

Contemplating a Civil Law Paradigm for a Future International Commercial Code

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I. INTRODUCTION

The international community has worked toward a global law of contracts for the last century. These efforts include the Uniform Law on the International Sale of Goods, the Uniform Law on the Formation of Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and the Vienna Convention for the International Sales of Goods (CISG). These texts are all tremendous achievements in their own right. The CISG, especially, is a monumental achievement, testifying to the increasing willingness of modern nations to cooperate toward a unification of commercial law.¹ However, they reflect a delicate juxtaposition of the two

1. See John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J. L. & Com. 365, 373 (1998).

primary legal systems of the world—the civil law and the common law. A consequence of this tension has been that the texts are full of compromises between the two systems. The excessiveness of these compromises has resulted in confusion and lessened effectiveness of the resultant provisions.² The hybridized legislation is devoid of interpretational methodologies which accompany statutes in the common law and civil law systems, respectively. The international effort at a unifying law of contracts is therefore at a relative impasse because of this tension between the two systems.³ A solution is needed.

Suggesting the solution to this tension is the purpose of this article. That is, this article seeks to determine, between the two great and dominant legal systems of the world—the common law and the civil law—which of the two is more workable as the model on which any future regime of international contracts law should be based. The purpose is not to argue for the superiority of one system or another in the abstract sense, or in the sense of superiority as applied to a single nation's domestic system of laws.⁴ Rather, this article's narrow focus is to decide whether a common law or civil law model is more efficacious in implementing any future effort at such a sophisticated system of international contracts law. For reasons I shall expound, I believe that in this narrow sense, the civil law may prove a more pragmatic and politically expedient solution to this dilemma.

2. See, e.g., Murray, *supra* note 1; Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. Transnat'l L. & Pol'y 217 (2001); Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J. L. & Com. 245 (1998); Larry A. Dimatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 Yale J. Int'l L. 111 (1997); V. Susanne Cook, *The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J. L. & Com. 257 (1997); Joanne M. Darkey, *A U.S. Court's Interpretation of Damage Provisions Under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity*, 15 J. L. & Com. 139 (1995); Johan Erauw & Harry M. Flechtner, *Remedies Under the CISG and Limits to Their Uniform Character*, in *The International Sale of Goods Revisited* 35, 73 (Petar Sarcevic & Paul Volken eds., 2001).

3. See generally Murray, *supra* note 1.

4. "The question of superiority is really beside the point. Sophisticated comparative lawyers within both traditions long ago abandoned discussions of relative superiority or inferiority." John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 3 (2d ed. 1985). Moreover, I am explicitly avoiding any discussion or suggestion of whether a particular nation should codify its own contract law in a civilian sense. Such an undertaking would seem vastly more radical than the proposal suggested herein.

Section II demonstrates that the common law and the civil law are easily the most widely practiced legal systems in the world. It will also provide a comprehensive historical overview and basic description of both the common law system and the civil law system. Particular emphasis is placed on the civil law. Section III describes the perceived need for an international law of contracts, the history of the efforts to attain such a regime, and the problem of uniform international interpretation of the current such law, the Convention for the International Sale of Goods (CISG). The effects of having participating nations from both legal systems is also discussed. Section IV asserts that a civil law model would provide a more pragmatic and efficacious solution for a future international contracts code, for the following reasons: (1) the civil law would be more distinctly unifying of the international law of contracts, (2) the civil law would minimize the surrender of nations' sovereignty to an international regime of contract law, primarily by promulgating a comprehensive code and eliminating *stare decisis*, (3) the characteristics of the international contract law—in excess of one thousand years old, and simultaneously a new supranational regime in the embryonic stages—are such that codification is especially appropriate for immediate implementation of any such regime, (4) common law jurisdictions have evidenced increasing amenability to codification of existing law and have also revealed an observable trend away from strict adherence to *stare decisis*, whereas there is no discernible converse trend in civilian jurisdictions, and (5) other considerations—including the sheer population numbers which weigh in favor of the civil law—point toward implementing a civilian international contracts code as the logical and pragmatic solution. Section V presents a brief conclusion. Section V, therefore, concludes by recommending that any future attempt at promulgation of a comprehensive international commercial code be done in the form of a civil code.

II. THE TWO DOMINANT LEGAL SYSTEMS OF THE WORLD: COMMON LAW AND CIVIL LAW

A. The Pervasive Reach of the Two Systems

Today's world is comprised of approximately 190 individual nation states.⁵ There are a host of differing legal systems in such nations. Included among these systems are very regionalized,

5. According to the United Nations (U.N.) website, there are 191 member nations in the U.N. See United Nations, *List of Member States*, at <http://www.un.org/Overview/unmember.html> (last visited May 2, 2005).

indigenous systems of customary law, and also various types of religious law.⁶ At first glance, it would appear that today's nations have decentralized into a veritable potpourri of legal systems, as scattered and irreconcilable as were the peoples in the aftermath of the biblical account of the Tower of Babel.⁷ In some respects this is doubtlessly true. In another important respect, however, there have really developed only two major, dominant systems of legal structure—the civil law and the common law.

That the civil law and the common law are the dominant world legal systems is immediately apparent from an observation of the statistics of the number of nations adhering to each of the respective systems. The University of Ottawa has assembled helpful information in this regard.⁸ Specifically, the jurisdictions in the world have been catalogued according to the following legal system categories: Civil law,⁹ Common law,¹⁰ Customary law,¹¹ and Muslim

6. See University of Ottawa, *World Legal Systems*, at <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.html> (last visited May 2, 2005) [hereinafter Ottawa Website]. The dominant religious legal system in use today is Muslim law, practiced in whole or in part by a number of nations in North Africa and the Middle East. See *id.*

7. The account of the Tower of Babel is found in the book of Genesis, reading as follows:

As men moved eastward, they found a plain in Shinar and settled there.

They said to each other, "Come, let's make bricks and bake them thoroughly." They used brick instead of stone, and tar for mortar. Then they said, "Come, let us build ourselves a city, with a tower that reaches to the heavens, so that we may make a name for ourselves and not be scattered over the face of the whole earth."

But the LORD came down to see the city and the tower that the men were building. The LORD said, "If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them. Come, let us go down and confuse their language so they will not understand each other."

So the LORD scattered them from there over all the earth, and they stopped building the city. That is why it was called Babel—because there the LORD confused the language of the whole world. From there the LORD scattered them over the face of the whole earth.

Genesis 11:1–9 (New International Version).

8. See Ottawa Website, *supra* note 6.

9. The Ottawa website describes its category of "Civil Law Systems" as follows:

In this category you will find political entities that, apart from other sources, have drawn their inspiration largely from the Roman law heritage and which, by giving precedence to written law, have resolutely opted for a systematic codification of their general law. However, you will also find political entities, generally with mixed legal systems, which may not have resorted to the technique of codification but which have retained, to varying degrees, a sufficient number of elements of Roman law, in written form, to warrant their inclusion in the civilian tradition (e.g. Scotland). On

law.¹² There is a fifth category, described as “Mixed,” which is designed to broadly state the presence of many jurisdictions which have a combination of two or more of the four legal systems described.¹³

the other hand, this category also includes political entities less influenced by Roman law but whose law, whether codified or not, is founded on a perception of the role of statute law which, in many regards, approaches that of countries with a “pure” civilian tradition (e.g., Scandinavian countries, which occupy an original position in the “Romano-Germanic” family).

Id.

10. The Ottawa website describes its category of “Common Law Systems” as follows:

Like that of civil law, the common law system has taken on a variety of cultural forms throughout the world. Notwithstanding the significant nuances that such diversity can sometimes create, and which political circumstances further accentuate, this category includes political entities whose law, for the most part, is technically based on English common law concepts and legal organizational methods which assign a pre-eminent position to case-law, as opposed to legislation, as the ordinary means of expression of general law. Thus this category includes countries or political entities that may not always have close ties with the English tradition and that sometimes possess an abundance of codes, legislation and non-jurisprudential normative instruments, but for which common law jurisprudence retains its character as the fundamental law (e.g., California).

Ottawa Website, *supra* note 6.

11. The Ottawa website describes its category of “Customary Law Systems” as follows:

Hardly any countries or political entities in the world today operate under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law (as a system, not merely as an accessory to positive law) still plays a sometimes significant role, namely in matters of personal conduct, in a relatively high number of countries or political entities with mixed legal systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example.

Id.

12. The Ottawa website describes its category of “Muslim Law Systems” as follows: “The Muslim legal system is an autonomous legal system which is actually religious in nature and predominantly based on the Koran. In a number of countries of Muslim persuasion it tends to be limited to personal status, although personal status can be rather broadly defined.” *Id.* That is, in general, Islamic law tends to concern itself with matters such as family law, estates and heirship proceedings, and penal matters, whereas matters such as contracts, commercial law, and taxation are largely, though not always completely, left to secular legal systems of the region. See David M. Neipert, *Law of Global Commerce: A Tour 11* (2002).

13. The Ottawa website describes its category of “Mixed Legal Systems” as follows:

Based on these categories, the University identifies the nations of the world by the appropriate category of legal system.¹⁴ The jurisdictions are divided into “pure” legal systems of only one of the categories, and also various combinations of “mixed” jurisdictions. All but three¹⁵ of the one hundred ninety-one nations of the world

The term “mixed”, which we have arbitrarily chosen over other terms such as “hybrid” or “composite,” should not be construed restrictively, as certain authors have done. Thus this category includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.

Ottawa Website, *supra* note 6.

14. Actually, the Ottawa website describes the legal affiliation of 232 “political entities,” rather than the 191 jurisdictions recognized by the United Nations. In this regard, the Ottawa website states:

The term ‘political entities’ refers to countries but it can also refer to political subdivisions of countries as well. Indeed, it seemed important to identify the legal system of a number of non-independent territories (some of which even enjoy varying degrees of autonomy), either because their geographic location obscures their connection to the legal systems of distant countries (e.g., the French territories in the Pacific Ocean, Indian Ocean or West Indies) or because they belong to a federal or other political structure, yet their legal system has acquired or maintained distinct characteristics within such structure (e.g., Quebec, which is a mixed law jurisdiction whose general law, at least in important areas pertaining particularly but not exclusively to private law, is essentially a product of codified civil law while, in the rest of Canada, general law is essentially based on the common law).

Id.

Notwithstanding the value of the University’s sub-categorization of the political regions in this manner, I have consolidated the various “territories” into their parent sovereigns, so that the “percentage of nations” numbers are calculated based on a denominator of 191, rather than 232. So, for instance, in the subsequent percentages of nations with common law systems, the United States, Puerto Rico, and Guam all count as only one nation. Likewise, in the percentages of nations with civil law systems, France, Guyana, and Martinique all count as only one nation, and so on.

15. The three nations which are not listed as having any form of either Common Law or Civil Law are Andorra (purely customary), and the “pure” Muslim Law nations of Afghanistan and Maldives Islands. *Id.* This data would appear to be based on the former Taliban regime in Afghanistan, which was toppled by coalition forces in 2001, in the aftermath of the events of September 11, 2001. The current government in place in Afghanistan is the interim Islamic Transitional State of Afghanistan. A constitution was signed on January 16, 2004. However, the future of Afghanistan’s judiciary and legal system is unknown at present. See CIA, *The World Factbook: Afghanistan*, at <http://www.odci.gov/cia/publications/factbook/geos/af.html#Govt> (last visited May 1, 2005). The constitution does provide that Muslim Law is to play a dominant role. See Afghanistan Const., available at <http://www.constitution-afg.com/resrouces/Draft.Constitution.pdf>. Article one of the new constitution

have some form of either civil law or common law. This represents 98.43% of all nations of the world.¹⁶ The population measure is even more impressive—99.56% of the population lives in a jurisdiction which utilizes a civil law system, common law system, or combination of the two, with some nations having other elements of indigenous customary law, or Muslim law, mixed into the system.¹⁷ Hence, literally all corners of the earth have been touched by either the Common Law or Civil Law systems.

Common law (exclusive of any Civil Law), whether in “pure” or “mixed” form, is utilized by some fifty-one nations, or 26.7% of all nations of the world.¹⁸ These nations account for 34.81% of the world’s population.¹⁹ These aggregate numbers are derived by adding together four combinations of nations: (1) Common Law (including the United States, United Kingdom, Canada, Australia, and Ireland); (2) mixed systems of Common Law, Muslim law, and local Customary law (including India, Kenya, Malaysia and Nigeria); (3) mixed systems of Common Law and local Customary Law (including Ghana, Myanmar, Nepal, Tanzania, and Uganda); and (4) mixed systems of Common Law and Muslim Law (including Bangladesh, Pakistan, Singapore, and Sudan).²⁰

Civil law (exclusive of any Common Law), whether in “pure” or “mixed” form, is utilized by some 115 nations, or 60.21% of all nations of the world.²¹ These nations account for 59.01% of the world’s population.²² These aggregate numbers are derived by adding together yet another four combinations of nations: (1) Civil Law (most of Continental Europe, Asia, Central America, and South America, including Argentina, Belarus, Belgium, Brazil, Colombia, France, Germany, Greece, Italy, Mexico, Netherlands, Peru, Poland, Romania, Russia, Spain, Turkey, Ukraine, Venezuela, and Vietnam); (2) mixed systems of Civil Law and local Customary Law (including China, Congo, Ethiopia, Japan, North Korea, South Korea,

provides that the new nation shall be an Islamic republic, and article three provides that “In Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution.” *Id.* arts. 1, 3.

16. See Ottawa Website, *supra* note 6.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The breakdowns for these categories were as follows: twenty-three nations (pop. 397,652,899) were “pure” Common Law; six nations (pop. 1,231,387,977) were a mixture of Common Law, Muslim Law and Customary Law; fourteen nations (pop. 201,311,714) were a mixture of Common Law and Customary Law; and eight nations (pop. 329,192,332) were a mixture of Common Law and Muslim Law. *Id.*

21. *Id.*

22. *Id.*

Madagascar, and Niger); (3) mixed systems of Civil Law and Muslim Law (including Algeria, Egypt, Libya, Morocco, Syria, and Tunisia); and (4) mixed systems of Civil Law, Muslim Law, and local Customary Law (including Indonesia).²³

Finally, it happens that there are a handful of jurisdictions which, in fact, have a legal system which is a mixture of Common Law and Civil Law. Such a Common Law-Civil Law blended legal system is utilized by some twenty-two nations, or 11.52% of all nations of the world.²⁴ These nations account for 5.74% of the world's population.²⁵ These aggregate numbers are derived by adding together the following four combinations of nations: (1) mixed systems of Civil Law and Common Law (including Philippines, South Africa, and Thailand);²⁶ (2) mixed systems of Civil Law, Common Law, and Customary Law (including Cameroon, Sri Lanka, and Zimbabwe); (3) mixed systems of Civil Law, Common Law, and Muslim Law (including Iran, Jordan, Saudi Arabia, Somalia, and Yemen); and (4) mixed systems of Civil Law, Common Law, and Talmudic Law (including only Israel).²⁷

The statistics thus bear out the proposition that Common Law and Civil Law are the two dominant legal systems of the world. For this reason, I have formulated my thesis so as to constrain myself to an observation of which of these two dominant legal system models—Common Law or Civil Law—is more suited to serve the needs of the international community in the form of a new, global commercial system. This is with all due respect for the localized indigenous practices which comprise the various Customary Laws and certainly also with due respect for the religious-based legal systems such as Muslim Law and Talmudic Law. In fact, these systems will almost certainly continue to have a sweeping influence.²⁸ Recognition

23. *Id.* The breakdowns for these categories were as follows: seventy-five nations (pop. 1,453,545,340) were "pure" Civil Law; twenty-five nations (pop. 1,771,184,518) were a mixture of Civil Law and Customary Law; eleven nations (pop. 199,732,510) were a mixture of Civil Law and Muslim Law; and four nations (pop. 237,016,553) were a mixture of Civil Law, Muslim Law, and Customary Law. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* In fact, the Ottawa website also includes Louisiana, Quebec, and Scotland in this category. While I have included those territories' populations in the numbers above, I have not included them as nations.

27. *Id.* The breakdowns for these categories were as follows: eleven nations (pop. 178,686,772) were a mixture of only Civil Law and Common Law; five nations (pop. 49,542,339) were a mixture of Civil Law, Common Law, and Customary Law; five nations (pop. 121,898,071) were a mixture of Civil Law, Common Law, and Muslim Law; and one nation, Israel, (pop. 6,029,529) was a mixture of Civil Law, Common Law, and Talmudic Law. *Id.*

28. See Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 Mich. J. Int'l Law 1, 76 (2003).

must also be here given to the fact that in many respects I am engaging in gross oversimplification—in the strictest sense it is not correct to simply say that all parts of the world are governed by either common law or civil law.²⁹ And, even within the systems which have here been classified as either fully or partly “common” or “civil,” there exists greater heterogeneities within these systems.³⁰ However, given the dominance of the Civil Law and the Common Law, it seems certain that a future international commercial legal system will bear the characteristics of one of these systems or the other.

B. Basic Origins, Precepts, and Characteristics of the Common Law System

1. Historical Roots

As I assume that much of my audience consists of common law lawyers, any explanation of the common law system need not be

Strong and influential alternatives to these transatlantic cultures [i.e., common law and civil law] will no doubt cause continual reworking of the global legal culture. Islamic law, for example, covers in some way perhaps a billion people, nearly 19% of the world's population, or the same as the coverage of the common law. It has shown a resilience and adaptability that guarantees that it will be a major factor in the final design of the world legal culture. The Hindu legal family is said to cover 450 million people—a greater population than the U.S. or all the E.U. countries combined. A variety of indigenous legal cultures may emerge from under superficial acceptance of the European legal systems. Non-transatlantic instincts, such as the Chinese and Japan [sic] exultation of cooperative values over individuality, will also increasingly vie for [a] place in the world's legal philosophy. And history and humility tell us that there are influences, philosophies, and value systems that cannot now be identified which will someday change, perhaps radically, the make up of the legal system.

Id.

29. See Frederick H. Lawson, *A Common Lawyer Looks at the Civil Law* 3 (1955). As Lawson stated in his widely-cited lecture:

Accordingly, one is tempted to say that with certain exceptions western law now prevails everywhere, and that it falls into two blocs, the Common Law bloc and the Civil Law bloc. That is, however, not correct: the Scandinavian laws, though slightly influenced by both blocs, are really independent; and there are many systems, some of considerable importance, which are hybrids, as it were balanced between the two blocs and possessing many of the characteristics of both. Such are Scots, the Roman-Dutch Law of South Africa and Ceylon, and the law of Quebec, all of which, though originally civilian, have suffered the impact of English Law, and the Laws of Louisiana, Puerto Rico, the Canal Zone, and the Philippines, which have been brought within the American orbit.

Id.

30. *Id.*

overly comprehensive. Nevertheless, a few comments are in order, for purposes of a later comparison with essential components of the Civil Law system. It is generally accepted that the Common Law system originated in England. At least parts of the British territory were, at one time, part of the Roman Empire.³¹ With the eventual fall of the Roman Empire, and the concomitant loss of its grip on political control and organization in Western Europe, including Britain, came the “de-legalization” of culture and society generally, and the descent into what is known colloquially as the “Dark Ages.”³² Many factors, including the rise of Islam in the seventh century, and the rise of Norse savagery, with the accompanying seizure of control of much of the Mediterranean Sea, began to isolate Western Europe, including Britain, from its eastern brethren in the former Roman Empire.³³ As was stated by Pirenne in his work, *Economic and Social History of Medieval Europe*:

It is quite plain, from such evidence as we possess, that from the end of the eighth century western Europe had sunk back into a purely agricultural state. Land was the sole source of substance and the sole condition of wealth. All classes of population, from the Emperor, who had no other revenues than those derived from his landed property, down to the humblest serf, lived directly or indirectly on the products of the soil, whether they raised them by their labor, or confined themselves to collecting and consuming them. Moveable wealth no longer played any part in common economic life. All social existence was founded on property or on the possession of land.³⁴

Because of this development into an agrarian-based society, Britain, like much of Western Europe, developed into such a state that markets, and sales and purchases generally, were relatively rare, being only necessary in the event of a personal financial calamity.³⁵ Because there were no markets, and thus no systematically, recurring commercial transactions, there also came to be no real need for a system of law in any organized sense, as had existed in the prior days of the Roman Empire.³⁶ The Anglo-Saxon rule of law, to the extent

31. See Arthur Taylor Von Mehren & James Russell Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* 4 (2d Ed. 1977).

32. See *id.*

33. See *id.* at 4–5 (citing H. Pirenne, *Economic and Social History of Medieval Europe* 4–5 (Clegg Trans., 1937)).

34. H. Pirenne, *Economic and Social History of Medieval Europe* 7 (1937) (cited in Von Mehren & Gordley, *supra* note 31, at 4–5).

35. Von Mehren & Gordley, *supra* note 31, at 5.

36. *Id.*

it existed at all, was highly regional, fragmented, and arbitrary.³⁷ The systems for resolving disputes were quite crude, as the society during this time was quite crude by modern standards.³⁸ This was attributable in large part to the feudal societal structure, which tended to decentralize the region and prevent the rulers from exercising effective control.³⁹ The legal order of the day tended towards primitive processes, such as vengeance, compurgation, the ordeal, and the hue and cry.⁴⁰ In short, it has been described as “barbarian law.”⁴¹

It was not until the English conquest of William from Normandy in 1066, that outside stimuli began to affect the prevailing systems there. This is the year commonly identified as the year that the common law tradition commenced.⁴² The Normans, unlike the indigenous Anglo-Saxons they conquered, were able administrators

37. See W. Freeman Galpin, *A History of England* 54–60 (1938).

38. *Id.*

It is important for the student, at this point, to divorce from his mind all present day concepts of law and court actions, as the great majority of these were totally unknown to the Saxons. Theirs was a simple life and there was no reason for an elaborate system of courts or laws.

Id. at 56–57.

39. *Id.* at 54.

40. *Id.* at 58–60. Compurgation consisted of sworn, formal oaths by others as to the conduct made the basis of the trial. The ordeal was even more emblematic of the crudity of the Saxon legal system—it involved applying a hot iron to the hands, or perhaps being tossed in a pond, and determining if the accused was burned, or if he floated, for purposes of determining his innocence or liability. Obviously, most of these methods lacked any probative value in the actual evidentiary sense, but rather were viewed as “appeal[s] to God who was known to have wreaked vengeance upon those who had knowingly wreaked vengeance upon those who had knowingly perjured themselves. It took courage to defy the wrath of Providence unless one was quite certain of the innocence of the accused.” *Id.* at 58–59. See also Dorothy Whitelock, *The Beginnings of English Society* 142 (1976 ed.) (also describing the “ordeal of hot water,” in which the accused “plunged his hand into boiling water to take out a stone. The hand was bound up, and if the wound had healed after three days without festering, the man was cleared of the charge.”); Frederick W. Maitland & Francis C. Montague, *A Sketch of English Legal History* 48–49 (1915) (describing ordeals and noting “[w]e cannot but guess that it was well to be good friends with the priest when one went to the ordeal.”).

41. Rene David & John E.C. Brierly, *Major Legal Systems in the World Today: An Introduction to the Study of Comparative Law* 287–88 (2d ed. 1978).

42. Merryman, *supra* note 4, at 3. This is not to say that the seeds for the common law may not have been germinated sooner. In fact, it has been claimed that “[t]he origins of the common law can be traced at least from Aristotle and Cicero through the Book of Exodus.” M. Stuart, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. Ark. Little Rock L. J. Rev. 555, 572 (1996) (citing Aristotle, *The Nichomachean Ethics*, Book V (1947); Cicero, *De Legibus* II 4, 10 (quoted in Benjamin Fletcher Wright, Jr., *American Interpretations of Natural Law: A Study in the History of Political Thought* 5 (1931)); *Exodus* 22:9 (quoted in James J. Restivo, Jr., *Insuring Punitive Damages*, Nat’l L.J., July 24, 1995 at C–1)).

which quickly claimed a centralized monarchical and political power over all the British territory.⁴³ Much of the early thrust of English political influence was directed toward the increasing centralization and unification of the English royal governmental structure and processes.⁴⁴ The Norman rulers quickly discovered that the state of the rule of law in England was in dire straits—it was said by a writer of the time that “definite truth of the law can seldom be found.”⁴⁵ It has further been stated that “in the early twelfth century men in England had every reason to be bewildered by the law.”⁴⁶

Accordingly, one of the Normans’ most critical and influential efforts was the creation of the king’s court, devised in order to impose orderly judicial rule.⁴⁷ Serving at the pleasure of the throne, these royal courts began to exercise competing jurisdiction with the local, feudal courts of the pre-Norman period.⁴⁸ The initial assumption of jurisdiction of these courts was a delicate matter, and initially much effort was directed at not stepping lightly around areas still adjudged by the Saxon-era courts.⁴⁹ Under Henry I, at the beginning of the twelfth century, the royal courts began to travel to the various municipalities in the country so as to hear local disputes.⁵⁰ Unlike the older Saxon courts, which rendered decisions in an often arbitrary and inconsistent manner, the new royal courts began applying a uniform, or “common” law, throughout England, with the purpose of normalizing and unifying the law for the entire country.⁵¹

43. Von Mehren & Gordley, *supra* note 31, at 12. One of the ways in which William quickly weakened the populace was to subdivide England into approximately 15,000 separate estates, making each separate “fief” so small that it would not have sufficient resources or power to provide a meaningfully substantive challenge to the king’s supremacy and dominion. See Neipert, *supra* note 12, at 14.

