operate businesses on their own behalf.<sup>438</sup> Nearly every other state followed New York's lead.<sup>439</sup> By 1895, the legislatures of forty-four states and territories had enacted some form of married women's statutes.<sup>440</sup>

Other illustrations of statutory property regulation abound. Virtually every state has enacted statutes regulating the financing of real estate transactions, specifically mortgage and redemption.<sup>441</sup> They have also enacted recording statutes to provide real estate grantees assurance and a reliable method for giving public notice of their property rights.<sup>442</sup> Congress and

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437. After years of debate, the New York Legislature in 1848 finally enacted a married women's property rights statute. See Dollinger, *supra* note 435, at 10–11; Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 509–10 (2000) (quoting the 1848 New York statute: "The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.").

438. Ranney, *supra* note 437, at 510. In 1860, New York enacted a statute guaranteeing all married women the right to contract and the right to control their earnings. *Id.* (citing 1860 N.Y. Laws 90). In addition, the statute allowed married women to operate their own businesses, including the right to contract to the extent necessary to that end, and to sue and be sued with respect to their separate property. *Id.*

439. See B. Zorina Khan, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790–1895*, 56 J. ECON. HIST. 356, 362 n.19 (1996).

440. *Id.* at 363–64 & tbl.1 (listing statutory enactments by state, by type, and by year spanning 1790–1895). The statutes reflected great variations from state to state, but most granted women the right to own and control property in their own names, to control their own earnings without their husbands' interference, and to execute contracts and engage in business transactions without their husbands' consent. *Id.* at 364 tbl. 1 notes.

441. "Unencumbered by centuries of mortgage practice in which lenders took [actual] possession of the mortgaged land, American mortgage law evolved more quickly than English law to focus on the debt aspect of the mortgage relationship." Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 266–67 (1999). See generally Ann M. Burkhart, *Freeing Mortgages of Merger*, 40 VAND. L. REV. 283 (1987) (tracing the development of mortgage law from ancient common law to the present).

442. Charles Szypszak, *Real Estate Records, the Captive Public, and Opportunities for the Public Good*, 43 GONZ. L. REV. 5, 24 (2008).

most states have enacted detailed statutes regulating the landlord-tenant relationship that protect the rights of tenants to decent housing.<sup>443</sup>

Finally, nearly every state has enacted comprehensive statutes on the administration of wills and estates, including the distribution of assets of intestate decedents.<sup>444</sup> The Uniform Probate Code and the Uniform Trust Code have both supplanted much of the relevant common law.<sup>445</sup>

#### 4. Criminal Procedure

Although codification has increasingly supplanted common law in the traditional fields of “private law”<sup>446</sup> and in many areas of public law, some might argue that federal criminal pro-

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443. Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord’s Right to Terminate*, 19 GA. L. REV. 483, 485–86 (1985) (describing inadequacies of the common law of landlord-tenant).

Under traditional common law, the landlord had two basic obligations: the duty to provide the tenant with possession of the land and the duty, based upon an implied covenant of quiet enjoyment, to refrain from disturbing the tenant in his possession of the land for the duration of the tenancy. A landlord had no obligation to provide premises with structures in a particular state of repair or to make repairs once the tenancy had begun. Because courts viewed the lease primarily as a conveyance of land, the tenant, as the purchaser of a possessory interest in the land, was responsible for ordinary repairs. Although the tenant could obtain from the landlord an express covenant to repair any buildings located on the property, the value of such a promise was limited by the doctrine of independent covenants. According to that doctrine, the tenant’s duty to pay rent continued unabated, despite the landlord’s breach of an express covenant to repair.

*Id.* (footnotes omitted); see also *id.* at 489–90 (identifying the “almost complete reversal of the common law no-repair rule . . . complemented by changes in tenant remedies and landlord tort liability,” among other reforms).

444. See Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049, 1050–51 (2006) (describing the impact of uniform laws on the law of wills, estates, and trusts, including those that reverse common law and those that predominantly codify common law).

445. See, e.g., Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 718–19 (2006) (noting that scholars, jurists, legislators, and practicing attorneys have issued a call for uniformity in probate and trust law, particularly with respect to will substitutes).

446. See Barnett, *supra* note 407 (discussing the traditional distinction between private law (torts, contracts, property, and similar subject matter that governs private relationships) and public law (constitutional law, criminal law, tax law, immigration, and other subject matter areas dealing with individual citizens vis à vis government institutions)).

cedure is one exception.<sup>447</sup> It is certainly true that over the last half century, the United States Supreme Court has devised a number of rules designed to ensure fairness and due process to those accused of criminal offenses, and to deter questionable law enforcement conduct.<sup>448</sup> Moreover, the Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause to extend these prophylactic rules to require states to comply when prosecuting individuals charged with state criminal offenses.<sup>449</sup>

However, the Court's "judge-made" rules in the domain of criminal procedure do not represent lawmaking in the traditional common law sense of that term. Rather, the Court's reasoning in those cases has been grounded in concerns that existing federal legislation and federal rules of criminal procedure are insufficient to deter violations of the Fourth, Fifth, and Sixth Amendments.<sup>450</sup> In fact, in *Miranda v. Arizona*,<sup>451</sup> the Court called on Congress to enact legislation to protect arrestees from overzealous attempts to coerce confessions in violation of the

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447. See, e.g., Stephen F. Smith, *Activism As Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1057–58 (2002) ("Now it is only slightly exaggerated to say that all of the rules that really count concerning the process of investigating and prosecuting crimes come from the pages of the *United States Reports*, not state and federal rules of criminal procedure.").

448. For example, the exclusionary rule is a judge-made rule of evidence devised to deter law enforcement officials from engaging in searches and seizures that violate the Fourth Amendment. See *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("If letters and private documents can . . . be [unlawfully] seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961), and *Elkins v. United States*, 364 U.S. 206 (1960); see also *Mapp*, 367 U.S. at 655 (extending exclusionary rule to state prosecutions).

449. E.g., *Mapp*, 367 U.S. at 655.

450. Indeed, the Fourteenth Amendment, on the basis of which the Court has reasoned that government restrictions in the Bill of Rights also extend to the states, expressly authorizes *Congress* to enact legislation to enforce its provisions "by appropriate legislation." U.S. CONST. amend. XIV, § 5; see Dickerson, *supra* note 289, at 785 & n.27. Identical enabling clauses appear in U.S. CONST. amend. XIII, § 2 and U.S. CONST. amend. XV, § 2, and of course Congress has enacted major statutory frameworks to enforce the three post-Civil War constitutional amendments.

451. 384 U.S. 436 (1966).

Fifth Amendment.<sup>452</sup> But rather than waiting for Congress to enact legislation (or the Judicial Conference to propose rules of criminal procedure), the Court devised its own remedy reflecting its best judgment on how federal courts might serve that purpose.

For these reasons, the Court's criminal procedure decisions do not represent lawmaking in the common law sense. Instead, they simply reflect the Court's exercise of its jurisdiction under Article III to resolve cases raising federal constitutional issues.<sup>453</sup> Those precedents involve interpretation and application of constitutional language—the foundation of American positive law—not common law lawmaking in the sense defined in Part I of this Article.<sup>454</sup>

In the decades and centuries to come, statutory enactments will continue to overlay what little remains of the American common law canvas. One scholar predicted this development well more than a century ago:

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452. *United States v. Dickerson*, 530 U.S. 428, 440 (2000) (referring to the "*Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination" (citing *Miranda*, 384 U.S. at 467)).

453. U.S. CONST. art. III, § 2. Indeed, the Supreme Court has declared that *Miranda* is a "fully constitutional rule." Ronald J. Rychlak, *Baseball, Hot Dogs, Apple Pie, and Miranda Warnings*, 50 TEX. TECH L. REV. 15, 16 (2017); see also Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1074–75 (2017) (referring to prophylactic rules such as *Miranda* and the exclusionary rule as "[s]ubconstitutional checks . . . not derived explicitly from constitutional language but from an interest in protecting explicit constitutional structure and to give substance to specifically enumerated constitutional rights."); cf. 42 U.S.C. §§ 1981–1988 (2012) (granting federal courts jurisdiction to consider claims against state officials for depriving any person of federal rights, privileges, or immunities guaranteed by federal statutes or federal Constitution).

454. See *supra* notes 25–32 and accompanying text (defining "common law" for purposes of this Article); see also *Dickerson*, *supra* note 289, at 774–81 (comparing features that statutes and constitutional provisions have in common and those that distinguish them for purposes of extracting meaning). Professor *Dickerson* observed "a widely professed judicial reverence for constitutional provisions so generously interpreted that they provide little or no appropriately disciplined guidance for meeting current social needs." *Id.* at 777. He wondered, "[H]ow can so much democratic wisdom be safely left to a democratically unresponsive and only modestly equipped judicial elite?" *Id.* *Dickerson* concluded by noting the "need for a healthier allocation of functions among the three main branches of government and [the] need, by this means, to reshape some judicial attitudes." *Id.* at 795. In particular, "the system needs a clearer concept of what the Constitution consists of [including supplementary constitutional law and subconstitutional enforcement of its purpose] and how much of either remains the exclusive province of the courts and how much . . . is shared with the legislature and subject to its supremacy." *Id.* at 795–96.



