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Articles

LEGAL INDETERMINACY MADE IN AMERICA: U.S. LEGAL METHODS AND THE RULE OF LAW

James R. Maxeiner*

I. INTRODUCTION

Not every legal question has a single right answer. In a nutshell, that is the problem of legal indeterminacy.¹ Legal indeterminacy threatens the rule of law. Professor Michael Dorf observes: “If the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require”²

Legal indeterminacy is a persistent problem of legal systems. There is, as the German legal philosopher Gustav Radbruch explained, an antimony among justice, public policy, and legal determinacy. “Legal certainty demands positivity, yet positive law claims to be valid without

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¹ See generally Richard A. Epstein, *Some Doubts on Constitutional Indeterminacy*, 19 HARV. J.L. & PUB. POL’Y 363 (1995); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 340 (1996). Legal indeterminacy is treated either as a subset of legal uncertainty or is itself held to be a synonym for a larger issue of legal uncertainty. Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 413-14 (1996).

² Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003); accord John Pickering, *A Lecture on the Alleged Uncertainty of the Law*, 12 AM. JURIST & L. MAG. 285, 287 (1834) (noting that “the glorious uncertainty of the law” threatens “a government of laws and not of men”); see also Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 582 (1993); Epstein, *supra* note 1.

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regard to its justice or expediency [i.e., public policy].”³ It seems that there is no way to attain absolute legal determinacy without unacceptable sacrifices in justice and policy interests. The indeterminacy problem is, as Dorf puts it, “built into the nature of the legal enterprise.”⁴

Legal indeterminacy is a perennial issue in American law.⁵ In the first half of the twentieth century American legal realists developed it to challenge formalism.⁶ In the second half, proponents of Critical Legal Studies used it to attack the rule of law itself.⁷ In this century, Professor Frank Upham concluded that notwithstanding American proselytizing for the rule of law, the structure of the United States legal system makes its realization “literally impossible.”⁸

Contemporary American jurisprudential writing on indeterminacy takes the perspective of appellate judges.⁹ It focuses on constitutional and legal theory.¹⁰ It asks: does law bind judges? If not, how can judges justify decisions based on ambiguous legal texts as law application rather than as law creation?¹¹ This aspect of legal indeterminacy has long been

³ GUSTAV RADBRUCH, LEGAL PHILOSOPHY § 9, in 4 THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN, 20TH CENTURY LEGAL PHILOSOPHY SERIES 109 (Kurt Wilk trans., 1950). Radbruch was also Minister of Justice in the tumultuous year 1923.

⁴ Dorf, *supra* note 2, at 883. “[T]he very feature of law that allows it to operate at the wholesale rather than the retail level—its abstraction—limits its ability to guide concrete decisions taken in the law’s name.” *Id.*

⁵ See James E. Herget, *Unearthing the Origins of a Radical Idea: The Case of Legal Indeterminacy*, 39 AM. J. LEGAL HIST. 59 (1995) (discussing nineteenth century origins).

⁶ See John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not To Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 86-92 (1995).

⁷ See generally Kress, *supra* note 1; Solum, *supra* note 1 (two articles summarizing and challenging their “radical indeterminacy” argument).

⁸ FRANK UPHAM, MYTHMAKING IN THE RULE OF LAW ORTHODOXY 17 (2002), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1063&prog=zgp&proj=zdr1>, reprinted in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 75 (Thomas Carothers ed., 2006).

⁹ Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1667 (1991); see, e.g., Anthony D’Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 170 (1990); Dorf, *supra* note 2, at 882, 918-19; Lawson, *supra* note 1, at 417; Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988); cf. Michael Taggart, *Should Canadian Judges Be Legally Required To Give Reasoned Decisions in Civil Cases?*, 33 U. TORONTO L.J. 1, 4 (1983) (noting the presence of “appellate-court-itis” in the United States). The focus on appellate courts is not surprising in view of the background of the writers on this topic: appellate clerkships and doctorates in philosophy are more common than is practice experience.

¹⁰ E.g., Dorf, *supra* note 2, at 889-909; Epstein, *supra* note 1, *passim*.

¹¹ Dorf, *supra* note 2, at 883 (quoting Jules L. Coleman and Brian Leiter, “by legal indeterminacy I mean simply that in more than a trivial number of cases that come before the courts, ‘[l]egal norms may not sufficiently warrant any outcome’”).

a controversial political issue in America.¹² Judicial decisions are seen as legitimate if they accurately apply law, but as illegitimate if they reflect non-legal factors.¹³

Professor Dorf says contemporary theory has reached a “dead end.”¹⁴ Professors Jules Coleman and Brian Leiter observe: “Only ordinary citizens, some jurists, and first-year law students have a working conception of law as determinate.”¹⁵ The American credo has become, says Professor Pierre Schlag: “Law is principally what courts say it is.”¹⁶ Because some level of indeterminacy is inevitable, maybe nothing can be done to reduce indeterminacy.

Resignation has set in. According to Professor Schlag and his colleagues, “a great many leading American legal thinkers have now mostly abandoned ‘doing law.’”¹⁷ Unable to overcome a problem, they want to move on to things that they can solve. Professor Dorf says that there are more important things to worry about than justifying judicial lawmaking as law application.¹⁸ Cope with it, America.¹⁹ “[W]e are all realists now.”²⁰ But ordinary citizens have not gotten over it; determinacy is an important element of the rule of law.

¹² Compare 2 THE WORKS OF JAMES WILSON 502 (Robert Green McCloskey ed., 1967) (1804) (“[E]very prudent and cautious judge . . . will remember, that his duty and his business is, not to make the law, but to interpret and apply it.”), with The White House, *President Announces Judge John Roberts as Supreme Court Nominee* (July 19, 2005), <http://www.whitehouse.gov/news/releases/2005/07/20050719-7.html> (“He will strictly apply the Constitution and laws, not legislate from the bench.”).

¹³ See Kress, *supra* note 1, at 285; cf. Dorf, *supra* note 2, at 880.

¹⁴ Dorf, *supra* note 2, at 876-77.

¹⁵ Coleman & Leiter, *supra* note 2, at 579 n.54.; cf. Gordon A. Christenson, *Uncertainty in Law and Its Negation: Reflections*, 54 U. CIN. L. REV. 347, 349 (1985); Anthony D’Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 7 (1983).

¹⁶ Pierre Schlag, *A Brief Survey of Deconstruction*, 27 CARDOZO L. REV. 741, 741 (2005).

¹⁷ PAUL E. CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, *AGAINST THE LAW* 1 (1996).

¹⁸ Dorf, *supra* note 2, at 979.

¹⁹ See generally BENJAMIN GREGG, *COPING IN POLITICS WITH INDETERMINATE NORMS* (2003) (discussing coping with indeterminate norms through proceduralism and through pragmatism). On the back cover of the paperback edition, Judge Richard A. Posner is quoted as saying: “Gregg demonstrates that efforts to deny or overcome normative indeterminacy fail.” *Id.*

²⁰ Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 247 (2000) (“The slogan ‘we are all realists now’ is so well-accepted in North America (in particular in the United States) that an unstated working assumption of most legal academics is that judicial explanations of a judgment tell us little if anything about why a case was decided as it was.”); see also Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 399-400 (1999) (noting much the same for the public at large).

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The thesis of this Article is that the indeterminacy that plagues American law is “Made in America.” It is not inherent in law. Rather, it is a product of specific choices of legal methods and of legal structures made in the American legal system.

American legal methods and structures have not mastered the transition from the world of the eighteenth century to that of the twenty-first. Some legal methods are stuck in the nineteenth century. Others have put nineteenth-century methods behind them, only to adopt methods even less satisfactory from the standpoint of legal determinacy.

The contemporary discussion of legal theory accepts legal indeterminacy as an inalterable fact.²¹ It has missed an opportunity to inform practice of alternatives that would enhance determinacy. Practice—unaware of alternatives—is resigned to the present unsatisfactory state.

The theoretical discussion pays practice no mind. The focus on whether legal rules control lawmaking by appellate judges addresses an important question, but is distant from how legal indeterminacy impacts practice.²² That much could be done to enhance determinacy becomes apparent when one takes into account the perspective of those who are subject to the law.

Part II sets out the approach of this Article and explains how the concept of the rule of law requires that rules guide those subject to them. It discusses the relationships among the rule of law, legal methods, and indeterminacy. Parts III, IV, and V survey indeterminacy in methods of lawmaking, law-finding, and law-applying, respectively. Part VI shows how rule conflicts result from deficient coordination among lawmakers. Finally, Part VII recommends looking at the legal methods of other legal systems.

Through its examination of legal indeterminacy and legal methods, this Article seeks to raise awareness of legal methods generally. It discusses the variety of legal methods that are available. Specifically, this Article suggests that the choice of methods has profound effects throughout the legal system.²³ Through breadth of coverage it seeks to

²¹ E.g., Dorf, *supra* note 2, at 877.

²² See *infra* notes 36-44 and accompanying text.

²³ See JAMES MAXEINER, POLICY & METHODS IN GERMAN AND AMERICAN ANTITRUST LAW, A COMPARATIVE STUDY (1986) (providing an example of such work limited to one area of law); James R. Maxeiner, U.S. “Methods Awareness” (*Methodenbewußtsein*) for German Jurists,

show how pervasive self-inflicted indeterminacy is in order to show the need for fundamental change.

To achieve breadth within the compass of one article, compromises are necessary. This Article does not measure levels of indeterminacy or even speculate whether such measurement is possible. It does not undertake to establish that the American legal system is highly indeterminate or even that it is more indeterminate than other legal systems. It does not purport to discuss all sources of legal indeterminacy or even all that are peculiar to the United States. It does implicitly accept that indeterminacy in the American legal system is substantial and is greater than need be. But it does not evaluate whether the costs that indeterminacy imposes are outweighed by countervailing benefits. Finally, this Article accepts certain fundamental assumptions of the rule of law as desirable, as Part II more fully details.

II. THE RULE OF LAW AND LEGAL METHODS

The rule of law promises legal determinacy. In popular use, the term often incorporates ideals of a liberal and democratic state, such as democracy, constitutionalism, human rights, and a free-market economy. As such, it is a contested concept that means different things to different people.²⁴ This Article uses the rule of law in a formal and narrow sense. Used in this manner, the rule of law focuses on principles that direct and limit the making and application of substantive law.²⁵

In a formal sense the rule of law is a law of rules.²⁶ When the rule of law is confined to a formal sense, it is a less contested concept.

FESTSCHRIFT FÜR WOLFGANG FIKENTSCHEK ZUM 70. GEBURTSTAG 114 (Berhard Großfeld et al., eds., 1998).

²⁴ Neil MacCormick, *Der Rechtsstaat und die rule of law*, JURISTENZEITUNG, 1984, at 65-66 [hereinafter MacCormick, *Der Rechtsstaat*]; Randall Peerenboom, *Varieties of Rule of Law, An Introduction and Provisional Conclusion*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1 (Randall Peerenboom ed., 2004) [hereinafter Peerenboom, *Varieties*] (both using exactly the same words, “an essentially contested concept”); see also RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 1 (2001).

²⁵ See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 91-113 (2004) (discussing both the substantive and formal theories of the Rule of Law). The advantages of a formal theory are discussed in Robert S. Summers, *A Formal Theory of Law*, 6 RATIO JURIS 127, 136-38 (1993) [hereinafter Summers, *A Formal Theory of Law*].

²⁶ See, e.g., TAMANAHA, *supra* note 25, at 96; Frederick Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENT 69 (1989) [hereinafter Schauer, *Rules*]; Summers, *A Formal Theory of Law*, *supra* note 25, at 131.

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Specifically, the rule of law in a formal sense requires that laws be:²⁷ validly made and publicly promulgated, of general application, stable, clear in meaning and consistent, and ordinarily prospective.²⁸ In this sense, it imposes requirements on the application of law:²⁹ law application should be impartial, provide parties who are sanctioned an opportunity to be heard, and deliver predictable, consistent decisions in individual cases.³⁰

Rules and the requirements of the formal rule of law help law fulfill an ordering function. They make voluntary compliance with law possible. They mean that law can guide those subject to it. They protect persons subject to law from arbitrary use of the power to make and apply law. When the rule of law is safeguarded, subjects can rely on the law and can foresee application of state power.³¹ As important as these requirements are, they only assure the integrity and the regularity of the application of the legal rules; they do not assure that these rules serve either justice or public policy.³²

A. Causes of Legal Indeterminacy

Causes of legal indeterminacy include: indefinite rules, conflict of rules, lack of rules, and uncertain application of rules.³³ One thinks first of indefinite rules, but conflicting rules also produce indeterminacy. While a lack of rules in today's regulated world is uncommon, rules

²⁷ See, e.g., MacCormick, *Der Rechtsstaat*, *supra* note 24, at 67; Randall Peerenboom, *A Government of Laws: Democracy, Rule of Law and Administrative Law Reform in the PRC*, 12 J. CONTEMP. CHINA 45, 51 (2003).

²⁸ These requirements are found in: LON FULLER, *THE MORALITY OF LAW* ch. 2 (2d ed. 1969) [hereinafter FULLER, *MORALITY*]; D. NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY* 45 (1999); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 317 (2003) (referring to a "minimalist rule of law"); MacCormick, *Der Rechtsstaat*, *supra* note 24, at 68; Peerenboom, *Varieties*, *supra* note 24, at 3 (contrasting a "thick" rule of law with this "thin" one); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693-95 (1999) [hereinafter Summers, *Principles*].

²⁹ FULLER, *MORALITY*, *supra* note 28, at 81-91 (who called this "[c]ongruence").

³⁰ See Summers, *Principles*, *supra* note 28, at 1693-95 (detailing a comprehensive inventory of the requirements of a formal rule of law).

³¹ See Peerenboom, *Varieties*, *supra* note 24, at 3; Summers, *Principles*, *supra* note 28, at 1705 (citing Rudolf von Ihering for the proposition that "having the law in the form of clear and definite rules is, itself, a bulwark against official interference with individual freedom").

³² See Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1314 (2001) (noting that "it is entirely compatible with legal regimes predicated on slavery [or] apartheid").

³³ See ROBERT ALEXY, *A THEORY OF ARGUMENTATION* 1 (Ruth Adler & Neil MacCormick trans., 1989). This list is suggestive; no claim is made that it is either comprehensive or systematic.

often intentionally grant those charged with applying them the authority to make value judgments. In such cases, rules provide only general limits, but no single correct answer.³⁴ Application of a rule may also be uncertain because the authority charged with applying the law may be authorized to decide contrary to the rule, or may improperly apply or fail to apply the rule, either out of corruption or incompetence, or may reach the wrong conclusion because of incorrect fact-finding.

By focusing on whether rules require appellate judges to reach particular correct answers, the American discussion of legal indeterminacy tends to overstate the level of indeterminacy and to overlook opportunities for decreasing it. Perfect precision is not essential for substantial fulfillment of the guidance function of the rule of law. This is apparent when the perspective is that of subjects, rather than of law-appliers.

B. The Perspective of People Subject to Rules

Whether law binds appellate judges is only one aspect of legal indeterminacy. Another aspect is whether and how well law guides people in complying with law.³⁵ The guidance function is not unknown in the United States, but it is as likely to be observed by legal philosophers from foreign countries as by natives. Hans Kelsen commented that “individuals who have to *obey* the law by behaving in a way that avoids sanctions, must understand the legal norms and therefore must ascertain their meaning.”³⁶ H.L.A. Hart wrote of the need for “certain rules” that people can apply to themselves.³⁷

Such self-application of law is essential to a well-functioning state based on the rule of law. If rules fail to guide citizens, citizens cannot apply law to themselves. The social order breaks down.³⁸ For every

³⁴ See HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY §§ 34-35, 78-79 (Bonnie Litschewski Paulson and Stanley Paulson trans., 1992). This is a translation of the first edition of the PURE THEORY OF LAW (REINE RECHTSLEHRE, 1934; the second edition was published in 1960).

³⁵ Cf. Tushnet, *supra* note 1, at 349.

³⁶ HANS KELSEN, PURE THEORY OF LAW § 45, at 348 (Max Knight, transl., 2d ed. 1967).

³⁷ H.L.A. HART, THE CONCEPT OF LAW 130 (2d ed. 1994) [hereinafter HART, CONCEPT]; see ROBERT S. SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY 379 (2006) (using the term “self-application”).

³⁸ See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). “Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.” *Id.*

instance of judicial application of legal rules, there are millions of instances of individuals applying rules to themselves. Most people pass through their entire lives without ever being party to a judicial decision of any kind, but no one of age lives even a single day without applying a rule to himself or herself.

Today American jurists speak of legal indeterminacy; in the nineteenth century they spoke of legal uncertainty.³⁹ The change is not coincidental. Today they are concerned with whether ambiguous legal texts determine decisions of appellate judges; in the nineteenth century Americans worried whether legal texts “made plain to the apprehension of the people what conduct on their part is forbidden.”⁴⁰ The perspective has shifted from that of ordinary people seeking to abide by the law, to that of appellate judges making decisions.

This Article uses the older perspective of those subject to rules to avoid conflating the legal system with appellate decision-making.⁴¹ Ordinary people expect to abide by the law without ever being the subject of judicial decisions. They have practical concerns; they want to know just enough law to be able to abide by it. They want to know what to expect from the legal system as much as whether at the end of a long process, a more or less determinate legal rule may or may not constrain this or that appellate judge.⁴² Law-abiding people apply legal rules to themselves. Law directs them in their conduct; they need not be compelled by others to follow the rules.⁴³ Everyday they engage in

³⁹ Herget, *supra* note 5. One also spoke of the “glorious uncertainty” of the law. See Pickering, *supra* note 2, at 287.

⁴⁰ Thomas M. Cooley, *The Uncertainty of the Law*, 22 AM. L. REV. 347, 355 (1888). Cooley was a noted judge, scholar, president of the American Bar Association from 1893 to 1894, and first Chairman of the Interstate Commerce Commission. JAMES GRAFTON ROGERS, AMERICAN BAR LEADERS, BIOGRAPHIES OF THE PRESIDENTS OF THE AMERICAN BAR ASSOCIATION 1878-1928, at 77 (1932).

⁴¹ Cf. Dorf *supra* note 2, at 881 (stating that “much of the contemporary debate focuses on how some single decisionmaker goes about the solitary task of resolving ambiguity”).

⁴² See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 3-4 (1994); Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993).

⁴³ This Article is not concerned with why some people are law-abiding or with when people are morally justified in not following rules. See Heidi A. Hurd, *Rationality of Rule-Following: Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn’t)*, 42 SAN DIEGO L. REV. 75 (2005) (articulating a highly readable statement of why one should follow rules and yet distrust them).

countless acts of self-application of law.⁴⁴ To abide by the law, they must know what the law requires.

The rule of law makes law-abiding possible. It requires that rules of law be clear and consistent and that their application be sure and predictable. When that is true, law-abiding people can know what the law is and can orient their conduct on what it requires.

C. *Indeterminacy and Self-Application*

Indeterminacy endangers self-application of law. When law is clear and its application sure, self-application is likely to match rules rather closely. When law is less clear or its application less sure, the calculus changes. Some people subject to rules are compulsive rule-followers: they follow the rules no matter what the rules are, so long as they can know them and consider them reasonably legitimate. On the other hand, many people subject to rules are not so law-abiding. If law is indeterminate, they start to calculate. They weigh competing considerations. Even with clear rules they may consider, what is the likelihood that the rule will be enforced? What is the benefit to me if I fail to comply?⁴⁵ Thus on the highways, virtually everyone drives on the nationally-mandated side of the road, but almost all drivers sometimes fail to observe posted speed limits when they find it in their interest and believe they can do so without unacceptable risk.⁴⁶ When rules and their application are less clear, the complexity of this calculation increases. Now parties subject to rules must also discern how those rules are put into practice. Those less inclined toward law-abiding may play close or even over the line. Those more inclined toward law-abiding or less able to tolerate risk may be timid. Although little discussed in theory, this is a known issue of everyday practice. For many clients, vindication under a rule is of little solace if the costs or risks of vindication are prohibitive.

⁴⁴ Cf. HART, *CONCEPT*, *supra* note 37, at 130, 135.

⁴⁵ See generally Abraham Lincoln, *The Perpetuation of Our Political Institutions*, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), in ABRAHAM LINCOLN, *SPEECHES AND WRITING 1832-1858*, at 28, 31 (Library of America ed., 1974). Lincoln observed the pernicious effect on self-application of permitting violations of law. *Id.*; see *infra* note 186.

⁴⁶ Moorfield Storey, *Lawlessness*, *Address Delivered Before the Maryland State Bar Association*, 13 AM. LAW. 290, 291 (1905). "Ask any friend who owns one of these cars, and you will learn his opinion of the law, and how determined he is to decide for himself when to obey it." *Id.* Storey was editor of the *American Law Review* from 1873 to 1879, and president of the American Bar Association from 1895 to 1896. ROGERS, *supra* note 40, at 86.