44. Von Mehren & Gordley, *supra* note 31, at 12. The English region was highly compartmentalized at the time of William’s invasion and was divided for legal purposes into “the law of Wessex, the law of Mercia, and the Danelaw.” H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 406 (1983).

45. R. C. Van Caenegem, *The Birth of the English Common Law* 17 (2d ed. 1988).

46. *Id.* (citing H.A. Cronne, *The Reign of Stephen 1135–54: Anarchy in England* 253 (London, 1970)).

47. Von Mehren & Gordley, *supra* note 31, at 12.

48. *Id.* Initially, three separate types of royal courts were created: the Court of Exchequer, the Court of Common Pleas, and the Court of King’s Bench. David & Brierly, *supra* note 41, at 291. These were originally created to hear cases on “royal finances, matters respecting the ownership and possession of land and serious criminal matters affecting the peace of the kingdom,” respectively, though eventually all three branches attained concurrent jurisdiction. *Id.*

49. *See id.*

50. Von Mehren & Gordley, *supra* note 31, at 12. *See also* Van Caenegem, *supra* note 45, at 18–22.

51. Von Mehren & Gordley, *supra* note 31, at 12.

The English citizenry gradually began to prefer these royal courts over the older Saxon-era courts, perceiving them as superior sources of adjudicatory and enforcement power.⁵² Thus, the royal courts eventually became the main courts in England, and the older, Saxon-era courts eventually ceased to have any importance.⁵³ This new uniform and superior law adjudicated by the royal courts, "common to all the realm," began to completely subsume and displace all of the "petty local and tribal peculiarities of which English law, at the time of the Conquest, [had been] full."⁵⁴ Thus, from the coronation of Henry I in 1100, through the death of Henry III in 1272, the royal courts "declared the Common Law of England."⁵⁵ Eventually, of course, with the advent of British imperialism, the common law system was transplanted far and wide, such that "the sun never set on the British empire," nor on some land which utilized the common law system.⁵⁶

52. David & Brierly, *supra* note 41, at 291.

The courts were also prompted to increase their jurisdiction upon the solicitation of the people in whose eyes royal justice appeared superior to that of the other court. It was only the royal courts that had the means to summon witnesses and to enforce judgments; and only the king, apart from the church, could require the swearing of an oath.

Id.

53. *Id.* at 292. See also Maitland & Montague, *supra* note 40, at 81–82 ("The king's courts have been fast becoming the only judicial tribunals of any great importance . . . the small freeholder . . . could here obtain a stronger and better commodity than any that was to be had elsewhere, a justice which, as men reckoned in those days, was swift and masterful.") (citing Pollock and Maitland, *History of English Law*, I., 202–03).

54. Von Mehren & Gordley, *supra* note 31, at 13 (citing E. Jenks, *Law and Politics in the Middle Ages* 36 (2d ed. 1913)).

55. *Id.* (citing Jenks, *supra* note 54, at 38). See also Merryman, *supra* note 4, at 50:

The Norman conquerors of England at the Battle of Hastings quickly set about centralizing the government, including the administration of justice. They established royal courts and a system of royal justice that gradually displaced the old feudal courts and rules. In the process of centralizing English justice, the judges of the royal courts developed new procedures and remedies and a new body of substantive law applicable, at least in theory, to all Englishmen. For this reason it was called the common law.

56. Koch, *supra* note 28, at 20 (citing H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 228–29 (2000)).

The common law expanded throughout much of the world as a result of the British empire The result . . . was a kind of embedding of common law thinking in a large number of diverse societies around the world. . . . What has happened, generally, is the marriage of the idea of a common law with that of multiple nation-states, and the marriage has been at times a difficult one.

Id.

2. *Basic Mechanics of the Common Law System*

What were, and are, the attributes of this system known as “the Common Law”? The answer is derived from the historical workings of the early court system in England. Early on, the royal courts developed a system of several dozen specific writs—i.e., court orders for relief—which could be issued to a litigant.⁵⁷ Only cases which had factual patterns matching one of these situations could be granted relief via a writ.⁵⁸ As a result, the early royal courts in the first two centuries after the Norman conquest began to pay particularly close attention to the different fact scenarios involved in the cases before them.⁵⁹ As the case load increased, the royal courts turned to an innovation in the interest of judicial efficiency—once the courts decided a particular dispute, all subsequent disputes would be decided in the exact same way, thereby eliminating the need for the judge to ever address that particular issue in any comprehensive manner again.⁶⁰ Indeed, based on the lack of any other written source of law, the English adherence to precedence seems logical.⁶¹ As early as the thirteenth century, Judge Bracton stated the principle in his incomparable treatise of the day:

[If any new and unwonted circumstances . . . shall arise, then if anything analogous has happened before, let the case be adjudged in like manner (*sit amen Sicilia evenerint per simile iudicentur*), since it is a good opportunity for proceeding from like to like (*a similibus ad Sicilia*).⁶²

However, it was actually not until the sixteenth century that case decisions began to be reported in print and available to lawyers—before this, the lawyers and judges simply worked from memory of the professionals and the official case file record.⁶³

Nevertheless, it is seen that early on the common law embraced the doctrine of *stare decisis*, defined thusly: “The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”⁶⁴

57. See Neipert, *supra* note 12, at 15. Neipert states that there were fifty-six such writs. *Id.*

58. *Id.* See also David & Brierly, *supra* note 41, at 292–94; Maitland & Montague, *supra* note 40, at 90–101.

59. Neipert, *supra* note 12, at 15.

60. *Id.* at 15–16.

61. See Maitland & Montague, *supra* note 40, at 87.

62. Arthur R. Hogue, *Origins of the Common Law* 200 (1966).

63. *Id.* at 202.

64. Black’s Law Dictionary (8th ed. 2004). See also William M. Lile et al., *Brief Making and the Use of Law Books* 321 (3d ed. 1914).

The rule of adherence to judicial precedents finds its expression in the

The common law system has been described as the process of applying rules derived from case precedents, to new factual situations, all for the purpose of producing uniform, consistent, and certain results.⁶⁵ Champions of the common law method of law-making and case resolution often praise it as being dynamic and ever-evolving, able to adjust to new situations which have been previously unaddressed by legal rules or principles.⁶⁶ Indeed, part of this dynamism is in the fact that common law courts and scholars have even imbued the rule of *stare decisis*, though it is the certainty-imbuing mechanism of the common law, with limitations.⁶⁷ As the United States Supreme Court

doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.

Id.

65. Hogue, *supra* note 62, at 245 (citing *Mirehouse v. Rennell*, 1 Cl. & F. 527, 546 (1833)). See also David & Brierly, *supra* note 41, at 348-49. Sir Frederick Pollock stated: "The [common law] judgment looks forward as well as backward. It not only ends the strife of the parties but lays down the law for similar cases in the future." Maitland & Montague, *supra* note 40, at 84-85 (citing Sir Frederick Pollock, *Expansion of the Common Law* 46-50).

66. See, e.g., *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894, 903 (Md. 1983) (citing *Felder v. Butler*, 438 A.2d 494 (Md. App. 1981)) ("[T]he common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.").

67. See *Boblitz v. Boblitz*, 462 A.2d 506, 526 (Md. 1983) (quoted in *Madden*, *supra* note 42, at 590):

Notwithstanding the great importance of the doctrine of *stare decisis*, we have never construed it to inhibit us from changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.

As Oliver Wendell Holmes put it more forcefully:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time in Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Jr., *Collected Papers* 187 (1920) (quoted in *Madden*, *supra* note 42, at 590 n.165).

Thus, the American experience with *stare decisis* has been a lukewarm one, which has been whittled away by scholars and judges alike. See John Henry Wigmore, *Problems of Law* 79 (1920):

Is the judge to be bound by his precedent? This part of the question ought not to trouble us overmuch. *Stare decisis*, as an absolute dogma, has seemed to me an unreal fetich. The French Civil Code expressly repudiates it; and, though French and other Continental judges do follow

has stated, albeit in the context of constitutional interpretation: “[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”⁶⁸

It does seem as though, in reality, common law judges do not follow prior decisions as dogmatically as the theoretical conventions

precedents to some extent, they do so presumably only to the extent that justice requires it for safety’s sake. *Stare decisis* is said to be indispensable for securing certainty to the application of the law. But the sufficient answer is that it has not in fact secured it. Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves—the government of the living by the dead, as Herbert Spencer has called it.

See also Benjamin N. Cardozo, *The Nature of the Judicial Process* 149–51 (1921):

I think adherence to precedent should be the rule and not the exception But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.

See also *Funk v. United States*, 290 U.S. 371, 382, 54 S. Ct. 212, 215 (1934) (“That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt.”).

68. *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472, 2483 (2003) (citing *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 2609 (1991)) (“*Stare decisis* is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’”).

The Court noted, however, that “when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.” *Lawrence*, 123 S. Ct. at 2483 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855–56, 112 S. Ct. 2791, 2809 (1992)). The Court cautioned that “[l]iberty finds no refuge in a jurisprudence of doubt.” *Id.* It should be noted that the English courts are far more vigilant about upholding the rule of stare decisis:

[W]e must apply those rules, to all cases which arise; and we are not at liberty to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

Hogue, *supra* note 62, at 245 (citing *Mirehouse v. Rennell*, 1 Cl. & F. 527, 546 (1833)).

of common law ideology and *stare decisis* would otherwise command.⁶⁹

This system of constant potential for change, while celebrated as a virtue among those who praise the common law's adaptability, is not without its historical critics. Jeremy Bentham, the English codification proponent, for instance, is said to have observed: "Common law judges make law as a man makes laws for his dog. When a dog does anything you want to break him of, you wait till he does it, and then you beat him for it."⁷⁰ Nevertheless, this system of precedent is the lifeblood of the operation of the common law, and it has persevered in the entire English-speaking world and elsewhere for centuries. The use of prior precedent as authoritative in future cases "is the distinctive feature of a common law legal system."⁷¹ So, quite simply, common law is "judge-made" law.⁷² Cases are law.⁷³

69. Koch, *supra* note 28, at 51. Sereni sheds further light on the historical context of *stare decisis*: "The rule of *stare decisis* . . . is of comparatively recent origin; it developed slowly in England during the seventeenth and eighteenth centuries; it was finally established there at a time when the law was almost entirely unwritten and precedents were few." Angelo Piero Sereni, *The Code and the Case Law, in The Code Napoleon and the Common-Law World* 66 (Bernard Schwartz ed., 1956). The American experience has been complex:

In the United States the rule of *stare decisis* was never rigidly followed, probably because of the fact that the vesting of the legislative power in Congress from the very origin of the Republic was not challenged by the courts, and because of the substantial number of statutes enacted in this country since its early days. Furthermore, the great number of cases officially reported tends somewhat to impair the binding force of judge-made law, and the increasingly rapid pace at which the law changes tends to shorten the period during which most cases may be considered as authorities.

Id.

70. Lawrence M. Friedman, *American Law* 93 (1984).

71. Benjamin P. Friedman, *Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 *Emory L.J.* 647, 673 (1993) (citing *Precedent in Law* 1 (Laurence Goldstein ed., 1987)).

72. See, e.g., *Spokane Methodist Homes, Inc. v. Dep't of Labor & Indus.*, 501 P.2d 589 (Wash. 1972) ("It is fundamental that the rules of common law which are court-made rules, can be changed by the court when it becomes convinced that the policies upon which they are based have lost their validity or were mistakenly conceived."); see also Madden, *supra* note 42, at 555 ("[T]he common law . . . [is] the judge-made law of property, contracts, torts and beyond."). Different scholars and jurists have defined the common law differently. For instance, Richard Posner defined it as "any body of law created primarily through judges by their decisions rather than by the framers of statutes or constitutions." Richard A. Posner, *The Problems of Jurisprudence* 247 (1990). Professor Madden stated that "[t]he common law is often called 'judge-made' law, to distinguish it from statutes, regulations and ordinances, which are enacted by state and federal legislatures, agencies and political subdivisions." Madden, *supra* note 42, at 558. Arthur Corbin, in a pragmatic manner, suggested that "the common law is not a body of rules; it is a method. It is the creation of law by the inductive process." Richard A.

3. *Legislation in Common Law Systems*

There are, of course, statutes in common law jurisdictions.⁷⁴ However, by and large, the common law is the comprehensive backdrop of law in such jurisdictions:

As a rule a common-law statute does not propose completely to supersede the pre-existing traditional law governing the topics covered by it, nor does it propose to lay down general principles of its own; on the contrary, it presupposes the existence of general principles, relating to the topic covered by it, that are part of the traditional common law predating the statute itself, and that may or may not have crystallized into precise legal rules. The statute is meant to be understood and construed against the background and to operate within the framework of such prior law. Thus, the general principles underlying the statute are to be found within the realm of the traditional unwritten law, while the main function of the statutory provisions is that of clarifying doubtful points, settling the law with regard to particular questions relating thereto, and implementing pre-existing rules and principles.⁷⁵

One state supreme court justice, speaking over twenty years ago, observed that in the cases before her court, only about ten percent of such cases were “purely common law,” with statutes bearing some relevance to the balance of the disputes.⁷⁶ Nevertheless, even so, the presence of statutes does not change the fundamental nature of the common law adjudicatory method, nor the manner in which courts are empowered to invoke wide-ranging interpretations and resort to prior precedents for aid in resolving disputes. The common law still “represents the largest proportion of property, contracts and torts.”⁷⁷

Cosgrove, *Our Lady the Common Law: An Anglo-American Community 1870–1930* at 39 (1987) (quoting Arthur Corbin, *What is the Common Law?* 75).

73. Koch, *supra* note 28, at 51.

74. See Merryman, *supra* note 4, at 26 (“There is probably at least as much legislation in force in a typical American state as there is in a typical European or Latin American nation.”).

75. Sereni, *supra* note 69, at 58–59. See also David & Brierly, *supra* note 41, at 354–58.

76. Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. Pitt. L. Rev. 995, 996 (1982) (commenting on cases before the Connecticut Supreme Court).

77. See Madden, *supra* note 42, at 558. Professor Madden’s observation came with a rather sizable caveat insofar as this conclusion related to the law of contracts. Namely, in order for the observation to be accurate in regard to the law of contracts, the presence of the Uniform Commercial Code must be considered to be a “crystallization of the common law of sales, negotiable instruments, secured

Indeed, since much legislation is concerned with public interests such as criminal prohibitions, environmental protections, employment relations, securities regulation, and the like, it has been said that legislatures in Anglo-American legislatures seem largely to "leave individual pursuit[s] of monetary or injunctive relief to existing common law."⁷⁸

Even where there are statutes in common law jurisdictions, they are "organic, a living creature."⁷⁹ Statutes, where applicable, do in theory govern preemptively, but even then cases may add "judicial gloss" to the statute by way of interpretation.⁸⁰ That is, in the words of one observer, "[t]he U.S. approach [to statutory language] easily recognizes the need for judicial adaptation. It has not committed itself to a stable approach to statutory interpretation."⁸¹ In the United States system, at least, judges often balance the interests advanced by the statute in question, rather than simply adducing the grammatical meaning of the provision.⁸² Here, there is great internal debate in the common law system between jurists willing to liberally construe statutory language and those who cling more fervently to a strict constructionist approach.⁸³ Nevertheless, the presence of statutes in common law jurisdictions, though undeniably affecting the common law, has not fundamentally transformed its basic essence and the law-making effect of case decisions.

interests, and the like." *Id.* at 558 n.15. If not, then quite obviously much of modern American contract law has been subsumed within the Uniform Commercial Code's statutory framework.

78. *Id.* at 559.

79. Koch, *supra* note 28, at 42.

80. See 15A Am. Jur. 2d *Common Law* § 1 (citing Metropolitan Life Ins. Co. v. Strnad, 876 P.2d 1362 (Kan. 1994); State v. Lawrence, 565 P.2d 989 (Idaho 1977); Wagner Bros., Inc. v. City of Williston, 335 N.W.2d 328 (N.D. 1983); Senear v. Daily Journal-American, a Division of Longview Pub. Co., 641 P.2d 1180 (Wash. 1982); H. Marlow Green, *Can the Common Law Survive in the Modern Statutory Environment?*, 8 Cornell J.L. & Pub. Pol'y 89 (1998); Madden, *supra* note 42, at 55).

81. Koch, *supra* note 28, at 42.

82. *Id.* (citing Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 495, 456 (1989)).

83. Koch, *supra* note 28, at 54.

U.S. jurisprudence also struggles with the overall confusion created by judicial law making. Justice Scalia of the United States Supreme Court has been a strong advocate for judicial faithfulness to [statutory] language. For example, in his concurring opinion in *Convoy v. Aniskoff*, he criticized the Court for not adhering to the literal language of the statute. He argued that free-wheeling interpretation "undermines the clarity of law."

Id. (quoting *Convoy v. Aniskoff*, 507 U.S. 511, 518-19, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring in judgment)).

4. *Equitable Powers of the Courts*

The influence of the common law judge is even more impressive when her equitable powers are taken into account. Judges in the common law tradition have such equitable powers inherent in their judicial authority, in addition to the powers to decide disputes according to fixed legal principles.⁸⁴ This power of equity gives the common law judge the ability to ameliorate the perceived harshness of a legal rule in the context of a particular set of factual circumstances, so as to achieve justice in the context of an individual dispute.⁸⁵ The common law judge's equitable powers are even seen as giving her the ability to "interpret and reinterpret in order to make the law respond to social change."⁸⁶ While this poses the potential for tension between the twin desires for certainty and justice in the law, in the common law system the mandate to maintain the balance between these two competing interests is set squarely at the feet of the common law judge.⁸⁷ Hence, the maintenance of balance between these two tensions is yet another responsibility of the common law judge, and yet another source of wide discretion and power within the operation of the common law system.

5. *The Role of the Court and Judges in the Common Law System*

From the foregoing, it is perhaps unsurprising that one of the enduring characteristics of the common law system is our reverence for, and even glorification of, judges and the judicial function. In the United States, and at least historically in England, judges at certain levels are heroes of the culture, at least the legal culture. "Many of the great names of the common law are those of judges: Coke, Mansfield, Marshall, Story, Holmes, Brandeis, Cardozo."⁸⁸ The reasons for this, given the mechanics of the common law system, are obvious. The judges are the creators of the law, with deference to the legislature's role.⁸⁹ It has been stated that the common law arose, at

84. See Merryman, *supra* note 4, at 51. The development of equitable principles in the common law stems from the courts of chancery in England, which themselves were an evolution from the system whereby the king's chancellor was appointed to hear petitions from Englishmen who pleaded for relief from the harsh effects of the application upon them of a principle of the common law. *Id.* at 50–51. See also Maitland & Montague, *supra* note 40, at 120–21.

85. Merryman, *supra* note 4, at 51. See also David & Brierly, *supra* note 41, at 300–05; Maitland & Montague, *supra* note 40, at 125–28.

86. Merryman, *supra* note 4, at 51.

87. *Id.* at 51–52.

88. *Id.* at 34.

89. *Id.* See also Von Mehren & Gordley, *supra* note 31, at 1146 ("The

least in part, out of an inherent suspicion of democratically elected majority rule, and, at least by implication, the legislative function.⁹⁰ In the American experience, the judicial system has been a stimulus for the advancement and safeguarding of civil liberties.⁹¹ As John Henry Merryman observed:

We know that our legal tradition was originally created and has grown and developed in the hands of judges, reasoning closely from case to case and building a body of law that binds subsequent judges, through the doctrine of *stare decisis*, to decide similar cases similarly. We know that there is an abundance of legislation in force, and we recognize that there is a legislative function. But to us the common law means the law created and molded by judges, and we still think (often quite inaccurately) of legislation as serving a kind of supplementary function. We are accustomed, in the common law world, to judicial review of administrative action, and in the United States the power of judges to hold legislation invalid if unconstitutional is accepted without serious question. We know that our judges exercise very broad interpretive powers, even where the applicable statute or administrative action is found to be legally valid. We do not like to use such dramatic phrases as "judicial supremacy," but when pushed to it we admit that this is a fair description of the common law system, particularly in the United States.⁹²

The fact that judges are held in such high regard in common law jurisdictions is, of course, a function of the reality that they are an indispensable part of operating the common law system. However, it also stems largely from the success that they have had in the practice of law before assuming the bench. Judges in common law jurisdictions have generally attended law school and had successful careers as practicing attorneys.⁹³ Further, in common law

common law is a monument to the judicial activity of the common-law judge. He, not the legislator or the scholar, created the common law. He still enjoys the prestige of that accomplishment.").

90. See Koch, *supra* note 28, at 56-57 (citing Martin Vranken, *Fundamentals of European Civil Law and Impact of the European Community* 63 (1997)).

91. Koch, *supra* note 28, at 57. Though the prospect for judicial abuses is acknowledged even in common law jurisdictions, the shining role that the court system has had in the American experience has led to the characterization of the judicial arm of government as the "least dangerous" branch. See *id.* (citing Alexander M. Brickel, *The Least Dangerous Branch* (1962) ("Brickel's famous and perhaps elitist characterization incorporates the notion that courts are also dangerous but somewhat more trustworthy than the democratic institutions.")).

92. Merryman, *supra* note 4, at 34.

93. *Id.* See also Koch, *supra* note 28, at 59 ("The common law judiciary has

jurisdictions, judges generally attain their office through, in part, their successful practice, but also in large part through peer reputation, and even influence in political circles.⁹⁴ It is rare for someone to become a judge early in his or her career, and certainly virtually unheard of to take the bench directly after law school. Rather, becoming a judge is often a “crowning achievement,” bringing a great deal of prestige and esteem.⁹⁵ In short, as one of the crafters of the law through the rendering of adjudications having precedential effect, the judge is a critical figure in the common law.⁹⁶

6. *Summary of Common Law System*

In summary, the Common Law derived historically from medieval England, as a way to provide uniformity—i.e., “commonality”—to the law throughout all of England. Its chief identifying methodological characteristic is its use of *stare decisis* to give precedential effect to case decisions, thereby giving them the force of law. The common law spread throughout much of the world as a direct result of eighteenth and nineteenth century British imperialism. Common law systems exalt the role of the judiciary, which has a very strong influence on the law-giving functions within government, rivaling and even exceeding the legislatures in this regard. Because of the largely positive experience with this system in England, and especially the United States, common law courts and judges have an esteemed place within government, and even society itself.

C. *Basic Origins, Precepts and Characteristics of the Civil Law System*

1. *Roman Origins and the Corpus Juris Civilis*

The Civil Law system of legal methodology is the world’s oldest system still in wide practice—it is also the world’s most broadly practiced and implemented system.⁹⁷ Other than the areas permeated by British imperialism in the eighteenth and nineteenth centuries, virtually the entire remainder of the world practices some form or another of civil law, or at least has systems which were, or are,

more status [than the civil law judiciary] in the system This status is enhanced in the legal community by the fact that common law judges come to the bench as successful members of the practicing bar.”).

94. Merryman, *supra* note 4, at 34.

95. *Id.*

96. *Id.* at 35.