The codes that have been attempted have not proved entirely satisfactory, and yet the demand for codification will go on until the common-law methods and common-law ideas are entirely eliminated from our jurisprudence. To participate in the work will be both the duty and the privilege of the coming generation of lawyers.<sup>455</sup>

In summary, common law's sphere has diminished to such an extent that it is no longer accurate to characterize the United States as a "common law" legal system. More than a century ago, Roscoe Pound declared it was, even then, "an age of legislation."<sup>456</sup> He predicted that "the course of legal development" already underway would ultimately lead American law to accept legislative innovation "not only as a rule to be applied but a principle from which to reason, and hold it . . . of superior authority to judge-made rules on the same general subject."<sup>457</sup>

More than six decades ago, Professor Ferdinand Fairfax Stone observed that "in this day and age the amount of unwritten law is infinitesimal as compared to written law . . ."<sup>458</sup> It was true in 1955; it is even more true now. Calabresi's radical attempt in 1982 to breathe new life into the common law by elevating the judiciary as a check on legislative innovation fell on deaf ears. The train had already long since left the station.

American law has continued to chug along into the future, developing in fits and starts by legislative enactment and partial codification throughout the twentieth century. By now, in the first quarter of the twenty-first century, the train has indeed arrived in the Age of Legislation that Pound long ago anticipated.<sup>459</sup> Yet the common law is dragged along like a caboose, serving only to fill gaps—and perhaps to reassure those who choose to believe that contemporary lawyers still practice in a common law age. But it will not be long before even the caboose is cut loose and we are finally back to the future.<sup>460</sup>

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455. Morris, *supra* note 226, at 67.

456. Pound, *supra* note 19, at 385.

457. *Id.* at 385–86.

458. Stone, *supra* note 20, at 305.

459. Pound, *supra* note 19, at 385.

460. See BACK TO THE FUTURE (Universal Pictures 1985).

## IV. REFORMING AMERICAN LEGAL EDUCATION

Although legislation is the primary instrument of social change in our society, it receives considerably less attention in law schools than judge made law, and there is a need for a better understanding by lawyers of the legislative process.

Joseph Dolan, *Law School Teaching of Legislation: A Report to the Ford Foundation*, 22 J. LEGAL EDUC. 63, 63 (1969).

The present attitude responsible for our cavalier treatment of legislation is certain to be a passing phenomenon . . . [T]he profession and the [law] schools are at fault for not affording the bench better technical aids. These United States present a most extraordinary laboratory for comparative legislative study. But while the [court] precedents . . . are carefully catalogued, analyzed, and weighed, no scientific concern is manifested over our constantly accumulating legislation. Texts and source-books thread their way through the welter of our decisions, throwing off statutes as excrescences upon the body of the law. Under the impulse of great law-teaching a national attitude toward the common law has arisen to counterbalance the centrifugal forces of our many states. But even the idea that the same spirit can control legislative law is wanting. The task of its development promises to be a chief concern of to-morrow.

James McCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7, 26 (1965).

Law and legal systems are constantly evolving.<sup>461</sup> In the twenty-first century, the traditional notion of “American common law” has become an anachronism.<sup>462</sup> Scholars have been

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461. See, e.g., Corbin, *supra* note 127, at 672 (“The change and growth of the law by . . . judicial action can never be avoided.”); Walter F. Dodd, *Statute Law and the Law School*, 1 N.C. L. REV. 1, 1 (1922) (“The law is a constantly changing and developing body of rules.”); The Right Hon. Lord Goff, *Judge, Jurist and Legislature*, 2 DENNING L.J. 79, 81 (1987) (“The only truly constant feature of the law is that it is in a constant state of change.”); Liaquat Ali Khan, *The Paradoxical Evolution of Law*, 16 LEWIS & CLARK L. REV. 337, 338 (2012) (“Law, rooted in the nation’s history and past traditions, continuously renews itself.”). In the age of statutes, change is ongoing, both by legislative enactment and amendment, and by judicial interpretation of enacted laws. See Hahlo, *supra* note 106, at 252 (“It is . . . of the nature of law that it stands perpetually in need of revision if it is to remain in keeping with changing conditions.”).

462. See, e.g., James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 520 (2006) (“American legal

foretelling it for decades.<sup>463</sup> We are indeed now living in an Age of Statutes and many other forms of enacted law, as long recognized by American jurists, legal practitioners, and even observant scholars.<sup>464</sup> Yet the common law myth that gives judicial decisions primacy as the source of American law lives on in the legal academy, and its perpetuation produces law graduates who falsely assume that the answer to most legal problems may be found in judicial precedent.<sup>465</sup> But lawyers confronting

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methods and structures have not mastered the transition from the world of the eighteenth century to that of the twenty-first.”).

463. *E.g.*, Dodd, *supra* note 461.

[T]o what extent can we adopt a broad view as to the place of statutes in the development of the law, when each succeeding generation of students is taught to get its law from cases and to ignore the statutes[?]

...

From the standpoint of the needs of its students, the American law school must give more attention to statutes. Much may be accomplished by an independent course on the subject; but all courses in the law school should at the same time devote some attention to the statutory basis of the law.

*Id.* at 2, 6.

464. *See, e.g.*, Horack, *supra* note 19, at 44–45 (“[T]he history of social control through law usually follows a pattern which eventually shifts from the unwritten to the written law—and thus, statutes become the significant legal materials.” (citing Williston, *supra* note 307)); Traynor, *supra* note 92, at 402 (“The endless cases that proceed before [a judge] increasingly involve the meaning or applicability of a statute, or on occasion, its constitutionality); *cf.* Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1740 (2016) (“The challenge ahead would seem to be to re-envision the role of courts in an age in which administrative regulations preponderate.”). Professor Sharkey argues that “[t]he United States is indeed still a common law country—not its nineteenth-century version, but a distinctly twenty-first century version that is just coming into view.” *Id.*

Professor Pojanowski has convincingly demonstrated that statutes, rather than being anathema to English and early American lawyers, in fact played an important role in the development of Anglo-American common law. Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1376–85 (2012). Indeed, in the early fourteenth century, the English government recognized no divisions among executive, legislative, and judicial power; the king’s courts both wrote statutes and applied them to resolve disputes. William Herbert Page, *Statutes as Common Law Principles*, 1944 WIS. L. REV. 175, 183–84 & n.11 (citing English cases decided in the early fourteenth century). It stands to reason that both statutes and customary law played an important role in the development of English common law by the time of the American Revolution.

465. Roger Traynor, then Chief Justice of the California Supreme Court, long ago observed the lack of an effective way to research statutes comparable to the system we have for researching caselaw. Traynor, *supra* note 92, at 426 (“There is great need not only for a systematic cataloguing and research of statutes but also for systematic criticism.”). Even earlier, Professor Horack observed the need for

the great majority of contemporary legal issues will not find the answers in caselaw.<sup>466</sup>

### A. Colonial and Post-Revolutionary Legal Education

Before the Revolution and throughout most of the first century of the new republic, prospective lawyers “read the law” — and in most cases that meant reading Coke’s *Institutes* and Blackstone’s *Commentaries*.<sup>467</sup> After the Revolution, several law

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improved access by courts “to the legislative precedents of their own jurisdictions” as well as recognition that the statutes of other states are helpful “guides to the development of their own policy.” Horack, *supra* note 19, at 55–56. Both Justice Traynor and Professor Horack called for improvements in the legal academy to facilitate the judiciary’s effective use of the burgeoning body of statutory law.

With all too little critical comment to serve as a warning or guide, how can judges immersed in mounting litigation ferret out potentially good statutes for use in their own lawmaking from among the host of inferior ones? . . .

We are still far from betterment measured by the goal of rational processes of lawmaking in all the lanes of law. We might well concentrate on a preliminary goal, better use in the judicial process of the good laws that often emerge amid the variegated products of the legislative process. There must be teamwork to that end. If the librarians and researchers will systematize the study of statutes, if the watchbirds will sharpen their watch on legislatures in action, if commentators will set forth salient qualities or defects of legislative products, the judges will surely make better use than they have of the statutes revolving in common-law orbits.

Then benefits will flow in every direction . . .

Traynor, *supra* note 92, at 427; see Horack, *supra* note 19, at 56 (“Law schools provide the most effective agency for the advancement of a jurisprudence which combines in an effective way the inter-related development of case and statute law. Unfortunately, even at this late date [1937], there is little appreciation or sympathy for such a movement.”). Still, a half-century after Justice Traynor issued his call to arms, the legal academy has largely failed to heed his call for helping the judiciary constructively navigate in what has largely become a statutory universe.

466. Under the auspices of the American Bar Foundation, two authors proposed what may be the earliest scholarly research agenda for curriculum reform in legal education. Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 223 (1974) (explaining that the Foundation had commissioned the study as “the initial step” of its “program of research on legal education”). The authors’ charge was “to survey the existing empirical knowledge of law schools, law students, and law teachers, to suggest areas in which further research is needed to lift ‘the shadow of very considerable ignorance’ that affects decision-making in legal education.” *Id.* (quoting ABA Special Comm’n To Consider the Feasibility of Undertaking a Comprehensive Survey of the Legal Profession, *Report* 3 (Aug. 1972)).