D. *Legal Methods Between Indeterminacy and the Rule of Law*

Almost every advanced legal system pays at least lip service to requirements of the rule of law at a high level of generality. But how does one determine whether a legal system delivers on its promise? One approach is to consider how it implements the rule of law.⁴⁷ Legal methods are the principal means by which law content is made clear and by which law application is made predictable.⁴⁸

In a broad sense, legal methods are devices used to apply abstract legal rules to factual situations in order to decide concrete cases.⁴⁹ Legal methods as the means to decide concrete cases include, in a broad sense, creating as well as implementing legal rules.⁵⁰ This Article considers these methods under three rubrics: *lawmaking*, *law-finding*, and *law-applying*.⁵¹ The classification is for convenience. Some legal methods classified under one rubric might just as well be classified under a different one.

Lawmaking is legislative. The legislature adopts a statute and an administrative authority adopts a regulation that implements the statute. *Law-finding*⁵² is determination by a decision-maker of the applicable rule of law for a particular case and any necessary interpretation of the rule. *Law-applying* is application of found rules to decide particular cases. Most commonly this process presupposes a process for fact-finding as well as law-finding.⁵³ The facts found are then related to applicable law.

⁴⁷ Summers, *Principles*, *supra* note 28, at 1691 n.2.

⁴⁸ Discussions of legal methods *qua* legal methods often focus on handling precedents and construing statutes. See, e.g., INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997); INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick and Robert S. Summers eds., 1991).

⁴⁹ 1 WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG 13-15 (1975).

⁵⁰ Cf. JAN SCHAPP, HAUPTPROBLEME DER JURISTISCHEN METHODENLEHRE (1983) (relating statute, case, and judicial decision).

⁵¹ HART, CONCEPT, *supra* note 37, at 61. Hart referred to a similar threefold classification: "law-making, law-identifying, and law-applying." *Id.* Professor Cappalli refers to creating, elaborating, and applying substantive law. Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 398 (1997).

⁵² While the term law-finding is infrequently used in the United States, it is not unknown. See, e.g., ROSCOE POUND, *Law Making and Law Finding*, in LAW FINDING THROUGH EXPERIENCE AND REASON: THREE LECTURES 1 (1960); Roscoe Pound, *Making Law and Finding Law*, 82 CENT. L.J. 351 (1916). The term is also used in England. See, e.g., LAW MAKING, LAW FINDING, AND LAW SHAPING. THE DIVERSE INFLUENCES (Basil S. Markesinis ed., 1997).

⁵³ The process of fact-finding also contributes to indeterminacy. It is, however, beyond the scope of this Article.

Rule conflicts result not only where lawmaking is deficient, but also where multiple lawmakers fail to coordinate with each other.

American legal methods as implemented by American structures of authority do not well fulfill the guidance function of the rule of law. Originally conceptualized in a largely agrarian and isolated world, in the nineteenth century these methods and structures proved inadequate to meet the demands of a modern, industrial society. While efforts were undertaken to modernize legal methods, success has been limited. The barriers to determinacy that the American system faces now, it faced long ago and failed to deal with adequately.

The balance of this Article shows many instances in which American legal methods fail the guidance function of the rule of law by increasing indeterminacy when they might have promoted determinacy instead.

III. LAWMAKING

The rule of law is a law of rules. In a literate society, people subject to rules expect that rules are written and that everyone can read them.⁵⁴ They expect rules that are reasonably definite and that do not conflict with other rules. Written rules take the form of statutes adopted by legislatures; lawmaking is central to realization of the rule of law.

In the first half of the nineteenth century, unwritten common law provided most of the rules under which Americans lived.⁵⁵ These rules developed out of the decisions of judges of individual cases apart from statutes. To the uninitiated, the very idea of rules that are not written is odd if not threatening. Even friends of the common law acknowledge that common law rules cannot hope to have the certainty and precision of written rules.

In the course of the nineteenth and twentieth centuries, statutes displaced common law as the principal source of American law.⁵⁶ Today Americans live in “the Age of Statutes.”⁵⁷ Statutes displaced common law for good reasons. Statutes legitimize political decisions. They

⁵⁴ Cf. Andrew Beckerman-Rodeau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 271 (1999).

⁵⁵ TIMOTHY WALKER, AN INTRODUCTION TO AMERICAN LAW DESIGNED AS A FIRST BOOK FOR LAW STUDENTS 53 (1837).

⁵⁶ See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) (referring to the “statutorification” of American law); WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 2 (2000).

⁵⁷ CALABRESI, *supra* note 56, at 1.

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provide predictability and impose uniformity. They can facilitate their own application by drawing bright lines and requiring use of forms. They speak directly to people subject to law by giving information about what is expected.⁵⁸ All these can do better than common law, which cannot do some of these things at all. Nineteenth-century critics, who saw in the uncertainty of the common law a “vast evil” and preferred written law,⁵⁹ should have cause for celebration in this displacement. But the promise of the written law has to a significant degree been denied to Americans. American statutes do not always provide a high level of guidance.

American jurists are uncomfortable with statutes.⁶⁰ The United States, says Judge Richard A. Posner, has no “overall theory of legislation.”⁶¹ An overall theory of legislation requires methods of drafting and methods of statutory interpretation. While the American legal system has methods of statutory interpretation, these are, according to Justice Antonin Scalia, unintelligible.⁶² It has no method of legislative drafting, which it has long neglected.⁶³ While scholarly interest in statutes has recently increased dramatically, the new literature of statutes is largely limited to political process and statutory interpretation.⁶⁴ It pays little attention to how legislatures should write rules.⁶⁵ Consequently, the American legal system pays a high price in indeterminacy for its lack of effective methods of statutory drafting and interpretation.

⁵⁸ HART, CONCEPT, *supra* note 37, at 125-26.

⁵⁹ *E.g.*, WALKER, *supra* note 55, at 56. Walker’s description of the common law as a “vast evil” is omitted from posthumous editions, including the 9th edition, revised by Clement Bates in 1887, and the 11th edition, revised by Clement Bates in 1905.

⁶⁰ ESKRIDGE ET AL., *supra* note 56, at 3.

⁶¹ See Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800 (1983).

⁶² Antonin Scalia, *A Matter of Interpretation*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION].

⁶³ Mary Ann Glendon, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 62, at 96.

⁶⁴ See, *e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 829 (1988); ESKRIDGE ET AL., *supra* note 56; WILLIAM D. POPKIN, MATERIALS ON LEGISLATION. POLITICAL LANGUAGE AND THE POLITICAL PROCESS (1993); Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1 (1993).

⁶⁵ Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1282, 1284 (1994). “[M]ost legal scholarship still focuses on the judge’s art, rather than the legislative drafter’s art.” *Id.*

In calculating the costs for determinacy of lack of effective methods of legislative drafting, one is inclined to think first of the obvious costs of poorly drafted rules. Effective methods can provide rules that are clear, or at least no more indefinite than necessary. They can prescribe particular elements for norms that set out precisely what is required.⁶⁶ When rules are insufficiently definite, people who obey rules may circumscribe their conduct too much, while people who flout rules may constrain their conduct too little.

Effective methods of legislative drafting provide tools to enable legal systems to deal with uncertainty in law and society. These tools include general clauses that are deliberately vague to permit their development by those charged with applying them, exceptions to otherwise generally applicable rules, and authorizations to officials charged with rules exceptionally to depart from them. Effective methods of legislative drafting allow legal systems to grant discretion to officials and to provide for control of that discretion.⁶⁷

Additionally, effective methods of legislative drafting contribute to coherence and consistency of all rules overall. A statute should, of course, not conflict with itself. But statutes should not only be internally consistent, they should be harmonious in their operation with other rules to which those subject to them are also subject.⁶⁸ Part VI discusses the frequent rule conflicts that result in the American legal system from the failures of multiple lawmakers to coordinate their legislation adequately (i.e., to make their rules consistent). But disappointingly, even single American lawmakers frequently fail to make rules consistent and systematic. The inconsistent Florida election statutes that precipitated the constitutional crisis of the 2000 election are only the most notorious instance in recent times of failed legislation.⁶⁹ Less dramatic are the costs

⁶⁶ See HANS SCHNEIDER, *GESETZGEBUNG: EIN LEHR- UND HANDBUCH* §§ 3-4 (3d ed. 2004).

⁶⁷ See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 219-28 (1969) (arguing for greater use of rules to structure and check administrative discretion); *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* 11 (Kenneth Culp Davis ed., 1971) (containing national reports on limiting and controlling discretion); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973) (arguing that officials' roles implicitly justify their failure to follow rules, which argument thus *sub silentio* acknowledges that existing law does not well grant and control discretion).

⁶⁸ Ernst Freund, *Prolegomena to a Science of Legislation*, 13 *ILL. L. REV.* 264, 268 (1918).

⁶⁹ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1231-34 (Fla. 2000), *rev'd sub nom.*, *Bush v. Gore*, 531 U.S. 98 (2000).

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of poorly systematized rules for everyday law application and enforcement.⁷⁰

A. *Defeat of Codification*

A remarkable feature of American legal history is that statutes displaced common law without effective methods of legislative drafting and statutory interpretation developing. Any explanation of this development should take into consideration the defeat of codification and the extension of common law methods to statutes. There was a time when the American legal system did consider effective methods of dealing with statutes.

Throughout the nineteenth century the American legal community debated adoption of systematic legislation in the form of codes. Codes would furnish state law with certainty and coordinate specific laws with one another.⁷¹ David Dudley Field, the preeminent proponent of codification, saw written rules as essential for predictability in law.⁷² He saw law as a system of rules.⁷³

But America did not learn how to legislate effectively; the organized bar defeated codification. Field's great opponent, James Coolidge Carter,⁷⁴ argued that certainty in the written law came only by sacrificing justice through unwritten law.⁷⁵ Unlike common law rules, Carter argued, statutory rules "are rigid and absolute, and cannot be modified and shaped to suit the varying aspects which different cases may exhibit."⁷⁶ Carter's arguments found a wide acceptance in the American

⁷⁰ See, e.g., Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 49 (1998). A former Deputy Associate Attorney General describes the federal criminal laws as a "morass of statutory provisions and judicial decisions [that] is so complex, and so confusing to law enforcement officials as well as to the public, that it could scarcely have been designed to be less efficient. This is extraordinarily costly." *Id.*

⁷¹ See ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 225 (1917) (referring to the latter as "correlation").

⁷² Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 340 (1988).

⁷³ See, e.g., David Dudley Field, *Magnitude and Importance of Legal Science*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 517, 530 (A.P. Sprague ed., 1884). "The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican government above all others." *Id.*

⁷⁴ Carter was president of the American Bar Association from 1894 to 1895. ROGERS, *supra* note 40, at 80.

⁷⁵ JAMES COOLIDGE CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884), *excerpted in* THE LIFE OF THE LAW, READINGS ON THE GROWTH OF LEGAL INSTITUTIONS 115, 118 (John Honold ed., 1964).

⁷⁶ *Id.* at 120.

legal community, which persists to this day.⁷⁷ The argument against codification claims that judicial legislation is able to adapt law to changing social reality gradually and without the shock of sudden legislative change.⁷⁸

Carter both understated the flexibility of statutory methods and overstated the determinacy of American common law methods. If that was not then apparent, after more than a century, it is now crystal clear to anyone familiar with the rampant indeterminacy of American treatment of statutes and the relative flexibility of civil law statutes.

Already a half-century before Carter, Justice Story refuted the argument that common law development is uniquely suited to adaptation over time.⁷⁹ Claims of superior adaptability of common law over statute collapse when brought down to specific changes in laws, where it often turns out that a statutory solution proved more effective.⁸⁰

While in hindsight Carter's arguments appear flawed, opponents of codification succeeded not only in defeating the codes, but also in retarding development of effective methods of lawmaking in the United States.

⁷⁷ Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 99 (1998) (speaking of "adaptability").

⁷⁸ William Draper Lewis, *Present Status of the American Law Institute: The Common Law and the Common Law System of Administering and Developing Law*, 6 N.Y.U. L. REV. 337 (1929).

⁷⁹ Joseph Story, *Law, Legislation, Codes*, in 7 ENCYCLOPÆDIA AMERICANA 576, 588 (Francis Lieber ed. & trans., 1831), reprinted as Appendix III, in JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 350, 367 (1971) [hereinafter Story, *Law*].

To say that, if found inconvenient, it [the common law] may be altered, so as to suit the future interests of the particular state, is, in effect, no argument at all; for the same may be said as to any provision of a systematic code. No code is supposed to be unalterable.

Id.

⁸⁰ Superiority of common law judicial legislation is claimed, for example, in displacement of the common law rule of contributory negligence by comparative fault. *See, e.g.,* M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 595-98 (1996). Yet civil law jurisdictions had comparative fault, when common law jurisdictions did not and some American states still have contributory negligence. *See* Jennifer J. Karangelen, Comment, *The Road to Judicial Abolishment of Contributory Negligence Has Been Paved by Bozman v. Bozman*, 34 U. BALT. L. REV. 265 (2004). Even in the field of constitutional law, which is uniquely oriented toward judicial legislation, statutes can be more effective. Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 440 (1999). "Desegregation gained its major legal impetus not from Brown [v. Board of Education], but from the Civil Rights Act of 1964." *Id.* (emphasis added).

B. *Particularist and Unprofessional Drafting*

The rule of law requires that rules be generally applicable and that they operate within a harmonious system. American legislation, instead of looking like systematic rules for the population at large, is sometimes just another way of resolving private disputes or of achieving private goals.⁸¹ In the American legal system, private interests and amateur draftsmen often determine and draft the laws that legislatures adopt. The periodic lobbying scandals that afflict the United States should be no surprise, as the system permits individual legislators to control particular provisions of legislation. Reform attempts fail because instead of curtailing the power of individual legislators, they merely punish the misuse of that power.

Already in the nineteenth century, other western democracies institutionalized the process of legislating in order to improve the quality of statutes and further their coordination.⁸² A common approach today, by practice or by law, requires that legislation originate with the government, a government ministry, or a parliamentary faction, and not with individual legislators. Proposed legislation is drafted, not by legislators, but by professional draftsmen. One or more government ministries, often the Ministry of Justice, is responsible for reviewing legislation prepared by other ministries and coordinating it with the constitution and other laws. For some ministries this is a principal reason for their existence. These measures seek to raise the quality and generality of legislation by shutting out private interests and entrusting drafting to those better able to promote the public interest, to coordinate new legislation with old, and to increase the transparency of the motivation behind the legislation. American-style lobbyist drafting is rare or unknown in Europe.⁸³

When in the nineteenth century Britain adopted the institution of the professional parliamentary draftsman and the practice of government-originated legislation, American jurists took note and urged comparable practices here.⁸⁴ In the early twentieth century, jurists—no less

⁸¹ Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 243 (1998) (pointing out the similarity between American legislation and common law adjudication).

⁸² ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* 225 (1917). Ernst Freund called this coordination, “correlation of provisions.” *Id.*

⁸³ See, e.g., Rebecca Goldsmith, *In Europe, Lobbying Is a Dirty Word*, NEWHOUSE NEWS SERV., Mar. 16, 2004.

⁸⁴ See, e.g., Simon Stern, *The English Methods of Legislation Compared with the American*, PENN MONTHLY, May 1879, at 336, 357 (discussing Continental and English practices, comparing these critically with the practice in the United States, and noting that “It is true,

illustrious than Roscoe Pound and Benjamin N. Cardozo—observed the benefits for legislation of European-style ministries of justice.⁸⁵ The salutary effect of their efforts to improve legislation can be seen in the creation of the National Conference of Commissioners of Uniform State Laws in 1893, in the founding of the American Law Institute in 1923, both of which are discussed in Part V below, in the establishment in many states of law revision commissions,⁸⁶ and in the creation of offices of legislative counsel in both houses of Congress.⁸⁷ Without doubt, individual pieces of American legislation are technically better, thanks to the work of these institutions. Yet their successes have been spotty rather than pervasive, largely because their involvement is sporadic rather than systematic. The National Conference, the American Law Institute, and law revision commissions all work on a specific project basis. Even the Congressional offices of legislative counsel, which could work systematically, are not so engaged by Congress, but act only when called upon. There is no obligation for Congress to make use of their services.⁸⁸ Lacking from all of these institutions is a combination in one body of subject-matter expertise, professional drafting skills, political

we have written Constitutions; but it is nobody's business to see to it, before a public bill is passed, that the bill is in conformity therewith"); Francis Wayland, Opening Address on Certain Defects in Our Methods of Making Laws Before the American Social Science Association at Its Annual Meeting, Saratoga Springs 13, 21, 27 (Sept. 5, 1881) (noting the practices of the English House of Commons, the new institution of the Parliamentary Counsel Office and that similar approaches were in place in France, Prussia, Belgium, Switzerland, Italy, and other Continental nations where they worked to "secure the uniformity, coherence, clearness and accuracy which are so essential to the efficient operation of all legislative enactments"). There is an extended report of Wayland's address in N.Y. TIMES, Sept. 6, 1881, at 5.

⁸⁵ ROSCOE POUND, 3 JURISPRUDENCE 736-37 (1959); Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921) (citing two contemporary works by Roscoe Pound); see RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW: CASES, TEXT, MATERIALS 14-15 (6th ed. 1998).

⁸⁶ See, e.g., California Law Revision Comm'n, GOVERNMENT CODE § 8289(a), www.clrc.ca.gov/ (last visited Sept. 11, 2006); Connecticut Law Revision Comm'n, www.cga.ct.gov/lrc/ (last visited Sept. 11, 2006); Michigan Law Revision Comm'n, www.council.legislature.mi.gov/mlrc.html (last visited Nov. 1, 2006); New Jersey Law Revision Comm'n, www.lawrev.state.nj.us/ (last visited Sept. 11, 2006); New York Law Revision Comm'n, www.lawrevision.state.ny.us/ (last visited Sept. 11, 2006). The federal Office of the Law Revision Counsel is charged with publishing the United States Code and is not analogous to the state commissions. See uscode.house.gov/ (last visited Sept. 11, 2006).

⁸⁷ Office of the Legislative Counsel, U.S. House of Representatives, <http://legcoun.house.gov/> (last visited Sept. 11, 2006); Office of the Legislative Counsel, U.S. Senate, <http://slc.senate.gov/index.htm> (last visited Sept. 11, 2006).

⁸⁸ See generally Peter M. Goodloe, *Simplification—A Federal Legislative Perspective*, 105 DICK. L. REV. 247 (2001).

influence on legislation, and political responsibility to people subject to legislation.

Consequently, the picture of American legislative drafting is varied. Some federal statutes and some state statutes, particularly uniform laws, receive close attention for clarity and consistency of content. But many do not.⁸⁹ Legislative language often results, not from careful study, but from compromises and late-night drafting or is provided by third parties.⁹⁰ Statutory drafting is not a carefully controlled process.⁹¹

Of course creating clear and authoritative rules is only the first step toward applying rules to concrete cases and giving subjects guidance in law.

IV. LAW-FINDING

The existence of rules alone is not enough to realize the rule of law. Decision of concrete cases requires law-finding (i.e., locating applicable rules and determining what those rules mean). Law-finding has two sides: identification of rules and their interpretation. In well-functioning legal systems in ordinary cases, law-finding is nearly invisible and does not give rise to indeterminacy. But in the American system, even in pedestrian cases, law-finding often is highly visible and productive of substantial indeterminacy. The process of law-finding sometimes undermines, rather than supports, law as rules. It fails to find a rule or changes the rule in the course of application. As a result it creates substantial indeterminacy for those subject to rules and makes self-application of law difficult.

A. *Law-finding as Lawmaking*

The common law is identified with case law—that is, with judge-made law created through decisions of cases. Yet most modern legal systems, to some extent, acknowledge some form of judge-made law.⁹² Judges are under a duty to decide controversies before them and must decide cases even if they can find no rule to apply.⁹³ When they decide

⁸⁹ See, e.g., Strauss, *supra* note 81, at 231. “We may sometimes succeed in enacting carefully prepared legislation, but that is a rarity.” *Id.*

⁹⁰ See generally Goodloe, *supra* note 88.

⁹¹ See, e.g., Daniel J. Meltzer, *Honoring David Shapiro: Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1922 (2004).

⁹² R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS 39-40 (1987).

⁹³ See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty To Decide*, 94 GEO. L.J. 121, 180-81 (2005) (distinguishing weak and strong requirements).

cases in the absence of clearly applicable rules, they may overtly create new rules to guide decision or they may through their decisions suggest a practice that future judges will follow. While they may prefer to emphasize the latter rather than the former role, in either case, the effect is that judges in some sense make law.⁹⁴

Lawmaking incident to law-finding is controversial. On the one hand, it threatens basic elements of the rule of law (e.g., that law is knowable beforehand and that neutral and uninvolved judges apply that law to individual cases). It raises the question of whether the judiciary is usurping the legislative function.⁹⁵ On the other hand, if there is no lawmaking incident to law-finding, many a party will be denied justice. Historically different legal systems have dealt with lawmaking incident to law-finding differently. The Prussian General Law of 1794 went so far as to prohibit statutory interpretation altogether, not to speak of judicial lawmaking.⁹⁶ But today, most legal systems accept some form of lawmaking incident to law-finding. None does so with greater eloquence than the Swiss, which explicitly authorizes judges to decide unprovided for cases as if they were legislators.⁹⁷

Lawmaking incident to law-finding thus is not unique to the United States or to common law legal systems. Precedents both here and abroad are thought to promote determinacy. Yet case law, as it has developed in the United States in the last two centuries, often contributes to indeterminacy.