97. *Id.* at 2.

influenced by civil law.⁹⁸ The system almost certainly has its origins in the ancient Roman Empire.⁹⁹ The Romans were quite adept, given their historical context, at developing legal methodologies and substantive legal precepts.¹⁰⁰ Justinian's great codification in the sixth century A.D. is often the starting point for a discussion of the history of the civil law, but that does not go far back enough.¹⁰¹ Rather, the civil law system is said by Merryman to have originated nearly a millennium earlier, in 450 B.C. when the Twelve Tables were published in Rome.¹⁰² This was Rome's first system of written law, codified around the time the Roman Republic was founded,¹⁰³ shortly before the demise of the original Roman monarchy.¹⁰⁴ The process of putting the law of the Republic into written form was important, as one of its chief functions at the time was to give the Roman citizenry the means to review the applicable legal standards of the day.¹⁰⁵ The legal principles were literally inscribed onto

98. See *supra* notes 21–24 and accompanying text.

99. See Von Mehren & Gordley, *supra* note 31, at 4 (“Our sketch [of civil law history] must begin with the Romans.”).

100. *Id.*

101. Though not often cited in discussions of the history of Civil Law, Hammurabi's Code far pre-dated the Roman Empire. Hammurabi was a unifying leader over the ancient kingdom of Babylon (present-day Iraq), and his rule occurred approximately 3,750 years ago, or in approximately the year 1,750 B.C. See Neipert, *supra* note 12, at 5–6. Hammurabi, unlike the arbitrary monarchical governments of that and subsequent ages, desired a uniform law which would obtain social justice and protection of human rights. *Id.* at 6. Therefore, he ordered the assembling of what has been called “the forerunner of a modern legal code,” one which contained provisions on family law, inheritances, property law, criminal law, rules of evidence, womens' and slaves' rights, medical malpractice, lending, water rights, agricultural activities, minimum wages, principal and agent rules, and appellate rights. *Id.* The provisions of the Code of Hammurabi were set forth in 282 separate sections, and were engraved onto stone tablets and set up for public viewing in Babylon. *Id.* at 7. Perhaps Hammurabi's contributions to the modern code, and to the Civil law system itself, are greatly underrated by legal historians.

102. Merryman, *supra* note 4, at 2.

103. See James Bacchus, *Turning to Tacitus*, 37 Vand. J. Transnat'l L. 631, 644 (2004) (citing Michael Grant IV, *Translator's Introduction to Tacitus, The Annals of Imperial Rome* 132 (Michael Grant IV trans., Penguin Books 1996)).

104. See Larry Cata Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 Wm. & Mary Bill of Rts. J. 117, 167 n.211 (2003).

105. *Id.* See generally Alan Watson, *The Law of the Ancient Romans* (1970); Alan Watson, *Rome of the XII Tables: Persons and Property* (1975) (cited in Backer, *supra* note 104, at 167 n.211). Henry Maine has suggested that, ultimately, the benefit of codes in ancient society “was the protection which they afforded against the frauds of the privileged oligarchy and also against the spontaneous devaluation and debasement of the national institutions.” Henry Sumner Maine, *Ancient Law* 18 (Transaction Pub. 2002). The law was thought to eventually be better put in writing and made publicly available, rather than being “deposited with

twelve stone tablets, which were then affixed in a prominent location in the city itself, so as to be viewable by all citizens.¹⁰⁶ The physical Tables were demolished by the marauding Gauls in 390 B.C.¹⁰⁷ However, due to the prior memorization of all the principles contained in the Tables by Roman citizens, the Twelve Tables had an enduring influence and continued vitality until the time of Justinian's great codification and reformation of Roman law.¹⁰⁸

In 533 A.D., nearly one thousand years after the publication of the Twelve Tables, the Emperor Justinian published his great codification, the *Corpus Juris Civilis*.¹⁰⁹ Justinian had at least two critical rationales for ordering the codification.¹¹⁰ His first rationale was that a reformation of Roman law was in order—Justinian considered the legal system of the day to be corrupt, as a result of centuries of deterioration and decline.¹¹¹ Justinian desired to return the Roman law to its prior glory at the foundation of the Republic.¹¹² His second rationale was more pragmatic—he perceived a need for codification in light of the massive volume of authorities, treatises, and commentaries on Roman law, many of which differed in opinion, and even directly contradicted each other.¹¹³ These commentaries were written by the legal scholars of the period, which were called juriconsults.¹¹⁴ Accordingly, Justinian sought to reform the existing legal precepts and authorities by discarding what he perceived as incorrect, arcane, or superfluous, and to organize the remainder into a categorized, systematized whole—i.e., a code.¹¹⁵

When Justinian's Code was completed, it consisted of approximately 4,600 sections, which were organized into ten volumes.¹¹⁶ The Code provisions themselves were written in Latin, which was the academic language throughout the empire.¹¹⁷ Included in the promulgation of Justinian's Code were: the Institutes (a

the recollection of a privileged oligarchy." *Id.* at 14.

106. See Barbara R. Hauser, *The Tale of the Testament*, 12 Probate and Property 58, 62 (Sept./Oct. 1998).

107. *Id.*

108. *Id.*

109. Merryman, *supra* note 4, at 6–7. The preparation of Justinian's Code was accomplished under the supervision of the scholar Tribonian. *Id.*

110. *Id.* at 7.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* See also Alan Watson, *The Evolution of Western Private Law* 3 (2001).

116. See Neipert, *supra* note 12, at 8.

117. *Id.* The codification in the Latin language would prove useful for the purpose of the Code's subsequent study in the Renaissance period by European legal scholars. See *infra* notes 12–36 and accompanying text.

treatise-like exposition of the code provisions), the Digest (a collection of excerpts of writings from scholars on the pre-Justinian Roman law), and the Codex (an aggregation of royal pronouncements affecting the law).¹¹⁸ Also accompanying the Code provisions were the *Novels*, which were declarations of Justinian himself, and were written in Greek, the language commonly used by ordinary citizens of the time.¹¹⁹ The Code was a celebrated achievement of the day (those sharing this view included Justinian himself).¹²⁰ One of the commands Justinian gave regarding the Code was that all pre-Code authority (which was not incorporated into the code itself or the supplementary code materials), such as jurisconsult commentary, was to be thenceforth disregarded as legal authority, persuasive or otherwise.¹²¹ Justinian's motives in this regard were at least partly positive—he wanted to obviate the need for the citation of any authority other than the Code itself, lessening the research burden of finding the law.¹²² Justinian sought not only to abolish prior commentary, his motive was actually to abolish all prior law itself, with the *Corpus Juris Civilis* completely replacing and superseding all prior law.¹²³ Justinian even went so far as to have many of the pre-Code manuscripts and authorities burned in order to effectuate his pronouncements in this regard.¹²⁴ Though he also sought to ban any subsequent commentary after the promulgation of the Code, he was utterly unsuccessful, as commentary began to be written almost as soon as the Code was completed.¹²⁵

118. See Lawson, *supra* note 29, at 10–11. The Digests were especially important. They included the recommended adjudication of both actual and hypothetical fact patterns. *Id.* at 11. “The Digest is the core of the *Corpus Juris*, and it is a world in itself. Of the same order of size as the Bible, it has meant different things to different ages, and is almost as exhaustible.” *Id.* at 12.

119. *Id.* at 11. See also Neipert, *supra* note 12, at 8.

120. It is from the name of Justinian, that we derive the following words: justice, jurisprudence, jury, judicial, judge, judgment, etc. See Neipert, *supra* note 12, at 5, 8. It should be noted, however, that Justinian is not without blemishes on his historical legacy. Historians note that, in 532 A.D., a large crowd of Roman citizens assembled in the Hippodrome to demand that a new emperor be appointed. *Id.* at 9. The reason they were disgruntled with Justinian's rule was the extraordinary taxes he had imposed in order to finance various military campaigns to reacquire certain lands which had previously been lost. *Id.* at 8–9. In response, Justinian reputedly loosed a vicious legion of barbaric German mercenaries on the crowd, resulting in a massacre of approximately 30,000 Roman citizens. *Id.* at 9. Any outward signs of protest against Justinian's taxes quickly dissipated. *Id.*

121. See Merryman, *supra* note 4, at 7.

122. *Id.* Of course, it is impossible not to consider that power and ego were not also driving factors in this monarchical maneuvering.

123. *Id.*

124. *Id.*

125. *Id.* at 7–8.

2. Revived European Study of the Corpus Juris Civilis

With the fall of the western Roman Empire (succeeded to the east by the Byzantine empire), all of Western Europe descended into the Dark Ages.¹²⁶ Much interest in law and scholarly studies virtually disappeared during this period, replaced instead by the force of might and feudal hierarchies.¹²⁷ The Roman civil law remained in the consciousness and memories of the indigenous peoples of Western Europe, however, and eventually cruder, “vulgarized” versions of the Roman civil law, mixed with indigenous cultures and customary law of invading tribes, came to be practiced in many parts of Western Europe during this period.¹²⁸ The revived intellect and scholarly pursuits that came with the Renaissance in Europe, however, brought with it a renewed spark of enthusiasm for studying the law in a refined, intellectual manner.¹²⁹ The first modern-era university was founded in Bologna, Italy at the end of the eleventh century (not long after the time William was conquering England).¹³⁰ At Bologna, law was one of the primary areas of academic interest, and the law which was studied was not any of the indigenous laws of the various regions or the “vulgarized” Roman law that had appeared in certain parts of Europe—rather, the academicians turned their attention to Justinian’s *Corpus Juris Civilis*.¹³¹ Irnerius is given credit for being the first scholar to provide instruction based on the Roman code.¹³² Soon, other universities in Italy and elsewhere in Europe were founded, and they, too, studied the *Corpus Juris Civilis*.¹³³ So dominant was the emphasis on studying Roman law, that virtually none of the

126. See Neipert, *supra* note 12, at 9.

127. *Id.* “There was a general decline in culture which attended the barbarian invasions from the fifth century and even earlier, and the diversion to theology of many of the best brains which might formerly have been attracted to law.” Lawson, *supra* note 29, at 12.

128. See Merryman, *supra* note 4, at 8.

129. *Id.*

130. *Id.* at 8–9.

131. *Id.* at 9. See also Neipert, *supra* note 12, at 9 (“no modern law arose to take the place of the feudal system. Instead, scholars looked back to the Romans . . .”). The revived study of Roman law “was of immense importance, for it restored to human knowledge the mass of detailed solutions which, far more than a few imperfectly stated general principles, are the true contribution of Roman Law to modern civilization.” Lawson, *supra* note 29, at 21–22.

132. See Von Mehren & Gordley, *supra* note 31, at 7.

133. See Merryman, *supra* note 4, at 9. “Roman law became the basis for all teaching of law in Europe’s new universities, and the universities took the lead in promoting the idea of the rule of law throughout the Renaissance.” Neipert, *supra* note 12, at 9.

universities in Europe concerned themselves with the study of "local laws" until well into the 1700s.¹³⁴

There were several reasons for the interest in Justinian's Code by the legal scholars of Renaissance Europe. First, it had the obvious credibility associated with the great Roman civilization, which by this point seemed almost mystical in its historical and sociological significance, especially in light of the dim period from which the continent had just emerged.¹³⁵ Further, the European scholars recognized the superior logical and organizational scheme of the Code, which they came to refer to as "written reason."¹³⁶ It was quickly realized that Justinian's codification contained substantive legal principles which were well suited for the solution of many of the dilemmas presented by the emerging commercial markets and increasingly sophisticated citizenry.¹³⁷ More pragmatically, perhaps, the Code was written in Latin, which was still the common language of academic study in Renaissance Europe, and hence, Justinian's Code was eminently accessible by the scholars of the day.¹³⁸ In a very real sense, with the uniform study of the *Corpus Juris Civilis* throughout Europe, and its almost universal acceptance as the foundation for all prospective thought about the law and what it should be, the *Corpus Juris Civilis*, along with the commentary on it by the scholars of the day, became known as the "common law of Europe," or the *jus commune*.¹³⁹ Indeed, at a certain point in the thirteenth century and beyond, Roman law began to go beyond being the source of academic study, and began also to be applied by the courts in Italy and elsewhere, so as to actually have the force of binding law.¹⁴⁰ This was known as the "Reception" of Roman law.¹⁴¹

134. Neipert, *supra* note 12, at 9–10.

135. Merryman, *supra* note 4, at 9. As stated by Von Mehren and Gordley, [t]he newly discovered *Corpus Juris Civilis* had a claim to direct authority as the law of the *imperium romanum*. It also embodied the Roman cultural ideal. Rome, its glory and its unity, had lingered on in men's minds. Roman law was one of the expressions of that glory and that unity for which men still longed.

Von Mehren & Gordley, *supra* note 31, at 8 (citing P. Koschaker, *Europa und das römische Recht* 81–82, 114–15 (1947)).

136. Merryman, *supra* note 4, at 9.

137. See Von Mehren & Gordley, *supra* note 31, at 8.

138. Merryman, *supra* note 4, at 9.

139. *Id.* The scholars in Renaissance Europe, which produced massive amounts of commentaries on the *Corpus Juris Civilis* for modern academic study, were known as the Glossators and the Commentators. *Id.* See also Lawson, *supra* note 29, at 22–23 (the name "Glossators" came from the fact that these scholars "glossed" the Justinian Code with cross-references and notes, and made greater systematic sense of it for further academic study).

140. See Von Mehren & Gordley, *supra* note 31, at 10.

141. See Lawson, *supra* note 29, at 24. Indeed, Maitland famously lectured that

At this stage, therefore, Merryman has observed that “[t]here was a common body of law and of writing about law, a common legal language, and a common method of teaching scholarship.”¹⁴²

3. *The Rise of the Nation-State, the Revolution, and the Advent of National Codes*

The Roman Empire, and subsequently the Byzantine empire, was the dominant civilization and organized governmental structure in the wider European-Mediterranean region for the better part of two millennia.¹⁴³ When the Roman Empire fell in the West, for a time, only crude tribal and regional authorities filled the power vacuum that was left by Rome’s absence.¹⁴⁴ The eastern Byzantine empire, which was based in Constantinople, did not fall until 1453 A.D. when it was conquered by the Ottoman Turks.¹⁴⁵ The fall of the last vestiges of the supraregional Roman Empire, coupled with the renewed intellectual and philosophical energy that accompanied the Renaissance, corresponded from the fifteenth century and forward with the gradual ascendancy of the concept of the nation-state, and national sovereignty.¹⁴⁶ With this development, the idea of a *jus commune*, or “common law of Europe,” began to decline, and instead sovereign nations began to assume the lawmaking prerogative for their own populaces.¹⁴⁷ Nevertheless, the *Corpus Juris Civilis* continued to have a profound influence on the laws of these nations, as nearly all of the continental European nations either formally received Roman law as having the actual binding force of law, or at least were heavily influenced by Roman law in their own promulgation of laws.¹⁴⁸ In short, “Roman law was the beginning

German historians referred to the “triad of three R’s” which symbolized the inception of the modern era—“Renaissance, Reformation, and Reception.” *Id.* (citing Frederic William Maitland, *English Law and the Renaissance* (1901)). It is interesting to note, however, that the idea of a “reception” in Italy and southern France is of dubious value, since Roman law never fully left these regions from the days of the Roman Empire. *Id.* at 26.

142. Merryman, *supra* note 4, at 9. Notably absent from this “common study” was England, which developed its system of common law and precedent in a manner fairly isolated from its Continental brethren. “The English courts never received Roman law at all.” Von Mehren & Gordley, *supra* note 31, at 10.

143. See generally Carlton J.H. Hayes, Marshall Whithed Baldwin, & Charles Woolsey Cole, *History of Western Civilization*, Vol. I (2d ed. 1967); Wikipedia, *Rome*, at <http://en.wikipedia.org/wiki/Rome> (last visited May 1, 2005).

144. See Hayes, Baldwin, & Cole, *supra* note 143, at 63–75.

145. See Neipert, *supra* note 12, at 7; see also Hayes, Baldwin, & Cole, *supra* note 143, at 305.

146. See Merryman, *supra* note 4, at 10.

147. *Id.*

148. *Id.* Merryman states:

point for the development of modern legal systems on continental Europe."¹⁴⁹

Eventually, the continental European nations began devising plans for their own national codes. However, other complex political forces were at work, more than merely a desire to intellectually arrange and re-systematize the original Roman codification. Broad geopolitical revolutionary forces were at work in the eighteenth and nineteenth centuries, including notably the revolutions of America and France.¹⁵⁰ Novel approaches of thought arose about humankind, social order, markets, and national sovereigns.¹⁵¹ These new paradigms for thinking about government and society were very much the impetus for the new European legal order of the day.¹⁵² One important influence was that of nonreligious "natural law"—the idea that all humans are equal, all have rights to property and life and liberty, and that government should protect these rights.¹⁵³ Feudalism, and the idea that wealthy members of society could "purchase" judicial protection for the highest price, were swift

In some parts of Europe (e.g. Germany), the Roman civil law and the writings of the Bolognese scholars were formally 'received' as binding law (Civil lawyers use the term 'reception' to sum up the process by which the nation-states of the civil law world came to include the *jus commune* in their national legal systems). In other parts of Europe the reception was less formal; the *Corpus Juris Civilis* and the works of the Glossators and Commentators were received because of their value as customary law or because of their appeal as an intellectually superior system. But, by one means or another, the Roman civil law was received throughout a large part of Western Europe, in the nations that are now the home of the civil law tradition.

Id.

149. Neipert, *supra* note 12, at 9.

150. Merryman, *supra* note 4, at 14.

This movement, which affected most Western nations, included such dramatic events as the American and French revolutions, the Italian Risorgimento, the series of wars of independence that liberated the nations of South and Central America, the unification of Germany under Bismarck, and the liberation of Greece after centuries of Turkish domination.

Id.

151. *Id.*

152. *Id.*

153. *Id.* at 15. See also Neipert, *supra* note 12, at 10.

The concept of natural law was the first expression of the idea that humans had individual rights merely because they were humans and existed on the earth. The concept of a natural law had a profound effect on government because the idea of government not merely enforcing law, but itself being subject to a natural law. [sic] It limited government's powers to unjustly interfere with the lives of the citizenry and provided the basis for thought that led to the American democracy.

casualties of this new revolutionary thought.¹⁵⁴ Instead of feudalism, the new era was to glorify the secular nation-state, which was to gain sovereignty within its borders over the lawmaking function.¹⁵⁵ Another extremely important consequence of this revolutionary thought was in the idea of governmental separation of powers.¹⁵⁶ Several philosophers of the day, including Montesquieu and Rousseau, stressed the critical importance to democratic governmental structure of separating the dominion of, respectively, the legislative and the executive branches, from the judicial branch.¹⁵⁷ The explicit purpose of this separation was to thwart any attempt by the judiciary to exercise the other governmental powers—namely, legislation and/or executing the laws.¹⁵⁸

Understanding the reason for the revolutionary hostility to the judicial function on the continent is critical to understanding the modern civil law tradition as it exists today.¹⁵⁹ The French revolutionary movement besieged the judicial branch for at least two reasons—their propensity for favoring the land-owning aristocracy, and also their tendency to make law outright rather than merely apply existing law.¹⁶⁰ This distrust of the judiciary had longstanding origins in French history, as courts were seen as instruments of monarchical subjugation.¹⁶¹ Even prior to the revolution, the French courts had

154. Merryman, *supra* note 4, at 15.

155. *Id.* at 17.

156. *Id.* at 15.

157. *Id.* Montesquieu's work in this regard was *Spirit of the Laws*, whereas one of Rousseau's writings covering this area was *The Social Contract*. *Id.*

158. *Id.* It is worth noting that, though separation of powers is an important concept in American democracy, the Founders of the American Republic were not nearly so distrustful of the judiciary. *Id.* "The system of checks and balances that has emerged in the United States places no special emphasis on isolating the judiciary, and it proceeds from a philosophy different from that which produced the sharp separation of powers customarily encountered in the civil law world." *Id.* at 15–16.

159. *Id.* at 16.

160. *Id.* As to the former reason, one explanation for the fact that the judiciary was less of an issue in the American democracy was that feudalism was essentially a non-factor in the American colonies. *Id.* at 17. On the other hand, it was very much alive and well in France and throughout Europe. *Id.* Thus, for French revolutionists, the political process was in part a means by which to effect, in the words of Maine, a "transition 'from status to contract.'" *Id.*

161. See Koch, *supra* note 28, at 25 (citing Andrew West, et al., *The French Legal System* 142 (2d ed. 1998)) ("The Republic had traditionally been wary of the power of the judiciary. This distrust is rooted in the way the Parlements of the Ancien Régime abused their position and interfered in politics."); see also Sereni, *supra* note 69, at 77 n.11:

[I]n France the judiciary was, prior to the Revolution, a class organization and courts were responsible for many abuses; thus, it was felt that their power should be controlled. Further, from the doctrine of the sovereignty

proven reticent to enforce the various reforms propounded by the French monarchs, frustrating the government's attempts at progressivism.¹⁶² The French revolutionaries, in part influenced by Montesquieu and others, came to conclude that the surest manner by which to prevent such perceived abuses was to sharply isolate the judiciary from the legislative function, and to closely guard against any operational judicial encroachment into such lawmaking areas.¹⁶³ Thus, closely restricting the ability of judges to do anything other than strictly a law-application/enforcement function was of paramount importance in French revolutionary thought.

In the aftermath of the French Revolution, Napoleon Bonaparte rose to power in 1799.¹⁶⁴ In 1804, France adopted its Code Civil, or, as it is sometimes called, the Napoleonic Code.¹⁶⁵ The substantive areas covered by the Napoleonic Code were very similar to Justinian's *Corpus Juris Civilis*, and even the structure was quite comparable.¹⁶⁶ The Roman influence was obvious and comprehensive.¹⁶⁷ Also comprehensively influential, however, were the ideologies of the revolutionary thought that flowered in the years prior to the Code's promulgation.¹⁶⁸ As had Justinian's Code, the

of the people and of the right of the people to enact its own laws through legislative bodies freely elected, it necessarily followed that the lawmaking power should be vested in the legislature only, which expressed the will of the nation, whereas courts, not being the expression of the will of the people, should administer, not create, the law.

162. See Merryman, *supra* note 4, at 16; see also Von Mehren & Gordley, *supra* note 31, at 1147:

In the struggle for nonrevolutionary reform during the period immediately preceding the Revolution, the courts were on the side of the old order. Particularly resented were the obstructionist tactics of the French courts known as 'Parlements' both in refusing to give effect to reform legislation and in issuing general orders (*arrest de réglemant*) on such matters as customary law, police regulations, and procedure.

163. Merryman, *supra* note 4, at 16. Again, it is worth noting that, in the great common law jurisdictions of England and the United States, this wariness of judicial legislation and lawmaking was not extant. *Id.* Rather, the power of common law judges to shape the law, and provide a force for progressivism and against governmental tyranny, was widely celebrated and even encouraged. See *id.* In short, "[t]he judiciary was not a target of the American Revolution in the way that it was in France." *Id.*

164. See Charles Downer Hazen, *The French Revolution and Napoleon* 265-69 (1917). Napoleon initially rose to power in a relatively peaceful *coup d'état*, taking the office of First Consul—the leading officer in a three party executive. *Id.* Eventually, however, in 1804, he became emperor. *Id.* at 288-89.

165. Merryman, *supra* note 4, at 10.

166. *Id.*

167. *Id.*

168. *Id.* at 27. Indeed, it has been said that

[t]he *Code Civil* has remained, for the peoples (of the world), the French Revolution—organized. When one speaks of the benefits of this

Napoleonic Code purported to abolish all prior law.¹⁶⁹ Nationalism played a large role in this decision, as any notion that the law could have come from a larger community (i.e., post-Roman Europe via the *jus commune*) outside the glorified state violated the sense of patriotism that accompanied the revolution and the growing nationalism of the era.¹⁷⁰ The acute restriction on judicial power permeated the ideology of the Napoleonic Code, and moreover, one of the utopian goals of the Code was to eventually obviate the need for lawyers.¹⁷¹ As stated by Merryman:

There was a desire for a legal system that was simple, nontechnical, and straightforward—one in which the professionalism and the tendency toward technicality and

revolution and of the liberating role of France, one thinks of the *Code Civil*, one thinks of this application of the idea of justice to the realities of life.

C. J. Friedrich, *The Ideological and Philosophical Background, in The Code Napoleon and the Common Law World* (Bernard Schwartz ed., 1956) (quoting Albert Sorel's Introduction to *Le Code Civil 1804–1904 XXX* (1904)).