467. See Bryson, *supra* note 37, at 13–19, 27; Pound, *supra* note 310, at 7–8. Pound observed that English common law was taught “almost from the very beginning,” and that

schools were established, the first at William and Mary in Williamsburg, Virginia.<sup>468</sup> Others were established in the New England and Middle Atlantic states.<sup>469</sup> In 1826, Thomas Jefferson founded the University of Virginia and its law school.<sup>470</sup> Both William and Mary and the University of Virginia law school curricula incorporated politics and government, reflecting what Jefferson thought was an essential aspect of legal training for gentlemen who would be instrumental in developing government institutions.<sup>471</sup> Several proprietary law schools soon followed and would come and go over the next century.<sup>472</sup>

But law schools were expensive, and many prospective lawyers could afford to attend only for one year, or two at the most.<sup>473</sup> Many others opted for apprenticeships with practicing

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what gave it life and enabled it to prevail in the critical period of legal development in early America, in the fore part of the nineteenth century, in the time of apprentice training of lawyers, was that English Common Law was the only system that was or could be taught to young men studying for the bar with the books at hand in law office or law office-type of law-school.

*Id.* Pound explained why, in his view, American proponents of the French Civil Code in the first half of the nineteenth century did not succeed: Americans were “averse to authorities in a foreign tongue,” *id.* at 8, and English translations of the French Civil Code came too late. By that time, American jurists Kent and Story had published texts that presented English common law in a “systematic, ordered, reasoned fashion which appealed to the bar and to the courts.” *Id.* at 8, 9; see also *infra* note 483 (discussing Kent’s *Commentaries*).

Professor Pound went so far as to credit the commentators with preserving the common law on American soil: “More than anything else the books of our great nineteenth-century text writers saved the common law.” Pound, *supra*, at 9. Pound also attributed English common law’s endurance in America to the “premature and crude codification during the legislative reform movement which came to an end about 1875.” *Id.* at 8; see *infra* notes 473 & 485 (noting Dean Story’s reasoning for disregarding legislation and related topics by focusing the Harvard curriculum on common law).

468. Bryson, *supra* note 37, at 9. A chronological listing of degree-awarding law schools by date of establishment appears in REED, *supra* note 17, at 424–30.

469. REED, *supra* note 17, at 424.

470. Bryson, *supra* note 37, at 9, 18. The scope of the law school course at Virginia was to include instruction in both “common and statute law.” REED, *supra* note 17, at 118 n.3.

471. See REED, *supra* note 17, at 118–19 & nn.2–3, 149. But by the mid-1850s, Government and Political Economy were “crowded out of the law course” at the University of Virginia and relocated to other departments, and law students were encouraged to take courses in other parts of the university. *Id.* at 119.

472. Bryson, *supra* note 37, at 9–10, 16–18.

473. Early law schools were not able to cover everything even in a regular two-year curriculum. Harvard, for example, elected to narrow course coverage for the

lawyers,<sup>474</sup> which was the only way to obtain an eighteenth-century legal education in either the Colonies<sup>475</sup> or in England<sup>476</sup> before the Revolutionary War.

Legal treatises, and Blackstone's *Commentaries* in particular, were the basic fodder for legal education in Virginia and the rest of early America until 1875.<sup>477</sup> Both Coke<sup>478</sup> and Blackstone were Englishmen, and both touted common law as vastly superior to legislation.<sup>479</sup> But neither was among the Framers, and neither one had anything to do with drafting United States constitutions or statutes. Coke and Blackstone were never empowered to alter the constitutional system of positive law in the United States. And yet the dead hands of Coke and Black-

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"regular" two-year course of study, while offering additional subjects for students who elected to study for an additional year. REED, *supra* note 17, at 146. Reed observed that Harvard Law School deliberately dropped both state government law and statutory law from the basic curriculum, retaining only federal constitutional law as a supplement to the "original narrow field" of course coverage. *Id.* at 146–47.

474. *See id.* at 126 (noting that apprenticeship law training was still "firmly entrenched" in the early nineteenth century).

475. Bryson, *supra* note 37, at 9–10, 16–18. In the eighteenth and nineteenth centuries, a legal education was not undertaken exclusively for the purpose of representing clients. Many believed "reading the law" was the most suitable preparation for the "country gentleman" to conduct his own personal affairs and take a place in political life. *See id.* at 21–24; *supra* note 471 and accompanying text.

476. By 1700, England's Inns of Court no longer provided legal training to prospective lawyers. *Id.* at 11 (citing, e.g., Needham, *supra* note 89, at 201–02).

477. Bryson, *supra* note 37, at 32–33; Charles E. Consalus, *Legal Education during the Colonial Period, 1663–1776*, 29 J. LEGAL EDUC. 295, 310 (1977). Bryson explained why:

It was Blackstone's succinct and well-written survey of the entire law of England that made it so attractive as a textbook for law students. It was at the same time an outline and an encyclopedia. It was clearly written and could be read by a beginning law student with relative ease of comprehension in a fairly short period of time . . . . While it was not perfect, it was far better than anything that had gone before. It most certainly aided in the learning of the law and resulted in a better trained bar.

Bryson, *supra* note 37, at 32.

478. *See generally* DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578–1616 (2014).

479. "Coke and Blackstone saw statutes as evil devices marring the symmetry of the common law." Beatson, *supra* note 30, at 299. "[T]he dominant ideology in common law systems since Coke and Blackstone is that statutes and common law flow next to but separately from each other in their separate streams." *Id.* at 300.

stone, like the dead hand of the common law itself, have long continued their hold on American legal education.<sup>480</sup>

### B. *Early American Law Schools*

The earliest American law schools were extensions of the apprenticeship model, and they provided little more than the rudimentary training necessary to pass the bar and practice law.<sup>481</sup> Many were short-lived proprietary schools.<sup>482</sup>

Legal education gradually shifted to the universities beginning early in the nineteenth century. Columbia University appointed James Kent professor of law, who began delivering lectures there in 1794.<sup>483</sup> The University of Maryland hired six law faculty in the second decade of the 1800s. One of them, David Hoffman, developed a comprehensive law school “course of legal study,” first published in 1817.<sup>484</sup> Harvard took steps to

480. See, e.g., Weiss, *supra* note 38, at 475 (crediting Blackstone’s *Commentaries* as an “enormous improvement of English law ‘in form,’” but concluding that the work “could not completely solve the problems of the diffuse and muddled state of the sources of law”; further, because “the *Commentaries* were written strictly on the basis of the existing common law, reformers soon found them to be too conservative”).

481. Harlan F. Stone, *Some Phases of Legal Education in America*, 58 AM. L. REV. 747, 750–51 (1924).

482. See Bryson, *supra* note 37, at 9–11, 16–18.

483. REED, *supra* note 17, at 121. Kent went on to publish the first American legal treatise in four volumes between 1826 and 1830. *Id.* Even Kent’s *Commentaries*, however, were “conceived in the general spirit of Blackstone’s *Commentaries*,” *id.*, which would further entrench English common law as the focus of American legal education. See Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440, 440 (1993) (“Kent managed to reconcile . . . what appear to be contradictory positions: to justify the common law on a basis other than the English customary tradition and, at the same time, to borrow extensively from the substance of that tradition as authority for legal rules.”); *id.* at 446 (“Kent, like Story, was forced to overcome the resentment directed at the importation of English law, and to reconcile reception with the widespread nativism that balked at the prospect.”).

484. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (Philadelphia, Thomas, Cowperthwait & Co. 2d ed. 1846). Hoffman expressly incorporated legislation as well as jurisprudence in his course of study. See *id.* at ix–x, 31 (referring to study of Political Economy, “a study essential in a nation where the lawyer and politician are so frequently combined”). Hoffman revised and republished his *Course of Legal Study* several times before the 1846 edition was published, in part reflecting American law as it had developed in the 1830s and early 1840s. REED, *supra* note 17, at 454–55; see HOFFMAN, *supra*.

So great has been the change in the legal science, even of England (and altogether for the better), that [even Lord Coke] would find himself compelled to become a close and methodical student of the law, before he

add a law school as early as 1817, but not until 1830 was the first Harvard Law professorship established, held by Joseph Story.<sup>485</sup> Yale College established a law department in 1824 when it took over a proprietary law school then operating in New Haven.<sup>486</sup> But most early law schools continued to rely on treatises as primary teaching materials, and the treatises then available were steeped in the common law of Coke and Blackstone.

In 1870, Harvard Law School hired a new dean, Christopher Columbus Langdell, who would perpetuate the common law myth<sup>487</sup> while otherwise revolutionizing law school teaching

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could venture to take a stand among his professional brethren. [T]he improvements [in the law] to which we principally allude, are the growth of, perhaps, the last fifteen years."

HOFFMAN, *supra*, at x–xi; see also REED, *supra* note 17, at 454–55 (discussing revisions to Hoffman's *Course of Legal Study*, including one published in 1836).