Article 4 of the French Civil Code states such a duty absolutely: "A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice." C. CIV. art. 4 (Goerges Rouhette, trans.), available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm.

⁹⁴ John Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052, 1056 (1931).

⁹⁵ See, e.g., GORDON TULLOCK, *THE CASE AGAINST THE COMMON LAW* 2 (1997) (arguing that the courts have developed law "with a vengeance, and that in so doing they have largely emasculated the rule of law in this country"); Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 172 (1891) ("The phrase 'judicial legislation' carries on its face the notion of judicial-usurpation.").

⁹⁶ ALLGEMEINES LANDRECHT FÜR DIE PREUßISCHEN STAATEN VON 1794, Einleitung §§ 46, 47, at 58 (Hans Hattenhauer ed., 2d ed. 1994). This was not as strange then as it might seem today. Napoleon, himself a contemporary of the drafters of the Prussian law, prohibited writing of commentaries on his new code. VAN CAENEGEM, *supra* note 92, at 156.

⁹⁷ Schweizerisches Zivilgesetzbuch of Dec. 10, 1907, as revised Dec. 27, 2005 [ZGB] [Civil Code] Art. 1(2), available at <http://www.admin.ch/ch/d/sr/2/210.de.pdf> (visited Nov. 11, 2006).

B. *Finding Common Law Rules*

In common law systems, ideas of the nature of case law and of the role of judges in creating it have varied. In the eighteenth century under what is referred to as the “declaratory theory,” judges asserted that they never created law, but only declared law that had always existed. Binding to precedent did not figure prominently in that theory.⁹⁸ The classic theory of binding to precedent—of *stare decisis*—developed largely in the nineteenth century. Under the classic theory, precedents appear as another form of positive law where judges substitute for legislators as the givers of rules. Under that theory, precedents had binding authority comparable to legislative statutes. Modern American theories of *stare decisis* reduce the binding effect of precedents; some almost deny that generally applicable rules result from common law adjudication at all.

Outwardly judges’ methods of finding applicable common law rules have been the same under all variations of common law theory. First, look for a directly applicable rule in the form of a precedent on “all fours.” Then, if there is no such rule, take as a starting point the *ratio decidendi* of a precedent, the reason for deciding a previous case,⁹⁹ and consider whether there is another rule, of which the earlier precedent is an example, which would encompass the later dispute as well. Theoretically judges move analogically to extend the earlier *ratio* to cover the facts of the new controversy.¹⁰⁰ While this procedure is outwardly the same under all theories, the attention paid to prior precedents and in particular to the *ratio decidendi*, varies depending upon how strictly judges have felt themselves bound by these precedents. In England where binding to precedent has been stricter than in the United States, more energy has been devoted to distinguishing the *ratio decidendi* than in the United States where there is greater willingness to permit judges to launch off on their own. Where binding is less strict, precedents

⁹⁸ Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 774-76 (2004) [hereinafter Schauer, *Failure*]; Thayer, *supra* note 95, at 180.

⁹⁹ KARL NICKERSON LLEWELLYN, *THE BRAMBLE BUSH* 45-47 (2d ed. 1951) [hereinafter LLEWELLYN, *BRAMBLE BUSH*]; Arthur L. Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959).

¹⁰⁰ EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-2, 8-9 (1949); see LLEWELLYN, *BRAMBLE BUSH*, *supra* note 99, at 49, and already 150 years ago, George van Santvoord, *The Study of the Law as a Science: An Address to the Graduating Class of the Law School of the University of Albany* 35 (Nov. 21, 1856) [hereinafter Van Santvoord, *Study of Law*] (“legal precedents ought not despotically to govern, but discretely to guide us”).

provide more rules of thumb that guide decision than rules of general application that determine decisions.¹⁰¹

1. Classic Stare Decisis

According to the classic theory of stare decisis, judges were strictly bound by precedents of their predecessors. Compared to other common law theories, the classic theory enhanced legal determinacy and constrained the lawmaking activities of judges.¹⁰² Justice Story observed, following precedents provided “certainty as to rights, privileges and property” and “control[] [of] the arbitrary discretion of judges.”¹⁰³

Under classic stare decisis, judges functioned in two distinct and separate capacities. Where law already existed, i.e., where a particular precedent applied, the common law was, Justice Story observed, “a system of rules . . . fixed, certain, and invariable.”¹⁰⁴ Judges were applicers of law and not legislators. If new facts fell within the rule of an earlier case, the inquiry was closed.¹⁰⁵ Only if the common law provided no rule did judges take on the function of legislators.¹⁰⁶ Then judges’ decisions were positive law for subsequent cases.¹⁰⁷ Like the positive law of statutes, it was essential that those decisions be published. It is not coincidental that the development of law reporting as known today coincided with the development of the classic theory of binding precedent. Published reports contributed to the rule of law by bringing determinacy and control of judicial discretion.¹⁰⁸ The very style of the decisions reported changed to enhance legal determinacy. While

¹⁰¹ KARL NICKERSON LLEWELLYN, PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA (1933), translated as THE CASE LAW SYSTEM IN AMERICA § 56, at 80 (Michael Ansaldi trans., 1989) [hereinafter LLEWELLYN, CASE LAW]; see also HART, CONCEPT, *supra* note 37, at 135.

¹⁰² Cf. Schauer, *Failure*, *supra* note 98, at 774-76.

¹⁰³ Story, *Law*, *supra* note 79, at 588 (McCLELLAN, *Appendix III*, at 359); see also THE FIRST REPORT OF THE COMMISSIONERS APPOINTED BY THE GENERAL ASSEMBLY OF MARYLAND TO REVISE, SIMPLIFY AND ABRIDGE THE RULES OF PRACTICE, PLEADINGS, & IN THE COURTS OF THE STATE 8 (1855) [hereinafter MARYLAND REPORT].

¹⁰⁴ Story, *Law*, *supra* note 79, at 588 (McCLELLAN, *Appendix III*, at 368).

¹⁰⁵ Thayer, *supra* note 95, at 181-82.

¹⁰⁶ Cf. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8-22 (2001) (discussing *stare decisis* in antebellum America and, in particular, James Madison’s concept of “[l]iquidation,” i.e., settling on an interpretation).

¹⁰⁷ So strong was this view that in England precedents bound the courts that issued them and not just lower courts. American courts have never considered themselves bound by their own precedents. *Hertz v. Woodman*, 218 U.S. 205, 212 (1910); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 242-43 (2d ed. 1921); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 477 (14th ed. 1896) (1826).

¹⁰⁸ 1 WILLIAM CRANCH, *Preface to REPORTS OF CASES ARGUED AND DECIDED IN THE SUPREME COURT OF THE UNITED STATES* (circa 1801).

eighteenth-century English reports presented reporters' transcripts of seriatim statements of individual judges, American reports offered unison written decisions of courts.

Classic stare decisis theory held that judges had little room to make law. If a precedent did not apply, existing precedents constrained free legislation. Judges were, Justice Story wrote, "hemmed round by authority on every side."¹⁰⁹ In making law, judges did not start from their own notions of right, but from other precedents. Judges legislated, but only within the interstices of an existing system.¹¹⁰

In this way, the strict theory of stare decisis permitted adherents of the common law to meet the argument that the judiciary was usurping a function properly belonging to the legislature. It was merely filling in gaps. Within these interstices, judges were expected to behave predictably and to fall back on considerations of justice in filling those gaps.¹¹¹ Hardship has not worked on the parties affected by such "interstitial legislation," because "[t]he feeling is that nine times out of ten, if not oftener, the conduct of right-minded men would not have been different if the rule embodied in the decision had [not] been announced by statute in advance."¹¹²

2. Modern Stare Decisis

The strict binding of classic stare decisis gave way to a less strict theory. As judges were law-appliers and legislators alike, from the start suitors sought to have judges overturn prior precedents. The American system, unlike the English, did not hold that courts were bound by their own decisions. Soon judges overturned precedents in substantial numbers. The argument was, because judges made the law, should not they be the ones to revise it?

¹⁰⁹ Story, *Law*, *supra* note 79, at 582 (McCLELLAN, *Appendix III*, at 359).

¹¹⁰ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-14 (1921); *see* *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); *see also* HART, *CONCEPT* *supra* note 37, at 135; Goodhart, *supra* note 99, at 50; H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977), *reprinted in* *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 123, 128 (1983) [hereinafter Hart, *American*].

¹¹¹ CALABRESI, *supra* note 56, at 96-98 (who speaks of "legal fabric"); MORRIS COHEN, *LAW AND THE SOCIAL ORDER* 213-15 (1933); LON FULLER, *ANATOMY OF THE LAW* 94-96 (1968); MAXEINER, *supra* note 23, at 30-31; Roscoe Pound, *The Theory of Judicial Decision III*, 36 HARV. L. REV. 940, 952-53 (1923).

¹¹² CARDOZO, *supra* note 110, at 143.

The central role of adversary parties in law-finding facilitated this development. The maxim familiar to lawyers in civil law jurisdictions – that the court knows the law, *iura novit curia*¹¹³ – does not apply.¹¹⁴ Lawyer responsibility for finding the law has deep roots in common law litigation. Under the writ system that prevailed in the early days of the United States,¹¹⁵ the lawyer selected the appropriate writ, and thereby determined the law that applied to the case. If he chose incorrectly, the court dismissed the case.¹¹⁶ But his responsibility for law-finding did not end with the choice of the writ itself. The lawyer was responsible for arguing what the law was. In the interest of doing justice, American courts, even when convinced that a rule of law was clear, developed a practice of permitting counsel to argue the point at length, leading to what Justice Story called a “vast consumption of time.”¹¹⁷

Modern common law methods do not apply *stare decisis* strictly. They discourage following precedents “mechanically” lest judges perpetuate legal rules that have “outlived their usefulness.”¹¹⁸ They de-emphasize precedent as rule. They also anticipate that judges analyze the facts of the past case, compare them to the instant case, and draw their own conclusions as to essential similarities.¹¹⁹ Under these

¹¹³ The maxim under that name is practically unknown in American legal literature. A Lexis search (July 2, 2005) under “*iura novit curia*” and “*jura novit curia*” turned up only one case. A criminal defendant arguing pro se used it in an unreported case. *State ex rel. Buckner v. Court of Appeals*, 2001 Ohio Lexis 2788 (Ohio Oct. 24, 2001). A similar search of the U.S. Law Reviews and Journals database (December 28, 2004) returned 25 entries, all dealing with issues of international or foreign law.

¹¹⁴ F.A. Mann, *Fusion of the Legal Profession*, 93 LAW. Q. REV. 367, 369 (1977) (“perhaps the most spectacular feature of English procedure is that the rule *curia novit legem* has never been and is not part of English law . . .”); Basil S. Markesinis, *Five Days in the House of Lords: Some Comparative Reflections on White v. Jones* 7 (Mar. 1995), <http://w3.uniroma1.it/idc/centro/publications/16markesinis.pdf>. Indeed, lawyers are under an ethical obligation to bring to the court’s attention potentially applicable precedents and statutes. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(B)(1) (1969); MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3); RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 111 (2000) (Disclosure of Legal Authority).

¹¹⁵ See *infra* notes 221-39 and accompanying text.

¹¹⁶ See, e.g., *Booth v. Hall*, 6 Md. 1 (1854).

¹¹⁷ Story, *Law*, *supra* note 79, at 590 (MCCLELLAN, *Appendix III*, at 370). Just how vast can be gleaned from a contemporary review of a reform report: “An argument which ought not to consume more than two or three hours, is . . . frequently drawn out to the length of as many days, and sometimes of a week.” [Comment on] *Report of the Chancellor and Judges of the State of New York, . . . Upon the Question, Whether any Alterations Are Necessary in the Present Judiciary System of the State*, 2 U.S.L.J. 120, 132 (1826). A glance at some of the early reports of the Supreme Court of the United States, which then printed the arguments of counsel, likewise demonstrates how much time was given over to such discussions.

¹¹⁸ JANE C. GINSBURG, INTRODUCTION TO LAW AND LEGAL REASONING 3 (Rev. 2d ed. 2004).

¹¹⁹ LEVI, *supra* note 100, at 2-3.

approaches, judges constantly validate the legitimacy of the rules they apply. Typical of these approaches is that of Judge Ruggero Aldisert, stated in a textbook used by the National Institute of Trial Advocacy:

The heart of the common-law tradition is adjudication of specific cases. Case-by-case development allows experimentation because each rule is reevaluated in subsequent cases to determine if the rule did or does produce a fair result. If the rule operates unfairly, it can be modified. . . . The genius of the common law is that it proceeds empirically and gradually, testing the ground at every step, and refusing, or at any rate evincing an extreme reluctance, to embrace broad theoretical principles.¹²⁰

In one more extreme view, each case is but a “short story” that settles a particular dispute.¹²¹ Under this view, judges compare fact patterns from previous cases and decide whether there is sufficient similarity to warrant a similar result as in a previous case.¹²² This view borders on denying an essential feature of rules—their generality—to case law. While this view may not be typical, modern *stare decisis* allows what Professors Summers and Philip Atiyah refer to as the “open modification of the rule to allow purposes or policies to be taken into account.”¹²³ Professor Schauer argues that in the American legal system, rules apply only so long as their reason applies.¹²⁴ The result is that a

¹²⁰ RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 8 (3d ed. 1997). Judge Aldisert formerly was Chief Judge of the United States Court of Appeals for the Third Circuit.

¹²¹ See STEVEN J. BURTON, *AN INTRODUCTION TO LEGAL REASONING* 12-13 (1985) (contrasting cases and rules). “[A] *rule* is an abstract or general statement of what the law permits or requires of classes of persons in classes of circumstances[]”; “a case [is] a short story of an incident in which the state acted or may act to settle a particular dispute.” *Id.*

¹²² See ALDISERT, *supra* note 120, at 11.

¹²³ P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 91 (1987); cf. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, 25 *HARV. L. REV.* 489, 515 (1912).

¹²⁴ FREDERICK SCHAUER, *PLAYING BY THE RULES* (1993); cf. Philip Bobbit, *What It Means To Follow a Rule of Law*, in *RULES AND REASONING, ESSAYS IN HONOUR OF FRED SCHAUER* 55-56 (Linda Meyer ed., 1999).

[In the United Kingdom] I have observed an attitude toward legal rules that illustrates this point about rigidity. Whereas in the USA there seems to be a rule for everything, there is no rule that cannot be flouted if it can be shown that the application of the rule is in direct conflict with its purpose.

Bobbit, *supra*, at 55-56.

system adopted to enhance legal determinacy can undermine it. While precedents are numerous, authoritative ones are scarce.

3. Indeterminacy of Finding Common Law

In the England of classic *stare decisis*, several characteristics of common law rules helped improve their predictability, notwithstanding the absence of firm statutory bounds. First and best known is that English courts of the day considered themselves strictly bound by their own decisions. Second, there were only limited numbers of authoritative precedents owing to the paucity of reports. Third, only a handful of courts (essentially three) interpreted those precedents.¹²⁵ Fourth, only a few judges (fewer than a score) of similar political and social backgrounds decided cases. Thanks to these characteristics, lawyers could often tell beforehand what the starting points would be, could rely on those points being adhered to, and could predict how those points would be elaborated. These characteristics do not hold true of contemporary American common law. American courts never considered themselves strictly bound by their own precedents, and even less so today. The number of precedents is immense. The number of courts is large and the number of judges in the thousands, and judges' political and social backgrounds vary widely.

Even in the classic era, American courts were not strictly bound by their own decisions. Today, under modern doctrines of *stare decisis*, there is even less hesitancy to reexamine old rules and change them. There is great attraction to the idea that judges should reevaluate the rules that they apply to determine whether they result in justice. But carried out to its fullest, it would produce great indeterminacy. If judges actually reevaluated every rule in every case, adjudication would come to a crashing halt; the resources are not available. Even if resources were found, such practices would fail the rule of law. What measure should judges use to reevaluate existing rules? Reevaluation would make litigation more expensive and its results even more uncertain.

Regular reevaluation threatens self-application of law. Is the rule still valid, or has it been wholly undermined by more recent decisions?¹²⁶

¹²⁵ The Court of Common Pleas, the Court of King's Bench, and the Court of the Exchequer. Overseeing them all was the institution of the judges sitting together in the Court of Exchequer Chamber.

¹²⁶ See Dickinson, *supra* note 94, at 1055 (locating the uncertainty of common law rules less in their failure to be stated in a particular form of words and more in doubt as whether they have been completely eaten away).

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People subject to rules, instead of figuring out how to comply with them, spend their energies imagining how those rules should be revised to comport with the conduct they would like to undertake.

Even occasional reevaluation of precedents burdens those who comply with law. Since the heart of common law method is adjudication and careful evaluation of facts, rules are reevaluated with respect to facts. Trials to determine those facts are expensive and for that reason exceptional.¹²⁷ Parties may be put to three levels of judicial consideration merely to affirm existing common law rules.¹²⁸

Indeterminacy of common law methods does not end with reevaluation of precedents. Cases are but examples of rules in application; they are not statements of rules directly to those subject to them.¹²⁹ Even where a common law rule is considered clear and longstanding, it rarely takes on one precise verbal form.¹³⁰ As the points covered by precedents became more numerous, in theory the rule becomes clearer, but it still does not set strict limits. In practice, however, precedent proliferation undercuts, rather than affirms, the authority of common law.

In the United States, precedents are strictly binding only on inferior courts and not on courts in other jurisdictions or in coordinate courts in the same jurisdiction. Decisions of these other courts constitute only “persuasive” authority; they inform, but do not determine the decision of the court looking to them. Already in 1824 an advocate of codification caustically commented: “The multiplication of reports, emanating from the numerous collateral sources of jurisdiction, is becoming an evil alarming and impossible long to be borne By their number and variety they tend to weaken the authority of each other, and to perplex

¹²⁷ See *infra* text accompanying note 187.

¹²⁸ See, e.g., *Keltner v. Washington County*, 310 Or. 499, 800 P.2d 752 (1990).

¹²⁹ HART, CONCEPT, *supra* note 37, at 104-05 (characterizing common law rules as the teaching of standards of conduct through example, which produces more indeterminacies than legislation).

¹³⁰ LLEWELLYN, CASE LAW § 4, at 3-4 (“[T]he legal rules do not lay down any *limits within* which a judge moves. Rather, they set down *guidelines from* which a judge proceeds to decision.”); Karl Nickerson Llewellyn, *The Rule of Law in Our Case-Law of Contracts*, 47 YALE L.J. 1243, 1244 (1938).

the judgment.”¹³¹ Laymen likewise were dismayed by the lack of guidance the common law provided.¹³²

The indeterminacy of common law methods begins with finding an authoritative precedent. Precedents are not systematized. They are thousands of points of light; every year thousands of new ones are added to the inventory. Thanks to the ingenuity of American publishers, beginning even before West’s American Digest system of the nineteenth century and continuing well into today’s computer-assisted searching, it has been easy to find not just one, but many precedents on just about any point. It is a truism worthy only of a footnote that “[e]very first year law student can distinguish any precedent.”¹³³

In most areas of American law, state law controls. This means that courts of fifty different states generate precedents. The dilemma for determinacy is obvious. From the standpoint of determinacy within one state jurisdiction, one would prefer that a court not pay attention to any precedents but those of the state’s highest court. But from the standpoint of determinacy across state lines and throughout the nation, one would prefer that that court pay attention to what courts in other states decide. As a matter of practice, where a particular question is not clearly resolved in the law of the state or states examined, lawyers are expected to examine the law in other states to help determine how the state where the law is unsettled would resolve the issue.¹³⁴ Inevitably and frequently, lower courts are required to choose between following what a superior court may have decided decades ago and adopting what most courts in other jurisdictions have done in recent years. While this poses dilemmas for judges, it imposes impossible predicaments for people trying to comply with law. They are left to guess which path a yet-to-be-determined court might follow.

¹³¹ William Sampson, *The Common Law*, 19 N. AM. REV. 411, 433 (1824).

¹³² E.g. James Kirk Paulding, *The Perfection of Reason*, in *THE MERRY TALES OF THE THREE WISE MEN OF GOTHAM* 120 (1839) (“That it is the common law is certain, but nobody can tell exactly what is the common law.”); cf. BRITTON A. HILL, *LAW AND LIBERTY OR OUTLINES OF A NEW SYSTEM FOR THE ORGANIZATION AND ADMINISTRATION OF FEDERATIVE GOVERNMENT* 48 (2d ed. 1880) (urging abolition of “that unknown quantity called the common law” which “no citizen who is not a lawyer can possibly know much”).

¹³³ William N. Eskridge, Jr., *Textualism and Original Understanding: Should the Supreme Court Read the Federalist but not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1317 n.88 (1998); see JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 279 (1950). “Any case is an authoritative precedent only for a judge who, as a result of his own reflection, decides that it is authoritative.” FRANK, *supra*, at 279.