169. Specifically, Article 7 of the Law of 30 Ventôse, An XII (March 21, 1804), provided: "From the day on which these laws enter into force, the Roman laws, the ordinances, the general and the local collections of customs, the statutes (*statuts*), the regulations all cease to have the force of law in the matter covered by the laws which comprise this Code." Von Mehren & Gordley, *supra* note 31, at 14. "Justinian and the French codifiers sought to destroy prior law for different but analogous reasons: Justinian sought to re-establish the purer law of an earlier time, the French to establish an entirely new legal order." *Id.* It is said that a French lawyer of that era would often say: "I know nothing of the civil law; I know only the Code Napoleon." Merryman, *supra* note 4, at 28. Or, as stated in French: "Je ne connais pas le Droit civil, je n'enseigne que le Code Napoléon." Lawson, *supra* note 29, at 42 n.67. This is not to suggest that all of pre-Code French law was of no import in the Code era. Indeed, a large amount of existing French law, much of it having been reported and organized by the commentator Pothier, was incorporated into the Code. See Sereni, *supra* note 69, at 56:

Nor could it be maintained that the substance of many of the Code Napoleon's provisions was startlingly original. To a considerable extent the Code adopted and organized pre-existing French law as mainly developed through the *coutumes* and the decisions of the various *Parlements*; also, in many instances it almost literally embodied provisions of previous statutes, such as the famous *Ordonnances* of Daguesseau on Gifts (1731), Wills (1735), and Substitutions (1747). By the time work started on the Code these various bodies of law had been systematically organized and authoritatively construed by Pothier and the other great commentators of pre-Napoleonic French law.

170. Merryman, *supra* note 4, at 27. It was also was bound up in the revolutionary ideology of reform that marked the era, as embodied in Voltaire's declaration: "Do you want good laws? Burn yours and make new ones!"—"Voulez-vous avoir des bonnes lois? Brûlez les vôtres, et faites-en des nouvelles." See Friedrich, *supra* note 168, at 1.

171. Merryman, *supra* note 4, at 28.

complication commonly blamed on lawyers could be avoided. One way to do this was to state the law clearly and in a straightforward fashion, so that the ordinary citizen could read the law and understand what his rights and obligations were, without having to consult lawyers and go to court. Thus the French Civil Code of 1804 was envisioned as a kind of popular book that could be put on the shelf next to the family Bible. It would be a handbook for the citizen, clearly organized and stated in straightforward language, that would allow citizens to determine their legal rights and obligations by themselves.¹⁷²

The French Code Civil was an undeniable triumph for the orderly rule of law, and a great improvement over the previous state of law in France.¹⁷³ The Code was a vast improvement over any prior Codes since the days of Justinian, and the Code's language is "clear and precise, concise and direct . . . a literary as well as a legal masterpiece."¹⁷⁴ It is said that Napoleon considered it his greatest achievement in his military and political career, which was not small, self-praise since his exploits included political conquest of most of Western Europe.¹⁷⁵

Because a principal purpose of the French Code was to constrain the role of the judiciary to merely the application of existing law, the

172. *Id.*

173. Jean-Étienne-Marie Portalis, a French scholar of the day and one of the advisers to the drafting of the Napoleonic Code, is said to have commented on the state of the law prior to the enactment of the Code:

What a spectacle opened before our eyes! Facing us was only a confused and shapeless mass of foreign and French laws, of general and particular customs, of abrogated and nonabrogated ordinances, of contradictory regulations and conflicting decisions; one encountered nothing but a mysterious labyrinth, and, at every moment, the guiding thread escaped us. We were always on the point of getting lost in an immense chaos.

Von Mehren & Gordley, *supra*, note 31, at 14. Indeed, diversity of the law was the controlling attribute of the state of the pre-Code law in France—i.e., the *Ancien Régime*. See René Cassin, *Codification and National Unity*, in *The Code Napoleon and the Common-Law World* 46 (Bernard Schwartz ed., 1956). This caused Voltaire to remark about the state of the pre-Code law: "The traveler changed his law as often as he changed his horses." Von Mehren & Gordley, *supra* note 31, at 48.

174. See Sereni, *supra* note 69, at 56; see also Lawson, *supra* note 29, at 48 (The Napoleonic Code's "style, with its admirable clarity, its pure everyday French, and its almost complete freedom from jargon, remains incomparable.")

175. See Bernard Schwartz, *Preface to The Code Napoleon and the Common-Law World* vii (1956). It is said that Napoleon wrote, near the end of his life: "My glory is not to have won forty battles, for Waterloo's defeat will destroy the memory of as many victories. But what nothing will destroy, what will live eternally, is my Civil Code." *Id.*

drafters strove to make the Code consistent (so there were no conflicting provisions which a judge could choose between and thereby “make law”), comprehensive in its coverage (so there were no “gaps” in coverage which a judge might thereby fill in by making law), and clear (so as to minimize any reason for a jurist to seek to engage in the demonized “lawmaking” or even its recognizable cousin, law interpreting).¹⁷⁶ Thus, the ultimate goal of the French codifiers was to draft a systematic, comprehensive code, which would be so all-encompassing and lucid that the judicial role would be restricted simply to ascertaining the pertinent code section and applying it to adjudicate the litigation before the court.¹⁷⁷

Though the Napoleonic Code is often described as the “archetype” of the civil codes promulgated in the eighteenth and nineteenth centuries,¹⁷⁸ mostly in Western Europe, it was not the only significant one, nor the first. A decade earlier, in 1794, an immensely detailed civil code was adopted by Prussia under Frederick the Great.¹⁷⁹ Whereas the Napoleonic Code had 2,281 sections,¹⁸⁰ the Prussian Code had over 17,000 sections, all designed to govern a myriad of factual scenarios.¹⁸¹ This attempt at hyper-specificity was widely viewed as a “spectacular failure,” one which the French codifiers explicitly endeavored to avoid by making the Napoleonic Code more general and universal, in the nature of its Roman ancestor.¹⁸² The French codifiers recognized the futility of trying to address every possible factual scenario, and instead sought to promulgate broad principles, which would suggest the correct outcomes of disputes.¹⁸³ As several of the codifiers of the day stated:

176. Merryman, *supra* note 4, at 29.

177. *Id.*

178. *Id.* at 10.

179. *Id.* at 29. At least three other codes which could be characterized as civilian in nature were also enacted in the century before the Prussian code, though they are fairly unheralded in most discussions of civil law history. See Sereni, *supra* note 69, at 55.

As early as 1683 Christian V had promulgated for Denmark a civil code that was later extended to Norway and Iceland; in 1734 a civil code was enacted in Sweden; and in 1786 a body of family laws that were to be part of a civil code was issued in Austria.

Id.

180. See Schwartz, *supra* note 175, at vii–viii.

181. Merryman, *supra* note 4, at 29.

182. *Id.* at 29–30. “One notes as a principal defect of the Prussian code the overabundance of doctrine.” Von Mehren & Gordley, *supra* note 31, at 55 (quoting Jaubert, Member of the Tribunate, Report on 30 ventôse An XII to the Legislative Body, 1 P. Fenet, *Recueil Complet des Travaux Préparatoires du Code Civil civ*, cxvi (1827)).

183. See Von Mehren & Gordley, *supra* note 31, at 54 (quoting Portalis, Tronchet, Bigot-Préameneu & Maleville, *Discours préliminaire*, in J. Locré, *La*

"The function of the law (*loi*) is to fix in broad outline, the general maxims of justice (*droit*), to establish principles rich in suggestiveness (*consequences*), and not to descend into the details of the questions that can arise in each subject."¹⁸⁴

The other great civil code of the nineteenth century was the German Civil Code enacted in 1896.¹⁸⁵ Many German scholars originally advised patterning after the much-admired Napoleonic Code—however, it was eventually decided instead that the German Code would more directly codify existing and historical law, including Roman law, and would tend toward the more detailed nature of the Prussian Code, though not to that extent of excess.¹⁸⁶ The German code exudes a belief that the law is entirely scientific.¹⁸⁷ Unlike the Napoleonic Code, which was theoretically written so as to be understandable by laymen, the German code was written strictly for legal professionals—the structure and language utilized makes legal acumen an absolute necessity.¹⁸⁸ However, though there are great differences between the French and German codes (including prominently the difference in the level of detail), substantial similarities in ideology are unmistakably present.¹⁸⁹ Certainly one of these major similarities was the desire for a clear, lucid, yet comprehensive and all-encompassing code, to govern all aspects of the affairs of its citizenry.¹⁹⁰ Another overarching similarity is the adoption of a well-defined role for the judiciary and its complete prohibition from any type of law-making function whatsoever.¹⁹¹ In this regard, the French and German codes, and all of their progeny adopted by the various civil law nations of the world throughout the

Législation Civile, Commerciale et Criminelle de la France 251, at 255–72 (1827)):

A code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge. Because the laws, once written, remain as they were written. Man, on the contrary, never remains the same, he changes constantly; and this change, which never stops, and the effects of which are so diversely modified by circumstances, produces at every instant some new combination, some new fact, some new result . . . [Therefore a] great many things are necessarily left to be determined by custom (*usage*), to the discussion of informed men, to the decision (*arbitrage*) of the judges.

184. *Id.*

185. Merryman, *supra* note 4, at 30.

186. *Id.* at 30–31.

187. *Id.* at 31.

188. See Von Mehren & Gordley, *supra* note 31, at 78 (citing P. Boehmer, *Einführung in das Bürgerliche Recht* 77 (2d ed. 1965)) ("For example, in order to determine one's legal rights upon discovering that a newly purchased cow is sick, five different parts of the code must be consulted.").

189. Merryman, *supra* note 4, at 32.

190. *Id.*

191. *Id.*

nineteenth and twentieth centuries, share these legalistic values. These codes, and especially the French code,¹⁹² as the modern descendants of the Roman law tradition and the *Corpus Juris Civilis*, serve as the models for the modern civil law tradition.¹⁹³

4. Codification Efforts in England and the United States

The geopolitical reverberations of the study of the *Corpus Juris Civilis*, and, later, the French Revolution, did not have the same effect in England and on its common law heritage, but their effects were certainly felt. Cardinal Reginald Pope, in the sixteenth century, suggested that England promulgate a code in the order of the *Corpus Juris Civilis* in order to reform “barbaric,” confusing English law.¹⁹⁴ Although it is said that Henry VIII, the monarch at the time of Pope’s suggestion, was amenable to the idea, nothing came of it.¹⁹⁵ Edward VI was also said to be open to the idea of codification, and the House of Lords considered it in 1549, but again no consensus or action was ever effected.¹⁹⁶ These suggestions for codes continued during the reigns of Elizabeth I (1558–1603) and James I (1603–1625).¹⁹⁷ James is actually reputed to have attacked the common law, and to have suggested that all laws be converted to statute; James revered the Danish legal system, where “the formality of the law hath no place . . . all their state is governed only by a written law Happy were all kingdoms if they could be so. But here, curious writs, various conceits, different actions and variety of examples breed questions in the law.”¹⁹⁸ But, no codification occurred, despite the efforts of the early English codifying proponent Sir Francis Bacon.¹⁹⁹

Most of the reasons for the failure of these codification proposals were political, not jurisprudential.²⁰⁰ Parliament was generally too

192. See Schwartz, *supra* note 175, at viii (The French Code “has served as the model for similar codes in most countries outside the Anglo-American world. In countries so diverse as Belgium and Japan, Italy and Egypt, the French Code has served as the basis for analogous codifications.”).

193. See Neipert, *supra* note 12, at 10.

194. See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 *Yale J. Int’l L.* 435, 471 (2000) (citing Frederic W. Maitland, *English Law and the Renaissance*, in 1 *Selected Historical Essays of F. W. Maitland* 135, 137 (1907)).

195. *Id.* (citing Maitland, *supra* note 194, at 142).

196. *Id.* (citing Maurice E. Lang, *Codification in the British Empire and America* 28 (1924)).

197. *Id.* at 471–72.

198. *Id.* at 472 (citing *The Political Works of James I* 332 (C.H. McIlwain ed., 1918), *quoted in* Donald Veall, *The Popular Movement for Law Reform, 1640–1660* at 71 (1970)).

199. *Id.* at 472–73.

200. *Id.* at 473–74.

conservative during this period to consider such sweeping reforms.²⁰¹ The only legal, as opposed to political, reason which can be historically ascertained for England's opposition to codification at the time was that English law was not yet "thoroughly systematized and conceptualized"—i.e., not yet "ripe" enough.²⁰² Eventually, Blackstone's commentary on English common law was published in 1765, and this seemed to satisfy the English desire for a systematizing organization of English common law precepts.²⁰³

As the eighteenth century drew to a close, Jeremy Bentham emerged as the new English champion of the codification ideology.²⁰⁴ In fact, so obsessed was Bentham with eradicating the "evils" of the common law and replacing it with codified systems, that he has been called the "greatest codification enthusiast of all times and all peoples."²⁰⁵ He even went so far as to correspond with several heads of state in England, the United States, and elsewhere in an effort to convince those nations to adopt his codification ideology.²⁰⁶ Bentham was convinced that England had reached a "disastrous" state in the development of its law, and that radical reform was imperative; he detested what he perceived as the lack of clarity, lack of certainty, and even dawdling functioning of the English judiciary.²⁰⁷ Instead, Bentham advocated a streamlined, comprehensive code, simple enough that it shared the French revolutionary ideal that "every man [could be] his own lawyer!"²⁰⁸

Like his English codifying predecessors, however, Bentham's efforts to implement actual Anglo codification were generally unsuccessful, though it is noteworthy that his theoretical conceptualizations of codification are very widely respected in the civil law world.²⁰⁹ The reasons for the historical failure of codification in England are varied and complex, but some of them are: (1) national pride and admiration for the long, textured history

201. *Id.*

202. *Id.* at 473–74 (citing Werner Teubner, *Kodifikation und Rechtsreform in England* 59 (1974)).

203. *Id.* at 474–76 (referring to William Blackstone, *Commentaries on the Laws of England*)).

204. *Id.* at 475–76.

205. *Id.* at 476 (citing Karl Freirechtsbewegung und Kodifikationsidee, *reprinted in Gesetzesbindung und Richterfreiheit: Texte zur Methodendebatte 1900–1914* at 275–76 (Andreas Gängel & Karl A. Mollau eds., 1992)).

206. *See id.* (citing 8 Jeremy Bentham, *The Correspondence of Jeremy Bentham* xxx & 366–71 (Stephen Conway ed., Oxford 1988)).

207. *Id.* at 476.

208. *Id.* at 480 (citing Jeremy Bentham, *Letter to the Citizens of the Several American United States* (II) (1817)).

209. *See id.* at 476 (citing Michel Berger, *Codification, in Perspectives in Jurisprudence* 144 (Elspeth Attwooll ed., 1977) ("Bentham's is regarded as the most thorough-going approach to codification.")).

of English common law,²¹⁰ (2) no need for a code as a unifying agent since England was already well-unified by its common law system, and (3) a general conservatism and view of the French revolution as a traumatic event to be avoided.²¹¹

The United States also has a history of considering the possible codification of its law. In the aftermath of the American Revolution and the War of Independence, codification was widely considered a distinct possibility for the shaping of future American law.²¹² This is quite unsurprising, given the fierce conflict with England, the desire to be free of all or many things English, and the French support during the war. Louisiana eventually decided to expressly codify its law in the tradition of Roman law and the Napoleonic Code, and still practices it today as a civilian island in a common law sea.²¹³ The other states considered codification, but in a much more measured manner than Louisiana.²¹⁴ Bentham wrote a letter to President Madison in 1811, urging the adoption of an American code, and he also posted letters to various state governors as well.²¹⁵ Subsequently, Joseph Story addressed the idea of codification in an 1821 speech to the Suffolk Bar, but his support was generally ignored.²¹⁶

More recognized were the efforts of William Sampson, in 1823, to support the idea of American codification.²¹⁷ His efforts led to a serious American discussion of the possibility of codes.²¹⁸ Beginning in 1830, the American consideration of codification became

210. See David & Brierly, *supra* note 41, at 287:

The English jurist likes to emphasize the historical continuity of his own system; it appears to be the product of a long tradition untroubled by revolution and he is proud of this fact because he sees in it, and with good reason, proof of the great wisdom of the Common Law, its ability to adapt, its lasting value and those other qualities that correspond to the nature of English jurists and English people generally.

211. See generally Weiss, *supra* note 194, at 489–93.

212. See *id.* at 498–499.

213. *Id.* at 499–501; see generally William E. Crawford, *Life on a Federal Island in the Civilian Sea*, 15 Miss. C. L. Rev. 1 (1994).

214. See Weiss, *supra* note 194, at 501.

215. *Id.* (citing 8 Jeremy Bentham, *The Correspondence of Jeremy Bentham* (Stephen Conway ed., Oxford 1988)).

216. *Id.* (citing Joseph Story, *Progress of Jurisprudence*, in *The Miscellaneous Writings of Joseph Story* 213–14, 237–39 (1852)).

217. *Id.* (citing William Sampson, *An Anniversary Discourse Before the Historical Society of New York, on Saturday, December 6, 1823: Showing the Origin, Progress, Antiquity, Curiosities, and Nature of the Common Law*, in *Sampson's Discourse, and Correspondence with Various Learned Jurists Upon the History of the Law, with the Addition of Several Essays, Tracts, and Documents, Relating to the Subject* (1826)).

218. *Id.* (citing Charles M. Cook, *The American Codification Movement: A Study of the Antebellum Legal Reform* 108–18 (1981)).

especially strong, especially in light of the Jacksonian desire for improved democracy—ordinary citizens came to view the complex nature of the law as evidence of attempts by lawyers to impose control over the system and keep non-lawyers ignorant of basic legal principles.²¹⁹ During the 1830s and 1840s, both South Carolina and Massachusetts came quite close to a codification of their laws.²²⁰

In the advent of these failures to codify, David Dudley Field came upon the scene in the United States. Described as “America’s Bentham,” Field was actually a practicing lawyer, who had a pragmatic perspective on reforming and codifying American law, as contrasted with Bentham’s theoretical underpinnings.²²¹ Field was principally concerned with judicial sluggishness, lack of clarity, and also the overly complex nature of the law of New York, which was emblematic of the law in all of the American states.²²² Field defined his vision of codification thusly:

The records of the common law are in the reports of the decisions of the tribunals; the records of the statute law are in the volumes of legislative acts. To make a code of the known law is therefore but to make a complete, analytical, and authoritative compilation from these records [a] complete digest of existing law, common and statute, dissected and analyzed, avoiding repetitions and rejecting contradictions, molded into distinct propositions, and arranged in scientific order, with proper amendments, and in this form sanctioned by the Legislature, is the Code which the organic law commanded to be made for the people of this State.²²³

Field actually had great success in enacting codifications of New York’s rules of civil procedure, and Field’s theories remain the structural framework and inspiration for the American Federal Rules of Civil Procedure currently in force.²²⁴ However, Field’s vision for a codification of substantive law in New York did not succeed, and, in the aftermath of the American Civil War, interest in the project declined as other matters became more pressing.²²⁵

219. *Id.* at 502–03.

220. *Id.*

221. *Id.* at 503–04 (citing Charles Noble Gregory, *Bentham and the Codifiers*, 13 Harv. L. Rev. 344, 356 (1900)).

222. *Id.* at 504.

223. *Id.* (quoting 1 David Dudley Field, *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* 326 (Abram P. Sprague ed., 1884)).

224. *Id.* at 505–06.

225. *Id.* at 506–08.

The arguments in Field's day for and against codification were familiar to Anglo-American codification proponents. Codifiers urged that reform would make the law easier to access, greater in efficiency, and more clear, as well as introduce stricter separation of powers.²²⁶ Those against codification urged that a code would be too inflexible as contrasted with common law, and varied judicial interpretation would lead to greater uncertainty.²²⁷ Another reason was that Americans were generally less suspicious of the courts, and actually more suspicious of occasionally corrupt legislative bodies.²²⁸ Perhaps the most efficacious reason for opposition, however, was that, as in England, American legal professionals were conservative, traditionalist, and thus for the sheer force and pride of history alone were successful in opposing codifying reforms of the law.²²⁹ Actually, later in the nineteenth century, five states did enact legislation resembling, and even titled, civil codes, though the practice in these states still retains a decidedly common law characterization.²³⁰ Thus, though England and the United States considered civil law-type codifications throughout their history, the effects have never matured into practice, and thus these nations remain the vanguards of the common law tradition.

5. *The Code in the Modern Civil Law System*

With the foregoing richness and depth of historical and ideological perspective in mind, what then are the basic operational structures and mechanics of the modern civil law system, and how is it different from the other great legal tradition, the common law? It is often recited that the cornerstone of civil law is "the Code."²³¹ This concept is far more philosophical and dogmatic than most common lawyers immediately realize.²³² What is the philosophy? First and

226. *Id.* at 509.

227. *Id.*

228. *Id.* at 510 (citing Merryman, *supra* note 4, at 34).

229. *Id.* (citing Charles M. Cook, *The American Codification Movement: A Study of the Antebellum Legal Reform* 206 (1981); Rene David & John Brierly, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* 402 (3d ed. 1985); Karl N. Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika* 24 (1933); Mathias Reimann, *Historische Schule und Common Law: Die deutsche Rechtswissenschaft des 19. Jahrhunderts im amerikanischen Rechtsdenken* (1993); Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 *Am. J. Comp. L.* 95, 115–16 (1989)).

230. *Id.* at 511–13 (codes were enacted in Georgia, North and South Dakota, California, and Montana).

231. *See* Koch, *supra* note 28, at 24.

232. *See id.* (citing Merryman, *supra* note 4, at 26–27).

foremost, it can be described as a fundamental preference for "positive law" in the judicial and legal process.²³³ As mentioned earlier, this is bound up with restraining judicial abuses, and the ideology of having an all-encompassing code itself is a large part of effectuating this ideal.²³⁴ Law is supposed to come from the code, and not from the decisions of the judiciary.²³⁵ The lawmaking prerogative of the legislature is jealously guarded against incursion by a lurking ambitious judicial system, which is to be avoided based on historical experience.²³⁶ In civil law jurisdictions, courts

persist in the attitude of obedience to enacted law, even when the legislature itself has recognized that they [sic] may be gaps in the legislation Legislators, who nowadays are called upon to establish the framework of the legal order, do so by formulating commands and creating rules of law. Very rarely are courts authorized to use this method.²³⁷

Preventing a freewheeling judiciary is one of the reasons for the ideology of the code, but what is the reason behind this reason? Certainty in the law. Within civil law jurisdictions, certainty "has come to be a kind of supreme value, an unquestioned dogma, a fundamental goal."²³⁸ Certainty is unquestionably a value in common law jurisdictions as well, but not to the extent it is in the civil law.²³⁹ Approaching the law from more of a scientific perspective²⁴⁰ than the rugged experiential approach of the common law,²⁴¹ civil law

233. See Jeffrey Waggoner, Comment, *Discretion and Valor at the Russian Constitutional Court: Adjudicating the Russian Constitutions in the Civil-Law Tradition*, 8 Ind. Int'l and Comp. L. R. 189, 199 (1997) (citing J.G. Sauveplanne, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems 1* (1982) ("[I]n civil law [sic] systems the starting point for legal reasoning is formed by the provisions of the written law.")).

234. See Koch, *supra* note 28, at 25.

235. See Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 Tul. L. Rev. 1010, 1012 (1974) ("The courts, however, may not make law. This prohibition stems from the doctrine of separation of powers . . .").

236. See Koch, *supra* note 28, at 25-26.

237. David & Brierly, *supra* note 41, at 123.

238. Merryman, *supra* note 4, at 48.

239. See *id.*

240. See Lawson, *supra* note 29, at 76.

241. See Oliver Wendell Holmes, Jr., *The Common Law 1* (Dover ed. 1991). As Holmes, the revered realist, stated in virtually complete ideological opposition to the ideals of the civil law:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through

jurisdictions approach their codes as the embodiment of logic and reason itself.²⁴² Civil law codes are drafted, developed, and utilized based on the view that there is order to life, rather than haphazard happenstance of events.²⁴³ The code philosophy is tied up in the ideal of objective rationality in the law.²⁴⁴ Civilians design and revere their civil code to be the lifeblood of the legal system,²⁴⁵ indeed, even the very framework for all of society.²⁴⁶ Oliver Wendell Holmes famously stated that, as to common law, “[t]he life of the law has not been logic: it has been experience.”²⁴⁷ This statement is somewhat puzzling to civilians.²⁴⁸ The importance of experience is undoubted to them, but logic is the very lifeblood of the civil code ideology.²⁴⁹ To civil law scholars, there is no meaningful distinction between logic and experience—they are the same. The code is an aggregation of legal precepts with such internal consistency that to civilians logic is inescapably part of the legal reason which must accompany judicial operations:

Logic should be an important factor in the development of law, and it can play a much more important role in the judicial process, both in civilian countries and in common-law countries, than is usually admitted. Only logic brings clarity and justice. The question whether a particular set of circumstances should be governed by precedent A or precedent B (or by Article A or Article B) is of no consequence if precedents A and B (or Articles A and B) are logically consistent. The question will not even arise. Litigation will arise, on the contrary, if the precedents or articles are inconsistent. The decision will even be a third precedent that will make the law more complicated than it was. Logic, therefore, is an essential need of law, as of any

many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Id.