Hoffman's law school curriculum and his "diffusive tendencies" influenced both Harvard and the University of Virginia. REED, *supra*, at 454–55. But Hoffman had undertaken what ultimately proved "a hopeless task—that of reforming legal education single-handedly." *Id.* at 126.

485. Stone, *supra* note 481, at 750. In his 1830 inaugural address at Harvard, [Story] stretched historical accuracy in his sweeping declaration that our ancestors brought [the common] law over, as a fully developed body of legal doctrines it would appear, which they deliberately put into operation. He persuaded himself, accordingly, that all that was necessary in order to secure good statutes was to have them drafted by masters of the common law—such as the Harvard law school intended to train. He underestimated how much efficient legislation involves beyond mere knowledge of the common law that it is designed to supplement or replace . . . .

Whatever judgment may be passed upon Story's and Harvard's slighting of everything except the general principles of the common law, and American decisions developing this and the Federal Constitution, one thing at least is certain. Under the lead of this most successful of American law schools the orthodox province of law school teaching was now defined. Politics and law were no longer to be joined as in Jefferson's two Virginia institutions. Politics, as a subject of university study, was eventually to be developed by the college in its departments of government or political science; the particular function of the law school, from now on, was to cope with the increasing flood of judicial decisions.

REED, *supra* note 17, at 148–49.

486. Stone, *supra* note 481, at 750; see also REED, *supra* note 17, at 423.

487. In the early 1870s, a debate was already well underway in England about the relative merits of codification over common law. See W. Markby, *Codification and Legal Education*, 3 L. MAG. & REV. QUART. REV. JURIS. & QUART. DIG. ALL REP. CASES 5th ser. 259, 259–60, 262 (1878) (observing that calls for codifying English common law had increased "in the last five and twenty years" and noting the objections of the English bench and bar). Markby, in fact, addressed some of the



methods.<sup>488</sup> At the time, reading primary sources of law—rather than the tomes of Coke, Blackstone, and others—was considered revolutionary in legal education.<sup>489</sup> But Langdell's casebooks were filled with case reports. By the last quarter of the nineteenth century, there was no shortage of state and federal statutes that could have been studied side by side with judicial opinions as primary sources of law. Yet Langdell selected appellate court opinions as the primary source of law that students would study to learn how to “think like lawyers.”

Thereafter, the Socratic method took hold as the primary teaching approach in the American legal academy. The casebook and the Socratic method enabled single law professors to teach huge classes, which in turn generated tuition revenue

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same arguments in his 1878 article that Gilmore and Calabresi would debate a century later in the United States. *See, e.g., id.* at 268–69 (“[O]ne of the most frequent objections brought against codification [is] that it will not provide for new wants and new contingencies . . . . Experience shows that these gaps will continue to be filled by the common law[which] will not die out in England because of the Code . . .”).

In his Storrs Lectures, Professor Grant Gilmore was perhaps going a bit far when he described the English codification movement as having been “abandoned” in the last quarter of the nineteenth century. Gilmore (1975), *supra* note 294, at 1029 (asserting that England had “quietly abandoned” codification after enacting the Bills of Exchange Act (1882) and the Sale of Goods Act (1893)); *cf.* Wagner, *supra* note 46, at 345 (referring in 1953 to the Bills of Exchange Act and the Sale of Goods Act as “[a]mong the *first and most important* of [the English codification] achievements” (emphasis added)). *But see* Jonathan Teasdale, *Codification: A Civil Law Solution to a Common Law Conundrum?*, 19 *EURO. J. L. REFORM* 247, 249–50 & n.5 (2017) (citing England’s Partnership Act (1890), Arbitration Act (1889), and Marine Insurance Act (1906), after which “there was a hiatus” during World Wars I and II until the Law Commissions Act 1965, which expressly charged the Law Commission with “codification of [the] law”).

488. *See generally* WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 28–31 (1982) (describing Langdell’s method and law-as-science philosophy); HARNO, *infra* note 497, at 53–60 (describing Langdell’s lasting influence as the progenitor of “the most significant event in the evolution of American legal education”).

489. Bryson, *supra* note 37, at 33 (noting that Langdell’s case method was a “pedagogical innovation” that substituted the analysis of judicial opinions as primary sources of law for classroom lectures based on secondary legal authorities). As Bryson explained, however, the “true foundation of the fame of the faculty of Harvard Law School rest[ed] upon their succession to Blackstone as writers of the basic legal treatises.” *Id.* The challenges Harvard Law School slowly overcame following Langdell’s 1870 appointment are chronicled in WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994).

that has incentivized law schools to largely continue those practices ever since.<sup>490</sup>

### C. Adding Legislation to the Traditional Curriculum

Early in the twentieth century, the first scholarly call for American legal education reform to include statutes and legislative lawmaking was a 1911 *Illinois Law Review* article authored by a member of the New York Bar.<sup>491</sup> Perhaps the Illinois legal academy was responding to that call when Northwestern University School of Law soon after began offering Legislation, which was apparently the first time any modern American law school had offered such a free-standing course.<sup>492</sup> Columbia began offering a Legislation course a few years later during the 1919–1920 academic year.<sup>493</sup> The course

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490. See, e.g., Leib, *supra* note 18, at 170.

For a long time, the standard first-year curriculum has been badly out of synch with what lawyers actually do. [In] particular . . . the first-year slate of courses tends to be dominated by a judge-centered perspective on the law, in which all legal questions are answered by people in black robes—and generally black-robed people at the appellate level. That neither reflects reality, nor approximates how lawyers need to perceive the workings of the law.

*Id.*; see also Boyer & Cramton, *supra* note 466, at 224 (observing that “[t]he large-class, case method of instruction, usually in a ‘Socratic’ question-and-answer format, has dominated law teaching since it was pioneered by Langdell . . . . The reasons for the longevity and popularity of the case method [include] its adaptability to large classes, and thus its low cost . . . .”); *id.* at 289 & n.234 (explaining that the Langdellian approach to legal education, “notable for its low cost[,] . . . has survived on faculty-student ratios that would shock teachers at undergraduate colleges, much less at graduate schools”). LaPiana speculated that Langdell’s teaching method became entrenched in the legal academy in part because “law schools came to link case method training with the prestige of the bar.” LAPIANA, *supra* note 489, at 169.

491. Horace A. Davis, *Instruction in Statute Law*, 6 ILL. L. REV. 126, 126 & n.1 (1911) (noting, even then, that “one of the first experiences of a clerk in a busy [law] office is to be obliged to pass on questions of statute law; and the more responsible his work the more he is thrown upon legislative enactment”).

492. Wigmore, *supra* note 395, at 141 (referring in 1920 to “a unique course entitled ‘Practical Problems in Contemporary Legislation,’ conducted now for some ten years past, each year, at Northwestern University Law School”).

493. Thomas I. Parkinson, who taught the course that year at Columbia Law School, had been appointed to a newly created professorship at Columbia in 1917, and in 1918 he began serving as the United States Senate’s first legislative counsel. Grad, *supra* note 14, at 2 n.7. At the same time, Middleton Beaman was appointed the House of Representatives’ first legislative counsel. These two appointments were the forerunners of the Office of Legislative Counsel. See Frederic P. Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381, 385–87 (1929); see also Reve-

met with such favor during its first decade that Columbia required all first-year students to take the course beginning in 1929.<sup>494</sup>

The Carnegie Foundation for the Advancement of Teaching published a comprehensive, detailed report in 1921 on the history and development of legal education.<sup>495</sup> But little is known about law school course offerings in the 1930s and 1940s. The economic depression, followed by World War II, most likely led to a period of retrenchment rather than innovation in legal education. But Roosevelt's New Deal programs and the rise of the administrative state would underscore the need to revamp American legal education for the modern era. James M. Landis, then a member of the Securities and Exchange Commission,

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nue Act of 1918, Pub. L. No. 65-254, § 1303, 40 Stat. 1057, 1141 (codified as amended at 2 U.S.C. §§ 271, 281 (2012)).

494. Grad, *supra* note 14, at 2. Yet Professor Samuel McCune Lindsay, Columbia's Professor of Social Legislation in 1929, continued to reflect the legal academy's traditional common law bias when he explained that "courts of last resort" were "often the more important part of the legislative process." Samuel McCune Lindsay, *Social Legislation*, 34 AM. J. SOC. 1053, 1053 (1929) (reviewing state legislative output in 1928).

In any review of American legislation it is well to remember that decisions of courts of last resort, which determine constitutionality and practically define the scope and application of statutes, constitute often the more important part of the legislative process, especially in dealing with social problems through the legislative method.