¹³⁴ Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. U. L.Q. 283, 286 (1951). “[W]here the proposition he wants to urge is without firm precedent there, he must research the law of all other states and the federal courts.” *Id.*

American jurists have long recognized the deleterious effects for legal determinacy of so many competing precedents. The remarks of two nineteenth-century presidents of the American Bar Association are telling. Judge John F. Dillon concluded that, “the multiplicity and conflict of decisions are among the most fruitful causes of the unnecessary uncertainty, which characterizes the jurisprudence of England and America.”¹³⁵ Simeon E. Baldwin, Chief Justice of Connecticut, commented that: “The multiplication of distinct sovereignties in the same land . . . bewilders the American lawyer in his search for authority.”¹³⁶ In practice, proliferation of precedents has sapped much of the theoretical strength of the common law method of careful consideration and comparison of differences and similarities between facts of different cases.¹³⁷ Precedents often serve simply as authority, which vary depending not on the quality of the reasoning, but on their place in the judicial hierarchy of the rendering court.¹³⁸

B. Finding Statutory Rules

Systematic statute law, particularly in the form of codes, promises that law-finding will be simpler. That has been the siren call of advocates of codification for two centuries. Notwithstanding that codes age, and are revised and supplemented, the cognoscibility of continental code law is orders of magnitude greater than that of its common law counterparts. Practitioners can quickly find the law, even in areas in which they are not experts. In ordinary cases, judges in civil law jurisdictions spend little or no time interpreting, let alone finding authoritative rules. Only exceptionally do lawyers propose unorthodox interpretations. As a result, subjects of the law can trust to relative stability in statutes’ interpretations. In the United States, however, promises that statutory law-finding would be easy and that statutes would lead to greatly enhanced legal determinacy have been, at best,

¹³⁵ JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 242 (1894). “Dillon was a ‘lawyers’ lawyer,” noted judge and jurist, and president of the American Bar Association 1891-1892. ROGERS, *supra* note 40, at 66.

¹³⁶ SIMEON E. BALDWIN, *MODERN POLITICAL INSTITUTIONS* 250 (1898). Chief Justice Baldwin was also president of four national organizations: the American Bar Association (1890-1891), the American Social Science Association, the Association of American Law Schools, and the American Historical Association. ROGERS, *supra* note 40, at 61. He was also founding director of the Comparative Law Bureau of the American Bar Association.

¹³⁷ See generally Cappalli, *supra* note 51.

¹³⁸ John Bassett Moore, *The Passion for Uniformity*, in *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* 316, 331-32 (1924), as quoted in Hessel E. Yntema, *The Jurisprudence of Codification*, in DAVID DUDLEY FIELD, *CENTENARY ESSAYS* 251, 255 (Alison Reppy ed., 1948). Moore was the first American justice of the Permanent Court of International Justice in the Hague.

only partially realized. The disappointing performance in law-finding through statutes can be attributed to three factors: lack of system in ordering and interpreting statutes; assimilation of statutes to common law resulting in the undermining the reliability of statutes as authoritative rules; and encouragement of lawyers to develop novel legal theories.

1. Lack of System in Ordering and Interpreting Statutes

As seen above, the American legal system has not developed effective means of lawmaking. Legal drafting techniques, and law-finding are closely related.¹³⁹ American legislatures turn out unsystematized statutes in quantities rivaling the precedents of the courts.¹⁴⁰ Yet there is little in America in the way of systematic legislation. In the nineteenth century, state and federal governments compiled and sometimes revised their statutes.¹⁴¹ These revisions and compilations are called “codes,” although they have almost nothing in common with Continental codes.¹⁴² Among American laws, the Uniform Commercial Code has the best claim to status as a code.¹⁴³ Among compilations called codes, the United States Code is the most famous. Its origin is in the Revised Statutes of 1875, a volume of over 1,437 oversized pages, but still a single volume.¹⁴⁴ Today the United States Code is over

¹³⁹ Reinhard Zimmermann, *Statuta Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective*, 56 CAMBRIDGE L.J. 315, 325 (1997).

¹⁴⁰ See, e.g., Charles P. Sherman, *One Code for all the United States the Only Remedy To Cure American Law of Its Confusion and Uncertainty*, 25 GREEN BAG 460 (1913).

The uncertainty of our law, its confusion, its startling bulkiness, redundancy and prolixity, increased annually by some 20,000 new statutes and thousands of new reported cases, make our law today the most intolerable in the world and perhaps the worst ever known to human history—all because its form and lack of uniformity are so objectionably bad.

Id.

¹⁴¹ The work of revision sometimes approached that of codification. See, e.g., JOHN DUER et al., *Preface to 1 THE REVISED STATUTES OF THE STATE OF NEW-YORK* iii (1829).

¹⁴² Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1091 (1988).

¹⁴³ William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 235 (1995); see Bergel, *supra* note 142, at 1076; Richard Buxbaum, *Is the Uniform Commercial Code a Code?*, in RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT 197, 220 (1994); 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, 1138, 1160 (1994). But see Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 429 (2003) (arguing that the U.C.C. shares little with Continental codes).

¹⁴⁴ REVISED STATUTES OF THE UNITED STATES PASSED AT THE FIRST SESSION OF THE FORTY-THIRD CONGRESS, 1873-74 (1875).

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30,000 pages,¹⁴⁵ and this is just for the federal government. Each state has its own code of laws, many of which are comparable to the United States Code in size. Private publishers long ago began annotating these codes—that is, adding references to cases that cite particular statutes. Code annotations are not code commentaries in a civil law sense and do not bring comparable cognoscibility. Their goal is not to systematize statutes but to help lawyers find cases.

Justice Scalia excoriates the American legal system for its lack of an intelligible theory of statutory interpretation.¹⁴⁶ Statutory interpretation in the United States is dominated by canons of construction.¹⁴⁷ Justice Story identified twenty-one canons and observed that there are many others of a “special character.” They all, he said, “point to one great object—certainty and uniformity of interpretation.”¹⁴⁸ Certainty, however, they have not brought. Only a few years later, Professor Timothy Walker, caustically commented: “There are many rules of interpretation; but they are of little use. Common sense is the best guide.”¹⁴⁹ A century later Professor Karl Llewellyn observed “two opposing canons on almost every point.”¹⁵⁰

Since 1980 there has been an upswing in interest in statutory interpretation.¹⁵¹ Where once the literature was meager, today it is “daunting.”¹⁵² Whether the new literature will lead to improved results remains to be seen. In 1995, the authors of the Uniform Statute and Rule Construction Act still referred to prevailing approaches as “incoherent.”¹⁵³ That proposed act, more recent proposals for a

¹⁴⁵ The 2000 edition has 35 volumes (27 volumes of text, 8 volumes of tables and indices, and 1 mixed volume). The text volumes range from around 1,000 pages to 1,300 pages. In 1964 it was 9,797 pages. W. David Slawson, *Legislative History and the Need To Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 402 (1992).

¹⁴⁶ See *supra* note 62 and accompanying text.

¹⁴⁷ Story, *Law*, *supra* note 79, at 583-85 (MCCLELLAN, *Appendix III*, at 362).

¹⁴⁸ *Id.*

¹⁴⁹ WALKER, *supra* note 55, at 53. Walker was Professor in the Law Department of the Cincinnati Law College; the book cited was the nation’s first comprehensive introduction to law study for students and went through eleven editions, the last appearing in 1905.

¹⁵⁰ Karl Nickerson Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (quoting numbers 1 and 16).

¹⁵¹ It coincides with the publication of JAMES WILLARD HURST, *DEALING WITH STATUTES* (1982).

¹⁵² WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 14-47 (1994); Strauss, *supra* note 81, at 225.

¹⁵³ NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, *SUMMARY UNIFORM STATUTE AND RULE CONSTRUCTION ACT* (1995), available at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-usarca1995.asp.

“Restatement of Statutory Interpretation,” and Federal Rules of Statutory Interpretation, share the same assumption that statutory interpretation is an enterprise that itself must be regulated by law to provide legal determinacy, or at least, to help lawyers do law.¹⁵⁴ This may be one instance where less would be more. American canons of statutory interpretation differ from their foreign counterparts not so much in content as in quantity.¹⁵⁵ The rule-oriented German legal system gets along well enough without rules of statutory interpretation. Elements of interpretation dating from Justice Story’s time and analyzed by Friedrich Carl von Savigny provide adequate legal determinacy.¹⁵⁶ This may be because in Germany, canons of interpretation guide, but do not determine decisions.¹⁵⁷

2. Judicial Assimilation of Statutes to Common Law

While substantive common law has been in retreat for two centuries, common law methods have survived and have flourished. The common law is dead; long live common law methods! That common law methods should apply to statutory enactments is generally accepted.¹⁵⁸ The result for legal determinacy is nothing short of disastrous, for it undercuts the principal benefit of statutes as general and authoritative rules.

In applying statutes, American judges sometimes act superior to statutes instead of subordinate to them. This rests on a long tradition of common law judges preferring common law to statute law.¹⁵⁹ American judges routinely review legislation for consistency with constitutions, state and federal. That practice has its forerunner in the English

¹⁵⁴ See Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333, 335 (2003); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

¹⁵⁵ Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 461, 462 (D. Neil MacCormick & Robert S. Summers eds., 1991). A study by an international group of scholars found the approaches to statutory interpretation in the United States and eight other countries to share “important similarities.” *Id.*

¹⁵⁶ Zimmermann, *supra* note 139, at 320.

¹⁵⁷ See ANUSHEH RAFI, KRITERIEN FÜR EIN GUTES URTEIL 79, 85-86 (2004) (“[The canons of interpretation] provide arguments which serve to convince others of a particular interpretation of the statute.”).

¹⁵⁸ Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 6 (1995) (“Even in today’s legal landscape, dominated by statutes, the common-law process remains the core element in state court decisionmaking.”); see also Glendon, *supra* note 63, at 95.

¹⁵⁹ See Zimmermann, *supra* note 139, at 318.

doctrine, highly influential in early America, of the “supremacy of the common law” asserted by Chief Justice Edward Coke in *Dr. Bonham’s Case* of 1610:¹⁶⁰

And it appears in our books that in many cases the common law will controul acts of parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.¹⁶¹

Today, some American judges are more interested in controlling statutes than in applying them.¹⁶²

An early canon of interpretation was that statutes in derogation of the common law are to be strictly construed and not extended beyond their rules.¹⁶³ According to Justice Story: “In all cases of a doubtful nature, the common law will prevail, and the statute not be construed to repeal it.”¹⁶⁴ This canon made fodder of those statutes that judges found to infringe on the common law. Even in the nineteenth century this doctrine was said to be obsolete and deserving of rejection.¹⁶⁵ Still the reasoning behind the doctrine—that statutes should be narrowly construed—continues. Uniform laws, such as the Uniform Commercial Code, include provisions requiring that they “be liberally construed and

¹⁶⁰ THEODORE F.T. PLUCKNET, *A CONCISE HISTORY OF THE COMMON LAW* 50-51 (5th ed. 1956). It is described as a “rule of construction of statutes” in Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 149-85, 365-409 (1928-1929), reprinted in EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 50 (1955).

¹⁶¹ As quoted in S.E. Thorne, *Dr. Bonham’s Case*, 1938 LAW Q. REV. 543, 543-52, reprinted in S.E. THORNE, *ESSAYS IN ENGLISH LEGAL HISTORY* 269, 275 (Hambledon Press 1985), and also in CORWIN, *supra* note 160.

¹⁶² CHARLES E. WYZANSKI, JR., *WHEREAS—A JUDGE’S PREMISES* 6 (1965); cf. Richard A. Posner, *Law and Economics—ethics, economics, and adjudication*, IVR ENCYCLOPEDIA OF JURISPRUDENCE, LEGAL THEORY AND PHILOSOPHY OF LAW, <http://www.ivr-enc.info/en/article.php?id=42> (last visited Dec. 31, 2006) (“American judges [have] a taste, and a felt competence, for participating in the creation and not merely the application of law. . . . [They] indulge their taste in innovative, policy-oriented judicial rulemaking. . . .”).

¹⁶³ THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* 267 (John Norton Pomeroy ed., Baker, Voorhis & Co. 2d ed. 1874); Story, *Law, supra* note 79, at 583-84 (McCLELLAN, *Appendix III*, at 362) (especially numbers 14, 15, 21).

¹⁶⁴ Story, *Law, supra* note 79, at 584 (McCLELLAN, *Appendix III*, at 362) (number 14).

¹⁶⁵ SEDGWICK, *supra* note 163, at 267-71 n.b (John Norton Pomeroy).

applied,"¹⁶⁶ for fear that otherwise they would be limited to their precise words.¹⁶⁷

Another way that American judges shape statutes, sometimes beyond the point of recognition, is through free use of legislative history.¹⁶⁸ Legislative history used in the United States for statutory interpretation is not limited to careful ministry or comprehensive committee reports about proposed legislation, but includes cryptic conference reports mediating final language between two houses of Congress, speeches made on the legislature's floor, and even speeches and testimony in committee hearings. Opportunities for manipulation of such materials are obvious;¹⁶⁹ statutory "interpretation" of this sort renders statutes opaque and guts guidance to the law-abiding. Adverse reaction to such manipulation has encouraged development of a new approach to statutory interpretation, known as "new textualism," which *excludes* reference to legislative history.¹⁷⁰

Perhaps even more destructive of development of systematic lawmaking is that American judges give judicial decisions interpreting statutes the binding force of precedents. Lower courts *must* follow higher court interpretations, not because their interpretations are better, but because they are authoritative. By giving interpretations of statutes the force of law, higher courts arrogate to themselves determination of what the law is until the legislature acts again.¹⁷¹ This practice has another pernicious, but largely unappreciated, effect on law-finding in concrete cases. When judges find law, they often begin not with a statute that the legislature drafted to cover a multitude of cases, but with a precedent that an appellate court wrote to decide one particular case.¹⁷² As a result, the generality of law, and therefore its predictability, suffers.

¹⁶⁶ U.C.C. § 1-103(a) (2004).

¹⁶⁷ *See id.* § 1-103 cmt. 1

¹⁶⁸ *See generally* CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION (2002).

¹⁶⁹ Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 14 (1993); Strauss, *supra* note 81, at 231-32.

¹⁷⁰ Alan Schwartz, *Constitutional Law and the Supreme Court: The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y.L. SCH. L. REV. 149, 152 (2001).

¹⁷¹ *See* Strauss, *supra* note 81, at 244. "Often presented as if it were an act of self-abnegation . . . giving interpretations precedential force actually dramatizes judicial power; it makes the courts a political competitor with the legislature in the creation of law." *Id.*

¹⁷² Judges not infrequently lament that, in the absence of a guiding precedents, they have had to turn to reading the legislative text!

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Yet another consequence of applying stare decisis to decisions interpreting statutes is that even in the federal system, law is not uniform. Federal law varies by judicial circuit.¹⁷³ Theoretically the Supreme Court resolves conflicting interpretations, but practically it addresses only the most important of them—at best, a few dozen each year.¹⁷⁴ In the 1970s and 1980s, there were proposals for creation of a “National Court of Appeals” or an “Intercircuit Panel” that would handle these kinds of cases, but no such court was established.¹⁷⁵ Opponents argued that “many circuit courts act as ‘laboratories’ of new or refined legal principles,” and that the “diversity” of a “vast country” benefits from a “flexible system” and federal law with “regional variations.”¹⁷⁶ To complete the analogy, they should have asked the laboratory subjects how they felt!

3. Adversarial Argument of Novel Legal Theories

People trying to comply with law may be dismayed to learn that the American procedural system encourages lawyers to challenge the plain meaning of statutes. The role of the parties in finding law—always substantial¹⁷⁷—has, since Justice Story’s time, actually *increased*. Justice Story was concerned with time wasted in argument about what common law *was*.¹⁷⁸ American law now permits adversary lawyers to argue what the law *should be*.¹⁷⁹ Rule 11 of the Federal Rules of Civil Procedure

¹⁷³ Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 427 (1987) [hereinafter Carrington, *Function*]. “In fact, the federal courts never resolve authoritatively many questions of interpretation of federal legislation.” *Id.*

¹⁷⁴ The Court’s principal role now is that of a constitutional court. It decides each year with opinion fewer than 100 cases of all types each year. See Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 49 (2004). Typically European supreme courts, with many more judges and no constitutional responsibilities, decide many times that number of cases.

¹⁷⁵ Erwin N. Griswold, *The Federal Courts Today and Tomorrow: A Summary and Survey*, 38 S.C. L. REV. 393, 396-97 (1987).

¹⁷⁶ J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 929-30 (1983); cf. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 46 (1995), available at <http://www.uscourts.gov/lrp/CH05.PDF> (asserting there is no problem); Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605 (2003) (arguing that “the thousands of intercircuit conflicts in the United States federal court system are a problem in need of resolution”) (emphasis omitted); Carrington, *Function*, *supra* note 173, at 427-28; Paul Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound’s Structural Solution*, 15 J.L. & POL. 515, 517 (1999).

¹⁷⁷ See *supra* text accompanying note 117.

¹⁷⁸ See *supra* text accompanying note 117.

¹⁷⁹ See *supra* text accompanying note 117.

provides that when a lawyer submits a paper to a court, the lawyer represents: “[T]he claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”¹⁸⁰ The provision permits parties to seek legal redress even though there is no existing legal ground. The Advisory Committee Note to Rule 11 states that there is no violation so long as a litigant has “researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys.”¹⁸¹

Professor William G. Ross observes that lawyers are expected to spend time developing arguments, some of which may turn out in the end to be fruitless.¹⁸² Professor Anthony D’Amato explains how party self-interest impels attorneys to invent hypothetical cases for argument, and thus moves the law “toward complete uncertainty.”¹⁸³

The deleterious effect on rule determinacy of the indulgent attitude of Rule 11 is magnified by the unusual cost system that prevails in the United States. In most countries, in litigation, the loser normally pays the attorneys’ fees for both sides.¹⁸⁴ That allocation of costs is consistent with the court’s determination that the winning party was in the right; the party in the right should not have to suffer. In the United States, however, generally each side must pay its own attorneys’ fees. As a result, parties who raise claims not found in existing rules incur little risk so long as they satisfy the minimal requirements of Rule 11. A party may lose, but the other side is out its time and fees for its attorneys. This has an impact long before trial. American lawyers sometimes counsel their clients to avoid conduct when there is a mere possibility that someone may assert a dubious claim.¹⁸⁵

¹⁸⁰ FED. R. CIV. P. 11(b)(2).

¹⁸¹ *Id.* (1993 amend. cmt.).

¹⁸² WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 113 (1996).

¹⁸³ Anthony D’Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 22-25 (1983).

¹⁸⁴ See generally W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the “Odd Man Out” in How It Pays Its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361 (1999).

¹⁸⁵ Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States – Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147, 154 (1994). Suggestions to introduce a loser pay rule meet vigorous opposition, which argue that a loser pay rule might “excessively discourage parties with plausible but not clearly winning claims.” REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, APRIL 2, 1990, at 105 (1990), available at http://air.fjc.gov/library/fjc_catalog.

Finding rules is only an intermediate step on the way to applying rules to concrete cases and giving subjects guidance in law. Part V addresses applying law to facts.

V. LAW-APPLYING

The rule of law requires rules that apply surely and predictably. If rules are not correctly put into practice, voluntary compliance is undermined.¹⁸⁶ The United States has no generally accepted method for applying rules. Frequently it fails to apply rules at all. The absence of a general method of rule application is one of the most important factors in legal indeterminacy in America.

When there is a generally accepted method of applying law, different people looking at the same rules, if the rules are otherwise determinant, should reach the same conclusions. In such cases people can conduct their lives within the rules confident that they normally will not be disturbed by government authorities or by third parties asserting that their conduct is outside the law. They can rely on the rules. If, however, application of law is erratic and unpredictable—if application is divorced from the rules of law—people cannot safely rely on the law even if the rules themselves appear determinant.

If there is a natural model for a legal system's method of law-applying, that model is the system's law of civil procedure. Modern systems of civil procedure, including the American, decide cases by applying rules to facts. The American system, however, is less than a fully satisfactory model. There are two principal reasons for this.

One reason American civil procedure is a poor model of law-applying is that today applying law to facts is a rarity. Changes in the system of civil procedure have shifted law-applying to the trial stage of proceedings and away from the pleading stage, which once had an important role in law application. But trials—never common in recent

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unid=40C7E33B291C77AF85256D66007255F2.

¹⁸⁶ See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189 (2004). “[T]he action-guiding work of substantive law is inextricably entangled in the action-guiding work of procedural law.” *Id.* Abraham Lincoln warned: if perpetrators of unlawful acts “go[] unpunished, the lawless in spirit, are encouraged to become lawless in practice; While, on the other hand, good men, men who love tranquility, who desire to abide by the laws . . . become tired of, and disgusted with, a Government that offers them no protection” Lincoln, *supra* note 45 (speech before the Young Men’s Lyceum in 1838).

times—are “vanishing.”¹⁸⁷ While percentages vary, probably in no jurisdiction do even five percent of cases reach the trial stage. If no trial occurs, application of law to facts takes place, if at all, in determinations of motions for dismissal (which test the pleadings against very generous standards) or in motions for summary judgment. While these are not uncommon, they do not occur in most cases; and when they do occur, they do not always deal completely with the case.