242. See Koch, *supra* note 28, at 28.

243. *Id.* (citing Martin Vranken, *Fundamentals of European Civil Law and Impact of the European Community* 35 (1997)).

244. *Id.* at 29.

245. *Id.* (citing Lord Goff of Chieveley, *The Future of the Common Law*, 46 *Int'l & Comp. L.Q.* 745, 753 (1997)) (“Continental lawyers love to proclaim some great principle, and then knock it into shape afterwards. Instead the boring British want to find out first whether and, if so, how these great ideas are going to work in practice.”).

246. *Id.*

247. Holmes, *supra* note 241, at 1.

248. See André Tunc, *The Grand Outlines of the Code, in The Code Napoleon and the Common Law World* 19 (Bernard Schwartz ed., 1956).

249. See *id.*

other intellectual experience, and it is submitted that it would do injustice to the common law, as well as to the civil law, to consider them as collections of rules without connection and without consistency.²⁵⁰

Thus, civilians perceive no meaningful contrast between experience and logic.²⁵¹ The code is a manifestation of both logic and experience.²⁵²

The concept of having all positive law stated in a written code has more pragmatic justifications as well. In making the law enacted by the representative legislature firm, fixed, and unassailable by the threat of an activist judiciary, the civil code ideology embodies the quintessence of majoritarian governmental rule.²⁵³ The people democratically elect the legislatures, which enact the laws. The judges, not being subject to the electorate, are not empowered to enact laws. It is also noteworthy that the civil code has long been viewed as having a distinctly unifying feature—that is, civil codes have unified the law of the sovereigns which have promulgated them.²⁵⁴

The code, to effectuate these civilian ideals, also seeks to be all-encompassing and exhaustive, affecting all aspects of social order. Hence, the frequent usage by civilian codifiers as implementing the code as a “legislative novation,” replacing all prior law since the new code is thoroughly complete in nature.²⁵⁵ Because civilians value the ability of human reason to effect a legal order, the code is envisaged as complete, with the wherewithal to furnish the resolution of any legal issue which could possibly arise as to matters within its jurisdiction.²⁵⁶ That is, as stated by Sereni on the advent of the 150th anniversary of the enactment of the Napoleonic Code: “within [the code’s] four corners an answer could and should be found to each question arising in connection with any topic covered by the code

250. *Id.*

251. *Id.* at 31.

252. *Id.*

253. Koch, *supra* note 28, at 30.

254. See Lawson, *supra* note 29, at 51; see also Koch, *supra* note 28, at 30 (“[A] code is an effective technique for centralization. The code-like use of the treaties forming the E.U. demonstrates this unifying nature.”). Interestingly, “[t]he E.U. treaties’ ambiguous nature has generated a call for the creation of an actual European code.” *Id.* at 30 n.128 (citing Ugo Mattei, *Hard Code Now!*, 2 *Global Jurist Frontiers* 1 (2002)).

255. See Sereni, *supra* note 69, at 57 (citing Gény, *La Technique Législative dans la Codification Civile Moderne*, in *Le Code Civil, 1804–1904*, Livre du Centenaire, Vol. II, 987 (1904)).

256. *Id.* (citing Art. 4 of the Code Napoleon, which goes so far as to state that “a judge who shall refuse to decide a case under pretext that the law is silent, obscure or inadequate, may be prosecuted for denial of justice.”).

itself without resorting to other sources or to any method of implementation of its provisions."²⁵⁷ One commentator has succinctly summarized the purpose and characteristics of the civil law code in the following manner:

The goal is to have the entire body of law on a subject condensed into a general code. The code does not try to answer directly every question that may arise in that particular area of law. Rather, the code is supposed to be a set of basic rules from which the proper resolution of a specific legal problem can be deduced. If the rule is too general, it is not of any help to someone wishing to read the law in order to find a way to avoid a conflict with it. On the other hand, it must be general enough to apply to a broad situation rather than some particular aspect of it. . . . The code should set out the general framework of the law and give the court a set of standards for its decision. If the code is too detailed it will encourage parties to find loopholes and therefore a certain amount of generality is thought to give the judge more latitude to achieve a just result.²⁵⁸

Though different jurisdictions have codified their civilian laws along different parts of this continuum,²⁵⁹ this remains nevertheless the fundamental philosophy of the civil code: rational, systematized, organized, clear, and comprehensive, leaving the judiciary with no function but to select and apply the applicable provisions, with resort to no other sources of law.

6. *The Judicial Function in the Modern Civil Law System*

The judicial function in modern civil law systems follows inexorably from the ideology of the civil law code—that is, in fact, part and parcel of the reason for the code in the first place. There are at least two fundamental limitations placed on civil law judiciaries.²⁶⁰ The first limitation is that, since positive law in a civil law jurisdiction is ideologically expressed exclusively in the

257. *Id.* at 58.

258. Neipert, *supra* note 12, at 11. "The fictions of completeness and self-sufficiency . . . constitute the fundamental premises of a modern civil-law system considered as a whole. The body of provisions (code and statutory) constituting the written law of the country is held to be complete and self-sufficient." Sereni, *supra* note 69, at 59.

259. Witness the broad, general provisions of the French Code, *vis-à-vis* the much more detailed and numerous provisions of the German Code. See Neipert, *supra* note 12, at 11.

260. See generally Sereni, *supra* note 69, at 62–65.

comprehensive provisions of the code, the power of courts to adjudicate disputes is limited quite literally and strictly to the scope of coverage of the code precepts.²⁶¹ The court must come to its resolution of the case by working strictly within the framework of the code.²⁶² Because of the dogmatic philosophy that the code is complete and sufficient, the court may not rely on any authorities not contained in the code itself.²⁶³ So devout is this dogma of completeness, courts are generally prohibited from declining to adjudicate a dispute based on any perception of gaps in the code's coverage of a particular subject matter.²⁶⁴ This is simple enough when the civilian judge is able to readily find a clearly applicable code section, but what of the situation where none presents itself as being directly "on point?" The judge is to enlarge the meaning of another code section, or even to analogize from one or more other code sections to obtain a reasoned solution.²⁶⁵ The tendency of civil codes to be broad and general in nature, actually accords civil law courts with greater discretion than their common law counterparts.²⁶⁶ This is by civilian design, as stated by the French codifier Portalis:

The function of the law is to determine, by means of basic concepts, the general precepts of the law, and to establish principles fertile in consequences, rather than to go into the details of questions that may arise with regard to each particular matter. It is for the judge and the lawyer, who are imbued with the spirit of a legal system, to attend to its implementation. . . . Those changing and petty details with which the legislator ought not to be preoccupied and all those matters that it would be futile and even dangerous to attempt to foresee and to define in advance, we leave to the courts.²⁶⁷

261. *Id.* at 62.

262. *Id.* See also Von Mehren & Gordley, *supra* note 31, at 1134-35 ("In France and Germany, an authoritative starting point for legal reasoning is ordinarily to be found in one of the various codes or in the general body of statutory law.").

263. Sereni, *supra* note 69, at 62. See also Von Mehren & Gordley, *supra* note 31, at 1135 n.20 ("It is unquestionable that for the judge in the existing state of our system [France] there is not, properly speaking, any source of positive law other than statute.") (quoting Ballot Beaupré, *Le Centenaire du Code Civil* 26 (1904)).

264. Sereni, *supra* note 69, at 62. See also *supra* note 256 and accompanying text (discussing Napoleonic Code's criminal prohibition of judicial refusal to adjudicate disputes based on perceived silence of the code).

265. *Id.*

266. Sereni, *supra* note 69, at 61.

267. *Id.* at 62 (referring to Portalis, Preliminary Discourse of the Commission of the Year VII).

The process has been likened to the moves in a chess match, with each following logically and intellectually from the prior move.²⁶⁸ It is for this reason, in part, that the code is required to be organized in such a logical and systematic manner—the code provisions are envisaged as a system of closely interrelated premises, different threads of the same fabric, which may be utilized through deduction to achieve an adjudicative solution.²⁶⁹ Coming back to the all-encompassing authority of the civil code, however, the case must ultimately find its definitive authority within the precepts of the code.²⁷⁰ This complete focus on the code language as the sole source of primary authority results, unsurprisingly, in a much greater civilian emphasis on the explicit language of the legislative embodiments than is found in common law jurisdictions.²⁷¹ Where actual definitions of code terms are codified, such definitions will, of course, be referenced, but where there are no such definitions, the court will rely on other concepts and sections of the code, construing them together consistently as part of an organic whole.²⁷² Accordingly, it is seen that the first fundamental limitation placed on the civil law court is that it must derive its judicial solutions from the code.

The second fundamental limitation on civilian judiciaries follows from the first—cases are not law. Only the code is law. That is to say, civil law courts may not adopt prior cases as precedents, or “positive law” to be followed in subsequent litigation.²⁷³ There is no *stare decisis*.²⁷⁴ It follows, of course, that civil law courts do not see themselves as “making law” at the time of the rendering of their opinions. So vigorously and dogmatically is this principle adhered to in France, that it is not only explicitly legislated,²⁷⁵ but criminal

268. Koch, *supra* note 28, at 43.

269. *Id.* at 36 (“The theory is that every code provision is considered a thread in one whole cloth. The significance of this strategy is that where there is an ambiguity in a code provision, the first place one looks is at other code provisions.”). See also Sereni, *supra* note 69, at 63.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 65. See also Von Mehren & Gordley, *supra* note 31, at 1135 (Civil law ideology “refuses any binding effect to previous judicial interpretations, even one emanating from a hierarchically superior court.”).

274. Sereni, *supra* note 69, at 65. See also Lawson, *supra* note 29, at 83 (“Of course in the strict sense that a judge is absolutely bound by a previous decision which he knows to be radically wrong in logic, justice, and common sense, no Civil Law judge adheres to the principle.”); Merryman, *supra* note 4, at 46 (“judicial decisions are not a source of law”).

275. Sereni, *supra* note 69, at 65 (citing C. civ. art. 22 (Fr.), which provides: “Judges are forbidden to decide in a general manner or in the form of regulations with regard to the cases submitted to them.”).

liability is actually imposed for violating it.²⁷⁶ Though this precept is set forth expressly in the Napoleonic Code, such provision is basically superfluous, as "the principle of nonrecognition of the rule of *stare decisis* applies, as a rule, in civil-law countries even in the absence of an express provision to that effect."²⁷⁷ In France, even the form of the opinions reflects this narrow focus in terms of source authority.²⁷⁸ This refusal to allow citation to other single court decisions as positive law, though at first quite foreign to the common lawyer, actually follows as a matter of inescapable logic in light of the doctrine of the completeness of the code—what reason would there be for a court to concern itself with case authority when all of the answers are in the code directly, or may be deduced from the code's provisions?²⁷⁹ Again, the civilian concept of separation of powers is crucial to this ideology—legislatures are the lawmakers, and courts are merely to apply the law written down by the legislature: they must do no more and they must do no less.²⁸⁰

This is not to suggest or imply that civil law cases are utterly inconsequential. In fact, the French use the term *jurisprudence* to refer to the body of case decisions rendered by its courts.²⁸¹ Civil cases do tend to be persuasive in civilian litigation.²⁸² A civil court may well, and often does, review prior civilian decisions.²⁸³

276. *Id.* (citing C. pén. art. 127 (Fr.)).

277. *Id.*

278. See Von Mehren & Gordley, *supra* note 31, at 1135:

[T]he traditional form of the French decision . . . begins with a recital of the applicable code provisions, does not discuss or analyze previous decisions, and sets forth the court's holding as deductively derived from the cited provisions, usually without indicating such doubts as the court may have had to overcome in reaching this result.

For that matter, it is interesting to note the differences in the case reporting systems between, for example, the United States, France, and Germany. As one would expect, the United States case reporting system is comprehensive in nature, covering the full text of the case decisions, and being organized along practical scenarios for subsequent research. *Id.* at 1141–41. In France and Germany, on the other hand, the reporting system is much less developed and systematized. *Id.* at 1142. The reports are selective, and even when opinions are reported often only excerpts are printed, rather than the full text. *Id.* Such differences in reporting would seem to follow from the vastly different emphases placed on case decisions by these jurisdictions.

279. See Sereni, *supra* note 69, at 65.

280. See *id.* at 65–66.

281. *Id.* at 67.

282. *Id.*

283. See Merryman, *supra* note 4, at 47 ("A [civil] lawyer preparing a case searches for cases in point, uses them in his argument; and the judge deciding a case often refers to prior cases."); see also Koch, *supra* note 28, at 51 ("Only a fool would refuse to seek guidance in the work of other judges confronted with similar problems. The civil law system is unlikely to produce any more fools than the

However, the purpose is usually said to be in order to study an example of a logically-obtained resolution worked out from the code provisions themselves—i.e., an illustration of the deduction of a result from the positive code law, not a case law precedent to be followed in its own right.²⁸⁴ A civil law court may even choose to assimilate another court's reasoning, but once it does so it becomes the court's own reasoning, for which it is fully responsible.²⁸⁵ The difference between common law treatment of case decisions, though perhaps initially superficial, is in fact deeply embedded in the civilian ideology and exemplifies a fundamental divergence in treatment of case decisions from that practiced in common law jurisdictions.²⁸⁶

There is at least one way in which civilians approach the recognition of case authority, and that is in the doctrine of *jurisprudence constante*.²⁸⁷ Whereas a single court decision is no authority at all in a civil law system, but is rather only an illustration of that court's opinion of the correct solution to be deducted from the code, a series of decisions which reach the same result by the same deductive process in the same or similar situation will eventually attain a much higher level of persuasiveness than that of a single decision.²⁸⁸ This is *jurisprudence constante*—but even in light of such a line of similar resolutions, the court facing the present dispute must satisfy itself of the correct deduction to be reached.²⁸⁹

common law system.”).

284. Sereni, *supra* note 69, at 67. See also Lawson, *supra* note 29, at 84:

If, however, the decisions [in a civil law jurisdiction] are well reported and indexed, the judges will tend to follow them, partly for the negative reason that they may lose prestige if they are seen to be inconstant, and partly for the positive reason that they acquire the additional prestige attaching to legislators if they make stable law by always adhering to their decisions.

See also Merryman, *supra* note 4, at 47:

Although there is no formal rule of *stare decisis*, the practice is for judges to be influenced by prior decisions. A lawyer preparing a case searches for cases in point and uses them in his argument; and the judge deciding a case often refers to prior cases. . . . Those who contrast the civil law and the common law traditions by a supposed nonuse of judicial authority in the former and a binding doctrine of precedent in the latter exaggerate on both sides. Everybody knows that civil law courts do use precedents. Everybody knows that common law courts distinguish cases they do not want to follow, and sometimes overrule their own decisions.

285. Sereni, *supra* note 69, at 67.

286. *Id.*

287. *Id.* at 68.

288. *Id.*

289. See Von Mehren & Gordley, *supra* note 31, at 1135 n.21:

Decisions, especially a series of successive decisions reaching similar results, have as a practical matter considerable influence upon the future judicial handling of comparable situations. ‘. . . Certainly in theory, this is not a binding rule of law because, with us, in contrast to the case law or

Quite obviously, in actual practice, the dogma of metaphysical completeness of the civil code is a fiction.²⁹⁰ Short of perfect clairvoyance, not every conceivable scenario can ever be accounted for in a code in advance. Moreover, even where provision is made in a code, the dogma of perfect lucidity and clarity so as to obviate the need for any interpretation is likewise a fiction.²⁹¹ Accordingly, though the civil law courts do in fact practice the deductive and analogizing processes described herein, they also may fairly be said to engage in a considerable amount of statutory interpretation.²⁹² Civil law courts are to take into account not only the express grammatical provisions of the code section, but they are also to consider the legislative intent and the social goal of the provision.²⁹³ This is sometimes referred to as the “teleological approach”—that is, interpreting legislation in light of evolving societal or market forces.²⁹⁴ One scholar described the civilian interpretive process thusly:

English law of cases, other courts, and even those which made the decisions that established the jurisprudence (case law), retain full freedom to decide in a different way in similar cases that they will be called upon to decide in the future. But, in fact, these reversals hardly ever take place and the precedents, if they do not bind our judges, inevitably *inspire* them.’

Id. (quoting I A. Colin & H. Capitant, *Cours él émentaire de droit civil français* § 36 at 40 (11th ed. 1947)). See also Sereni, *supra* note 69, at 68 (“Yet even a *jurisprudence constante* does not excuse a subsequent court from the duty of writing an opinion in support of its holding, nor does it prevent from reaching a different conclusion.”).

290. *Id.* at 59. See also Von Mehren & Gordley, *supra* note 31, at 1136 (German civil law theory “clearly perceive[s] that the codified law is neither complete nor unambiguous”) (citing L. Enneccerus, *Allgemeiner Teil des Bürgerlichen Rechts* § 51, at 194, § 58, at 207–12 (14th ed. 1952)).

291. See Merryman, *supra* note 4, at 42–43:

[T]he illusion of the self-applying statute, the legislative norm so clear that its application is an automatic process, was long ago dispelled by exposure to the facts. Ever since the revolutionary period, civil law courts have been engaged in hearing and deciding disputes whose resolution depends on the meaning to be given to a legislative provision.

292. *Id.* Merryman adds,

Hardly an article in a typical civil code has escaped the need for judicial interpretation to supply a meaning that was unclear to the parties, to their counsel, or to the judges themselves. . . . [T]he dogma that a code can be complete and coherent fails to survive even a cursory glance at the jurisprudence (the civil law term for judicial decisions).

Id. See also Von Mehren & Gordley, *supra* note 31, at 1135.

293. *Id.* (citing Julien Bonnacese, *The Problem of Legal Interpretation in France*, 12 J. Comp. Leg. & Int. Law 3d Ser. 79, 91(1930)).

294. See Koch, *supra* note 28, at 36 (citing Peter de Cruz, *Comparative Law in a Changing World* 270 (2d ed. 1999)).

[W]hen the text presents some ambiguity, when doubts arise as to its meaning and scope, when it can to a certain extent be contradicted or contracted or when on the contrary expanded through comparison with another text, I believe that the judge has the broadest powers of interpretation. He does not need to confine to an obstinate inquiry into the meaning that, in framing such and such an article, the framers of the Code had actually intended a hundred years ago. He must ask himself what would have been their intent if the same article had been framed by them today. He must say to himself that in the light of all changes that have occurred in the course of a century of ideas, ethical standards, and institutions, in view of the economic and social conditions now prevailing in France, justice and reason direct him to adapt the statutory text, liberally and with humanity, to the realities and needs of modern life.²⁹⁵

Similarly, in Germany, courts go beyond the grammatical text where necessary, and instead seek the underlying gist and reason for the code provision.²⁹⁶ As in France, German courts are to consider not only the text of the statute, but, if necessary, the history of the text, and even what the legislator would have intended, in the hypothetical scenario of her writing the code section with full cognizance of the present situation before the court.²⁹⁷ The array of steps available to the civil law court in this process, and the manner according to which such interpretation proceeds, has been compared to playing a chess match.²⁹⁸ As stated by Merryman, the judge's role is to seek applicable code sections and apply them to the fact pattern: "[t]he whole process of judicial decision is made to fit into the formal syllogism of scholastic logic."²⁹⁹

Some mention should be made, as well, of the oft-repeated characterization that the common law courts use inductive reasoning processes, whereas the civil law courts use deductive reasoning processes. By induction, is meant the "inference of a generalized conclusion from particular instances."³⁰⁰ In one sense, of course, this is obviously a quite correct manner of describing the common law system—the law is made by various cases which adjudicate specific

295. Von Mehren & Gordley, *supra* note 31, at 1135–36 n.24 (quoting Ballot Beaupré, *Le Centenaire du Code Civil* 27 (1904)).

296. *Id.* at 1136 (citing L. Enneccerus, *Allgemeiner Teil des Bürgerlichen Rechts* § 51, at 195 (14th ed., 1952)).

297. *Id.* (citing I J. Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* 31 (10th ed. 1936)).

298. See Koch, *supra* note 28, at 43.

299. Merryman, *supra* note 4, at 36.

300. Merriam-Webster Online, *Induction*, at www.m-w.com.

disputes, out of which come generalized rules or precepts. By deduction, is meant "inference in which the conclusion about particulars follows necessarily from general or universal premises."³⁰¹ And thus, the same holds true of describing the civil law processes in this manner, for it is true that civil codes seek to be broad and universal, and cases are merely the adjudication of specific disputes based on those principles. Lawson, however, thought that this description was of limited accuracy or usefulness.³⁰² In either system, he said, there is the finding of the law—the general principles—in common law it is often found in cases, and in civil law it is found in the code.³⁰³ Then, however, in both systems, a specific factual dispute—the litigation—is resolved by applying those principles to resolve the case.³⁰⁴ More crucial, in Lawson's view, was the fact that the common lawyer's source of law was in constant flux and increase, whereas the civil lawyer's source—the code—was much more stable.³⁰⁵

When civil law courts apply and interpret the code provisions deemed to be applicable, it could be argued that, at least in some sense, they are "creating" law.³⁰⁶ However, such "law" is secondary to the code at all times.³⁰⁷ The decisions of civil law cases are to be viewed as evolving "beside the sanctuary of the statutes and under the control of the legislator."³⁰⁸ Civilians thus view the role of the judiciary, not as making law, but as serving a function in assisting in the actualization of the code—the courts add definition and sharpness to the code, they fill in the gaps of the code, and they even adjust it to conform to new societal pressures and innovations.³⁰⁹ However, through all of these judicial machinations and refinements, the supremacy of the code provisions themselves is the recurring theme, and respect is never lost for its guiding principles.³¹⁰ Rather, the courts are viewed as merely extending the law set forth in the code provisions to the specific circumstances presented by the case.³¹¹

301. *Id.*

302. *See* Lawson, *supra* note 29, at 65.

303. *Id.*

304. *Id.*

305. *Id.*

306. *See* Tunc, *supra* note 248, at 26–27.

307. *Id.* at 26.

308. *Id.* at 27 (quoting Fenet, *Recueil complet des travaux préparatoires du Code Civil*, Vol. I 470 (1827–1828); Locré, *Législation civile, commerciale et criminelle de la France*, Vol. I 258 (1827–1832)).

309. *Id.*

310. *See id.*

311. *Id.* at 28; *see also* Merryman, *supra* note 4, at 44:

The books are full of decisions in which the court has had to fill gaps in the legislative scheme and reconcile apparently conflicting statutes.

That is, “[t]he courts make explicit the law in particular circumstances, according to the general rules declared by the legislature” in the articles of the code.³¹² Thus, although civil law courts do in a sense perform some “tuning” of the law, they do it with reverence for the code, and with due cognizance for their relative inferiority to the code provisions and the legislature.³¹³ The courts recognize that the legislature is to make any significant modifications or additions to the law, and that the judicial function is, at most, only “to legislate interstitially.”³¹⁴ Moreover, the purpose of the code as the sole source of positive law is not defeated by such judicial refinement—to the contrary, such refinement would be meaningless without the backdrop of a code, and invariably the adjudication will be based on a comparison of two or more analogous code provisions; that is, the debate will not be whether or not the code applies, but which part of it applies with greater force.³¹⁵ Thus, the code reigns supreme over the judicial function.

Although the text of a statute remains unchanged, its meaning and application often change in response to social pressures, and new problems arise that are not even touched on by existing legislation. . . . [The civil law judge] is engaged in a vital, complex, and difficult process. He must apply statutes that are seldom, if ever, clear in the context of the case, however clear they may seem to be in the abstract. He must fill gaps and resolve conflicts in the legislative scheme. He must adapt the law to changing conditions. The code is not self-evident in application, particularly to the thoughtful judge.

312. Tunc, *supra* note 248, at 28.

313. *Id.*

314. *Id.* Actually, it was Justice Holmes who remarked about the judicial task of “legislating interstitially,” but the concept has been ascribed to the process of civil law adjudication. *See id.*; *see also* Southern Pac. Co. v. Jensen, 244 U.S. 205, 221, 37 S. Ct. 524, 531 (1917) (Holmes, J., dissenting) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; . . .”).