*Id.* The required course at Columbia was expanded to three credits in 1936 and was moved to the first semester of the first-year required curriculum. Grad, *supra*, at 2 n.8. Beginning in 1944, the required Legislation course evolved into Legal Methods, which was apparently designed at first to give "equal attention to legislation and case law." *Id.* at 3-4, 4 n.8. A two-course sequence remains a part of Columbia Law School's first-year curriculum, but the course description no longer mentions legislation. See *Academics & Courses, First-Year Curriculum*, COLUM. L. SCH. <https://www.law.columbia.edu/admissions/jd/learn/curriculum/11> [<https://perma.cc/3T4G-ERMB>] (last visited Mar. 29, 2019) (describing Legal Methods I and II as "an intensive introduction to the legal system and case analysis . . . , exposing students to important legal methods and jurisprudential, ethical, social, or cultural perspectives relevant to different areas of the law"). Columbia now offers Legislation and Regulation as one of fourteen elective courses from which first-year students may select during the second semester. See *id.* Across the country, Legal Methods courses became a typical part of many law schools' required first-year curricula during the latter half of the twentieth century. See generally *infra* notes 511-14 (citing ABA curriculum surveys in 2002 and 2010).

495. REED, *supra* note 17.

was an early proponent of including legislation as a component of the law school curriculum.<sup>496</sup>

Nevertheless, by the 1950s “[l]egislation, long neglected, [had become] an integral field of study . . . firmly installed in the programs of a substantial number of [law] schools.”<sup>497</sup> Professor Reed Dickerson was without doubt the twentieth century’s greatest champion of adding courses in legislation and legislative drafting to the American law school curriculum.<sup>498</sup> For decades he advocated for the legal academy and practicing

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496. See James M. Landis, *The Implications of Modern Legislation to Law Teaching*, 8 AM. L. SCH. REV. 157, 159 (1935) (observing that legal education had ignored legislative materials to an even greater extent than it had administrative law materials); *supra* notes 129–32 and accompanying text. In 1937, Landis was appointed Dean of Harvard Law School at the age of thirty-seven, replacing Dean Roscoe Pound, who had resigned a few months earlier. *Appointment of James M. Landis as Dean of Law School is Confirmed by Overseers*, HARV. CRIMSON (Jan. 12, 1937), <https://www.thecrimson.com/article/1937/1/12/appointment-of-james-m-landis-as/> [<https://perma.cc/T3M8-6M83>].

497. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 182 (1953). Among other criticisms of legal education, Harno noted its overemphasis on case analysis to the exclusion of other aspects of a lawyer’s professional work. In particular, legislation was “[o]ne of the neglected fields in legal education,” including the legislative process as well as planning and drafting legislation. *Id.* at 141–42.

It is passing strange that law teachers could at any time, at least in the modern era, have ignored a phase so real, so essential to the education of lawyers as the legislative process. It is an enigma that can be explained only in the light of the facts of history. Even so, any explanation must leave much to conjecture. Our English heritage with its strong emphasis on judge-made law no doubt was a contributing factor. With the introduction of the case method and the acceptance of Langdell’s premise that printed books, consisting solely of reported cases, were the ultimate sources of a legal education, the mold that shaped the materials of legal education was fixed. Statutory law and related operations in the broader context of the legislative process . . . were not in the mold, and it was not until the last twenty-five or thirty years [the second quarter of the twentieth century] that law teachers began to seriously question this arrangement.

*Id.* at 142; see also, e.g., Dolan, *supra* note 116, at 63, 71 (calling on law schools to offer legislative process courses).

498. Miers & Page, *supra* note 21, at 23 n.2 (“Professor R. Dickerson has been one of the most significant advocates of the need for legal education to include explicit and direct teaching of legislation.”); Dickerson, *supra* note 115; see also F. REED DICKERSON, LEGISLATIVE DRAFTING (1955) (published in 17 editions between 1954 and 1977); CHARLES B. NUTTING, SHELDON D. ELLIOTT & REED DICKERSON, LEGISLATION, CASES AND MATERIALS (4th ed. 1969) (among the earliest of the published Legislation textbooks); J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9, 12–15 (2017) (summarizing the significant contributions of Professor Dickerson to the field of Legislation and Legislative Drafting).

lawyers to focus more attention on both legislation and improving legislative drafting.<sup>499</sup> By 1967, one scholar estimated that just over half of the ABA-accredited law schools at that time offered courses in legislation.<sup>500</sup> But during the two decades between 1960 and 1980, the consensus among scholars is that law schools essentially disregarded legislation as a stand-alone law school course.<sup>501</sup>

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499. See, e.g., Entrikin & Neumann Jr., *supra* note 498, at 12–15 (citing many of Professor Dickerson’s scholarly publications as well as his longtime service as a member of the ABA Standing Committee on Legislative Drafting). See generally, e.g., Reed Dickerson, *Professionalizing Legislative Drafting: A Realistic Goal?*, 60 A.B.A. J. 562 (1974).

500. Dolan, *supra* note 116, at 74 (reporting that in January 1967, of the 115 ABA-approved law schools, sixty-six (somewhat more than half) offered legislation courses); see *id.* at 71 (“The primary instrument of ordered social change is legislation. But our law schools have, in general, maintained an orientation that the primary body of the law is the common law, and the primary instrument of change is the evolution of common law decisions.”).

In 1966, an English scholar pointed out the “grave dangers” of using judicial decisions as the primary source of teaching material in the legal academy:

[L]itigation is a pathological phenomenon in the body politic. The reported cases are the cases of the most serious diseases, and the leading cases are often the worst, and least typical of all . . . [P]art of the case against [the dichotomy of the English legal profession] is . . . that the barristers from whom the judges are recruited get through their professional lives a picture of society in a distorting mirror . . . Is legal education based on case law not like a medical education which would plunge the student into morbid anatomy and pathology without having taught him the anatomy and physiology of the healthy body? More than that, is the concentration on decided, and especially on reported, cases not like a clinical education which would enable the doctor to diagnose and to treat some complicated brain tumor without ever telling him how to help a patient suffering from a simple stomach upset?

O. Kahn-Freund, *Reflections on Legal Education*, 29 MOD. L. REV. 121, 127 (1966); see also *id.* at 136 (noting that by then, even in England, statute law was “increasingly supplanting case law,” and courts were spending much more time interpreting statutes than developing common law; “Yet in the legal literature our students use, . . . statute law developments are not always given their proper place especially in the treatment of the sources of law.”).

501. Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 3 n.8 (1993) (citing Robert J. Araujo, *Suggestions for a Foundation Course in Legislation*, 15 SETON HALL LEGIS. J. 17, 18 n.5 (1991)).

In 1975, the Council on Legal Education for Professional Responsibility sponsored a comprehensive study of elective courses offered in legal education. That study confirmed the relatively low number of credit hours generated by law schools in course electives in legislation and legislative process. See DONALD W. JACKSON & E. GORDON GEE, *BREAD AND BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION* 43–44 (1975) (providing data concerning “courses which examine the

In the mid-1970s, the ABA Special Committee for the Study of Legal Education commissioned a study by the American Bar Foundation to determine the scope of curricular offerings related to statutory drafting.<sup>502</sup> At about the same time, the first comprehensive study of law school curricula was published in 1975 by the Council on Legal Education for Professional Responsibility, Inc.<sup>503</sup> A follow-up study of law school curricula was issued by the American Bar Association in 1987.<sup>504</sup> The latter two reports both confirm that Legislation, Administrative Law, and similar courses were underrepresented in law school curricula during the last quarter of the twenty-first century.<sup>505</sup>

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materials and skills necessary to the proper understanding and use of legislation as well as courses with review the current problems within the Legislative Branch and its relationship with Executive and Judiciary," including "Law of Legislative Government, Legislation and the Legislative Process, and Statutory Interpretation"). The 1975 study reflected a sizeable difference between the number of credit hours offered in elective legislative courses compared to the number of credit hours actually generated by student enrollments in those elective courses. *See id.* at 44 (noting that with one exception, neither law schools nor law students devoted more than five percent of their elective "resources" to legislative courses); *see also id.* at app. 29 (listing elective course offerings in legislation and legislative process).

502. BERNARD LAMMERS, LEGISLATIVE PROCESS AND DRAFTING IN U.S. LAW SCHOOLS (1977). *See generally* Reed Dickerson, *Legislative Process and Drafting in U.S. Law Schools: A Close Look at the Lammers Report*, 31 J. LEG. EDUC. 30, 36 (1981) (critiquing the 1977 American Bar Foundation Report).

503. E. GORDON GEE & DONALD W. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA (1975); *see also* JACKSON & GEE, *supra* note 501 (supplementing the first-cited report by focusing on law school elective courses).