Another reason that American civil procedure is a poor model of law-applying is that even when it does purport to apply law to facts, its commitment to that application is imperfect at best. When it uses a jury, it does not insist on applying law to facts. Its insistence is greater when it uses trial by judge alone.

This Part asserts that applying law to facts is a necessary element of deciding according to law. It contends that decisions according to law are decisions that subsume facts under legal rules. Further, it shows that such syllogistic law application has suffered a continuing diminution in American civil procedure as the power of juries to decide free of rules has been enhanced and the role of pleading in law-applying has been reduced.

A. *Syllogistic Law Application*

To apply law to facts means to reach a decision according to rules of substantive law.¹⁸⁸ Not every decision by a legal tribunal qualifies. If a decision-maker were to flip a coin, that would not qualify as a decision according to law.¹⁸⁹ Deciding according to law requires finding an applicable rule, determining the facts, and applying the rule to the

¹⁸⁷ See, e.g., Patricia Lee Refo, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUDIES v (2004). This is the introduction to a symposium issue and the report of the Vanishing Trial Project of the Section on Litigation of the American Bar Association. *Id.* Trials may never have been common. See, e.g., SIR WALTER SCOTT, NAPOLEON BONAPARTE, EMPEROR OF THE FRENCH 417 (1858) (reporting that the number of actions at common law tried yearly in England averaged only two to thirty per county).

¹⁸⁸ But see Schauer, *Rules*, *supra* note 26, at 69 (discussing the conflation of decision according to rule with the rule of law). Edward H. Levi asserted that: “The pretense is that the law is a system of known rules applied by a judge In an important sense legal rules are never clear” LEVI, *supra* note 100, at 1.

¹⁸⁹ See ADMIN. OFFICE OF THE U.S. COURTS, JURY HANDBOOK—HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS, *In the Jury Room*, http://www.mnd.uscourts.gov/jury_handbook.htm (last visited Dec. 31, 2006); Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 58 (1990) (citing G. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 14 (1905)) (all referring to coin-tossing).

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facts.¹⁹⁰ This is considerably more difficult than is generally supposed. The legal rule cannot always be read from a statute or precedent. It may be necessary to search statutes and precedents, analyze them, compare them to facts, revisit statutes and precedents in light of the facts, and again examine facts in light of the law.¹⁹¹ The end result is to bring facts and law together.

When people apply rules to themselves, they normally follow a syllogistic process: a legal rule is the major premise, facts are the minor premise, and these facts are subsumed logically under the legal rule to reach a correct legal decision. Syllogistic application of law to facts brings law and facts together.

American jurists have long criticized use of the syllogistic model. Dean Roscoe Pound called it “mechanical jurisprudence.”¹⁹² Yet when Pound coined the phrase a century ago, he did not challenge the use of deduction to decide cases according to law. He praised the then new German Civil Code for laying down “principles from which to deduce, not rules, but decisions.”¹⁹³ It was deduction of rules from concepts¹⁹⁴—that is, using syllogistic reasoning to create law and not to apply it—that Pound disparaged.¹⁹⁵

Although frequently disparaged, syllogistic law application is essential to fulfillment of the rule of law. Objections to it are founded less on its use at all and more on its exclusive use in all cases all the time. In hard cases, it may mislead decision-makers into viewing application of law to facts as a simple process that is devoid of nuance or valuing. It may result in failing to take into account differences or similarities in individual cases that are apparent only when rules are viewed against

¹⁹⁰ Brodin, *supra* note 189, at 225; Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920).

¹⁹¹ Vicki Wayne, *Judicial Fact-Finding: Trial by Judge Alone in Serious Criminal Cases*, 27 MELB. U. L. REV. 423, 434 (2003). “Any model of legal decision-making that strictly bifurcates the application of legal rules from fact-finding is likely to mask the latent evaluative content of legal rule application.” *Id.*

¹⁹² Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 613 (1908) [hereinafter Pound, *Mechanical Jurisprudence*].

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 612, 616.

¹⁹⁵ *Id.* at 619.

their reasons.¹⁹⁶ It may lead to their applying law to fact patterns where there is no applicable law.

In civil law jurisdictions, syllogistic law application once held unchallenged pride of place. It now shares place with other methods such as analogy, induction, and abduction. It is no longer seen as a sufficient explanation for all cases all of the time. Its results cannot be accepted automatically, but are checked against ideas of justice. But, though tempered in its use, syllogistic law application dominates daily practice. No competing theory better describes what it means to apply law to facts in ordinary cases.¹⁹⁷

In common law jurisdictions, the role of syllogistic law application is not radically different.¹⁹⁸ Its use is pervasive.¹⁹⁹ It is readily used in practice even if its use is only reluctantly acknowledged in the academy.²⁰⁰ Syllogistic reasoning is the reasoning that jury instructions expect juries to apply.²⁰¹ It enables self-application and permits legal systems to respond to the need identified by Hart, “for certain rules which can, over great areas of conduct, safely be applied by private

¹⁹⁶ HART, CONCEPT, *supra* note 37, at 130. For a categorization of such missteps, see Samuel C. Darman, *The Utilization of Syllogisms in Contemporary Legal Analysis: Law, Logic and the Boolean Universe*, 1998 DETROIT COLLEGE L. REV. 63, 66 (1998).

¹⁹⁷ See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 194-239 (William Rehg trans., 1994); ARTHUR KAUFMANN, DAS VERFAHREN DER RECHTSGEWINNUNG. EINE RATIONALE ANALYSE 2-6, 29-30, 54-62 (1999) (reviewing criticisms and discussing alternatives to deduction); SCHAPP, *supra* note 50, at 1.

¹⁹⁸ NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 32-33, 43-47 (2005) (the legal syllogism is “central to legal reasoning”); Wolfgang Fikentscher, *The Evolutionary and Cultural Origins of Heuristics that Influence Law-making*, in HEURISTICS AND THE LAW 207, 220 (Gerd Gigerenzer & Christoph Engel, eds., 2006).

¹⁹⁹ See, e.g., RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW METHOD 55 (1997) (discussing its place in applying precedents).

²⁰⁰ See Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1498 (1996).

Most lawyers and judges experience law as a process of logical deduction. They believe they apply the law laid down by legislatures and appellate courts to the facts of cases and generate answers. Most law professors at elite schools (and many of the best trial lawyers) hold this ‘Formalist’ view of law in contempt.

Id. For texts and a monograph that recognize syllogistic law application, see ALDISERT, *supra* note 120, at ch. 5; STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING ch. 3 (1985); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY ch. 2 (1978).

²⁰¹ Standard jury instructions typically provide that jurors are to “apply the law” and then direct that they find the required facts that would fulfill the legal elements of a given cause.

individuals to themselves without fresh official guidance or weighing up of social issues."²⁰²

In the United States, however, legal procedure does not always require syllogistic law application. Decisions according to legal rules are allowed to give way when juries are introduced into decision-making. Juries have considerable freedom to put aside legal syllogisms and to decide according to their free assessment of the equities of particular cases irrespective of law. Just how much freedom they have has long been hotly debated.

B. Jury Decision-making

American civil procedure has a long history of tempering decisions according to law with decisions free, to a greater or lesser extent, of the formal syllogisms of legal rules. In contemporary America, the jury is the principal exponent of such decision-making. A decision that does not rest on syllogistic law application is legitimized, not as a correct application of law to facts, but as a just decision reached after all sides have had their "day in court" before a neutral jury.

The right to a day in court is one of the most firmly rooted, long-standing, and widely-held ideals in American law.²⁰³ It is a right to be heard,²⁰⁴ but it is much more than that. It prefers oral testimony in open court, subject to cross-examination, to other forms of proof.²⁰⁵ A day in court includes the "means of contesting before a jury all such facts as may be necessary to the attainment of justice."²⁰⁶ It is an opportunity for the parties to tell their stories unencumbered by the rule of law model.²⁰⁷

The contemporary American trial is structured to permit each side to tell its story; the judge is passive. The parties begin their cases with their

²⁰² HART, CONCEPT, *supra* note 37, at 130; accord Paul N. Cox, *An Interpretation (and Partial Defense) of Legal Formalism*, 36 IND. L. REV. 57, 71 (2003).

²⁰³ See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989); *State v. Anon.*, 2 N.C. 28, 29 (1794). It is an American's "birthright." *Ex parte Schenk*, 65 N.C. 353 (1871) (Argument no. 6 of counsel); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141 (2000).

²⁰⁴ *Curtis v. Cisna's Adm'rs*, 1 Ohio 429, 436 (1824).

²⁰⁵ Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1072 (2003).

²⁰⁶ *Vanzant v. Waddell*, 10 Tenn. 260, 265 (1829).

²⁰⁷ See generally Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1 (2001); see also Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2100 (1989).

opening statements. Following that, first one side, then the other, presents its witnesses. In the course of that testimony, the other side, in cross-examination, has the opportunity to challenge the other party's story.²⁰⁸ Finally, each of the parties provides a closing statement before the judge instructs the jury in the law and sends the jury out to decide the case. If trial is before a judge alone, the judge retires to reach his or her decision. Central to these presentations is that each party "identify a legal theory of the case, a factual theory of the case, and a theme, or persuasive theory of the case."²⁰⁹ The legal theory is only a part of the more important larger theme: "the moral-political claim the case makes on the jury's sensibilities."²¹⁰

When juries are involved in cases, syllogistic law application involves two separate actors: judge and jury.²¹¹ American civil procedure distinguishes the roles of these two actors by *separating*, rather than bringing together, questions of law and fact. The classic statement of the English common law applies: judges decide legal questions, juries decide factual issues.²¹² That leaves undetermined, however, who applies the law to the facts. Sometimes it is the judge, sometimes the jury; and sometimes, it is the parties themselves.

Juries have power to decide against the law.²¹³ Known as "jury nullification,"²¹⁴ the conventional view championed by Justice Story is that such decisions are made without authority and should be exceptional.²¹⁵ A more recent and radical view, however, holds that such

²⁰⁸ Robert P. Burns, *Reinvigorating the Jury: A Conservative Perspective on the Future of the American Jury Trial*, 78 CHI.-KENT. L. REV. 1319, 1326 (2003) (one side has an opportunity for "construction" of its narrative and the other for "deconstruction").

²⁰⁹ *Id.* at 1323.

²¹⁰ *Id.* at 1324.

²¹¹ Cf. McCormick, *Jury Verdicts Upon Special Questions in Civil Cases*, 2 F.R.D. 176, 177 (1973).

²¹² EDWARD COKE, 1 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND lib 2, cap 12 § 234, at 155(b) (Charles Butler ed., 18th ed. 1823). "The most usual triall [sic] of matters of fact is by 12 such men; for *ad questionem facti non respondent iudices*; and matters in law the judges ought to decide and discuss; for *ad questionem juris non respondent juratores.*" *Id.*

²¹³ *United States v. Thomas*, 116 F.3d 606, 615 (2d Cir. 1997); Comm. on Prof'l Responsibility of the Ass'n of the Bar of the City of New York, *Report on Jury Nullification*, 54 REC. 197, 199 (1999).

²¹⁴ The practice is possible because in certain cases, the jury has the last word. Its decision is final and cannot be corrected. This occurs most commonly when the jury acquits a defendant in a criminal case; the prosecution has no possibility of appeal. As discussed below, limitations on appellate review can give it a similar power in civil cases.

²¹⁵ *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14545). "[The jurors] have the physical power to disregard the law, as laid down to them by the court.

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decisions should be the norm and that their legitimacy should be acknowledged.²¹⁶ Under this latter view, jury nullification not only supplements syllogistic law application in extraordinary cases, but competes directly with it in ordinary ones. It is diametrically opposed to the rule of law as a law of rules.²¹⁷

Jury nullification is only the most extreme example of juries deciding free from rules of law; other instances are discussed below. Jury decision-making is expected to “reconcile law and justice in concrete cases.”²¹⁸ It is supposed to be “less legalistic and more infused with localized, lay notions of justice.”²¹⁹ It is to serve as a check on government and on rules and as a means to involve citizens in democratic government.²²⁰

C. Pleading

Over the course of the last two centuries, the American legal system has steadily reduced the role of rules and their syllogistic application in civil procedure. While the goal of civil procedure remains application of law to facts, the trend has been away from rule-oriented decision-making toward freer dispute resolution where rules have a diminished role. In this “[p]rogressive version of procedure,” facts have more importance than law, and disputing has a broader rather than a narrow focus.²²¹ While this is seen by some as a step towards more just resolution of individual cases, its effect has been to render rules less determinate and their application problematic. This diminution of the role of rules is apparent in the demise of common law pleading, the rise and fall of code pleading, and the eventual triumph of notice pleading. Notice pleading has largely eliminated a role for law-applying at the pleading stage. Pleading once was essential for narrowing issues and structuring a case

But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure.” *Id.*

²¹⁶ JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 247 (1995).

²¹⁷ IRA PERLEY, *TRIAL BY JURY: A CHARGE TO THE GRAND JURY* 7 (1867) (“If the rule of law were left to be discovered in each case by the jury, and decided according to their independent judgment, no man could know in advance what his legal rights would turn out to be.”). See generally Peter M. Tiersma, *Jury Instructions in the New Millennium*, *CT. REV.*, Summer 1999, at 28.

²¹⁸ ABRAMSON, *supra* note 216, at 248.

²¹⁹ Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 *MINN. L. REV.* 1149, 1198 (1997); accord ABRAMSON, *supra* note 216, at 60; Burns, *supra* note 208, at 1357.

²²⁰ See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972); Moore, *supra* note 138, at 1185.

²²¹ Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 *J. EMPIRICAL LEGAL STUDIES* 943, 948 (2004).

for trial. When it did this, it had an important role in applying law to facts.

1. The Demise of Common Law Pleading

When common law pleading prevailed, one could say that the parties themselves applied the law.²²² Common law pleading was characterized by the forms of action of the old writs and by the issue forming process of special pleading. The writ was the statement of the legal claim on which plaintiffs relied for recovery. Writs were limited in number. By choosing the writ, plaintiffs in effect chose the law to be applied. Through pleading, parties reached the issue to be decided. Each party answered the pleading of the other party by denying, affirming, or affirming and adding new matter, until a single material point was reached that one party affirmed and the other denied. When that issue was a question of law, it was for the judge to decide. When it was one of a fact, a jury would be summoned for a trial of that fact. It was the “glory” of the system that, in advance of trial, the parties themselves singled out the one material point as to which they were in dispute.²²³ Special pleading made jury trial efficient.²²⁴ It was “the mainspring and the regulative force of the whole machinery of the Common law.”²²⁵

Common law pleading relied on syllogistic law application. The form of action provided the major premise; it set out the essential facts

²²² Cf. Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1987 (2004). “The common law system almost automatically accomplished the diagnosis: the formal procedures integrated law and fact.” *Id.*

²²³ CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 12-13 (2d ed. 1947); see also MARYLAND REPORT, *supra* note 103; ROBERT W. MILLAR, COMMON LAW PLEADING 1-13 (1912) (Part I); R. ROSS PERRY, COMMON LAW PLEADING: ITS HISTORY AND PRINCIPLES 179, 191-203 (1897); G. VAN SANTVOORD, A TREATISE ON THE PRINCIPLES OF PLEADINGS IN CIVIL ACTIONS UNDER THE NEW YORK CODE OF PROCEDURE 37 (1852) (contrasting common law pleading with equity pleading).

²²⁴ MARYLAND REPORT, *supra* note 103, at 17-18; cf. CHARLES EDWARDS, THE JURYMAN’S GUIDE THROUGHOUT THE STATE OF NEW YORK AND CONTAINING GENERAL MATTER FOR THE LAWYER AND LAW OFFICER 166 (1831) (“All that the jury have to do, is to observe well those parts of the pleadings or matters in issue which deny the plaintiff’s claim; for they have nothing to do with that which is confessed, or not denied in the pleadings.”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*] (the writ, the jury and single issue pleading were “means of confining and focusing disputes, rationalizing and organizing law, and of applying rules in an orderly, consistent and predictable manner”).

²²⁵ MARYLAND REPORT, *supra* note 103, at 9.

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that formed the minor premise.²²⁶ The plaintiff's declaration set forth the cause of the complaint and had to include, as was said in a leading English text widely circulated in the United States early in the nineteenth century, "all essentials, or whatever is of the substance of the action."²²⁷ The law required of every plea two things: "the one, that it be in matter sufficient, the other that it be deduced and expressed according to the forms of law."²²⁸ Adherents of special pleading considered it to be, as the United States Supreme Court noted, "the best logic in the world, except mathematics."²²⁹

Special pleading required that parties choose a legal theory and then pick a single legal issue or factual point to contest. Common law pleading sometimes partially ameliorated the harsh effects of these perilous choices by allowing parties to plead the "general issue," i.e., to deny the pleading of the other party generally and not specially. This served to require the other party to prove all of the elements set out in that party's pleading. When the general issue was pleaded, no longer did a single question of law or a single issue of fact determine the outcome of the dispute. But use of the general issue created a conceptual and practical problem for applying law to facts.

A conceptual problem arose because general pleading involved the jury in law application. When the general issue was used, jurors almost necessarily confronted legal questions. There was no longer a single issue of fact for them to determine but a constellation of issues, the importance of which might be known only by referring to the parties' legal claims. This did not, however, make jurors into "judges" of the law. According to Justice Story, using the terminology of this Article, the judge *finds* the law while the jury *applies* the law.²³⁰ Indeed, juries were protected from being required to apply the law. They could not be compelled to give a general verdict, provided that they found a special verdict "showing the facts respecting which issue is joined and requir[ing] in such special verdict the judgment of the court upon the facts."²³¹

²²⁶ *Gould's Pleading*, 8 AM. JURIST & L. MAG. 74 (1832); see Subrin & Main, *supra* note 222, at 1987 ("In the early English system, writs declared the underlying essential facts.").

²²⁷ 5 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW WITH CONSIDERABLE ADDITIONS BY HENRY GWILLIM 326 (Bird Wilson, ed., 1st Am. ed. 1811).

²²⁸ *Id.* at 322.

²²⁹ *McFaul v. Ramsey*, 61 U.S. 523, 524 (1858) (quoting Sir William Jones).

²³⁰ *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14545) (in Justice Story's language, the judge "judges" the law, while the jury "determines" it).

²³¹ EDWARDS, *supra* note 224, at 167.

A practical problem arose because the general issue did not narrowly restrict trial as special pleading had. It demanded much more preparation than trial of a special issue. By definition, in trial of a special issue, there was only one fact to address. In trial of the general issue, many facts could be at issue. Legal questions could arise. The 1851 reform commission in Massachusetts rejected greater use of the general issue because of the “very great evils” it would create.²³² The Commission noted that evils “are felt in preparation for, during, and after the trial.”²³³ Specifically, “Neither party has any means of knowing what questions of fact and law are to be tried. Each must therefore conjecture, as well as he can, all reasonable possibilities and prepare for them.”²³⁴ As a result, special pleading was seen to be indispensable to jury trials of civil cases.²³⁵

The system of special pleading was complex, artificial, and formalistic. The writs had grown haphazardly over time and did not form a consistent system. Even adherents of special pleading acknowledged that “through ignorance or mistake, or sometimes by design, an issue is formed or a point presented which does not involve the merits of the cause, [and] a decision is made contrary to the justice and equity of the cause.”²³⁶ Gentle critics felt that, while it might work well in “skilful and cautious hands,” in practice, this “sharp and powerful machine inflicted many wounds on the ignorant and

²³² REPORT OF THE COMMISSIONERS APPOINTED TO REVISE AND REFORM THE PROCEEDINGS IN THE COURT OF JUSTICE IN THIS COMMONWEALTH (1851), reprinted in 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITING 149-50 (Benjamin R. Curtis, Jr. ed., 1879) [hereinafter MASSACHUSETTS REPORT]; accord G.T.C., *Special Pleadings*, 16 AM. JURIST & L. MAG. 324, 329 (1837). “[T]o abolish special pleading, and allow the use of no other form of defense than the general issue, must operate to produce surprise, uncertainty and want of exactness; thereby defeating the ends of justice.” *Special Pleadings*, supra, at 329. A similar view was expressed in England in, inter alia, the first article in the first issue of what was for nearly a century one of England’s most prestigious law journals. See *Principles and Practices of Pleading*, 1 LAW. MAG. 1, 3 (1828).

All that we can venture to assume is, the expediency of ascertaining beforehand the nature of the matter in dispute, and it is surely too obvious for denial, that if the parties were to proceed to trial without any warning but a summons to the court, without any species of preliminary arrangement, delay, uncertainty, and confusion would result.

Id.

²³³ MASSACHUSETTS REPORT, supra note 232, at 150.

²³⁴ *Id.*

²³⁵ *Could’s Pleading*, supra note 226, at 76.