315. *See* Tunc, *supra* note 248, at 28–29:

One may ask, if there is a case law supplementing the Code, has not the purpose of codification been defeated? The answer is clearly No. . . . [M]any of the provisions of the Code are so clear that they have not even been the subject matter of any litigation. There were no ‘particular circumstances’ in which their application needed any clarification. As for the many provisions that did give rise to litigation, the Courts found in the Code all the basic principles giving a lead to the decision of concrete cases. The discussion was therefore greatly clarified and narrowed. The question was often which of two principles, apparently conflicting on the given occasion, should prevail over the other; but at least the two principles themselves could not be a matter for discussion. The law had received a frame.

7. *The Status of Judges in the Civil Law System*

Before concluding the discussion of the basic history and mechanics of the civil law system, some mention should be made of the social and legal status of judges in the civil law system. As mentioned earlier, judges in common law jurisdictions are widely revered, celebrated figures in legal and societal culture. This follows naturally from the fact that they are entrusted with a powerful lawmaking role in our common law system.³¹⁶ As may be apparent from the different role of judges in the civil law system, and the lack of *stare decisis* in a formal sense, the same is not true, generally speaking, of judges in civil law jurisdictions. Civilian judges typically choose that career path directly out of school.³¹⁷ Moving from a career as a practicing attorney to a judicial office is relatively rare.³¹⁸ Instead, judges typically commence their judicial career at an entry-level position with a lower court and then advance through the system to, hopefully, progressively higher courts.³¹⁹

The actual work of the judge is seen as "fairly routine activity."³²⁰ The judge's job is to perfunctorily seek the applicable code provisions, apply it to the litigation, and render a decision.³²¹ "The net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one."³²² This is, quite obviously, bound up in the historical development of the civil law separation of powers ideology, with its concomitant suspicion of the judicial system.³²³ Thus, whereas the great names of the common law are often those of the judges (e.g., Holmes, Cardozo, Frankfurter, Mansfield, Coke), the celebrated historical names of the civil law are the codifiers (e.g., Justinian and Napoleon), and the academics (e.g., Pothier, Imerius, Savigny, Portalis).³²⁴ In civil law jurisdictions, judges tend to be anonymous, based in large part on the severe restrictions placed on them.³²⁵ In sum, the civil law judge is a civil

316. See *supra* notes 88–96 and accompanying text.

317. See Merryman, *supra* note 4, at 36.

318. *Id.*

319. See Koch, *supra* note 28, at 37 (citing Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 109 (Tony Wier trans., 3d ed. 1998)).

320. Merryman, *supra* note 4, at 37.

321. *Id.*

322. *Id.* at 38.

323. See Von Mehren & Gordley, *supra* note 31, at 1147.

324. Merryman, *supra* note 4, at 35, 38.

325. See Von Mehren & Gordley, *supra* note 31, at 1149. The civil law judge, though he has in some ways broad powers over the conduct of the litigation and usually sits without a jury, tends, except perhaps in the case of presiding judges, to be an anonymous figure, whose individuality is lost in a collegiate bench that does not permit the expression of concurring or

servant—a respected one, to be sure, but merely a servant seen as performing “important but essentially uncreative functions.”³²⁶

8. *Summary of Civil Law System*

In summary, the modern civil law system derived historically from the ancient Roman Empire, and more recently through the codifications of revolutionary France in 1804 and Germany in 1896. The chief identifying methodological characteristic of the modern civil law is its use of a unitary source of law—the code—which is dogmatically held to be all-encompassing, comprehensive, clear in its language, systematic, and capable of providing the solutions to any legal problem which may arise. The legislature is the superior governmental branch, which is seen as creating the governmental machinery, which the civil law judges simply operate as functionaries. There is no *stare decisis*. The only law is the code—cases are not law. Courts, in rendering their decisions, must always justify their decisions under code provisions which are directly applicable, under other code provisions by analogy, or by deducting a solution from broad principles derived from the overall structure of the code itself. Strict separation of powers dictates that the legislature makes law through the code, and judges are strictly to apply, not make, law.

III. INTERNATIONALIZED CONTRACT LAW: PAST AND PRESENT

A. *The Need for International Contract Law*

The world perceives a need for an international, even global, law to deal with transnational commerce and trade. There is no real debate that the global economy has arrived in unprecedented, modern force.³²⁷ Over the last half century, the global economic inclination has been steadily in favor of open markets—worldwide exports

dissenting opinions.

Id.

326. Merryman, *supra* note 4, at 38.

327. See Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations*, 34 *Int'l L.* 1055, 1057 (1999) (citing John A. Spanogle, Jr., *American Attorneys' Use of International and Comparative Legal Analysis in Everyday Practice*, 28 *Wake Forest L. Rev.* 1, 1 (1993)):

Any business person can tell you that the Global Economy is here. The necessity is to produce wherever it is most advantageous, and then to market and compete all over the world, is hardly news to them. It does still seem to be news to much of the legal profession, however, and to many in legal education.

expanded from eight percent to twenty-seven percent of total worldwide gross domestic product from 1950 to 1998.³²⁸ Moreover, total worldwide trade was fourteen times greater in 1997 than it was in 1950.³²⁹ Since shortening production and distribution times is crucial to profitable business operation, it has been stated that “the history of capitalism has been characterized by a speed-up in the pace of life.”³³⁰ Such accelerated processes of economic production and communication “increasingly render national borders anachronistic.”³³¹

This anachronistic limitation of individual nations is illustrated by some of the growing transnational issues of the day. For instance, the rising use of multinational enterprises such as Siemens, or General Motors, as a corporate form of business entity which transcends many national borders, increasingly defies the application of any single system of national law to its operations. Perhaps an even more profound example is the explosion of the Internet—who could have foreseen even ten years ago the extent to which the Internet has now pervaded our lives, both personally and commercially? The Internet also often defies application of any single system of national law to its operations. Consider the following hypothetical: an Internet web site is maintained on a server which is located in London, a mirror site and server is maintained in Sydney, Australia, and persons from the United States, France, and Germany all transact business on the Internet site. Which nation’s law governs in the absence of an agreement? Which nation’s laws should regulate affairs conducted on the site? Our legal regimes are currently struggling for answers to these questions.³³² Such dilemmas

328. United Nations Educational, Scientific and Cultural Organization, *Culture, Trade and Globalization: Questions and Answers*, at www.unesco.org/culture/industries/trade/html_eng/introduction.shtml (last visited May 1, 2005) [hereinafter UNESCO].

329. *Id.*

330. William E. Scheuerman, *Global Law in Our High Speed Economy*, available at <http://www.isanet.org/noarchive/scheuerman.html> (paper presented at 2002 annual conference of International Studies Association in New Orleans) (citing David Harvey, *The Condition of Postmodernity* 240 (1989)).

331. *Id.*

332. See, e.g., Ray August, *International Cyber-jurisdiction: A Comparative Analysis*, 39 Am. Bus. L.J. 531 (2002); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345 (2001); Asaad Siddiqi, *Welcome to the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction over Internet Activities—Including a Critique of Suggested Approaches*, 14 N.Y. Int’l L. Rev. 43 (2001); Henry H. Perrit Jr., *The Internet is Changing the Public International Legal System*, 88 Ky. L.J. 885 (2000); Michael S. Rothman, *It’s A Small World After All: Personal Jurisdiction, The Internet and the Global Marketplace*, 23 Md. J. Int’l L. & Trade 127 (1999); Mark C. Dearing, *Personal*

have led at least one international observer to note that “[n]ation states will continue to decline as effective centers of power—they are too small to solve the big problems, and too big to solve the small problems.”³³³ Because of this reality, a system of supranational law seems to be required in order to handle these emerging issues which transcend the legal system of any one nation.

There has, in fact, been growing supraregional economic integration, accomplished by such supranational entities as the European Union, ASEAN (Association of South East Asian Nations), NAFTA (North American Free Trade Agreement), and MERCOSUR (the Southern Cone Common Market).³³⁴ The general reasons for such supranational systems are obvious. They include efficiency, uniformity, certainty, reduction of transaction costs, and reduction of obstacles to trade. The globalization of the economy

Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?, 4 J. Tech. L. & Pol’y 4 (1999); *Developments in the Law—The Law of Cyberspace*, 112 Harv. L. Rev. 1575, 1680–1704 (1999); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 Cardozo L. Rev. 121 (1999); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199 (1998); Steven Betensky, *Jurisdiction and the Internet*, 19 Pace L. Rev. 1 (1998); David G. Post, *The “Unsettled Paradox”: The Internet, the State, and the Consent of the Governed*, 5 Ind. J. Global Leg. Stud. 521 (1998); Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 Harv. J.L. & Tech. 429 (1998); Henry H. Perritt, Jr., *The Internet Is Changing International Law*, 73 Chi.-Kent L. Rev. 997 (1998); John A. Lowther IV, *Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms*, 35 San Diego L. Rev. 619 (1998); Yvonne A. Tamayo, *Who? What? When? Where?: Personal Jurisdiction and the World Wide Web*, 4 Rich. J.L. & Tech. 7 (1998); Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. Marshall J. Computer & Info. L. 997 (1998); Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet’s Role in Strengthening National and Global Governance*, 5 Ind. J. Global Legal Stud. 423 (1998); Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 Fed. Comm. L.J. 117 (1997); Timothy S. Wu, *Cyberspace Sovereignty? The Internet and the International System*, 10 Harv. J.L. & Tech. 647 (1997); Howard L. Steele, Jr., Comment, *The Web That Binds Us All: The Future Legal Environment of the Internet*, 19 Hous. J. Int’l L. 495 (1997); Gwenn M. Kalow, *From The Internet To Court: Exercising Jurisdiction Over The World Wide Web Communications*, 65 Fordham L. Rev. 2241 (1997); Sean Selin, *Governing Cyberspace: The Need for an International Solution*, 32 Gonz. L. Rev. 365 (1996–1997); David Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. Pitt. L. Rev. 993 (1994).

333. Ernesto Gr n, *Globalization of Law: A Systemic and Cybernetic Phenomenon* (Maria Micaela Novas trans.), at http://www.filosofiayderecho.com/rtfd/numero2/global_english.htm (citing Walter Goodbar, *Los enigmas del porvenir*, La Naci n, Oct. 5, 1997) (last visited April 3, 2005).

334. See UNESCO, *supra* note 328.

has been likened to the twenty-first century's equivalent of the debate during the eighteenth and nineteenth century about societal organization itself.³³⁵ "Globalization as generally understood involves the increasing interaction of the world's peoples through their national economic systems."³³⁶ As evidenced by the statistics set forth herein, trade markets in the world have dramatically broadened in the last fifty years, especially as obstacles to such trade and financial activity have gradually lessened.³³⁷ Because globalization of economies tends to stimulate economic expansion, it also tends to improve standards of living for the population of states participating therein.³³⁸

As the worldwide economy has become more globalized, there is an irresistible urge to work the law itself toward globalization in order to accommodate.³³⁹ The inclination toward unification may be irreversible as well.³⁴⁰ The globalizing of the markets is primarily an economic occurrence, though it has undeniable political characteristics as well.³⁴¹ Any new global commercial law will value certainty so as to facilitate commercial activity.³⁴² "Convergence of legal systems or harmonization of commercial law will, in the long run, stabilize and strengthen national economies and will create a healthy competitive environment";³⁴³ hence, the discussion of how best to effectuate such an international legal order of contracts.

335. See Alan Greenspan, Remarks at The Institute for International Economics' Inauguration of the Peter G. Peterson Building, Washington, D.C. (October 24, 2001), available at www.federalreserve.gov/boarddocs/speeches/2001/20011024/default.htm.

336. *Id.*

337. *Id.*

338. *Id.*

339. See Mistelis, *supra* note 327, at 1057; see also Koch, *supra* note 28, at 30 ("Globalization will instinctively drive toward unification . . ."). As one commentator has stated, "The globalization of law should be the answer of lawyers to the globalization of the international market." Aleksandar Goldstajn, *Lex Mercatoria and the CISG: The Global Law Merchant*, in *The International Sale of Goods Revisited* 241, 258 (Petar Sarcevic & Paul Volken eds., 2001).

340. See Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga. J. Int'l & Comp. L. 183, 187 (1994):

[A]lthough the revival of this ancient trend [lex mercatoria] has been criticized by legal scholars, the trend seems irreversible, as evidenced by the fact that in some systems the new lex mercatoria has been recognized not only by legal scholars, but also by courts and arbitration tribunals as well as by the legislature.

341. Mistelis, *supra* note 327, at 1057.

342. *Id.* at 1068.

343. *Id.*

B. *Historical International Contract Law: The Jus Commune and Lex Mercatoria*

The current era is not the first time in which there has been a contemplation of global commercial law: “Medieval *lex mercatoria* and *ius communis* [i.e., *jus commune*] were genuine global legal rules.”³⁴⁴ For the last two hundred years or so, all legal systems have been a function of national sovereigns, but this was not always so.³⁴⁵ As Europe ascended from the Dark Ages, a new international, informal body of law arose to accommodate the business practices of merchants who readily moved across regional borders.³⁴⁶ This body of law which arose at the time, is now referred to historically as “law merchant,” or “*lex mercatoria*.”³⁴⁷ It was autonomous, and was run not by a formal legal order, but rather by the business persons, merchants, themselves.³⁴⁸ This law merchant, likened by some scholars to the European *jus commune*, waned in effectiveness with the advent of the nation states and codes in the seventeenth and eighteenth centuries.³⁴⁹ What were the *jus commune* and *lex mercatoria*? A brief historical overview provides an enhanced modern perspective.

From the fall of the western Roman Empire, until late in the eleventh century—the so-called “Dark Ages”—there was no “common” law of Europe that prevailed.³⁵⁰ Around this time, however, at least two factors began to contribute to a common legal thought on the continent. First, the influence of the Roman Catholic Church and canon law began to have a dominating effect, spreading uniformly to the nations of Europe.³⁵¹ This canon law encompassed areas of ecclesiastical authority, but also family law, inheritance law, criminal law, and even civil law, as well as procedure.³⁵² The other great contributor to the idea of a European common law, or *jus*

344. *Id.* (citing Clive M. Schmitthoff, *The Law of International Trade, in Commercial Law in a Changing Economic Climate* (2d ed. 1981)).

345. Franco Ferrari, *International Business, Law Merchant, and Law School Curricula*, 6 Yale J.L. & Human. 95, 95 (1994) (citing R. H. Graveson, *The International Unification of Law*, 16 Am. J. Comp. L. 4 (1968) (“[t]he international process of assimilating the diverse legal systems of various countries goes back into ancient history.”)).

346. *Id.* at 96.

347. *Id.*

348. *Id.*

349. *Id.* at 96–97.

350. See Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 Syracuse J. Int’l L. & Com. 1, 4–5 (1994).

351. *Id.* at 5.

352. *Id.* (citing Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition 199–254* (1983)).

commune, was the revival of the study of Justinian's *Corpus Juris Civilis*.³⁵³ In the time of the Renaissance, this became the universal subject of legal scholars in Italy and elsewhere in Europe.³⁵⁴ Though it was not ever formal, "positive law" in such a sense, its effect was pervasive, and permeated the promulgation of indigenous law throughout the continent in this time frame.³⁵⁵ Latin was the universal language of study, and this also facilitated the common schools of juristic thought throughout Europe during this period.³⁵⁶

Whereas the *jus commune* constitutes an almost mystical, "soft" historical significance, the history and effect of the medieval law merchant—*lex mercatoria*—was more concrete and more substantive in practice. While the European scholars were busy studying Justinian and the *jus commune* on the university campuses, the business persons and merchants of the day were industriously forming rules and procedures to govern disputes which arose from their transactions. It is certainly true that "some form of commercial law is as old as commerce" itself.³⁵⁷ However, the beginning of the medieval law merchant as scholars now describe it can be traced to Italy and the Crusades, for it was then that the Mediterranean sea routes were re-opened to western European businesses.³⁵⁸ Guilds were formed, and towns became centers of commercial activity with rules being prescribed to govern the fairs and other commercial activity there.³⁵⁹ The "courts" which heard such disputes were staffed

353. *Id.* at 6.

354. *Id.*

355. *Id.* Berman and Reid explain that

[t]he thousands of jurists trained in Roman law who graduated annually from the European universities became the advisors and officials of rulers at all levels of government in the various European polities, and they applied their Roman legal learning to the solution of practical legal problems. To cite one famous example: in 1158 the Emperor Frederick I recruited the greatest scholars of Roman law of the University of Bologna—"the four doctors," Martinus, Bulgarus, Jacobus, and Hugo—to draft legislation for the Diet of Roncaglia, defining in detail the jurisdiction and legal powers of the emperor in the cities of northern Italy. The law that they drafted was not the Roman law of Justinian, but it drew heavily on the Romanist legal concepts and doctrines which they expounded in their glosses of the Digest and in their university courses.

Id.

356. See Merryman, *supra* note 4, at 9.

357. *Id.* at 12-13. See also Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* 7 (1983) ("That commonwealth of merchants hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of all nations do take special knowledge.") (quoting Sir John Davies, *The Question Concerning Impositions* 10 (1656)).

358. Merryman, *supra* note 4, at 13.

359. *Id.*

with merchants, not legal professionals.³⁶⁰ The rules promulgated by the various towns and fairs quickly gained a uniformity, even across national borders, such that in a very real sense, an international commercial law developed to accommodate trade.³⁶¹ The law merchant and its principles were developed largely exclusive of formal legal systems—indeed, it has been hailed as “the most successful example of global law without a state.”³⁶² However, its principles were gradually subsumed by the sovereign national legal systems which arose at the time of the Renaissance and beyond—both, notably, by common law jurisdictions and civil law jurisdictions alike.³⁶³

The law merchant was quite informal—it emphasized flexibility of approach and commercial orientation, and good faith was of paramount importance.³⁶⁴ It has been said that the *lex mercatoria* had five characteristics: “(1) it was transnational; (2) its principal source was mercantile customs; (3) it was administered not by professional judges but by merchants themselves; (4) its procedure was speedy and informal; and (5) it stressed equity, in the medieval sense of fairness, as an overriding principle.”³⁶⁵ Above all, merchants were required to perform their agreements.³⁶⁶ Agreements were enforceable largely without regard to any requisites of form.³⁶⁷ Another of the procedural features of the law merchant was that disputes were heard and adjudicated on an expedited basis to avoid unwarranted interruptions of the contestants’ commercial activities.³⁶⁸ This included the common practice of oral hearings, informal evidentiary standards, and immediate oral rulings from the adjudicator.³⁶⁹ “The grandeur and significance of the medieval merchant is that he creates his own laws out of his own needs and his own views.”³⁷⁰

360. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 346–48 (1983).

361. *Id.* at 342–44.

362. Gunther Teubner, “*Global Bukowina*”: *Legal Pluralism in the World Society*, in *Global Law Without a State* 3 (Gunther Teubner ed., 1997).

363. Merryman, *supra* note 4, at 13.

364. See Trakman, *supra* note 357, at 23.

365. Harold J. Berman & Colin Kaufman, *The Law of International Transactions (Lex Mercatoria)*, 19 *Harv. Int’l L.J.* 221, 225 (1978). See also Wyndham A. Bewes, *The Romance of the Law Merchant* 19 (1923) (“[T]he two great distinctive elements in the merchant’s law, as enforced by their own courts, were good faith and dispatch, for speed and honesty must be obtained, though by means not sanctioned by common law.”).

366. Trakman, *supra* note 357, at 10.

367. *Id.*

368. *Id.* at 13.

369. *Id.*

370. *Id.* at 10 (quoting 1 Goldschmidt, *Handbuch des Handelsrechts* 373–75

The law merchant flourished for centuries, largely because of the homogeneity of commerce along the Mediterranean Sea and throughout Europe.³⁷¹ In fact, the presence of this element was fairly crucial to the success of the law merchant, that is, "a general similarity in economic conditions . . . and [a] predominant influence of the legal conceptions and the commercial usages of . . . merchants."³⁷² With the rise, however, of nation states and their assertion of monopoly power over the creation of positive law, the force of the law merchant began to wane.³⁷³ Moreover, greater diversity and heterogeneity among merchants' practices, inevitable at the time with the advent of more widely observed national boundaries, made the maintenance of a uniform law merchant even more difficult.³⁷⁴ This indigenous variation in both rules, customs, and results all contributed to a budding lack of unity, which itself led to an actual growing distrust in the law merchant itself, as inferior to the growing, sovereign, national, legal systems in which merchants began to have national pride and investment.³⁷⁵ Hence, by the time of the promulgation of the Napoleonic Code in 1804, if not before, the existence of a vibrant, effective law merchant ceased to have the currency it had enjoyed previously. The positive law thenceforth was almost wholly a matter of national government and politics.

The historical evidence for the *jus commune* and the medieval *lex mercatoria* provides interesting food for thought. Though many now believe that unification of contract law on a global scale is an insurmountable, Sisyphean task, it was a reality over a millennium ago. And it existed under much harsher conditions, much less technology, and much less comprehensive structures for world communication and diplomacy. The historical evidence answers the skepticism that an international commercial law could not be fashioned in the present day.³⁷⁶

(1891)).

371. *Id.* at 18-19.

372. *Id.* at 19 (quoting Mitchell, *An Essay on the Early History of the Law Merchant* 156 (1904)).

373. *Id.* See also Ferrari, *supra* note 340, at 184-85 (noting that the enactment of the great codes of the eighteenth and nineteenth centuries "infringed upon the transnational character of the law previously in force which constituted a real *lex universalis*: the so called *lex mercatoria*.").

374. Trakman, *supra* note 357, at 19.

375. *Id.*

376. Cf. Kilian, *supra* note 2, at 220:

[T]he romantic notion that the old *lex mercatoria* truly represented disinterested anationalism is, of course, a fallacy. There has never been a law that transcends domestic legal traditions, nor has there ever been a genuinely disinterested judiciary (or, in case of the medieval *lex mercatoria*, disinterested merchant judges). A judge cannot be genuinely independent of

C. *Present Day Echoes of the Lex Mercatoria*

Is there a modern *lex mercatoria* which has arisen during the twentieth and twenty-first centuries? This question has been hotly disputed for the better part of the last half-century.³⁷⁷ There arises a more fundamental question, which is whether the parties agree on what the term "*lex mercatoria*" means in the present day, and whether it even is worthwhile to have this debate at all.³⁷⁸ Be that as it may, there has been a clear rise of efforts to craft an international commercial legal order for the better part of a century, and these initial efforts shed much light on any subsequent efforts that may be undertaken to create a true, unifying international regime of contract law.

The perception of a modern-era need for transnational law is widely believed to have originated in the Industrial Revolution, since national economies at that time began to over-produce in proportion to their population, thereby economically necessitating the exportation of products beyond national borders.³⁷⁹ Therefore, for the past one hundred years or so, efforts have increasingly been underway to "create an internationally uniform discipline for cases linked to a plurality of countries."³⁸⁰ Stated another way, economists and scholars have increasingly been working toward a *droit corporatif international*.³⁸¹ The growing sense of a need for such a unifying legal regime is based on the perceived "anarchy upon which [current] international relationships are based,"³⁸² and the obstacles presented by the fiercest adversary of international business persons—"nationality of law."³⁸³ Therefore, beginning in the twentieth century, scholars and legal professionals began to take steps to fashion contract laws which

his or her own legal paradigm. Nevertheless, the myth—and utopia—of a *lex mercatoria* haunts legal scholars in search for harmonization of international law so that transborder trade may proceed without certainty [sic] and to the satisfaction and benefit of all trading parties.

377. See Hans-Joachim Mertens, *Lex Mercatoria: A Self-Applying System Beyond National Law?*, in *Global Law Without a State* 31 (Gunther Tuebner ed., 1997).

378. *Id.*

379. See Franco Ferrari, *The Sphere of Application of the Vienna Sales Convention* 1 (1995).

380. *Id.* (citing Sergio Carbone & Marco Lopez de Gonzalo, *Art. 1, Nuove Leggi Civili Commentate* 2, 2 (1989)).

381. *Id.* at 2 (citing Edouard Lambert, *Sources du droit comparé ou supranational. Législation uniforme et jurisprudence comparative*, in 3 *Recueil D'Etudes sur les Sources du Droit en L'Honneur de François Gény* 478, 499 (1934) (using the term in a similar way as *lex mercatoria*)).

382. *Id.* (citing René David, *I Grandi Sistemi Giuridici Contemporanei* 9 (1980)).

383. *Id.* (citing Roy Goode, *Reflections on the Harmonization of Commercial Law*, in *Commercial and Consumer Law. National and International Dimensions* 3, 3 (Ross Cranston & Roy Goode eds., 1993) ("The particular characteristic of [. . .] harmonization lies in its motivation, which is to reduce the impact of national boundaries.")).

would transcend national boundaries and thereby facilitate world commerce.