504. WILLIAM B. POWERS, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA (1987). The survey covered 175 ABA-accredited law schools. *Id.* at 75–76. The Powers study listed a wide variety of course titles classified under "Legislation and Legislative Process," many of which were specialized courses in drafting or subject-matter specific topics such as "Employment Legislation," "Mental Health Law," or "Drafting of Legal Instruments." *Id.* at 142. Of the law schools that did offer such courses, most offered just one. *See id.* at 30 (noting that the average number of courses offered under the Legislation and Legislative Process classification was 1.03 in 1984–1985 and .80 in 1974–1975). Among all courses offered, those classified as Legislation and Legislative Process courses ranked twenty-nine out of thirty-three classifications with respect to the total number offered in 1984–1985, and twenty-eight out of thirty-three in 1974–1975. Of the total law schools responding, 9.7 percent listed Administrative Law and Process as a required course, while only 2.3 percent listed Legislative and Administrative Process as a required course. *Id.* at 14 (listing courses required by fewer than 25 percent of responding law schools). None listed Legislation alone as a free-standing requirement. *See id.*

505. In 1974, Professors Boyer and Cramton acknowledged the efforts some legal educators had undertaken to develop skills beyond the "ability to critically

*D. Late Twentieth Century Curriculum Developments*

By the mid-1980s, Professor Dickerson's advocacy efforts were beginning to make a difference by nudging the legal academy to make changes to the traditional law school curriculum.<sup>506</sup> But with respect to the proportion of law schools offering courses in Legislation, not much had changed since 1967.<sup>507</sup> In 1981, somewhat more than half of the 174 "approved" law schools reportedly offered some kind of elective course in Legislation.<sup>508</sup> Typically courses covered the legislative process, statutory interpretation, and legislative drafting.<sup>509</sup>

Other than the American Bar Foundation study pertaining to legislative drafting and similar courses, no comprehensive study has been undertaken of legislative course offerings by ABA-accredited law schools. As discussed further below, several law schools have recently revamped their required curricula to include a first-year course in Legislation and Regulation.<sup>510</sup>

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analyze . . . cases." Boyer & Cramton, *supra* note 466, at 227. Specifically, they observed that "[c]oncern for an understanding of legislative and administrative processes in earlier years has expanded to a broader interest in the totality of skills required for the many professional roles to be assumed by law graduates." *Id.*

506. See Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1068 (1986) (noting that because of statutes' increasingly central role in American law, more law school courses dealing with Legislation and Administrative Law were offered in 1986 than fifty years earlier).

507. See *supra* note 500 and accompanying text.

508. Bruce Comly French, *Teaching about Legislation and the Legislative Process*, 31 J. LEG. EDUC. 604, 607-08 (1981) (reporting results of an unscientific survey of about 100 law schools; finding that "a large number of law schools offered no [legislation] courses"); Grad, *supra* note 14, at 3 (estimating that of the 174 law schools approved by either AALS or the ABA, roughly forty percent did not offer any sort of legislation course); see POWERS, *supra* note 504, at 44 (1987) (reporting that the average number of credit hours offered by law schools in elective courses in legislation and legislative process averaged 2.48 in 1984-1986, up from an average of 2.14 in 1974-1975); POWERS, *supra*, at 142 (listing elective courses in legislation and legislative process).

A number of scholars had published articles during the early 1980s encouraging law schools to devote more curricular focus on legislation as a separate topic of study. *E.g.*, Dickerson, *supra* note 502, at 36 (reviewing the 1977 American Bar Foundation report and decrying its results showing "the serious imbalance that persists between case law and statute law" in American law schools); Posner (1983), *supra* note 313, at 802-05 (calling for upper-level legislative courses that address legislative process, empirical and political science research on the legislative process, legislative history research, and statutory interpretation).

509. Grad, *supra* note 14, at 6-8; Williams, *supra* note 406, at 820-28 (summarizing and explaining the value of typical course content).

510. See *infra* note 514 and accompanying text.

But little is known about how many law schools now require such a course in the first year. Even less is known about the scope and depth of upper-level required or elective course offerings in Legislation and related areas such as legislative drafting.

The American Bar Association Section of Legal Education and Admissions to the Bar published comprehensive reports based on surveys of law school curricula conducted in 2002<sup>511</sup> and again in 2010.<sup>512</sup> But those reports revealed little about curriculum changes related to Legislation courses. For example, the most recent report's executive summary highlighted the significant increase in the number of professional skills courses offered, including transactional drafting, as compared to the 2002 survey results.<sup>513</sup> But the report made only passing mention of the substantial curriculum innovations that Harvard Law School and several others had undertaken during the previous decade to add required courses in Legislation and Regulation for first-year students.<sup>514</sup>

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511. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 1992–2002 (2004) [hereinafter ABA 2002 CURRICULUM SURVEY], [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/1992\\_2002\\_survey\\_of\\_law\\_school\\_curricula.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/1992_2002_survey_of_law_school_curricula.pdf) [https://perma.cc/2Y58-7H8W]. The 2002 report included survey data provided by law schools about curriculum changes undertaken since 1992. *See generally id.*

512. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010 (Catherine L. Carpenter ed., 2012) [hereinafter ABA 2010 CURRICULUM SURVEY], [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2012\\_survey\\_of\\_law\\_school\\_curricula\\_2002\\_2010\\_executive\\_summary.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf) [https://perma.cc/5JUD-YZW6].

513. *Id.* at 16.

514. *Id.* at 15 (summarizing changes to first-year curricula, noting that “the first-year lineup of core courses has remained constant since 1975,” although some law schools “reconfigured unit allocation and timing of core courses” and offered additional courses and electives for first-year law students); *id.* at 102 (“Doctrinal courses most likely added [in restructuring first-year courses] were Legislation or Statutory Regulation.”). Of 162 responding law schools, twenty-eight reported significant increases in upper-division course offerings in “Administrative Law/Legislation/Government Law” in 2010 as compared to course offerings in 2002. *See id.* at 71, 74. This figure reflects a notable upswing compared to the number of law schools reporting significant increases in course offerings in the same subject-matter areas over the previous decade. *See* ABA 2002 CURRICULUM SURVEY, *supra* note 511, at 33. Of 152 responding law schools in 2002, eleven reported significant increases in upper-division course offerings in “Administrative Law/Legislation/Government Law” as compared to course offerings in 1992. *Id.*



Thus, the limited published data reflects that most of today's American law students continue to study judicial opinions in casebooks as if they were still the supreme law of the land.<sup>515</sup> The reasons have nothing to do with reality and everything to do with perpetuating the common law myth that still primarily relies on an outdated teaching method.<sup>516</sup> In the meantime, most law schools do not require even a single foundational course on legislation and statutory analysis, let alone legislative process or administrative law. Yet the legal issues of today's clients are largely based on statutes and administrative regulations. Those problems cannot be effectively resolved by lawyers formally trained almost exclusively to read and analyze judge-made law in casebooks edited and published by the legal academy.

Our American system of legal education remains deeply rooted in the doctrine of English treatise-writers who treated English common law as gospel and denigrated legislation as a source of law.<sup>517</sup> Formal postgraduate legal education in the

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515. See Boyer & Cramton, *supra* note 466, at 222 ("The teaching method and first-year curriculum used by most law schools today antedate the [twentieth] century.").

516. See Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 610 (2007) ("[W]e legal educators are still doing the same basic thing we were doing [130] years ago. Many law professors are conscientious and devoted teachers, . . . but their efforts are constrained and hobbled by an educational model that treats the entire twentieth century as little more than a passing annoyance.").

517. Professor Frank Grad placed the blame squarely on the shoulders of Harvard's Dean Langdell and the Socratic method. Grad, *supra* note 14, at 2.

There was no training in any aspect of legislation for many years following Christopher Columbus Langdell's major contribution to legal education. The whole Langdellian apparatus of case law study, with its insistence on case-by-case development and synthesis of the common law, its reliance on the Socratic Method, and its abhorrence of principles of law that could not be drawn from reported cases, began as a monumental advance in legal education, but also served as a massive obstacle to the teaching of legislation well into the 20th century. Langdell's contribution to legal education choked the development of legislation as a subject for serious academic concern.

*Id.* (footnotes omitted). Grad posited that Langdell's method reflected the general perception of the time that statutes were merely "intrusions into the perfect and seamless web of the common law." *Id.* In fact, Langdell and others "actively sought to prevent legislation from being taught in American law schools," an effort that in part reflected the lack of esteem the public then held for elected representatives, especially state legislators. *Id.*; see also CHASE, *supra* note 488, at 28 ("Langdell did consciously exclude the study of legislation by means of [the case]

United States has never properly balanced its focus on primary sources of American law—which consist almost entirely of written state and federal constitutions; state and federal statutes; court rules of procedure; administrative rules and regulations; and increasingly, international treaties, conventions, and agreements. The truth is that the United States of America is a nation governed by enacted law—the product of the People as sovereign in a democratic republic.<sup>518</sup> Judicial opinions are an important component of legal training only because they demonstrate how enacted law is *interpreted, construed, and applied* in litigation—not because judicial opinions are any longer the primary source of American law.<sup>519</sup>

### E. Legal Education for the Twenty-First Century

Encouragingly, a few law schools over the last two decades<sup>520</sup> have added required first-year courses on Legislation and Administrative Law (often known as “LegReg”).<sup>521</sup> Professor Peter

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method, and it is clear from his later thought that he would not have considered administrative law a worthy subject for ‘law’ study.”).