²³⁶ MARYLAND REPORT, supra note 103, at 12.

unwary.”²³⁷ For the harshest critics, it made the science of law into “the fruitful mother of the rankest injustice.”²³⁸ The “interests of justice” and the “voice of the people” demanded nothing less than “radical reform.”²³⁹

By the middle of the nineteenth century, much of the legal community found common law pleading, even as moderated by pleading of the general issue, unsatisfactory. It was too easy to make a misstep: to go to the wrong court, to choose the wrong form of action, to make the wrong plea. Reformers saw only one way out of the misery: “abolish the whole system of special pleading; all actions of law and bills in equity.”²⁴⁰

2. The Growth of Code Pleading

Change came first through the introduction of “code pleading,” named after the Code of Civil Procedure enacted in New York in 1848.²⁴¹ The New York Code abandoned the distinction between actions at law and suits in equity and created a uniform course of proceeding.²⁴² It abolished the forms of action and substituted “one form of action . . . denominated a civil action.”²⁴³ It likewise abolished “[a]ll the forms of pleading heretofore existing” and set its own rules for determining the sufficiency of pleadings.²⁴⁴ For example, those rules required that the plaintiff serve a document denominated a complaint that included, *inter alia*, “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”²⁴⁵ The Code sought to banish technicalities and rest

²³⁷ MASSACHUSETTS REPORT, *supra* note 232. The report was authored by later Supreme Court Justice, Benjamin R. Curtis. Curtis dissented in the infamous Dred Scott case.

²³⁸ ROBERT WILLIAM WELLS, *Observations on the Pleadings and Practice of the Courts of Justice of Missouri: and, A Radical Change Therein Recommended*, in A LETTER ADDRESSED TO THE “METROPOLITAN” (1847), *substantially reprinted in Law Reform*, 21 U.S. MAG. & DEM. REV. 477, 482, 486 (1847).

²³⁹ David Dudley Field and fifty members of the New York Bar, *The Code of Procedure, Memorial to the Legislature* (Feb. 1847), *reprinted in 1 SPEECHES, supra* note 73, at 261.

²⁴⁰ WELLS, *supra* note 238, at 483.

²⁴¹ An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, 1848 N.Y. Laws 497 [hereinafter NEW YORK CODE].

²⁴² *Id.*

²⁴³ *Id.* § 62, at 510.

²⁴⁴ *Id.* § 118, at 521.

²⁴⁵ *Id.* § 120(2).

decisions on substantial rights.²⁴⁶ Pleadings did not have to decide the correct legal theory to apply.²⁴⁷

The promise of common law pleading had been that it would “bring the matter of litigation to one or more points, simple and unambiguous.”²⁴⁸ This was its contribution to applying law to facts. Accordingly, the reform commissions recognized that their codes had to accomplish this task if their work was to prove successful. Some of the commissions saw this as a choice of who should frame the issues for decision: a public officer or the parties.²⁴⁹ Should the parties have the task, as in special pleading, of reaching the issues, or should they present the case to the court “in gross” so that it might “review[] the complex allegations of both parties and methodis[e] them and evolv[e] the real points on which the controversy turns.”²⁵⁰ They regarded the latter as characteristic of the civil law and impracticable. The Massachusetts Commission saw borrowing from a foreign system of law as something “extremely hazardous and inconvenient.”²⁵¹ Better, it thought, “to take what we now have . . . and amend and build upon it, not in a foreign style of architecture or with wholly new materials, but, as far as possible, with old materials and after the old fashions”²⁵²

Code pleading thus retained a law-applying function for the process and gave the parties a role in it. Code pleading anticipated, as had common law pleading, that the parties’ pleadings would define the issues.²⁵³ The device it used to guide law application was the “cause of action.”²⁵⁴ The cause of action was an aggregate of operative facts that

²⁴⁶ *Id.* § 151, at 526.

²⁴⁷ Charles E. Clark & James William Moore, *A New Federal Civil Procedure, II. Pleadings and Parties*, 44 *YALE L.J.* 1291, 1301 (1935).

²⁴⁸ *McFaul v. Ramsey*, 61 U.S. 523, 524 (1857).

²⁴⁹ MASSACHUSETTS REPORT, *supra* note 232, at 154-55. For a contemporaneous argument in England that reformers should look to how the magistrate in the old Roman law prepared the case for decision, see JOHN GEORGE PHILLMORE, *THOUGHTS ON LAW REFORM AND THE LAW REVIEW*, FEBRUARY, 1847, at 11-15 (1847).

²⁵⁰ MARYLAND REPORT, *supra* note 103, at 10-11. The Commission chairman used the same language in Samuel Tyler, *Introduction*, in HENRY JOHN STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* 15-16 (Samuel Tyler ed., 3d Am. ed., 2d London ed. 1871) (reprinted 1892).

²⁵¹ MASSACHUSETTS REPORT, *supra* note 232, at 159.

²⁵² *Id.*

²⁵³ NEW YORK CODE, *supra* note 241, § 203, at 536. “Issues arise upon the pleadings” *Id.*

²⁵⁴ Charles E. Clark, *The Code Cause of Action*, 33 *YALE L.J.* 817, 828 (1924) [hereinafter Clark, *Code*].

gave rise to a legal right enforceable in the courts.²⁵⁵ The idea was that the pleading should set out the facts that fulfilled a complete cause of action and in so doing would facilitate narrowing the issues. The 1848 New York Commissioners thought that the pleadings should “present the facts on which the Court is to pronounce the law; to present them in such a manner as that the precise points in dispute shall be perceived, to which the proofs may be directed.”²⁵⁶ The Massachusetts Commissioners proposed that plaintiffs state only the facts on which they based their claims and not be required to recite legal conclusions. Each party would put the result of his case “upon the facts which he states” and would fail if he could not prove them.²⁵⁷ The role of facts in pleading led code pleading also to be termed fact pleading.

Thus code pleading also used syllogistic law application. While code pleading did not require parties to commit to a single legal theory, it pushed them to choose specific legal theories. Without having some idea of the legal basis of their claim, parties could not well plead relevant facts. Thus, to the extent that courts were more or less tolerant of extraneous material, or more or less tolerant of amendments, the pleadings commenced the law application process. Code pleading did not, however, force the parties to a single issue as special pleading had. It did not even force them to a limited number of issues.²⁵⁸

To reach a manageable number of issues the code reformers placed hopes in truth and party good will. Common law pleading had compelled parties to rely on fictions and fictitious claims and in effect encouraged them to make untrue averments. The reform codes demanded the actual facts.²⁵⁹ To discourage unfounded claims and defenses, the parties were to verify on oath the truth of their

²⁵⁵ *Id.* Its exact parameters were subject to some debate, particularly with respect to whether it included the remedy associated with the right (as the old writs had done). *Id.*; see also Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354 (1934) [hereinafter Clark, *Cause*]. Many of the commissioners who worked on the civil procedure codes were also involved closely in codifying the substantive law in a civil code, which could have worked together to effectuate code pleading of causes of action.

²⁵⁶ FIRST REPORT OF THE PRACTICE COMMISSION (Feb. 29, 1848), *extensively excerpted in* 1 SPEECHES, *supra* note 73, at 262, 273 [hereinafter NEW YORK REPORT].

²⁵⁷ MASSACHUSETTS REPORT, *supra* note 232, at 160.

²⁵⁸ *Cf.* *McFaul v. Ramsey*, 61 U.S. 523, 525 (1857) (discussing a case with fifty demurrers and exceptions under a code).

²⁵⁹ *E.g.*, NEW YORK CODE, *supra* note 241, § 65, at 511 (abolishing “feigned issues”); *id.* § 91, at 515 (requiring that actions be prosecuted in the name of the real party in interest). The New York Code, in discarding fictions and insisting on a simple statement of facts, was seen to substantially approximate civil law pleadings. Van Santvoord, *Study of Law*, *supra* note 100, at 32.

allegations.²⁶⁰ According to the New York Commissioners, the parties would be “better acquainted beforehand with the really disputable points, and therefore more able to prepare for and point out to the Court and the jury those which are, and those which are not, disputed.”²⁶¹

Code reformers did not rely on party good will alone. Advocates of code pleading, foremost among them David Dudley Field, were also advocates of codification of substantive law. Had they been successful in codifying substantive law, the number of possible causes of action might have been circumscribed and their content better defined. In the absence of codification, pleading remained difficult.²⁶²

Lacking causes of action limited and defined in codes of substantive law, code pleading failed to bring litigation down to disputing a few precise points. Lawyers could and did draft pleadings that made out causes of action without framing issues for trial; their adversaries had to prove a great deal rather than just a few essential issues.²⁶³ This failure led one New York judge, generations after the introduction of code pleading, to advocate the very course that the code commissions had consciously avoided: judicial takeover of issue narrowing. According to this proposal for a “justice factory,” definition of issues should be “distinctly a court rather than a partisan proceeding.”²⁶⁴

²⁶⁰ MASSACHUSETTS REPORT, *supra* note 232, at 160; NEW YORK CODE, *supra* note 241, at 523, § 133.

²⁶¹ NEW YORK REPORT, *supra* note 256, at 274; see Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 146 (1999). “Field believed that the verification of pleadings would lead to agreement on the truth of facts . . .” Subrin, *supra*, at 146.

²⁶² Cf. G.T. Bispham, *Law in America, 1776-1876*, 122 N. AM. REV. 154, 185-86 (1876).

Whether the results of this simplification of procedure have been altogether desirable, may possibly be doubted. . . . [I]n the method of presenting a case for decision by mere statement and answer, there is lost that precise and clear definition of the exact points in dispute which is found when the technical forms of the pleading of the common law are skillfully and carefully applied. . . . [I]t is plain that at some stage or other of a judicial proceeding, immaterial and admitted facts must be eliminated, otherwise the investigation would become hopelessly prolonged and confused . . .

Id.

²⁶³ Frederick D. Wells, *A Justice Factory*, JUSTICE THROUGH SIMPLIFIED LEGAL PROCEDURE, 73 ANNALS AM. ACAD. POL. & SOC. SCI. 196, 202 (1917).

²⁶⁴ *Id.* Judge Wells imagined a world suggestive of modern continental litigation.

The court could practically say: “Now on this issue are you seriously going to dispute the fact? As a reasonable man, are you denying it?” If he answers “Perhaps it is so, but, let the other side prove it,” it ought

Code pleading did not sweep the United States. Its adoption was spotty. Only gradually over a course of decades did it become the dominant form of procedure in the American states. Even after adoption of notice pleading in the Federal Rules of Civil Procedure in 1938, common law pleading remained in use.²⁶⁵ Code pleading's uneven and often unsatisfactory adoption was frequently attributed to the resistance of courts to abandon common law ways and fairly apply the codes. The Supreme Court itself evidenced considerable hostility when it described the code drafters as "sciolists, who invent new codes and systems of pleading to order," who with their experiments managed to "destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice."²⁶⁶

Spotty adoption of the codes led to lack of uniformity. The federal system did not adopt a code and did not merge law and equity jurisdictions until 1938.²⁶⁷ In order that actions at law in one state might be governed by essentially the same rules, Congress provided in what was called the Conformity Act of 1872, that federal practice at law—but not at equity—should "conform[] as near as may be" to state practice.²⁶⁸ The Conformity Act, however, hardly lived up to its name and itself led to considerable uncertainty.²⁶⁹

3. Modern Notice Pleading and the Federal Rules of Civil Procedure

Sixty years of experience with code pleading led many American lawyers to judge it almost as negatively as their predecessors had judged common law pleading.²⁷⁰ A "campaign for modernizing procedure"

to be possible for the court to throw his technical objections out of the window.

Id.

²⁶⁵ JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING (1969).

²⁶⁶ *Id.* at 525.

²⁶⁷ W.S. SIMKINS, A FEDERAL SUIT AT LAW 3 (1912) (describing the resulting conditions as "chaotic").

²⁶⁸ *Id.* at 2 (emphasis omitted).

²⁶⁹ *See id.* at 7. When in 1912 the federal courts adopted a set of national rules for equity jurisdiction Professor W.S. Simkins asked: "In this uncertainty, may it not be asked why a national code of practice cannot be formulated for the law side as well as the equity side of the court?" *Id.*

²⁷⁰ Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003). "The cure—code pleading—proved to be as bad as the disease . . ." *Id.* According to Thomas W. Shelton, the campaign's principal leader through the 1920s as Chairman of the American Bar Association's Committee on Uniform Judicial Procedure, the courts had become "the fencing schools of highly-trained pleaders" where justice was subordinated to

began with the first Interstate Conference of Judges in 1912 and eventually led to introduction of the Federal Rules of Civil Procedure in 1938.²⁷¹ Professor Stephen N. Subrin sees in adoption of the Federal Rules the triumph of equity over common law procedure.²⁷²

The Federal Rules made a major change in pleading: they essentially eliminated a role for it in formulating issues, and thereby largely eliminated application of the law at that stage. Charles E. Clark, the principal drafter of the Federal Rules, believed that the procedure codes had successfully abolished the forms of action and the separation of law and equity, but had failed in their attempt to substitute fact pleading for common law issue pleading.²⁷³ The reformers had not appreciated, he argued, that the difference between law and fact is one of degree.²⁷⁴ A pleader often could not know his or her legal theory before the evidence was produced and, if he or she did, would not want to give the theory away.²⁷⁵ The code concept of cause of action, Clark claimed, had a “long, inglorious, and destructive career,” and had “done more damage than ever the forms of action could possibly do.”²⁷⁶ Clark advocated that one should “expect less” of pleading.²⁷⁷ He proposed abandoning both issue pleading of the common law and fact pleading of the codes and advocated adoption of “notice pleading.”

technicality. Thomas W. Shelton, *The Reform of Judicial Procedure*, 1 VA. L. REV. 89, 90 (1913) [hereinafter Shelton, *Reform*]. Shelton focused on adoption of legislation to enable the Supreme Court to adopt rules of court. *Id.* at 97. The problem with procedure of the day, he felt, was exclusive legislative control in the form of “rigid, uncompromising statutes, or by the ancient common law made over by statutes.” *Id.*; see also THOMAS W. SHELTON, *THE SPIRIT OF THE COURTS* [iii-dedication], *passim* (1918) [hereinafter SHELTON, *SPIRIT*] (tying his campaign to the movement for uniform legislation discussed below).

²⁷¹ See generally SHELTON, *SPIRIT*, *supra* note 270; Thomas W. Shelton, *Campaign for Modernizing Procedure*, 7 A.B.A. J. 165 (1921). The campaign followed Roscoe Pound’s celebrated 1906 address to the American Bar Association. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 35 F.R.D. 273 (1964); see Charles E. Clark & James William Moore, *A New Federal Civil Procedure, I. The Background*, 44 YALE L.J. 387, 388 (1935).

²⁷² Subrin, *How Equity Conquered Common Law*, *supra* note 224.

²⁷³ Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 544 (1925) [hereinafter Clark, *History*].

²⁷⁴ *Id.* at 533-34.

²⁷⁵ Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 260 (1926) [hereinafter Clark, *Complaint*].

²⁷⁶ Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 312 (1938) [hereinafter Clark, *Handmaid*].

²⁷⁷ See Clark, *History*, *supra* note 273, at 542.

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As a result, the Federal Rules utilize notice pleading, and they “massively deemphasize[]” the role of pleadings.²⁷⁸ In a notice pleading system, the pleading tells the other side the general subject of the controversy and little more; in fact, the Federal Rules require only “a short and plain statement of the claim.”²⁷⁹ The official forms make explicit how little is required. For example, a complaint for goods sold and delivered is sufficient if it states “Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.”²⁸⁰ Unlike common law pleading, the Federal Rules do not require that parties choose a legal theory.²⁸¹ Unlike code pleading, they do not require that parties plead all the elements of a cause of action.²⁸² The Federal Rules do not normally require that parties even state the facts that support the claims they make.²⁸³

Since most state systems have adopted the Federal Rules outright or have emulated them in most respects, application of law through pleadings has largely vanished. Clark saw reduction in the role of pleading as a step toward the continental civil law, where “little is expected of pleading.”²⁸⁴ In the liberal attitude toward pleading, Clark observed, “We tend towards the civil law system; we shall probably not reach it for many generations, if at all.”²⁸⁵ Because the civil law system treats ascertaining of issues as part of the process itself, it does not give great importance to pleading. Clarke contended that “the continental system has the great advantage over our own of avoiding in the main all the extensive litigation over pleading and procedural points which is such a reproach to our system of justice.”²⁸⁶ By stripping away the law-applying function of pleadings, the Federal Rules were to assure litigants their day in court.²⁸⁷ Many decades later, however, American civil

²⁷⁸ Fairman, *supra* note 270, at 990.

²⁷⁹ FED. R. CIV. P. 8(a)(2).

²⁸⁰ FED. R. CIV. P. Form 5.

²⁸¹ Fairman, *supra* note 270, at 1001.

²⁸² See *Swierkiewics v. Sorema, N.A.*, 534 U.S. 506, 515 (2002); *Bennett v. Schmit*, 153 F.3d 516, 518 (7th Cir. 1998); Fairman, *supra* note 270, at 1001 n.95 (citing *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002)).

²⁸³ *Subrin & Main*, *supra* note 222, at 1991; see FED. R. CIV. P. 9(b) (stating that pleading requirements for fraud or mistake are higher than mere notice: these claims must be stated with “particularity”). *But see* Fairman, *supra* note 266, at 1064 (questioning, but then essentially affirming the predominance of notice pleading).

²⁸⁴ Clark, *History*, *supra* note 273, at 542.

²⁸⁵ *Id.* at 543.

²⁸⁶ *Id.* at 525.

²⁸⁷ See Clark, *Handmaid*, *supra* note 276, at 318-19; Fairman, *supra* note 270, at 990.

procedure is as far from continental procedure as ever: it is just that now it is distant in a different direction. While American procedure abandoned common law forms as a means of law-applying, it did not adopt civil law-applying either.

D. Law-applying Post Pleading

If pleading has lost its law-applying function, when in this new modern procedure are law and fact to come together?²⁸⁸ They do not, according to Professor Subrin, who caustically concludes that in today's "equity-dominated system . . . the highest goal is for courts not to apply law to facts."²⁸⁹ The drafters of the Federal Rules, of course, hoped that law would be applied. They saw litigation as a two-stage process: "In the first stage the points of dispute are ascertained and defined; in the second they are tried and determined."²⁹⁰ Today Americans speak of pretrial, which is common, and trial, which is rare. Pretrial includes the discovery phase and possible motions for summary judgment to avoid trial. Trial includes trial by court or jury and associated motions for directed verdicts, for judgment notwithstanding the verdict, and for new trials.

1. Pretrial Procedures

a. Discovery

Just as their code reformer predecessors had, the drafters put a great deal of faith in the power of truth. According to Professor Edson R. Sunderland, Clark's partner in drafting the Federal Rules and the one responsible for pretrial, the great weakness of pleading for developing issues of fact for trial was its "total lack of any machinery for testing the factual basis for the pleaders' allegations and denials."²⁹¹ Discovery is a means for the parties, prior to trial, to learn the substance of each other's cases. The theory is that once both sides know the full truth, they can either settle the case themselves, or can at least agree on which issues are material to decision. Should the parties be unwilling to agree, where there is no reasonable dispute about the facts, the court may determine those claims upon motion for summary judgment. According to the Supreme Court, the system "relies on liberal discovery rules and

²⁸⁸ Cf. Subrin & Main, *supra* note 222, at 1993. "So, when, in this brave new procedural world, would the diagnosis function of civil procedure take place? Or, put another way, when would the parties integrate law and fact to advocate and persuade?" *Id.*

²⁸⁹ Subrin, *How Equity Conquered Common Law*, *supra* note 224, at 989.

²⁹⁰ Edson R. Sunderland, *The Function of Pre-Trial Procedure*, 6 U. PITT. L. REV. 1, 1 (1939).

²⁹¹ *Id.*

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summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”²⁹²

Discovery is allowed of any matter “relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or the claim or defense of any other party.”²⁹³ It is sufficient that the information or materials sought “appears reasonably calculated to lead to the discovery of admissible evidence.”²⁹⁴ Discovery largely works through the parties. In most cases, judicial involvement is limited to directing one or more pre-trial conferences that determine schedules and decide claims of privilege. As there is little judicial involvement, discovery can define issues only to the extent that the parties are willing to agree. Dean John S. Beckerman identifies as one of discovery’s fatal flaws “conflicts between discovery’s cooperative ideal and the rest of adversarial litigation’s aggressively partisan ethic.”²⁹⁵ That the permissive nature of discovery leads to delay and to the “disadvantage of justice” is widely acknowledged.²⁹⁶

b. Summary Judgment

Summary judgment is a way to avoid trial after or even in the course of discovery. Federal Rule of Civil Procedure 56(c) permits parties to “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The other side defeats the motion by showing that there is a “genuine issue of material fact.” Summary judgment, reformers hoped, would make the system “efficient” by clearing out baseless claims.²⁹⁷ Their hopes were overly optimistic. The practical problem that summary judgment confronts is the high bar it sets. Nothing compels litigants to admit points, so that to establish that there is no “genuine issue of material fact” can be hard to do. Before the mid-1980s, it was almost impossible.²⁹⁸ In the mid-1980s the Supreme Court decided a trilogy of cases that taken together are seen

²⁹² Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002).

²⁹³ FED. R. CIV. P. 26(b).