1. *Uniform Laws on Sales of Goods (ULIS, ULFIS, and CISG)*

The first such effort is widely credited with having commenced at the end of the 1920s, when a scholar named Ernst Rabel suggested the creation of a uniform law to govern the international sale of goods.³⁸⁴ The contract for sale of goods was selected as the focus of this first effort because of its perception as the "mercantile contract par excellence."³⁸⁵ Rabel's suggestion was directed to the logical private body of the day, the International Institute for the Unification of Private Law, or as they are more commonly known, UNIDROIT.³⁸⁶ Rabel became the leading member of the group constituted to effect this task and was also its general reporter.³⁸⁷ The first drafts of the uniform sales law were prepared in 1935 and 1939—they were based primarily on an amalgamation of European civil law principles, though the common law had some influence as well.³⁸⁸ Some years later, in 1964 to be exact, the first two formal bodies of international uniform contract law were adopted by multiple nations in The Hague—the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS).³⁸⁹ The ULIS and ULFIS, like the earlier drafts, reflected mainly the principles in Continental Europe.³⁹⁰ For whatever reason,³⁹¹ the ULIS and ULFIS were only adopted by a handful of nations, not including France or the United States.³⁹²

So, the international legal community decided to try again. This time, the task was undertaken by the United Nations Commission on

384. See Ole Lando, *Comparative Law and Lawmaking*, 75 Tul. L. Rev. 1015, 1017 (2001).

385. Ferrari, *supra* note 379, at 2 (citing Francesco Galgano, *Il Diritto Privato fra Codice e Costituzione* 6 (2d ed. 1980)).

386. Lando, *supra* note 384, at 1017.

387. *Id.*

388. *Id.*

389. *Id.* (citing Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague April 1964, at 2 (1964)).

390. *Id.*

391. Franco Ferrari has opined that the relative failure of the ULIS and ULFIS can be attributed to the scarce role that both Socialist and Third World countries played in the elaboration and compilation of the aforementioned Conventions and which resulted in those countries' refusal to enact the 1964 Hague Conventions which they considered as being modeled on the sole exigencies of the industrialized nations.

Ferrari, *supra* note 379, at 3.

392. Lando, *supra* note 384, at 1017.

International Trade Law (UNCITRAL) in 1968.³⁹³ The scope of coverage of the ULIS and ULFIS was merged, and the new text took the form of a treaty, namely, the United Nations Convention on Contracts for the International Sale of Goods (CISG).³⁹⁴ At an international conference in Vienna in 1980, forty-two nations adopted the new sales convention as law.³⁹⁵ As of 2001, over sixty countries have subscribed to the CISG.³⁹⁶ It has been referred to as “the most important piece of [modern] *jus commune* within the law of obligations.”³⁹⁷ The CISG is positive, actual, operating law in these sixty-plus nations, and it will be discussed more below.

2. *Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts*

In 1968, the same year that UNCITRAL was charged with the task of reworking a uniform code for the sale of goods which eventually led to the CISG, UNIDROIT began considering the concept of preparing a broader, more comprehensive “Restatement” of all principles of international contract law.³⁹⁸ In 1971 UNIDROIT published an initiative called “Progressive Codification of the Law of International Trade,” which further signaled its resolve in this regard.³⁹⁹ It took another nine years, in 1980, for a committee to actually be appointed by UNIDROIT to begin drawing up the Restatement.⁴⁰⁰ The first version of the contract principles was made public in 1994 and adopted by UNIDROIT.⁴⁰¹ Entitled “UNIDROIT Principles of International Commercial Contracts” (hereinafter “UNIDROIT Principles”), they were originally published in English and French, and then subsequently in all of the “major languages.”⁴⁰² The principles contain 119 articles, which cover the broad range of most issues of contract law, including: freedom of contract,

393. *Id.* at 1018. Sixty-two different nations participated in UNCITRAL’s process. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. See Klaus Peter Berger, *The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contract*, 28 *Law & Pol’y Int’l Bus.* 943, 944 (1997).

399. *Id.* at 944–45 (citing Progressive Codification of the Law of International Trade: Note by the Secretariat for the Unification of Private Law (UNIDROIT), 1 *Uncitral Yearbook* 285, 285 (1968)).

400. *Id.* at 945.

401. *Id.* (citing Klaus Peter Berger, *Formalisierte Oder “Schleichende” Kodifizierung Des Transnationalen Wirtschaftsrechts* 141–42 (1996)).

402. Lando, *supra* note 384, at 1019.

formation, *pacta sunt servanda*, good faith, and also trade usages.⁴⁰³ The provisions contain basic statements of legal rules and precepts, followed by commentary and hypothetical case illustrations.⁴⁰⁴ Notably, though the experts who participated in the drafting of the UNIDROIT Principles came from five continents and all major legal systems of the world, the introductory commentary to the UNIDROIT Principles states that they “are drafted more in the style of European codes than of typical common law statutes,” though the commentary also states that the “drafters deliberately avoided using the terminology peculiar to any given legal system and preferred the adoption of terms frequently used in international contracts.”⁴⁰⁵ The UNIDROIT Principles are not positive law,⁴⁰⁶ nor is this on the immediate horizon—rather, the more modest goal of the UNIDROIT Principles is to be used in any number of ways, including incorporation by parties into their own private contracts, reference by arbitrators, and even by judges and legislative bodies.⁴⁰⁷

Curiously, at about the same time that UNIDROIT was beginning work on its comprehensive restatement of international contract law, a separate group of scholars organized itself with the self-styled moniker Commission on European Contract Law (CECL).⁴⁰⁸ The CECL had as its forming mission the drafting of a similar set of comprehensive contract law principles, with a focus on the rules of the nations of Europe.⁴⁰⁹ After an initial draft was prepared in 1995, a complete version of the CECL’s text—the Principles of European Contract Law (PECL)—was published in 1999.⁴¹⁰ English and French versions have been published, and CECL intends to also publish and widely disseminate the PECL in German, Spanish, Italian, Russian, Chinese, and Japanese.⁴¹¹ Like the UNIDROIT Principles, the PECL cover issues of “formation, validity,

403. See Berger, *supra* note 398, at 946.

404. *Id.*

405. UNIDROIT Principles of International Commercial Contracts, in G. Gregory Letterman, UNIDROIT’s Rules in Practice: Standard International Contracts and Applicable Rules 66–67 (2001).

406. It should be noted, however, that while the UNIDROIT Principles are not themselves positive law, they have already been widely influential in recent legislation in numerous countries. See Michael Joachim Bonell, *The UNIDROIT Principles on Practice: The Experience of the First Two Years*, 2 Uniform L. Rev. 34, 37 (1997) (noting that the Principles inspired the Dutch Civil Code, the new Civil Code of Quebec, and the Civil Code of the Russian Federation, and that the Principles were referenced by Lithuania, Estonia, Czech Republic, Scotland, Tunisia, New Zealand, and several African states in recent legislative drafts).

407. See Lando, *supra* note 384, at 1019.

408. *Id.* at 1018.

409. See generally *id.* at 1018–19.

410. *Id.*

411. *Id.* at 1019.

interpretation, contents, performance and nonperformance (breach) of contract, and remedies for nonperformance."⁴¹²

The PECL are held out for the same immediate purposes as the UNIDROIT Principles—adoption by parties into their contracts, arbitral usage, and even potential reference by courts and legislative bodies.⁴¹³ However, the CECL has a much more ambitious, express goal for the PECL: “several of the members of the CECL hope that the EU or its member states will one day adopt a European civil code, and they see the PECL as a first draft of the contract rules of that Code.”⁴¹⁴ Thus, the PECL have been implemented for the express purpose of facilitating development of a common unified contract law for all of Europe. However, for now, neither the UNIDROIT Principles, nor the PECL, are positive law in and of themselves—they are merely private drafts of contract law, held out to the world for discussion about their prospective utilization in further developments of the law.

D. The Implementation of CISG as Positive Law and the Degree of Uniformity in its Interpretation Among Contracting States

As set forth herein, and as is well known, the CISG is a landmark achievement insofar as it is “real” law,⁴¹⁵ which applies to all those states who have subscribed to it.⁴¹⁶ It is the only current comprehensive contract law applicable on an international scale, and, for all practical purposes, the first one ever in the age of cooperation among modern nation-states. As such, it is unparalleled in its potential for “laboratory observations” which may illuminate the process of fashioning unifying contract law in the future. As it turns out, many commentators have concern for the CISG’s viability in the

412. *Id.*

413. *Id.*

414. *Id.*

415. See Ferrari, *supra* note 379, at 4–5. Ferrari explains that the CISG represents a so-called *self-executing* treaty, that is, a “treaty where legal rules arising from the treaty are open for immediate application by the national judge and all living persons in a Contracting State are entitled to assert their rights or demand fulfillment of another person’s duty by referring directly to the legal rules of the treaty.”

Id. This is in contrast to the ULIS and ULFIS, which were not self-executing, but rather required for their implementation the respective national legislatures to incorporate them by domestic legislative enactment. *Id.* at 5.

416. See Murray, *supra* note 1, at 365 (“When the United States and ten other nations ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG), it was quite legitimately characterized as a monumental achievement.”).

future.⁴¹⁷ Paramount among these fears is the problem of uniform interpretation of its provisions—indeed, it was noted early on that “the lack of a common heritage of judicial techniques and substantive law among the Contracting States” could pose a “special hazard” for the CISG’s implementation in practice.⁴¹⁸ Put simply, “even if you get uniform laws you will not get uniform results.”⁴¹⁹

The CISG was promulgated with input from members of all of the major legal systems, including both common law and civil law,⁴²⁰ though its designers hoped it would “escape[] the ethnocentric perspectives and biases of any one legal system.”⁴²¹ Additionally, because of the CISG’s unique compromising feature of being limited in scope, hardly exhaustive in content, and taking on a hybrid nature *vis-à-vis* the dominant legal methodologies of the nations, problems

417. See, e.g., *id.*:

As the Convention begins its second decade as the governing law for the sale of goods in a number approaching fifty nation states, one can only be cautiously pessimistic about its future. It has not lived up to the promise that was so cheerfully shared by those of us who gathered at the University of Pittsburgh School of Law for a 1988 symposium to celebrate this achievement.

418. *Id.* at 367 (citing John Honnold, *The United States Uniform Commercial Code: Interpretation by the Courts of the States of the Union*, 181, 183, in *International Uniform Law in Practice, Acts and Proceedings of the 3rd Congress on Private Law Held by the International Institute for the Unification of Private Law, UNIDROIT* (Rome, September, 1987)).

419. John O. Honnold, *The Sales Convention in Action—Uniform International Word: Uniform Application?*, 8 J.L. & Com. 207 (1998). See also Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687, 740 (1998) (“Whatever rules are chosen, uniform words risk remaining empty shells without a uniform methodology for their interpretation.”); Ferrari, *supra* note 340, at 204 (“[T]o succeed in the uniform application of the Vienna Sales Convention, as in any convention of uniform law, it does not suffice that the Convention is considered an autonomous body of rules, since it still can be interpreted in diverse ways in various systems.”); Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 Tul. J. Int’l & Comp. L. 99, 101 (1995) (“textual uniformity . . . is insufficient”); Ferrari, *supra* note 2, at 245:

[I]n order to create legal uniformity it is insufficient to merely create and enact uniform laws or uniform law conventions because ‘even when outward uniformity is achieved . . . , uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.

Id. (quoting R. J. C. Munday, Comment, *The Uniform Interpretation of International Conventions*, 27 Int’l & Comp. L.Q. 450, 450 (1978)).

420. See Ferrari, *supra* note 379, at 5 (“[T]he Convention represents a truly global effort, with balanced representatives of all the regions and economic and legal systems of the world.”).

421. *Id.* (quoting Errol P. Mendes, *The U.N. Sales Convention & U.S.-Canada Transactions: Enticing the World’s Largest Trading Bloc to Do Business under a Global Sales Law*, 8 J.L. & Com. 109, 122 (1988)).

in interpretation and application are perhaps bound to occur.⁴²² In order to affect a uniform, international interpretation of the CISG's provisions, article 7 was included, which provides as follows:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁴²³

The meaning of Article 7's mandate of uniform, international interpretation has proven elusive. One commentator, John Murray, has stated that to the extent "it means that the court is to transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state . . . it can only be an aspiration."⁴²⁴ In fact, it almost certainly does mean that, in theory, courts are to consider CISG issues without regard to the legal methodology from which they originate.⁴²⁵ As Murray further metaphorically posited: "If a judge in Hungary, the United States or any other Contracting State is to see the Convention through an international lens instead of a lifetime domestic lens, we now know that the typical judge may require assistance from an international legal ophthalmologist."⁴²⁶ Notwithstanding the importance of the objective of uniformity, the different legal systems and judicial methodologies involved make it an exceedingly complex puzzle.⁴²⁷

422. Ferrari, *supra* note 340, at 198.

423. The United Nations Convention on Contracts for the International Sale of Goods art. 7 (1980) [hereinafter CISG].

424. Murray, *supra* note 1, at 367.

425. Ferrari, *supra* note 340, at 200. *See also* Dimatteo, *supra* note 2, at 133:

The Convention is meant to be interpreted based upon its uniqueness and not its similarities to any one of the systems from which it was created. Article 7 mandates that the Convention be interpreted in a way that would "promote uniformity in its application." One commentator has noted that this dictate of uniformity was meant to allow individual judges to sever their thinking from domestic law mind-sets. It was an attempt "to free judges, particularly in countries of the common law tradition, from the iron chains of precedents, thus permitting them to examine foreign cases as well in order to attain uniformity."

Id.

426. Murray, *supra* note 1, at 367.

427. *See id.*

One of the difficulties is that, although Article 7 establishes a requirement to invoke the CISG's "general principles" when there is no explicitly applicable provision, ascertaining what these principles are has proven problematic.⁴²⁸ Professor Honnold has remarked that "[i]nternational unifying conventions, unlike true (civil law) codes, lack a general framework from which general principles can be derived."⁴²⁹ This notion of "general principles" is quite clearly a civilian concept, in which principles are used to fill in gaps in civil code coverage.⁴³⁰ In common law jurisdictions, on the other hand, the concept of general principles in legislation is not nearly as prevalent—statutes are ordinarily only for addressing specific, defined circumstances, rather than the broad, comprehensive coverage of a civil code.⁴³¹ The few United States court decisions applying the CISG have, perhaps unsurprisingly, violated Article 7's requirement to maintain the "international character" of the CISG, by instead falling back on domestic law.⁴³² These courts too often view the CISG through their "domestic lens," rather than through the aspirational "international" lens which the CISG seems to dictate.⁴³³ Moreover, there have been very few cases decided in United States courts at all, which is itself problematic for the development of a CISG jurisprudence which would aid in future interpretation.⁴³⁴ This is likely due to the fact that lawyers and their clients frequently avoid the CISG altogether due to unfamiliarity.⁴³⁵ Honnold has stated that he "has not yet seen a clear solution to this dilemma."⁴³⁶

428. *Id.* ("What, precisely are the general principles on which the Convention is based? The Convention does not say. They cannot be the general principles of any particular domestic legal system, since the pursuit of such principles would violate the directive to transcend domestic principles."). *But see* Ferrari, *supra* note 340, at 223–24 (identifying several general principles in the CISG, including good faith, party autonomy, lack of form requirements, interest, and communications being effective on dispatch).

429. Murray, *supra* note 1, at 367–68 (citing Honnold, *supra* note 419, at 190).

430. Ferrari, *supra* note 340, at 220.

431. *Id.* at 221.

432. Murray, *supra* note 1, at 367–68 (citing *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993) (applying Art. 8(3) of the CISG and failing to perceive the fundamentally different treatment by the CISG of parol evidence); *Delchi Carrier Spa v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995) (finessing the differences between the classical limitation on foreseeability of damages in *Hadley v. Baxendale* and CISG's limitation on damages set forth in Article 74)).

433. *Id.*; *see generally* Cook, *supra* note 2 (noting the failure of U.S. courts applying the CISG to take into account the numerous foreign cases as either having "persuasive value" or "full precedential effect").

434. Murray, *supra* note 1, at 367–68.

435. *Id.* at 371.

436. *Id.* at 368 (citing Honnold, *supra* note 419, at 190).

Central to the debate on uniformity of interpretation of the CISG, as it is structured, is the precedential effect that foreign cases interpreting the CISG should have on domestic courts. In this regard, it is interesting to note the dichotomy in the volume of CISG case decisions emanating from the common law member states on the one hand, versus the civil law member states on the other hand.⁴³⁷ In short, the civil law jurisdictions have generated a much larger number of cases, out of proportion to the ratio between the member states of the two traditions.⁴³⁸ The reasons for this discrepancy are, ultimately, a matter largely of speculation. One reason which has been advanced is that the common law courts “are loath to apply law that has not been created from within and, moreover, that may conflict with well-established domestic common law or code (such as the United States’ Uniform Commercial Code).”⁴³⁹ However, this is not necessarily any more the case with common law jurisdictions than civil law ones. Many scholars conclude that Article 7(1)’s requirement for international interpretation necessitates that domestic courts at least consider foreign CISG decisions.⁴⁴⁰ At least one commentator has even argued for a “supranational *stare decisis*” to be practiced by common law and civil law courts alike.⁴⁴¹ However, although no one questions that foreign case law should have persuasive authority, this suggestion of supranational *stare decisis* has been criticized,⁴⁴²

437. See generally Kilian, *supra* note 2.

438. *Id.* at 218 (citing 1 UNILEX, *International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods* (2000)). As of the time of writing her article, Kilian stated that out of over 600 CISG case decisions, only twenty-one were from common law jurisdictions—“one from Australia, two from Canada, and eighteen from the U.S.” *Id.* It should be noted that Pace University School of Law has CISG case decisions, as well as a wealth of other CISG and other international contract law-related material, on its website. See Pace Law School, *CISG Database*, at www.cisg.law.pace.edu (last visited May 1, 2005).

439. Kilian, *supra* note 2, at 218–19.

440. See, e.g., Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 *Yale J. Int’l L.* 1, 7 (1993); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 *U. Pa. L. Rev.* 687, 787 (1998); Darkey, *supra* note 2, at 142.

441. Ferrari, *supra* note 2, at 258–59 (citing Larry A. Dimatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 *Syracuse J. Int’l L. & Com.* 67, 79 (1997); Dimatteo, *supra* note 2, at 133).

442. See *id.* at 259 (citing Vivian Grosswald Curran, *The Interpretive Challenge to Uniformity*, 15 *J. L. & Com.* 175, 177 (1995)):

Although one must agree that in order to obtain uniformity civil law judges should start to ‘approximate their common law counterparts in increasing their reliance on [case law],’ and common law judges should increasingly take into account legal writing as well as legislative history,

primarily because there is no "rigid hierarchical structure of the various countries' court systems in which the 'national' stare decisis doctrine is embedded."⁴⁴³ Moreover, of course, there is also the deeply embedded civilian aversion to judicial "law."

In practice, such consideration of foreign CISG cases happens quite rarely.⁴⁴⁴ This, in fact, is equally true with decisions from civil law countries as well as common law countries.⁴⁴⁵ Some scholars have expressed surprise at this lack of cross-border citation of authority, certainly in common law jurisdictions where stare decisis is recognized, but even in civil law jurisdictions where it is widely appreciated that court decisions do have persuasive value.⁴⁴⁶ This may not be, however, a startling result. There is, after all, a qualitative difference in the way the various jurisdictions accord decisions with precedential effect, and the variety of different nations from which these decisions emerge creates a jurisprudential dissonance which is difficult to resolve. Courts the world over have undeniable "inertia[s] of habit" formed by their national biases, which make them intellectually resistant to undertake different ways of analyzing and adjudicating legal disputes.⁴⁴⁷ Moreover, courts are unlikely to modify and innovate their methodologies until they are obliged to do so, such as by a new legal structure or paradigm.⁴⁴⁸ These are issues for courts from any jurisdiction, but it is illuminating that the common law courts have issued CISG opinions in drastically fewer disproportionate numbers. This development is "worrisome for the harmonizing efforts of private international law," and could

one cannot attribute the value of binding precedent to uniform foreign case law, much less advocate a doctrine of "supranational doctrine of stare decisis."

443. *Id.* at 259–60. *See also id.* at 260:

[H]ow should one decide whether a specific court is, from a hierarchical point of view, a lower court in respect to the court of a different country? And where in the scheme of things would arbitral tribunals fit into the hierarchy? Are they to be considered hierarchically superior to courts of first instances, appellate courts or even supreme courts? And what about the courts of Non-Contracting States? Should their decisions be taken into account at all?

444. *See* Michael Joachim Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law*, 2 *Uniform L. Rev./Revue de Droite Uniforme* 385 (1997) (cited in Kilian, *supra* note 2, at 226).

445. *See* Peter M. Gerhart, *The Sales Convention in Courts: Uniformity, Adaptability and Adoptability*, in *The International Sale of Goods Revisited* 77, 106 (Petar Sarcevic & Paul Volken eds., 2001).

446. *Id.* at 106–07.

447. *See* David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 *Tul. L. Rev.* 495, 522–23 (1999).

448. *Id.* at 540.

potentially lead to the exclusion of common law jurisdictions from future unifying efforts.⁴⁴⁹

The national biases of the courts is a large problem. As stated, one of the problems of according precedential effect to CISG opinions is the respective desires of the various national courts to establish their ideas as judicial authority, rather than being “beaten to the punch” by foreign courts.⁴⁵⁰ Commentators hope that the allure of unifying international law embodied by the CISG will ultimately “dissipate the centrifugal force of domestic social and legal traditions.”⁴⁵¹ One other suggestion that has been made for the purposes of increasing uniformity in interpretation of the CISG is the creation of an international appellate court to hear appeals from CISG “lower” court decisions, though the loss of sovereignty accompanying such a measure is grounds for criticism.⁴⁵² Until that ameliorating reform, or some other measure, however, the parochialism of domestic courts is a quandary: “Naturally, each jurisdiction would like to have its CISG judgments become authority, and equally naturally, each ‘opposing’ jurisdiction would like to prevent that.”⁴⁵³

Another possibility for obtaining interpretative uniformity is through recurring legislative enactments. As stated by Professor Gerhart:

Inevitably . . . unification must be a legislative unification, and this will require UNCITRAL to have a continuing legislative presence that will allow refinement and amendment of the Convention’s provisions over time. If . . . the Convention is an act of public lawmaking (albeit in the realm of private transactions), then new legislation is the only legitimate way of changing aberrant outcomes, filling gaps in a uniform way (when the gaps are not fairly covered by the Convention’s general principles), or extending the scope of the Convention beyond that crafted in 1980. In other words,

449. See Kilian, *supra* note 2, at 234. It is also notable that, to date, the United Kingdom is not a party to the CISG. *Id.*

450. *Id.* at 240.

451. *Id.* at 242 (quoting Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687, 790 (1998)).

452. *Id.* at 242–43 (citing Ronald A. Brand and Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & Com. 239, 239 (1993)). See also Gerhart, *supra* note 445, at 111 (citing Louis Sohn, *Proposals for an International Tribunal to Interpret Uniform Legal Texts*, in *Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law*, May 18–22, 1992, New York; United Nations A/CN.9/SER.D/1, sales No. 94 V. 14, 50–54 (1995)).

453. Kilian, *supra* note 2, at 243.

continued amendments of the Convention are necessary, and those amendments can be done only through a legislative process much like the one that gave rise to the Convention. The evolution from the ULIS to the Convention can be seen in just that light, with the Convention building on, and out of, the experience of the ULIS in order to improve the adoptability of the instrument. Similarly, in the United States the current work to amend and improve the Uniform Commercial Code shows the necessity of continued legislative amendments to provide uniformity when decentralized application leads to disparate results.⁴⁵⁴

Murray has concluded that, in bringing together different legal traditions for an attempt at uniform law such as the CISG, sometimes “[t]he desire for enactability breeds compromise that may be excessive.”⁴⁵⁵ He notes, however, quite correctly, that

CISG is a milestone, not . . . because it is the ultimate modern commercial code. . . . [Rather,] CISG is a monumental contribution because it evidences a willingness of Nation States throughout the world to seek uniformity in a critical commercial context. The success of CISG could spawn other and more sophisticated efforts at uniformity with critically important effects well beyond international trade.⁴⁵⁶

Concluding that it is unrealistic to expect courts, in applying the CISG, to study case law from all the jurisdictions of the contracting states around the world, Murray has suggested the establishment of an interpretative committee akin to the Permanent Editorial Board of the National Conference of Commissioners on Uniform State Laws for the American Uniform Commercial Code, with the concomitant publication of explanatory comments for aid in interpreting the CISG, and the authority to render non-binding advisory opinions.⁴⁵⁷ This is certainly another measure worthy of serious contemplation, but whether this is a comprehensive solution, or merely a temporary, ameliorative salve, is open to question. Ultimately, if the CISG is to

454. Gerhart, *supra* note 445, at 112–13.

455. Murray, *supra* note 1, at 371. In fairness, this quote is taken a bit out of context. Murray was speaking primarily of the compromise position of allowing parties to entirely exclude the CISG and/or to change the applicability of any of its provisions. See *id.* (“CISG allows the parties to exclude its application entirely or derogate from or vary the effect of its provisions.”) (citing CISG art. 6). Nevertheless, as illustrated by the thesis of this article, I believe that the more substantive, fundamental compromises in content and methodology may also impair the efficacy of the CISG.