518. See *supra* note 161 (referring to the People as sovereign under the Constitution).

519. See Maxeiner, *supra* note 462, at 527 (“In the course of the nineteenth and twentieth centuries, statutes displaced common law as the principal source of American law.”). The proliferation of statutes was acknowledged by scholars beginning as early as a century ago. *E.g.*, Bruncken, *supra* note 331, at 518. “At the present day, statutory rules have outgrown those of the common law, if not in fundamental importance, yet in the frequency with which the courts are called upon to apply them.” *Id.*

520. In the early 1940s, Wisconsin School of Law was perhaps the first to offer an “orientation” course to first-semester law students dealing with Legislation and Administrative Law. See Hurst, *supra* note 19, at 291–94 (describing the content and coverage of a first-semester course called “Law in Society,” which used excerpts from secondary materials as well as appellate cases, statutes, legislative history, and administrative source materials relevant to a single industrial accident problem); *id.* at 294 (calling on law schools to place “more explicit stress on . . . aspects of the lawman’s relation to the shaping and application of legislative policy”).

521. See, *e.g.*, Brudney, *supra* note 103, at 26 (“A growing number of law schools—public and private, elite and non-elite—have added Leg-Reg or Leg as a first-year requirement.”); John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45, 47–51 (2015) (describing the process leading to curricular reforms that Harvard Law School’s faculty adopted in 2006).

According to Brudney’s informal 2014 survey, at least twenty-seven law schools then required such a course, and a handful more required a first- or second-year course focused on legislation. See Brudney, *supra* note 103, at 4–5 & nn.7–8 (listing

Strauss, a highly respected legislative scholar, has lauded this development:

The past quarter-century . . . has seen a steady movement toward courses on legislation and regulation—today’s predominant sources of law—as required elements of first-year curricula. The phenomenon is a long-overdue reaction to the continued dominance of common-law, judicially oriented doctrinal analysis courses in the first year, conveying to entering students a strikingly inaccurate sense of the current world of law.<sup>522</sup>

But real innovation in the curriculum of American law schools may have to wait until key institutions that control access to the legal profession acknowledge that lawyers who lack a working understanding of both legislative and administrative law are simply not competent to practice law in the modern age.<sup>523</sup> State supreme courts, the National Conference of State Bar Examiners, and the American Bar Association’s Council of Legal Education and Admissions to the Bar must all recognize the need for change.<sup>524</sup> Significant change in law school curricu-

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law schools); see also Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation & Administrative Law in the Law School Curriculum*, 65 J. LEG. EDUC. 121, 122 & n.1, 144–45 (2015) (surveying ninety-nine “highly ranked” law schools; of the fifty-nine respondents, only fifteen required a first-year course in legislation or administrative law and two others required an upper-level course); Leib, *supra* note 18, at 189 & n.9 (acknowledging several law schools’ newly required courses in Legislative and Administrative Law, even predating Harvard’s curriculum innovations in 2006 to add a required first-year LegReg course); Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st-Century Issues*, N.Y. TIMES (Oct. 7, 2006) (referring to the change in Harvard’s required curriculum as “the broadest overhaul in more than 100 years”), <https://www.nytimes.com/2006/10/07/education/07harvard.html> [<https://nyti.ms/2VqvYXD>].

522. Peter L. Strauss, *Christopher Columbus Langdell and the Public Law Curriculum*, 66 J. LEGAL EDUC. 157, 168 (2016).

523. Ultimately, law schools’ continued existence heavily depends on ABA accreditation standards, which largely dictate the contents of law school curricula. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019 ch. 3 (2018) (Program of Legal Education), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf) [<https://perma.cc/74EA-DKXV>]. In turn, law schools’ curricular decisions are largely influenced by the subject matter tested on state bar examinations and the Multi-State Bar Examination, the latter annually updated by the National Conference of State Bar Examiners.

524. See GEE & JACKSON, *supra* note 503, at 33–34 (noting that the subject matter tested on state bar examinations “may exert a good deal of influence both on the courses offered by a law school and the courses which students will select during

la will not happen until the regulatory institutions recognize that traditional legal education fails to reflect the realities of modern law practice.<sup>525</sup> But regrettably, inertia is as omnipresent in the domain of legal education as it is in the evolution of common law.<sup>526</sup>

## V. CONCLUSION

From the standpoint of the needs of its students, the American law schools must give more attention to statutes . . . Statute law is subject to criticism and should be criticized, but it should not be ignored by the law school. Competent criticism of and emphasis on statutes by law school teachers would aid materially in improving the body of statute law. At the same time, it would send forth more effectively trained lawyers; and set in motion forces for statutory improvement in future generations.

Walter F. Dodd, *Statute Law and the Law School*, 1 N.C.L. REV. 1, 6-7 (1922).

One foresighted scholar once had this to say about needed developments in legal education to accommodate the modern age of statutes:

The demands of tomorrow will place on lawyers the burden of directing the orderly development of legislation, the correlation of administration with that policy, and the sympathetic review of that policy by the courts. If the lawyer of

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their three years of law school study"); Boyer & Cramton, *supra* note 466, at 288 ("[T]he law curriculum and the bar examination are based at least in part on implicit assumptions about the kind of work that many young lawyers will be doing in practice—assumptions which may or may not correspond to the facts.").

525. *But cf.* Edwards, *supra* note 22, at 78.

I wholly reject the argument that [legal] institutions are gripped by larger social forces[] that preclude their free action . . . . A single law school can decide to reemphasize legal texts, even if other law schools do not . . . . I am not arguing against some kind of coordinated action by the profession. But individuals and institutions should not wait for such action. They have no excuse for waiting, and the profession cannot afford their lack of leadership.

*Id.*

526. *See, e.g.,* Miers & Page, *supra* note 21, at 25 (surmising that "a degree of inertia in legal education" is in part responsible for the failure to teach using legislative materials); *see also* LAPIANA, *supra* note 489, at 170 ("Whatever the shortcomings of the legal education Langdell and his colleagues created, present-day legal education is still shaped by the actions and beliefs of those teachers and scholars of the preceding century . . . .").

tomorrow adequately fulfills this responsibility, he must be trained in a system of jurisprudence that excludes none of its potential materials. He must be able to synthesize statutes, administrative rulings, and judicial decisions into a consistent jurisprudence.<sup>527</sup>

This scholarly call to the American legal academy was published more than eight decades ago.<sup>528</sup> In 1949, the call for curricular reform was repeated, referring to the lack of Legislation courses in the law school curriculum as a “neglected opportunity.”<sup>529</sup> Nearly fifty years ago, the call was repeated again.<sup>530</sup>

527. Horack, *supra* note 19, at 56.

528. Two decades earlier, Professor Eugene Gilmore wrote that the time had already come for reforming legal education, in part by refocusing the curriculum on statutes and legislative lawmaking:

[T]here should be a close connection with and a participation in the activities of those agencies concerned with legislative law making. The imperative element in the law has been too long ignored by lawyers, judges, and law teachers, or, if not ignored, it has been treated with indifference. The time has come when in our law teaching and in the law curriculum serious consideration must be given to the great and constantly increasing body of statutory law. That our common law principles and traditions are to a rapidly increasing extent undergoing changes by direct legislation is undeniable. However much we may deplore the great mass of ill-digested statute law which comes annually from our legislative bodies, the process will continue. We can either stand by and watch it, criticize or ignore the results after they are reached, or we can join actively with those agencies seeking to improve such legislation and thus make a helpful constructive contribution.

Eugene A. Gilmore, *Some Criticisms of Legal Education*, 7 A.B.A. J. 227, 230 (1921).

529. Harry W. Jones, *A Case Study in Neglected Opportunity: Law Schools and the Legislative Development of the Law*, 2 J. LEGAL EDUC. 137, 139 (1949).

However sympathetically viewed, the record of American legal education—its teaching methods and its faculty scholarship—in the area of legislation is a record of neglected opportunity. The characteristic university law school case method is a realistic and effective procedure in so far as case-law knowledge and skills are concerned, but the very success of the case method as a means of communicating to students the realities of the judicial process has caused us to forget or underplay legislative processes and methods of at least equal importance. The best case lawyer is incompletely equipped for professional service in a dominantly legislative era. What should we be doing to give our students a better balanced picture?

*Id.*; see also Julius Cohen, *On the Teaching of “Legislation,”* 41 COLUM. L. REV. 1301, 1301–02 (1947) (“The revolt against the traditional in the field of law school training has assumed impressive proportions . . . . One of the many examples of the lag between training and skill . . . merits singling out for special mention—the training lag with respect to the skills needed by the lawyer functioning in the legislative arena.”).

And again in 1981<sup>531</sup> and 1984, when one scholar referred to the situation as “a professional disgrace.”<sup>532</sup> And yet again in 2008,<sup>533</sup> 2015,<sup>534</sup> and 2016.<sup>535</sup> But even today, relatively few American law schools require students to take courses in Legis-

530. Dolan, *supra* note 116, at 63.

A course in the legislative process should be, and can easily be, an integral part of the law student’s education . . . .

It would be helpful for law schools to have a required course in Legislative Process in the first year, and an elective course, devoted exclusively to problem solving, in the second or third year.

*Id.* Dolan went on to explain the need for change in legal education:

Legislation is the primary instrument of ordered social change under the United States constitutional system, at the federal, state and local level. Present day law school teaching generally places much greater emphasis on judge made law than on law made by legislative bodies . . . . Barely 10% of our law schools have required courses in legislation. Often, law school legislation courses give insufficient knowledge or insight into the legislative process, but rather confine themselves to structure, judicial review of the legislative process, rules of statutory construction and drafting of statutes.