²⁹⁴ *Id.*

²⁹⁵ John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 585 (2000).

²⁹⁶ FED. R. CIV. P. 26 (advisory comm.’s note to 1983 amend.).

²⁹⁷ Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 98-99 (1988). Reformers saw summary judgment as a device to reach “speedy disposition of many cases” where there was “no real cause of action or defense.” Clark, *History*, *supra* note 273, at 536; cf. FED. R. CIV. P. 56 (advisory comm.’s note to original rule).

²⁹⁸ Subrin & Main, *supra* note 222, at 1993-2004.

to invigorate the procedure.²⁹⁹ But even as reinvigorated, summary judgment can only deal with claims largely lacking in merit and cannot deal with claims requiring complex application of law to facts.³⁰⁰ That the American system, as a general rule, does not shift attorney costs to the losing party renders the motion for summary judgment less than complete solace for the law-abiding. Just as settling parties do not recover litigation costs, likewise parties victorious after summary judgment do not either. Yet summary judgment ordinarily presupposes some level of discovery. It requires a motion practice. Thus, even a law-abiding party who is lucky enough to win a motion for summary judgment still loses.

2. Trial Procedures

The jury model dominates law-applying by civil judicial process. There can be no bench trial if the parties do not waive jury trial. There can be no summary judgment if there are facts for the jury to determine. Where special verdicts are used, juries still decide facts. Even when parties apply the law to themselves by settling cases, they do so based on their beliefs as to what juries would decide.

a. Ordinary Jury Verdicts

Jurors are supposed to decide according to law, but the American legal system gives them no training in legal decision-making. Indeed, it gives them only the most rudimentary of assistance. Judges are responsible for instructing jurors in individual trials. Usually this means no more than that at the end of the parties' presentations of their cases, the judges orally state what the law is.³⁰¹ They admonish the jurors that it is their duty to apply the law as given by the judge to the facts the jurors find.³⁰² They no longer, as they once did, comment on the evidence produced at trial.³⁰³ Judges, in complicated cases, give detailed and lengthy instructions in the law that lead to what one judge called "[p]olysyllabic mystification."³⁰⁴ Instructing juries is not interactive;³⁰⁵

²⁹⁹ Miller, *supra* note 205, at 1041. The trilogy of cases regarding summary judgment were *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

³⁰⁰ *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002).

³⁰¹ The usual model is described here. There are variations among states and courts.

³⁰² *E.g.*, Fifth Circuit Pattern Jury Instructions—Civil 3.1 (2006), <http://www.lb5.uscourts.gov/juryinstructions/>.

³⁰³ See Renée Letton Lerner, *The Transformation of the America Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000).

³⁰⁴ *Gacy v. Welborn*, 994 F.2d 305, 314 (7th Cir. 1993), *cert. denied*, 510 U.S. 899 (1993).

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judges read instructions and juries listen. Should juries have questions during the course of their deliberations, they can submit these to the judges. Typically judges read back what they read originally.³⁰⁶ Proposals to improve jury application of law to facts have been modest. Even minor measures, such as giving juries printed copies of the judge's instructions, instructing juries at the beginning rather than the end of the testimony, and allowing the jurors to take notes during the trial, encounter opposition.

Ordinarily, juries return what are called general verdicts, i.e., decisions without reasoned statements of the grounds for decision. "[G]eneral verdict[s] [are] as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."³⁰⁷ Lacking written justifications, judges or parties might quiz the jurors about their verdicts to determine if the jurors followed the law correctly, but they are not allowed to do so. In order to protect jury independence, there is a "presumption that jurors . . . follow their instructions."³⁰⁸

Judges are able to exercise only the most limited control of general verdicts. Since general verdicts lack reasoned explanations, there is no way for judges to know whether jurors applied the rules of law correctly.³⁰⁹ Trial judges, who witness the testimony, may decide cases contrary to the jury's decision if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."³¹⁰ This

³⁰⁵ See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542, 675-77 (1990) (explaining how the European idea that judges might deliberate together with jurors is thought to be practically inconceivable). A proposal in a draft of the Federal Rules of Evidence to adopt the English practice of the judge commenting on the evidence was quickly shot down as "highly controversial." See also Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 429 (1992); Laura Braden Foster, Comment, *Nobles v. Casebier and Judicial Comments on the Evidence in Arkansas*, 51 ARK. L. REV. 801, 814 n.102 (1998).

³⁰⁶ Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1086 (2001).

³⁰⁷ Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920). Judge Jerome Frank used similar words in *Skidmore v. Balt. & Ohio R.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948).

³⁰⁸ *Gacy*, 994 F.2d at 313; Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption that Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791, 797-98 (1995).

³⁰⁹ Cf. Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1865 (1998). "The ability to disclose a decision without having to formally justify it is itself a kind of power, rather like the parents' 'because I said so.'" *Id.*

³¹⁰ FED. R. CIV. P. 50(a)(1); see Miller, *supra* note 205, at 1057-58. In some state courts, the judge may grant such a motion only if there is no "scintilla" of evidence supporting the

control is weak; competent lawyers can ordinarily produce enough evidence to avoid judgment as a matter of law.³¹¹ In other circumstances, trial judges may order new trials.³¹² Control is similarly limited on appeal. Appellate courts are able to control only whether verdicts are completely unsupported and not whether the verdicts are correct.³¹³ But they can only review the record to see if there is some evidence on which a jury might have based its decision. They cannot themselves take testimony. In any case, the Seventh Amendment to the Constitution prohibits their reexamination of most jury findings of fact.

b. Special Jury Verdicts

In the era of special pleading, as has been seen, the normal jury verdict was “special” – that is, the jury found a specific fact. That finding determined the outcome of the entire controversy. It was the general verdict—where the jury found all the facts in dispute and applied the law to those facts—that was exceptional. Special verdicts survived abolition of special pleading.³¹⁴ Today proponents recommend greater use of special verdicts in order to improve rationality of jury trials and to restore law-applying to judges as much as possible.³¹⁵ When judges use special verdicts, they instruct juries to make a “special written finding upon each issue of fact”; the judges then enter judgment based on the facts found.³¹⁶ Ordinarily they submit a series of questions. Judges have complete discretion whether to use special verdicts.³¹⁷ Special verdicts

opposing side’s case. Miller, *supra* note 205, at 1057-58. Judges do not have to wait for the jury’s decision. *Id.* On motion, where there is no evidence for one side, they may grant a directed verdict for the other side. *Id.*

³¹¹ ROBERT P. BURNS, *A THEORY OF THE TRIAL* 29 (1999).

³¹² Albert D. Brault & John A. Lynch, Jr., *The Motion for New Trial and Its Constitutional Tension*, 28 U. BALT. L. REV. 1, 39 (1998). These circumstances include jury verdicts that are against the weight of the evidence. *Id.* But judges may not set aside verdicts on evidentiary grounds simply because they would have decided the cases differently. *Id.* at 40.

³¹³ Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 515 (1975).

³¹⁴ Judge Seymour Thompson devoted a full chapter to the topic in his noted guide to trials. 2 SEYMOUR D. THOMPSON, *A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL* 2006-19 (1889).

³¹⁵ See, e.g., Brodin, *supra* note 189, at 21.

³¹⁶ FED. R. CIV. P. 49(a) (strangely stating the judge’s role only by implication).

³¹⁷ Thornburg, *supra* note 309, at 1840; cf. Brief for Petitioner at 17-23, *Libbey-Owens-Ford Co. v. Shatterproofglass Corp.*, No. 85-635 (Oct. 12, 1985) (arguing that due process requires fact questions in complex patent cases to be determined by special verdicts).

largely take the law-applying function away from juries; consequently, they are anathema to proponents of an extra-legal function for juries.³¹⁸

Jury interrogatories are a device similar to special verdicts. Here, judges submit to juries, along with forms for a general verdict, “written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.”³¹⁹ If the jury returns answers to the interrogatories that are consistent with each other, and with the general verdict, the judge then enters judgment on that verdict. If, however, the jury returns answers that are inconsistent with the general verdict, the judge may enter judgment consistent with the answers, may return the case for further consideration by the jury, or may order a new trial. If the answers are inconsistent with each other, the judge may not enter a judgment, but must either return the case to the jury for further deliberation or order a new trial.³²⁰

Special verdicts and written jury interrogatories are obvious approaches to making jury verdicts more consistent with law and to deal with complex cases that jurors may have difficulty comprehending.³²¹ Indeed, the drafters of the New York Code of 1848 recommended both devices “where the questions may be complicated.” The Commission thought that use of a “special verdict in writing, upon all or any of the issues[,]” or “a general verdict [found] upon particular questions of fact, stated in writing,” would tend “to give greater precision to the language of the Judge, enable the jury the better to separate the questions, and prevent mistake and misunderstanding.”³²² But use of special verdicts and written interrogatories is occasional rather than routine. This may be because judges feel that they intrude on the prerogative of the jury. It may, however, be because writing special verdicts and interrogatories is difficult. Applying law to even simple disputes quickly devolves into complex decision trees, where determination of relevant questions depends on answers to previous ones.

³¹⁸ E.g., Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505 (1995).

³¹⁹ FED. R. CIV. P. 49(b).

³²⁰ *Id.*

³²¹ See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (arguing that complex cases required eliminating use of juries).

³²² NEW YORK REPORT, *supra* note 256, at 273-74.

c. *Bench Trials*

While jury trials are preferred, many trials are by judge alone without jury.³²³ Here law application is more oriented toward syllogistic law application. Judges are required to “find the facts specially and state separately . . . conclusions of law.”³²⁴ While normally judges do this in writing, they can state these in court orally and file them as recorded.³²⁵ There is surprisingly little literature on how they should write their judgments. Compared to the mountains of German literature on the subject, there seems to be only one substantial American book.³²⁶ Why this difference? Training for judging plays no role in American legal education and only a tiny role in a newly appointed judge’s.

Even if decisions were all according to law and all those laws were well-drafted and easily found, the American legal system would still have unnecessary legal indeterminacy. The peculiar form of American federalism sees to that, as Part VI reveals.

VI. RULE CONFLICTS AND RULE COORDINATION

The rule of law promises that rules do not conflict with each other. No one can comply with two contradictory rules. Where rule conflicts originate with the same lawmaker, there is a failure of lawmaking. Where conflicts originate with different lawmakers, there is a failure of coordination.³²⁷ Rule conflicts due to failed coordination are rife in America and particularly pointless.

Rule conflicts due to failed coordination are intensely important for practice. The usual first step in self-application of law is to determine which jurisdiction’s rules apply. Uncertainty as to which rules apply and conflicts among them often contribute more to indeterminacy than doubts about what the rules themselves mean. People need to know *which* rules to abide by.

³²³ The parties may have no right to a jury trial (e.g., for an equitable claim) or they may waive their rights.

³²⁴ FED. R. CIV. P. 52(a); see Clark & Moore, *supra* note 247, at 411-13 (noting that the bench trial where the judge finds issues of fact without a jury is a statutory innovation of the nineteenth century).

³²⁵ FED. R. CIV. P. 52(a). There is no such requirement for determination of motions to dismiss under Rule 12 or for summary judgment under Rule 56. *Id.*

³²⁶ JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK (4th ed. 2000); see also FED. JUD. CTR., JUDICIAL WRITING MANUAL (1991) (a slim forty-one page pamphlet, portions of which are devoted to topics of ordinary writing).

³²⁷ See generally MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

The law of conflicts of law deals with one kind of rules conflict: where two different jurisdictions at the same level prescribe different rules for the same transaction, conflicts law chooses one rule to apply. For example, conflicts law determines which law applies when A, who resides in forum F1, buys goods from B, who maintains a business in forum F2. Here these are called horizontal conflicts. A well-functioning conflicts law improves legal determinacy and helps fulfill the guidance function of the rule of law. American conflicts laws are notorious for their uncertainty.³²⁸

Conflicts laws do not address two important situations of rule conflicts: horizontal harmony and vertical consistency. At the horizontal level, when different rules regulate similar but separate conduct in *different* jurisdictions, in theory there is no conflict because the different rules do not require contradictory conduct. But for parties active in both jurisdictions, such different rules in practice undercut the guidance function of the rule of law, since those subject to the different rules may not practically be able to adjust their conduct to local differences. They reasonably wish for rules in harmony with each other. Vertical rule conflicts arise when two (or more) governments, which are related one to the other in a vertical relationship, each have authority over the same jurisdiction and issue contradictory commands (e.g., state/federal, local/state).

Parties active in multiple jurisdictions complain when those jurisdictions prescribe inconsistent conduct. Yet American judges have grown so used to failed coordination between federal and state governments, among the state governments, and between state and local governments, that they have come to accept the resulting indeterminacy as a necessary evil, "the price we pay for our federalism."³²⁹ Such indeterminacy is indefensible. American governments could coordinate their laws without imposing the costs of indeterminacy on those subject to them.

³²⁸ See Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 527 (2000) (referring to the *Restatement (Second) of Conflicts of Law* as a "blend of indeterminate indeterminacy" and a "total disaster in practice"). They do bring a certain amount of determinacy to contract law through the principle of party autonomy that permits parties to choose the applicable law.

³²⁹ *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958).

A. *Federal-State Coordination*

The Constitution of the United States of America was path-breaking. It creates a federal government of limited powers and sets out what those powers are. It prescribes that where the federal government has legislative power, federal law is supreme.³³⁰ It provides that powers not delegated to the federal government are reserved to the states.³³¹ In a few instances, it prohibits states from certain conduct.³³² In its original form, since altered by the Seventeenth Amendment, it provided state governments a role in federal lawmaking by bestowing on state legislatures the power to appoint senators in Congress.³³³ But beyond these limited measures, it says little about how state and federal governments are to coordinate their laws.

Federal constitutions of more recent origin, written in light of American experiences, are less laconic.³³⁴ They do more to facilitate federal-state coordination. They include catalogs of competencies setting out which are exclusive to the federal government³³⁵ and which are shared (concurrent) with state governments.³³⁶ Also, they set out what these competencies mean and how they are to be implemented.³³⁷ They give state governments a direct role in the making of federal laws.³³⁸ As a result, they can create uniformity of national law while providing that the states are to administer it.³³⁹ By taking a proactive role in inter-governmental relations, they can reduce indeterminacy.

³³⁰ U.S. CONST. art. VI.

³³¹ U.S. CONST. amend. X.

³³² U.S. CONST. art I, § 10.

³³³ U.S. CONST. art. I, § 3, cl. 1.

³³⁴ Schauer, *Failure*, *supra* note 98, at 766. While it has fewer than 5,000 words, its German counterpart has more than 20,000. *Id.*

³³⁵ *E.g.*, Treaty establishing a Constitution for Europe, Official Journal of the European Union, C 310/12-13 art. I-13 (Dec. 16, 2004) [hereinafter DRAFT EU CONST.]; Basic Law for the Federal Republic of Germany of May 23, 1949, as amended to Sept. 28, 2006, art. 73 [hereinafter GG (for the German designation, *Grundgesetz*)].

³³⁶ *E.g.*, DRAFT EU CONST. arts. I-14, I-17; GG arts. 74.

³³⁷ *E.g.*, DRAFT EU CONST. arts. I-11, I-12; GG arts. 70-72.

³³⁸ *E.g.*, DRAFT EU CONST. arts. I-34, III-396; GG arts. 50, 77.

³³⁹ *E.g.*, GG art 84. Justice Story hoped for something similar for the United States, stating

it is altogether desirable that, in states which are only minor divisions of one nation, having the same religion, manners and cultivation, the municipal laws, and the institutions for their administration, should, as far as possible, be made common to the whole, although matters of political administration might be kept distinct.

Story, *Law*, *supra* note 79 (McCLELLAN, *Appendix III*, at 356).

1. Judicial Review

Early in the history of the United States, the Supreme Court stepped into the void left by the terse Constitution. Through the mechanism of judicial review the Court sought to distinguish legislative powers that are exclusive to the federal government from those that are concurrent with the states.³⁴⁰ It tried to craft a method for coordinating state and federal legislation. Its chosen method of judicial review measures both state and federal legislation for compliance with the Constitution's allocation of legislative powers.³⁴¹ Federal legislation must be based on a power enumerated in the Constitution; state legislation must not be preempted by federal legislation or by an unexercised grant of legislative power of the federal government.

Judicial review has tried to demark exclusive and concurrent competencies of federal and state governments. The task of drawing clear lines has proven impossible to achieve. In the very case where the Supreme Court first attempted to measure state statutes against federal legislative power, *Gibbons v. Ogden*, Justice Johnson presciently warned that the competing powers "meet and blend so as scarcely to admit of separation."³⁴² Many scholars believe that workable judicial rules of decision have not and cannot be attained.³⁴³ The Court's decisions suffer from a lack of political legitimacy: how legislative competencies should be shared among federal and state governments is quintessentially a political question subject always to be revisited over time.

Uncertainty in precise allocation of legislative competencies between federal and state government need not endanger the guidance function of the rule of law so long as the division of competencies is settled before application of the law. When complying with law, people are indifferent as to whose law they are complying with. But the American legal system does not give such legal determinacy. It decides questions of legislative competency, not before, but as the legal rule is applied, and therefore at the risk and expense of those trying to comply with it. It treats the issue of legislative competency as an element of a party's case.

³⁴⁰ Judicial review is not limited to review of legislative competencies, but is a general review of consistency with the Constitution.

³⁴¹ Cf. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 9 (2004) (noting that most "of federalism" is not founded in the "spare text" of the Constitution, but in subsequent judicial development).

³⁴² 6 U.S. (9 Wheat.) 1, 32 (1824).

³⁴³ Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 7 (1999).

There is no judicial review of legislation before it takes effect;³⁴⁴ instead, judicial review requires a case or controversy arising after a law is in force.³⁴⁵ The case or controversy doctrine allows courts to determine whether a federal or state law complies with the Constitution only when the law is applied in a way that impacts a particular person. The doctrine precludes what are called advisory opinions. The Supreme Court presents the case or controversy doctrine as a way to reduce the frequency of challenges to legislation and as its deference to legislation.³⁴⁶ But the effect is just the opposite: delayed decisions complicate abiding by law. Until overturned, laws are presumptively valid and the law-abiding must comply with them if they can.³⁴⁷

While other legal systems, with an eye to American experiences, have adopted the substance of American judicial review, few have adopted the American method. Foreign systems typically use “abstract” review of legislation, which American usage would consider impermissible advisory opinions.³⁴⁸ Abstract review authorizes designated interested parties (e.g., governments, legislators) to challenge legislation before it takes effect,³⁴⁹ and can make unnecessary consideration of issues such as federal preemption in ordinary lawsuits.³⁵⁰

American-style judicial review diminishes legal determinacy in other ways. By treating constitutional review as a matter to be raised exclusively in party litigation, it delays and confounds determination of constitutional questions. Parties must raise constitutional questions in ordinary courts at the lowest level, where the constitutional issues may be avoided. Even when constitutional issues are addressed in the lower

³⁴⁴ See already the criticism of Simon Stern in 1879, quoted *supra* note 84.

³⁴⁵ *Diamond v. Charles*, 476 U.S. 54, 61 (1986); see STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* (1997) (containing scholars questioning whether there is a basis in the early practice of American courts for the strong antagonism to advisory opinions).

³⁴⁶ Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 (1924).

³⁴⁷ See generally WILLIAM GREENE, *SOME DIFFICULTIES IN THE ADMINISTRATION OF A FREE GOVERNMENT* 32 (1851).

³⁴⁸ See generally Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744 (2003).

³⁴⁹ E.g., GG art. 93, para. 1, § 2 (German provision allowing the federal government, a state government, or one third of the members of the lower chamber of parliament, to bring a challenge).

³⁵⁰ See ALEXANDER KONZELMANN, *METHODE LANDESRECHTLICHER RECHTSBEREINIGUNG* n.542, n.544 (1997); WOLFGANG MÄRZ, *BUNDESRECHT BRICHT LANDESRECHT* 108-12, 204 (1989) (both noting that GG art. 31 is largely superfluous when the competency rules of GG Arts. 70 et seq. are followed); HANS SCHNEIDER, *GESETZGEBUNG* (3d ed. 2002).

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courts, appeals may end short of the Supreme Court. When that occurs, a law may be upheld in one jurisdiction, but struck down in another. This long and expensive process is destructive of determinacy.³⁵¹ While it is ongoing, people must abide by the law as written. Since many judges have authority to invalidate laws, and the Supreme Court can decide only a few cases each year, “rogue” judges can “get away” with interpretations that the high court would not accept.³⁵²

2. Competing Bureaucracies

Another distinctive feature of American federalism is that it establishes, parallel to state courts and administrative agencies, separate federal courts and administrative agencies.³⁵³ The Constitution does not require such parallel structures; while it establishes one Supreme Court, it merely authorizes Congress to create lower federal courts.³⁵⁴ James Madison would have liked the Constitution to mandate lower courts, but had to settle for what is called the “Madisonian compromise.”³⁵⁵ This system of dual competencies complicates coordination and causes “a tremendous waste of judicial and private resources.”³⁵⁶ This waste is accepted, with resignation, as a necessary evil.³⁵⁷

B. State-to-State Rule Coordination

Differences in laws among the states are a major source of legal indeterminacy in modern America. While the indeterminacy is real, the differences in substantive law generally are not. They are often only differences in details. With the abolition of slavery, at the latest, the

³⁵¹ This was noted long ago. See, e.g., Henry Reed, *Some Late Efforts at Constitutional Reform*, 121 N. AM. REV. 1, 20 (1875) (“The universal uncertainty inevitably prevailing in the interval between the passage of a law of doubtful constitutionality and the final adjudication upon it is an evil important enough to be noticed.”).