*Id.* The rest of Dolan’s article quoted scholars who had been calling for similar changes in American law schools as early as 1908, when Roscoe Pound openly acknowledged “the indifference, if not contempt, with which [legislative] output is regarded by courts and lawyers.” *Id.* at 64–65 (quoting Pound, *supra* note 19, at 383).

531. Dickerson, *supra* note 502, at 36 (“Instead of looking at statutes and administrative regulations mostly through the eyes of the courts, we need a heavy exposure to problem materials that can be handled only by explicating the applicable instruments.”).

532. Grad, *supra* note 14, at 1–2 (characterizing American law schools’ failure to train students in legislation as “a professional disgrace”). Professor Grad’s 1984 article reviewed the “miscellany” of legislation-related courses then offered at American law schools. *Id.* at 4–13; *see also* Posner (1983), *supra* note 313, at 800, 802–05 (calling for “better instruction in legislation in the law schools” and outlining the topics he would include in an upper-level legislation course); Williams, *supra* note 406, at 804 (“During the era of ever-increasing reliance on statutes, often under circumstances in which the common law proved inadequate, . . . legal education [has] failed to reflect the evolving realities of the modern legal system. This remains true today [1984].”).

533. Leib, *supra* note 18, at 167–69 (reporting on Harvard Law School’s addition of a first-year required Legislation and Regulation course as potentially having “dramatic ramifications for legal education more broadly” and calling on other law schools to follow the lead).

534. *See* Gluck, *supra* note 521, at 162–63 (affirming the “centrality of leg-reg topics in the work of modern lawyers” espoused by advocates of requiring a first-year course, but cautioning that doing so might detract from more specialized upper-level Legislation and Administrative law course offerings in law school curricula).

535. Strauss, *supra* note 522.

lation or Administrative Law. And those that do typically use traditional teaching materials—casebooks that focus on judicial opinions rather than statutes or regulations as primary legal authority.<sup>536</sup>

The “lawyer of tomorrow” in 1937 was the lawyer of yesterday, today, and the future.<sup>537</sup> It was true then just as it is true now: The common law myth perpetuated by many in the American judiciary and legal academy fails to serve the legal profession, the judiciary, or the clients and citizens that repre-

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536. *Id.* at 157, 158, 185 (noting the “recent growth of required courses on legislation and regulation” but critiquing teaching materials that rely primarily on judicial decisions consistent with the Langdellian model); see WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA R. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES v* (2014) (noting that “published materials [for LegReg and Legislation courses] are still dominated by the agenda and pedagogy of the 1950s”; offering a “departure from tradition” by offering statutes and regulations as well as judicial decisions as primary source materials); see also, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (5th ed. 2014) (using cases as primary materials, but prefacing some opinions with key statutory text); JOHN F. MANNING, *LEGISLATION AND REGULATION: CASES AND MATERIALS* (3d ed. 2017) (using appellate decisions as primary source materials).

537. Dolan, *supra* note 116, at 72 (“The government . . . of tomorrow will be determined by the students of today; whether that government will be democratic or tyrannical, representative or not will be determined . . . by the readiness, the willingness and the ability of the lawmakers of tomorrow to cope with the problems of tomorrow.”); see also Michael J. Graetz & Charles H. Whitebread II, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445, 454 (1981) (“A university law school is among the few institutions for anticipating future social needs and for relating the role of law to furthering those needs. It must produce lawyers for tomorrow.”). Professors Graetz and Whitebread also encouraged law schools to expand the scholarly community beyond the traditional insularity of legal theory:

The mission of creating and nurturing a community of scholars has met with varied success . . . , but all law schools have failed in one crucial respect. The promotion of a community of scholars among the faculty has to date everywhere excluded students, alumni, members of the practicing bar, judges and legislators. History shows only too well that scholarship simply cannot flourish in an atmosphere that does not support the endeavor. The failure of the modern law faculty to enter into a dialogue with these other constituencies as a means of convincing them of the worthiness of the enterprise is fast producing a crisis of misunderstanding—a misunderstanding of both the utility of scholarship to society as a whole and the value of scholarship in producing first-rate law practitioners in a rapidly changing legal environment.

*Id.* at 449–50; see *supra* note 22 and accompanying text.

sentatives of both institutions are presumably trained and compensated to serve.<sup>538</sup>

[I]t seems likely that the transition from customary to statutory law has made tremendous strides and is still actively going forward. Taken by itself, statutory law, that is law consciously and purposely adopted to meet social needs as they arrive, is certainly a higher stage of legal development than customary law, even in the highly refined form represented by our system of binding precedent. Not a few of us may look forward to a time when with us, as with most other Western nations, practically all law shall be statutory.<sup>539</sup>

The train has long since left the station, and there is no turning back. American legal education, long entrenched in the great common law myth, needs to get on board.<sup>540</sup> The time is

538. Dolan, *supra* note 116, at 71.

Present day and foreseeable future needs of society could be more adequately met if our law schools improved the nature and quality of their training. One of the ways in which improvement could be made would be to give more and better training in the nature of the legislative process, and its operation. Lawyers play an important voluntary and involuntary role in change in our society, as counsellors to clients, as legislators, as judges, as lobbyists and as draftsmen.

Too often the lawyer is ill-prepared for this role, because of the nature and the quality of the education he has had. The primacy of the case method of teaching in our law schools, granted its advantages, has had deleterious side effects. Too seldom is a law student trained to analyze a problem in terms of the relative efficacy of various solutions—negotiation, litigation or resort to the legislative process. And more and more often, the correct remedy is resort to the legislative process.

*Id.*

539. Bruncken, *supra* note 331, at 522. In 1997, Beatson analogized common law reasoning in disregard of statutes to viewing the world through a flawed kaleidoscope: “To ignore the contribution of the statute book in the search for principle is to use a kaleidoscope with three-quarters of the pieces of glass blacked out.” Beatson, *supra* note 30, at 314.

540. See, e.g., Gerald P. López, *Transform—Don’t Just Tinker with—Legal Education*, 23 CLINICAL L. REV. 471, 558 (2017).

For those of us who aspire to topple traditional legal education, to challenge and replace its assumptions and methods and aspirations, we must mobilize around a fierce unwillingness to accept familiar status-quo-plus changes as transformative and an equally ferocious effort to move beyond the limits of the deep stock story to articulate and insist upon the legal education our students (and so many others) deserve and require . . . The transformation that should have happened this past decade—and in earlier periods still—must happen now.

*Id.*



long overdue<sup>541</sup> for the legal academy to wake up from the deep slumber of Rip Van Winkle,<sup>542</sup> who languished for decades in a fictitious state of suspended animation.<sup>543</sup> The legal fiction is over. The time is now.<sup>544</sup>

As for American common law, may it forever rest in peace.<sup>545</sup>

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541. See Brudney, *supra* note 103, at 5 (“From a pragmatic standpoint, lawyers since the New Deal have devoted ever-increasing time and energy to understanding, applying, interpreting, litigating, and counseling about statutes and the regulations or agency judgments that flow from those statutes. Legal education must catch up.”); Cardozo, *supra* note 128, at 126 (“The time is ripe for betterment . . . The law has ‘its epochs of ebb and flow.’ One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure.”); see also Miers & Page, *supra* note 21, at 25 (attributing English law schools’ failure to teach using legislative materials in part to “a degree of inertia in legal education”).

542. WASHINGTON IRVING, *RIP VAN WINKLE AND THE LEGEND OF SLEEPY HOLLOW* 63 (1920) (“[A]t length his senses were overpowered, his eyes swam in his head, his head gradually declined, and he fell into a deep sleep.”).

It was some time before [Van Winkle] could be made to comprehend the strange events that had taken place during his torpor. How that there had been a revolutionary war—that the country had thrown off the yoke of old England—and that, instead of being a subject of his Majesty George the Third, he was now a free citizen of the United States. Rip, in fact, was no politician; the changes of states and empires made but little impression on him . . . .

*Id.* at 90. The irony of this storybook passage is telling and needs no further comment. See FARRAN ET AL., *supra* note 379, at 2 (“All modern legal traditions are both mixed and mixing. [E]ach is a hybrid; each continues to evolve over time.”).

543. See Robert Mitchell, *Suspended Animation, Slow Time, and the Poetics of Trance*, 126 PMLA 107, 108–09 (2011) (describing the origin of the term and its metaphorical use in early nineteenth-century literature); *id.* at 111 (describing one lay author’s premise that “only ‘a new language’ could communicate how suspended animation might make it possible to overcome death entirely” (citing WALTER WHITER, *A DISSERTATION ON THE DISORDER OF DEATH; OR, THAT STATE OF THE FRAME UNDER THE SIGNS OF DEATH CALLED SUSPENDED ANIMATION* (London 1819))).

544. See Edwards, *supra* note 22, at 78.

545. See H.R. Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241, 258 (1967) (“Once the common law is codified, it will, of necessity, cease to be the common law, not only (rather obviously) in form, but also in substance.”).