³⁵² Tushnet, *supra* note 1, at 253-54. Congress addressed the concentration issue in the Three Judge Court Act of 1910, which was repealed in 1976. Tamara Hall, *The Hyde Bill: An Attempt To Resurrect the 1910 Three-Judge Court Act*, CT. REV., Spring 1998, at 32-33.

³⁵³ Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1294 (2003); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 410 (2003).

³⁵⁴ U.S. CONST. art. III, § 1

³⁵⁵ Wythe Holt, “To Establish Justice”: *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1461 (1989). Madison argued that “Confidence cannot be put in the State Tribunals as guardians of the National authority and interests.” *Id.*; see also Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995).

³⁵⁶ *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996).

³⁵⁷ *Id.* at 249; accord *Noel v. Hall*, 341 F.3d 1148, 1159 (9th Cir. 2003).

United States rejected the idea that different states might have fundamentally different social, economic, or political systems.

The importance of differences among state rules as a cause of legal indeterminacy has increased over time and is directly related to the growth of commerce in the nineteenth century. When the Constitution was adopted in 1789, coordination of the laws of the several states was not a major issue.³⁵⁸ Travel in 1789 was rare;³⁵⁹ interstate commerce was insignificant.³⁶⁰ But within a century, all that had changed and merchants carried on trade in every state.³⁶¹ The effect of this revolution in commerce on the legal system was a common topic in legal literature.³⁶²

In the first half of the nineteenth century the issue of state-to-state rule coordination was nascent. It was overshadowed by the overriding question of slavery.³⁶³ Justice Story worried that the nation legally was “perpetually receding farther and farther from the common standard.”³⁶⁴ He sought coordination through a preeminent role for federal law and through an efficient choice of law system. He authored important court decisions enhancing the status of federal law,³⁶⁵ commentaries that might form the basis of uniform law,³⁶⁶ and the first book ever in English on

³⁵⁸ Maintaining two separate societies – one slave and one free – was.

³⁵⁹ Leonard A. Jones, *Uniformity of Laws Through National and Interstate Codification*, in REPORT OF THE SIXTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 157, 157-59 (1894), reprinted in 28 AM. L. REV. 547, 547-48 (1894) (noting that in 1789 it took nearly a week to travel between Boston and New York, the two leading commercial centers of the day).

³⁶⁰ Edward A. Moseley, *Interstate Commerce*, in 1 1795-1895: ONE HUNDRED YEARS OF AMERICAN COMMERCE 25, 30 (Chauncey M. DePew ed., 1895).

³⁶¹ Jones, *supra* note 359.

³⁶² See, e.g., Note, 17 AM. L. REV. 789, 789 (1883). “When our constitution was framed, the steamboat, the railway, and the magnetic telegraph were not dreamed of.” *Id.*

³⁶³ Cf. *The Proper Limits Between State and National Legislation and Jurisdiction*, 15 AM. L. REV. 193, 194 (1867) [hereinafter *The Proper Limits*]. Code-oriented law reformers concentrated on laws within a single state rather than on harmonizing laws among several states. They assumed that successful efforts in one state would be copied in other states. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 26 (1977) (Montana, California, and the Dakota Territory did adopt all five of the codes that David Dudley Field prepared for New York).

³⁶⁴ Joseph Story, *Progress of Jurisprudence*, An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, at Boston (Sept. 4, 1821), in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 198, 213, 224 (William W. Story ed., 1852).

³⁶⁵ See, e.g., *Swift v. Tyson*, 41 U.S. 1 (1842) (federal common law to govern diversity cases); *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776) (applying admiralty jurisdiction to navigable inland waterways). See generally TONY ALLAN FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* (1981).

³⁶⁶ GILMORE, *supra* note 363, at 27-28.

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conflicts of law.³⁶⁷ He thought it “hopeless to expect that any greater uniformity [would] exist in the future.”³⁶⁸

With the end of slavery and of the Civil War, the issue of state-to-state rule coordination burst on the legal scene with vigor and urgency.³⁶⁹ For a quarter-century the need for uniformity of law was a major issue in legal circles.³⁷⁰ Hannis Taylor succinctly stated the generally-felt need for national uniformity in wide areas of law:

[A]s the country has grown older, the people of the United States as a whole—in their personal relations—have become far more united and harmonious than have the various systems of State law by which their commercial and domestic interests are largely governed. For this reason the constant conflict of law which daily arises in the affairs of our national life, with its consequent uncertainties, is becoming an evil so serious that it must soon pass from the hands of the theorist to those of the practical statesman.³⁷¹

While there was little opposition to greater uniformity of law, there was considerable discussion as to how best to achieve that goal within the federal system. Should the federal government impose uniform law?³⁷²

³⁶⁷ See generally JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1834).

³⁶⁸ But see, e.g., FREYER, *supra* note 365, at 20 (citing JAMES SULLIVAN, THE HISTORY OF LAND TITLES IN MASSACHUSETTS 353 (1801)); John William Wallace, The Want of Uniformity in the Commercial Law Between the Different States of Our Union: A Discourse Delivered Before the Law Academy of Philadelphia (Nov. 26, 1851) (calling for uniform rules).

³⁶⁹ See, e.g., *The Proper Limits*, *supra* note 363.

³⁷⁰ A few examples are, EDWIN JOHN JAMES, THE BANKRUPTCY LAW OF THE UNITED STATES 1867, at 8 (1867) (national bankruptcy act of 1867 relied on specific constitutional grant in Article I, section 8, “to establish uniform laws on the subject of bankruptcies throughout the United States”); AMERICAN BAR ASSOCIATION, CALL FOR A CONFERENCE; PROCEEDINGS OF CONFERENCE, FIRST MEETING OF THE ASSOCIATION, OFFICERS, MEMBERS, ETC. 16 (1878) (Article I of the first American Bar Association Constitution in 1878 made “uniformity of legislation throughout the Union” a first purpose of the Association); Note, 17 AM. L. REV. 789, 789 (1883) (commenting: “scarcely an anniversary bar meeting takes place without suggestions being put forth in favor of uniformity or unification throughout the whole country in some department of the law”).

³⁷¹ HANNIS TAYLOR, AN INTER-STATE CODE COMMISSION (1881), *reprinted in* REPORT OF THE ORGANIZATION AND OF THE FIRST, SECOND AND THIRD ANNUAL MEETINGS OF THE ALABAMA STATE BAR ASSOCIATION 210 (1882).

³⁷² Many argued that it already had sufficient authority. See, e.g., George Merrill, *An American Civil Code*, 14 AM. L. REV. 652 (1880) (contending that if the federal government made full use of existing powers, it could enact laws that states would copy); Nathaniel A. Prentiss, *Unification of the Law*, 16 AM. L. REV. 307, 317 (1882); William Reynolds, *A National*

Or should the states voluntarily adopt uniform laws?³⁷³ Many variations were discussed.³⁷⁴

At the close of the nineteenth century, the United States tried both approaches. The federal government adopted the Interstate Commerce Act of 1887 and the Sherman [Antitrust] Act of 1890. Several states in 1892 founded the National Conference of Commissioners for Uniform State Law and charged it with drafting laws that they might voluntarily adopt in fields such as divorce and commercial law. This approach was consciously mixed: preferably, uniform legislation by voluntary state action, but where necessary, federal legislation without constitutional amendment, if federal powers were sufficient.³⁷⁵ The optimism of the founders of the National Conference was palpable; its first report asserted: "It is probably not too much to say that this is the most important juristic work undertaken in the United States since the adoption of the Federal [C]onstitution."³⁷⁶ Thirty years later, the founders of the American Law Institute were no less optimistic. Its founders compared their task to that faced by the lawyers of Justinian's day who "produced the codification and exposition of that law which has been the main foundation of all the law of the civilized world except

Codification of the Law of Evidence, 16 AM. L. REV. 1, 12-13 (1882); Seymour D. Thompson, *Abuses of Corporate Privileges*, 26 AM. L. REV. 169, 196-97 (1892); Note, 18 AM. L. REV. 868 (1884).

³⁷³ See, e.g., WILLIAM L. SNYDER, *THE GEOGRAPHY OF MARRIAGE OR LEGAL PERPLEXITIES OF WEDLOCK IN THE UNITED STATES* chs. xx-xxi (1889) (arguing that ways should be found to encourage the states to adopt uniform legislation and proposing a "prohibitory amendment" to encourage states to adopt uniform laws, e.g., prohibiting state laws from outlawing divorce); Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. PA. J. INT'L BUS. L. 227, 232 (1993) (citing and quoting 1903 PROCEEDINGS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 29) (remarks of Amasa M. Eaton).

³⁷⁴ In addition to the sources cited in the two previous footnotes, see Note, 17 AM. L. REV. 768, 768 (1883) (arguing that the Constitution should be amended to empower Congress to enact broader legislation).

³⁷⁵ See, e.g., AMERICAN BAR ASSOCIATION REPORT ON UNIFORM STATE LAWS, excerpted in 25 AM. L. REV. 832, 834 (1891); Elbert C. Ferguson, *The Necessity of Uniform Legislation*, 4 AM. LAWYER 492, 493 (1896); Francis B. James, *Commercial Aspect of Uniform State Laws*, 5 MICH. L. REV. 509, 509-11 (1907); F. J. Stimson, *National Unification of Law*, 7 HARV. L. REV. 92, 92 (1894).

³⁷⁶ Jones, *supra* note 359, at 169, reprinted in 28 AM. L. REV. 547, 557 (1894). Stimson's enthusiasm was common. See, e.g., Alton B. Parker, *Uniform State Laws*, 19 YALE L.J. 401 (1910); Pound, *Mechanical Jurisprudence*, *supra* note 192 ("as great an opportunity as has fallen to jurists of any age"); Walter George Smith, *The Progress of Uniform Legislation, 1911-12*, 24 GREEN BAG 457, 465 (1912) (President's Address delivered at the 22nd annual meeting of Commissioners on Uniform State Laws, Milwaukee, August 21, 1912).

the law of the English speaking people."³⁷⁷ Former Secretary of State Elihu Root, honorary chairman of the organizing committee, hoped that the Institute's work might become "the *prima facie* basis on which judicial action will rest."³⁷⁸

Neither Uniform Laws nor Restatements have produced the national legal unity that the founders of the two organizations hoped for. Even if their comparisons to the Constitution and to Justinian are dismissed as wishful thinking, the founders surely would be disappointed by the results. In the first century of its existence, the National Conference proposed approximately 200 uniform acts. Only about ten percent of these acts were adopted by as many as forty states; more than half were adopted by fewer than ten states.³⁷⁹ Since Restatements are not proposed for legislative adoption, their adoption necessarily is piecemeal. In practice, they are only sometimes the *prima facie* basis for judicial analysis that Root sought.³⁸⁰

C. Localism

American localism raises similar issues as federalism while adding a new one of its own: rank amateurism. Localities are often very small. Their rules may be deficient technically or even bizarre. Inasmuch as there are 3,034 county governments and 35,937 sub-county governments

³⁷⁷ REPORT OF THE FORTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 90 (1923); William Draper Lewis, *The American Law Institute*, 25 J. COMP. LEGIS. & INT'L L. 25, 28 (1943).

³⁷⁸ Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 22 (1929); see also ROGERS, *supra* note 40, at 184 (explaining that Root was president of the American Bar Association from 1915 to 1916); Herbert F. Goodrich, *The American Law Institute to Date*, 8 OR. L. REV. 3, 7 (1928).

³⁷⁹ James J. White, *One Hundred Years of Uniform State Laws: Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2103-05 (1991).

³⁸⁰ A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 299 (2003). The limited success of their work is demonstrated by the less than complete success of their best-received project, the U.C.C. Notwithstanding adoptions in all states, it has not created uniform law. States have adopted different versions of key provisions; in some instances, the U.C.C. even offers alternative provisions. *Id.* Amendments have been difficult first to agree upon within the two bodies and then difficult to get approved by state legislatures at consistent paces. Since the U.C.C. is state law, there is no single court that can interpret it authoritatively. Overby notes that people interested in uniform law are as likely to turn to the federal government to get uniformity. *Id.* This has proven more successful, but creates its own issues of rule reliability, since federal law may not well coordinate with the state law. *Id.*

(municipalities and townships) in the United States, the possibilities for perplexing the law-abiding are substantial.³⁸¹

While the problems of American localism for lawmaking parallel those of the federal-state relationship, their origins are different. The Constitution anticipates that both federal and state governments have lawmaking authority. But unlike some foreign federal constitutions,³⁸² it has nothing to say about local governments. Localities have lawmaking authority only by grace of the states.³⁸³ Originally, the states universally followed what was called “Dillon’s Rule.” That rule strictly limited municipal powers to those powers expressly granted by the legislature, necessarily implied from the grant or indispensable to the object and purpose of local government. It resolved all doubts in favor of finding that the local government did not have power.³⁸⁴

Beginning in the latter part of the nineteenth century, states began extending to localities municipal home rule. Often, in addition to authority to administer their own affairs, states granted authority to legislate. In the twentieth century most states reversed Dillon’s Rule. The United States Supreme Court went so far as to conceptualize local government as a “miniature State within its locality.”³⁸⁵ Today localism is characterized as “the intrastate analogue of federalism in American constitutional law.”³⁸⁶ Most states apply a rule that “all powers are granted until retracted.”³⁸⁷ This includes authority to issue laws³⁸⁸ as

³⁸¹ 2002 CENSUS OF GOV’TS, GC02-1(P) 5 (2002), available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf. The same census also reports another 13,522 school districts and special district governments (e.g., natural resources, fire protection, water supply). *Id.*

³⁸² See, e.g., ARTHUR B. GUNLICKS, LOCAL GOVERNMENT IN THE GERMAN FEDERAL SYSTEM (1986) (discussing, *inter alia*, that constitution’s guarantee of the right of localities to administer their own affairs).

³⁸³ Frank J. Goodnow, *Municipal Home Rule*, 10 POL. SCI. Q. 1, 1 (1895).

³⁸⁴ *Id.* at 2 (quoting 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 145 (4th ed. 1890)). Dillon was president of the American Bar Association from 1891-1892. ROGERS, *supra* note 40, at 66 (calling Dillon a “lawyers’ lawyer”).

³⁸⁵ D.C. v. John R. Thompson Co., 346 U.S. 100, 108 (1953); see Richard Briffault, *Our Localism: Part I—The Structure Of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) [hereinafter Briffault, *Our Localism*] (“an imperium in imperio, a state within a state, possessed of the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference”); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1421 (2001).

³⁸⁶ Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 627 (2001).

³⁸⁷ Briffault, *Our Localism*, *supra* note 385, at 10; see also CAL. CONST. art. XI, § 7. Under the California Constitution a “city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Richard

significant as creating criminal offenses and prohibiting trade practices.³⁸⁹ But broad lawmaking power in local governments diminishes legal determinacy. While it might be possible, if difficult, to keep track of the laws of fifty-one lawmakers, no one could cost-effectively follow the laws of 39,022 lawmakers.

Granting local governments free lawmaking authority was not inevitable. Nineteenth-century jurists, such as Professor Frank Goodnow, the “father” of American administrative law, pointed the way to an alternative approach based on administrative powers of local governments to carry out state laws and to be subject to state administrative oversight. Such an approach would have enhanced rule determinacy, not only by denying local governments “local legal autonomy,” but also by subjecting their actions to state oversight.³⁹⁰

States could limit the powers of local governments to administering their own affairs and curtail or eliminate altogether legislative authority. States could circumscribe with particularity what legislation local governments are allowed to adopt, and some do to some extent. Additionally, states could automatically review legislation adopted by local governments. Moreover, states could provide local governments with model laws and qualified draftsmen. While other countries with strong local governments do such things,³⁹¹ American states largely do not. Nor have they provided other effective mechanisms to coordinate and control the quality of the municipal rules that they have made possible. The principal device they have used is judicial review similar to that which federal courts apply to potential conflicts between state and federal legislation. State courts examine whether local legislation is consistent with state legislation or if state legislation preempts the field.³⁹² That review is subject to the same difficulties that federal review has discussed above. There are few opportunities to test local laws before they come into force.

Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL’Y SYMP. 79, 99 (1996); Logan, *supra* note 385, at 1421.

³⁸⁸ Briffault, *Our Localism*, *supra* note 385, at 15.

³⁸⁹ See, e.g., Logan, *supra* note 385.

³⁹⁰ David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2301-09 (2003). Goodnow’s studies of foreign approaches surely must have influenced his proposals; see, e.g., FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893) (having much in common with the German approach).

³⁹¹ See, e.g., GUNLICKS, *supra* note 382.

³⁹² Briffault, *Our Localism*, *supra* note 385, at 17-18.

VII. CALL FOR COMPARATIVE LEGAL RESEARCH

This Article has shown that American indeterminacy results from deliberate decisions³⁹³ unrelated to inherent weaknesses in legal systems. The American legal system abandoned—for good reasons—historic ordering mechanisms of binding precedents and pleadings. It turned to statutes and discovery. But it has yet to develop satisfactory mechanisms to make, find, and apply law, and to coordinate these functions among differing governments.

What should be done? Professor Dorf correctly says that Americans should see “legal indeterminacy as a real problem calling for a real institutional approach.”³⁹⁴ Indeterminacy is pervasive. The American legal system needs a major overhaul. Mere tinkering is not enough.

How to begin? First, Americans could pay more attention to law as legal rules that order society and less to law as a system of judicial resolution of disputes.³⁹⁵ Second, they could focus less on judicial process as a means for appellate courts to make legal rules and more on lower courts as neutral appliers of existing law. Third, they could acknowledge the importance of legal methods and the impact they have on legal determinacy. Fourth, they could strive to make better rules. In short, they could take rules seriously as rules.

How should this be done? Professor Dorf urges that Americans “reimagine” their legal system.³⁹⁶ How can they do that? “Reimagining” a whole system is a daunting and impossible challenge. It is beyond any one person’s capabilities. There are so many details in a legal system and so many consequences that cannot be foreseen. In any event, were some jurists to accomplish such a “reimagining,” how would they persuade legislatures not to reject their ideas as mere academic speculation? There is a faster, cheaper, and better way than imagination. The American law school academy puts great faith in inward-looking empirical scholarship. Now is time to look outward.

Ever since Solon drafted new laws for Athens, lawmakers have seen the benefit of looking at the laws of others.³⁹⁷ Americans could do the

³⁹³ Accord UPHAM, *supra* note 8, at 19.

³⁹⁴ Dorf, *supra* note 2, at 981.

³⁹⁵ *But cf.* John Dickinson, *Legal Rules in the Process of Decision*, 79 U. PA. L. REV. 833, 847 (1931).

³⁹⁶ Dorf, *supra* note 2, at 877.

³⁹⁷ Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experiences*, 26 BUFF. L. REV. 361, 362 (1977).

same. While scholars once downplayed the importance of methods in comparative law, today they see that there is much to learn from study of foreign legal methods.³⁹⁸ The problems considered in this Article are well-suited to comparative investigation. It is no coincidence that those Americans who most clearly saw the developing defects in the American system were themselves familiar with foreign legal systems and methods.³⁹⁹ Let Americans look to how others have addressed the same problems. Other systems may not have right answers, or their answers may not be right for the United States, but their answers can help Americans find the answers. The problems discussed in this Article lend themselves to comparative investigation. For example:

(1) Lawmaking through codification is the hallmark of the modern civil law. Systematic legislation is its program. Professional legislation is found in common law countries such as England. Codification and systematic legislation are topics of current vitality. Within the recent past, the Netherlands and America's next-door neighbor Quebec have adopted new civil codes. The European Union is systematizing legislation at a breadth, depth, and speed never before seen.

(2) Law-finding is facilitated by systematic legislation but is not fulfilled thereby alone. Civil law systems recognize the utility of case law today as never before. Case law and code law can work efficiently together.

(3) Syllogistic law application—long the stepchild of American law—is central to fulfillment of the guidance function of the rule of law. Subject to criticism around the world, it remains at the heart of civil law systems.

³⁹⁸ Maxeiner, *supra* note 23, at 114.

³⁹⁹ Accord van Santvoord, *supra* note 100, at 41-42.

[T]he example of these eminent jurists [Livingston, Story, Legaré] also shows you what has been done here in America towards elevating and improving our jurisprudence by infusing into it the principles drawn from a system which the common law has for so long a time virtually repudiated, and which is even today almost a sealed volume to the great mass of our legal practitioners.

Id.

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(4) Globalization of the world has required more federal states and closer cooperation among states than ever before. It has led to demands for increased localization. American federal experiences are no longer unique and there is much to learn from foreign experiences.

It's time to get started.⁴⁰⁰

⁴⁰⁰ See James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT'L & COMP. L. (forthcoming 2007).