456. *Id.* at 373.

457. *Id.* at 374–75.

fail, it is likely because there were many compromises on certain issues, and at other times intentional gaps in the CISG's coverage, which the drafters felt were unavoidable, and that "the attitudinal differences between approaches of common lawyers and civilians . . . were just too fundamental to bridge."⁴⁵⁸

IV. PROSPECTS FOR THE FUTURE INTERNATIONALIZATION OF CONTRACT LAW AND THE PRAGMATIC EFFECTS OF IMPLEMENTING A CIVILIAN RESOLUTION

The global community of scholars and legal professionals has not yet fashioned the definitive contracts legislation to govern all commercial transactions in all nations. Assuming that it wishes to do so, what form can, or should, such legislation take? The CISG is an important milestone in the historical development of such a code, but it is hardly the ultimate modern commercial code, but rather only is significant in that it indicates a willingness for states to eventually go further with a more sophisticated code.⁴⁵⁹ Promulgating and enacting such a sophisticated, comprehensive code is the next logical step. The lessons learned from the implementation of the CISG, as well as other internationalization efforts, should be put into practice as this code is envisioned and drafted. Uniformity among nations is a supreme goal, probably the paramount goal, of cross-border commercial legislation.

A comprehensive code, rather than one with intentional gaps for compromise purposes, is preferable, because the fewer gaps in the code's coverage, the fewer opportunities there will be for divergent judicial interpretation by different national courts, which lead in turn to non-uniform contract law across the nations. Also, the best hope for uniformity in a multinational context comes from the quality of the legislation, rather than reliance on judicial interpretations.⁴⁶⁰ The legislation must likely be the primary unifying factor to achieve the much desired certainty and uniformity that international commerce necessitates.

In all prior efforts at uniform international contract law, there has been a tension between pacifying both civil law representatives and common law representatives. The motivations for doing this are obvious—respect and deference for the two traditions, and the sincere conviction that one's legal system provides excellent and superior rules and methodologies for achieving the greatest justice in disputes. And yet one of the driving forces of globalization of contract law

458. Erauw & Flechtner, *supra* note 2, at 73.

459. See Murray, *supra* note 1, at 373.

460. Gerhart, *supra* note 445, at 112–13.

should be the shedding of domestic biases for the sake of achieving uniformity and certainty. And any concerns voiced over substantive outcomes and justices in the face of compromises from domestic legal precepts are quite likely highly exaggerated—in fact, the two systems have many fundamental ideologies and precepts in common.⁴⁶¹ Indeed, “it is not to be doubted that both systems [civil law and common law] tend, as they should, toward similar conclusions. A complete and adequate study of the genesis of each would show as kindred much that we might fancy to be foreign”⁴⁶² Litigation tends to be resolved in a similar manner under either system.⁴⁶³

There is also the historical fact that codification and civilian concepts are not, as some legal historians would posit, anathema to the common law traditions, given the fact that there have been multiple movements toward codification in the histories of both England and the United States.⁴⁶⁴ Moreover, many scholars actually observe an increasing convergence of the two systems—i.e., that common law jurisdictions are increasingly becoming legislatively “codified,” and that civil law judiciaries are becoming increasingly more active and tending closer to a system of precedent.⁴⁶⁵ Justice, it would seem, is a fairly universal concept after all, and the determinative differences between the civil law and the common law, when viewed in a macro-jurisprudential sense, tend to be about different procedural means to largely similar substantive ends. Thus, given a healthy perspective on the tremendous amount that the two systems have in common, resistance toward utilizing parts of a foreign system should be reduced. What is being discussed, after all, is not a revolutionary change in a nation’s own domestic legal system, but rather a pragmatic solution for a common international law of contracts.

461. See Koch, *supra* note 28, at 47 (“While civil law and common law legal cultures have some basic disagreements regarding interpretation, they share many fundamental principles.”).

462. Thibaudeau Rinfret, *The Relations Between Civil Law and Common Law, in The Code Napoleon and the Common Law World* (Bernard Schwartz ed., 1956).

463. *Id.* at 384 (citing *La Reception du Barreau Canadien a Paris 2*).

464. See *supra* notes 194–230 and accompanying text.

465. Weiss, *supra* note 194, at 440–41 (citing John H. Merryman & David S. Clark, *Comparative Law: Western European and Latin American Legal Systems, Cases and Materials* 54 (1978); Arthur T. Von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. Davis L. Rev. 659, 667 (1998)). Though there may indeed be some observable convergence tendencies between the two systems, the differences pertaining as to code ideology and the precedential effect of case decisions, likely makes any convergence ultimately asymptotic at best.

All of this having been said, there would seem to be much to recommend preparing any future sophisticated international commercial legislation in the form of an outright civil code with the concomitant interpretational methodologies, rather than as a common law statute, or as some type of diluted hybrid text. That is, to respond to Professor Murray's observation that world courts need to be fitted with "international lenses"⁴⁶⁶ to correct their domestic myopia, I suggest that we consider fitting them with civilian lenses, for purposes of use during interpretation and application of a future international civil commercial code. This conclusion is not reached without much trepidation of the reaction in the common law community, and it is done without any disdain for the common law system, which is justifiably proud of its noble traditions and will doubtlessly remain the legal methodology in the English-speaking parts of the world, and elsewhere, for centuries to come. However, there are many reasons why a civil law approach may well be the more efficacious and pragmatic solution for the international commercial community. A few of these reasons can be mentioned briefly by way of introduction.

Initially, one of the problems of the CISG is that it is substantially a neutral hybrid, and thereby, somewhat emasculated system.⁴⁶⁷ It is neither a civil law code, nor a common law statute, and it has no meaningful precepts providing guidance on how it should be interpreted. As a result, courts have been struggling with the manner in which this should be accomplished.⁴⁶⁸ Thus, fashioning any future code as a civil law code, with the concomitant legal interpretational methodology, will greatly reduce uncertainty in its application. Making a civil law, international code comprehensive in coverage, with vastly fewer gaps, will also dramatically reduce the opportunities for courts, civil law and common law alike, to inject judicial interpretational uncertainty into the international contract jurisprudence.

Abandoning any rigid concept of *stare decisis* in the international context is also a pragmatic reality—it is especially problematic, for numerous reasons, to ask or expect domestic courts to review prior foreign cases at all, let alone treat them as authoritative in the sense of being positive law,⁴⁶⁹ and thus the civilian concept of not

466. See Murray, *supra* note 1, at 375.

467. This characterization is in no way meant in disrespect of the drafters and advisers of the CISG, who are among the brightest minds in all of academia. Their efforts at achieving a successful global consensus were nothing short of miraculous and heroic—indeed, it would seem there would be no CISG at all if it were not for their efforts and the hybridizing compromises they made.

468. See, e.g., Murray, *supra* note 1; Kilian, *supra* note 2.

469. See Murray, *supra* note 1, at 373–75.

recognizing cases⁴⁷⁰ as such works much better, especially in the backdrop of having a comprehensive civil law code. Finally, as has been mentioned, international courts are not going to drop their habit of adding “domestic gloss” to an international provision until there is some structure which requires them to do so⁴⁷¹—an express civil code would do just that. Old habits would have to be overcome, and judicially uniform ones substituted in their place for purposes of international contract law applied under a unifying civil law commercial code.

One objection of common law lawyers—making them learn a “new” system is not fair—is somewhat lessened in persuasiveness because the CISG, after all, is supposed to have made them learn a “new” system already. Under Article 7 of the CISG, interpretation of its provisions is supposed to be of an autonomous, international, and uniform nature, without regard for domestic legal rules.⁴⁷² Thus, we already have a system where new rules were supposed to be learned—we just have not yet figured out what they are. With an expressly civilian code, we would know, or could readily discover, what such rules of interpretational methodology were. In fairness, implementing a “global common law” would arguably affect many, if not most, of the same above results that implementing a “global civil law” does. Thus, some additional justifications for considering an international civil law commercial code over other systems will be presented.

A. An International Civil Law Code Will Have a Unifying Effect on the Globalized Rule of Contract Law

Perhaps the supreme goal of current and future international contract law is unity.⁴⁷³ Uniform rules of contract law across national borders is a tremendous ally to the furtherance of international commerce and trade. Diversity of contract laws across nations, by contrast, is international trade’s greatest enemy.⁴⁷⁴ Here, the implementation of a civil code would seem an innovative, though also traditional, method by which to achieve unification. This is so because civil codes are distinctly unifying in nature.⁴⁷⁵ Indeed, one of the greatest historical triumphs of civil codes is in their efficacy at

470. See *supra* notes 273–289 and accompanying text.

471. See Frisch, *supra* note 447, at 522–23.

472. CISG art. 7.

473. See, e.g., Ferrari, *supra* note 379, at 1.

474. *Id.*

475. See Lawson, *supra* note 29, at 51; see also Koch, *supra* note 28, at 30 (“[A] code is an effective technique for centralization. The code-like use of the treaties forming the E.U. demonstrates this unifying nature.”).

achieving a unification of once-divergent systems of law.⁴⁷⁶ This was the effect of the Napoleonic Code in France, and certainly was also true of Germany, and most other nations which enacted codes in the last two centuries.⁴⁷⁷ Civil codes have an effective unifying effect on several different levels. First, they have the effect of greatly unifying the various sources of law.⁴⁷⁸ In revolutionary France, for instance, different parts of the country were governed by Roman law, customary law, canon law, and royal edicts—the Code Civil superseded all of these various sources, giving France a uniform, solitary source of law.⁴⁷⁹ Second, quite obviously, a civil code has had the historical effect of unifying regions or territories which are governed by different laws.⁴⁸⁰ In France, again used for illustration, different sets of customary law governed different regions of the country, such that determining the law in a given location was often an impenetrable maze.⁴⁸¹ Thus, it is no secret that paramount among the goals of the French revolutionaries, and other civilian codifiers that came afterwards, was to reform the legal system such that there came to exist “a single system of law—a law common to all citizens.”⁴⁸² The Napoleonic Code is commonly accepted to have had all of these effects on the French system, as did other codes, such as the German code and the Swiss code.⁴⁸³

Once the admittedly formidable geopolitical obstacles to enacting a comprehensive civil law code of contract law are overcome, such an international code would have much of the same unifying effects on a supranational scale. Like revolutionary France, and other illustrative nations in history, the world is now a virtual Babel of differing systems—mostly variations on common law and civil law traditions, to be sure, but nevertheless varied enough even in their commercial and contract law alone so as to be a veritable enigma of hopeless complexity and dissonance. Also, these differing systems come, quite obviously, from different regions—namely, different sovereign nations. An international civil law contracts code, once accepted, would almost certainly have the unifying effect on international contract law so craved by international businesspeople.

476. See, e.g., Cassin, *supra* note 173, at 46 (“Not even the most ardent adversaries of codification have been able to deny that the Civil Code of 1804, among its other noteworthy achievements, contrived to accomplish that unity of laws demanded in almost all of the *Cahiers* drawn up in 1789 on the eve of the Revolution.”).

477. *Id.* at 50.

478. *Id.* at 46.

479. *Id.*

480. *Id.*

481. *Id.* at 46–47.

482. *Id.* at 47.

483. See generally *id.* at 46–54.

Moreover, such a code, once enacted and applied on a regular basis over time, would only cement its unifying effect,⁴⁸⁴ bringing the nations together with regard to international contract law, overcoming obstacles presented by the fiercest adversary of international business persons—"nationality of law"⁴⁸⁵—and increasing encouragement for international trade.

Another characteristic of civil law codes—exhaustiveness and comprehensiveness of coverage of subject matter⁴⁸⁶—would also have a unifying effect on the international law of contracts. A civil law code is designed to be complete in its coverage of the regulated area, containing sufficient legal principles to provide an answer for any legal issue which could possibly arise as to matters within its jurisdiction.⁴⁸⁷ This coincides with the aim to minimize any "gaps" in coverage. In so doing, virtually every substantive area of contract law would be addressed in one or more civil code provisions, minimizing the likelihood of erroneously divergent adjudications from courts seeking to promulgate rules perceptibly uncodified and thus in need of attention. By having all or most substantive areas covered by applicable code provisions, the natural result would be that the contract law of the nations, being comprehensively set forth in a single, written code, would effectively be unified.

B. An International Civil Law Code Will Limit the Delegation of the Sovereignty of Nations

One of the principal concerns under the CISG is the reluctance of some courts to render decisions interpreting the CISG, or to cite to any foreign decisions, for apprehension of the perceived or real possibility of creation of foreign precedents on which courts must rely in the future under some type of quasi-stare decisis. In such a system, the case decisions themselves take on the force of law, as in common law jurisdictions generally.⁴⁸⁸ This is troubling for any regime of international law, because nations are still sovereigns, after

484. *See id.* at 48–49 ("If the preparation of the Civil Code (like that of the other great French codes—Commerce, Civil Procedure, Criminal Law and Procedure) was the crowning achievement of the evolution toward the unification of the laws, its completion and its operation in practice had the equally important effect of cementing national unity.").

485. Ferrari, *supra* note 379, at 2 & n.23 (citing Roy Goode, *Reflections on the Harmonization of Commercial Law, in Commercial and Consumer Law: National and International Dimensions* 3, 3 (Ross Cranston & Roy Goode eds., 1993)) ("[t]he particular characteristic of [. . .] harmonization lies in its motivation, which is to reduce the impact of national boundaries.").

486. *See supra* notes 255–259 and accompanying text.

487. Sereni, *supra* note 69, at 57.

488. *See supra* notes 57–73 and accompanying text.

all, and there is a pronounced territoriality over the rule of law.⁴⁸⁹ This idea is bound up in the interrelationship between a system of precedent, contract law, and international treaty and convention law.

A treaty, of course, is itself a contract between multiple nation states. The Vienna Convention on the Law of Treaties defines a treaty⁴⁹⁰ as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”⁴⁹¹ Rules of consent to be bound govern in the sphere of international treaties and conventions, much like they do in the realm of private contracts. A state, quite obviously, must in fact consent to be bound before the terms and provisions of the treaty are binding on it.⁴⁹² Much like private commercial parties in a negotiation, states undergo a process of negotiation of the exact terms of the convention, and then the formal execution of a final instrument.⁴⁹³ It is obviously very important to the contracting states what the terms of the treaty are. It is possible to amend treaties after they have been formalized, though this is difficult to accomplish and would normally require a great deal of subsequent negotiation.⁴⁹⁴

Consider, however, what in fact has happened under the CISG, if one considers even a quasi-stare decisis to be in effect under that convention. Nations, in 1980 and thereafter, after rigorous and laborious internal discussions, and discussions with other states, opted to subscribe to the convention for the sale of goods. The terms—all 101 articles—instantly became law in those nations.⁴⁹⁵ The nation justifiably believes that acceptance of those 101 articles (if the full CISG is accepted) is the extent to which its national sovereignty over law in its borders is being delegated to the CISG regime for international sales of goods. However, if a supranational stare decisis is operational, neither the state’s delegation of

489. See, e.g., Kilian, *supra* note 2, at 243 (“Naturally, each jurisdiction would like to have its CISG judgments become authority, and, equally naturally, each ‘opposing’ jurisdiction would like to prevent that.”).

490. A treaty and a convention are, for practical purposes, the same thing, so the definition here of “treaty” shall suffice. See Fritz Enderlein & Dietrich Maskow, Excerpt from *International Sales Law*, available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein-art90.html> (“[T]here is no difference between *treaty*, *convention*, *charter*, *covenant*, *pact*, *concordat* or *certified recommendation*.”).

491. Anthony Aust, *Modern Treaty Law and Practice* 14 (2000) (quoting Vienna Convention on the Law of Treaties, Art. 2(1)(a)).

492. *Id.* at 75–78.

493. See *id.* at 74 (regarding when a treaty is formally “concluded”).

494. See *id.* at 212–23.

495. Ferrari, *supra* note 379, at 4–5.

sovereignty, nor the “contractual consent” given by the state to the convention in the first place, is concluded after the signing of the convention. Rather, subsequent decisions of foreign courts interpreting various provisions of the CISG obtain precedential effect in that nation as they are decided. They become law. To take the United States as an illustrative example, an adjudication in Hungary would thereby obtain the force of precedential law in the United States for purposes of the CISG, months or perhaps years after the United States seemingly gave its otherwise final consent to the convention and final delegation of sovereignty to its international regime. The same effect on law would occur with decisions by courts in Chile, Egypt, Lesotho, Syria, Zambia, Ghana, Singapore, and Venezuela, to give a few examples of other CISG members.⁴⁹⁶ The United States’ delegation of sovereignty would be extended indefinitely, acceding to whatever precedential path the law in these or any other states would take, a veritable “blank check” written on American sovereignty, with no end in sight because of the effect that subsequent nations’ court decisions would have on the law of CISG as applied to American businesses.

Any future international commercial code, civilian or otherwise, is likely to be implemented in the form of another such treaty or convention.⁴⁹⁷ Therefore, this issue of limiting the surrender of sovereignty will continue to persist. The lessons of the CISG and courts’ reluctance to deal with it on occasion should be remedied.⁴⁹⁸

496. See *The Convention for the International Sale of Goods: A Handbook of Basic Materials* 65–71 (Daniel Barstow Magraw & Reed R. Kathrein eds., 2d ed. 1990) (listing all signature member nations to the CISG).

497. It should be noted that many commentators believe that the true *lex mercatoria* should be free of any connection to a sovereign or group of sovereigns, but rather should be law “free of any state.” See, e.g., *Global Law Without a State* (Gunther Teubner ed., 1997); Kilian, *supra* note 2, at 219–21. However, it is unlikely that this view will prevail against the eventual creation of a sophisticated commercial code. Since the days of the rise of the nation state, it has been widely accepted that commerce and positive law should correspond together. See, e.g., Scheuerman, *supra* note 330 (citing Max Weber, *Economy and Society* 162 (Berkeley: University of California 1978):

Liberal theorists from John Locke to Max Weber argued convincingly that market economies tend to rest on a system of legality characterized by a relatively substantial degree of formality, consistency, transparency, and constancy; in Weber’s famous phrase, an ‘elective affinity’ obtains between modern capitalism and ‘formally rational administration and law. See also Lon Fuller, *The Morality of Law* 171–72 (1964) (cited in Scheuerman, *supra* note 330) (opining that commercial activity ideally occurs “within a framework set by the law,” which Fuller described as a structure where “adjudication must act through openly declared rule or principle, and the grounds on which it acts must display some continuity through time”).

498. See, e.g., Murray, *supra* note 1; Kilian, *supra* note 2.

An expressly civilian international commercial code, comprehensive in coverage with no purposeful gaps, and with the concomitant explicit repudiation of the application of *stare decisis* in applying its principles, would be an effective remedy to the problem of unintended delegation and surrender of national sovereignty in signing on to such a future convention. States, much like private contracting parties, should negotiate extensively with their fellow states over the exact content of the substantive terms of the convention. The terms should be promulgated in great detail, with comprehensiveness of coverage, leaving no intended gaps, and the code should be structured to be interpreted according to civilian principles. Such a convention having been signed, the international contract law will be substantially, if not theoretically, complete in broad principle. With a repudiation of *stare decisis*, there would be no significant further derogation of national sovereignty effected by the constant stream of court adjudications emanating from other jurisdictions.⁴⁹⁹ There may eventually be subsequent modifications of the international legislation by mutual agreement and new or modifying conventions, but they would not be realized surreptitiously through the sovereign-derogating consequences of a supranationally operating form of *stare decisis*. Rather, such changes would be made through the formal requisites and procedures of international treaty law.⁵⁰⁰

The desire for maintaining individual national sovereignty over laws within its borders is not unique to common law nations, or civil law nations, or nations of any other legal methodology. All nations share this jealous guarding of sovereign monopolistic lawmaking power—the surrender of national sovereignty over such power should be minimized, and a civilian code with no *stare decisis* would go a long way towards achieving this ideal. *Stare decisis* effect of foreign cases, in fact, has the opposite effect and so it should be discarded in any future international contract code.

C. The Conditions that Historically Have Led to Codification Are Currently Present in the International Commercial Community

A significant reason to consider codification and the implementation of civilian methodologies in future international

499. A caveat would be that, if sufficient numbers of decisions from a sufficient number of jurisdictions reached a same or similar result as to a particular issues, one could envision a type of supranational *jurisprudence constante* springing forth according to civilian principles under the new commercial code. See Von Mehren & Gordley, *supra* note 31, at 1135 n.21. However, even with such a line of decisions, under civilian principles a court would have the autonomy to decide differently if it believed the law required it to do so. See Sereni, *supra* note 69, at 68.

500. See generally Aust, *supra* note 491, at 212–23.

contract law is that the political and legal cultural status of the global commercial community is such that the time may now be ripe for codification. Dean Roscoe Pound, on the occasion of the 150th anniversary of the enactment of the Napoleonic Code in France, speculated on the eventual trend toward codification in Anglo-American law.⁵⁰¹ As a preface to doing so, he made several observations about the historical readiness of jurisdictions for the enactment of systematized codes as a way of formalizing the law in such a jurisdiction.⁵⁰²

Dean Pound stated that, historically, two categories of nations have decided to adopt codes.⁵⁰³ The first category of codifying jurisdictions are "those with well-developed systems that had exhausted the possibilities of juristic development through the traditional element and so needed a new basis for further juristic development."⁵⁰⁴ Into this category, Pound historically placed nations such as Rome in the days of Justinian when the *Corpus Juris Civilis* was promulgated, Revolutionary France, Austria in the late 1700', and Germany in the late nineteenth century.⁵⁰⁵ These nations had long, proud legal histories, with an immeasurable wealth of scholarly and juristic commentary, and jurisprudential development. Their systems had ripened to the point at which there were not a great deal of new and innovative doctrines being developed, but rather gradually finer and finer refinements of pre-existing doctrines and precepts.⁵⁰⁶

Pound's second, observed, historical category of codifying nations is diametrically opposite of the first category—"those that had their whole modern legal development ahead of them and needed an immediate basis for development."⁵⁰⁷ As of the time of Pound's writing in 1954, he placed 1896 Japan, 1930 China, and 1922 Soviet Russia in this category.⁵⁰⁸ At the time of his writing, and also since that time, many examples could be added, including Israel,⁵⁰⁹

501. See generally Roscoe Pound, *Codification in Anglo-American Law, in The Code Napoleon and the Common Law World* 267 (Bernard Schwartz ed., 1956).

502. See *id.* at 275-78.

503. *Id.* at 277.

504. *Id.*

505. *Id.*

506. See *id.* at 275-77.

507. *Id.* at 277.

508. *Id.* at 277-78. As to Soviet Russia, however, Pound noted that their inclusion was dubious, given that "Soviet law grew to be no more than pretentious window dressing." *Id.* at 278 (citing Gsovski, *Soviet Civil Law* (1949); Roscoe Pound, *Soviet Civil Law: A Review*, 50 Mich. L. Rev. 95, 96 (1951)).

509. See generally Benjamin Akzin, *Codification in a New State, in The Code Napoleon and the Common Law World* 298 (Bernard Schwartz ed., 1956) (describing generally the considerations and processes of enacting a new legal

Mongolia, modern Russia, and the various former Soviet bloc nations. The reasons for the proclivity towards civil codes in these nations would seem readily apparent. There is neither the time nor desire to wait for years, decades, or even centuries for a complex system of national case precedent to develop. Rather, new nations such as these, while desiring to fashion a law for their own sovereign, but yet to do so efficiently and immediately, more often choose to do so by enacting comprehensive civil codes, usually modeling them after the French or German code. By doing so, the new nation has a ready-made system of law in place, which is unifying and complete in nature, and which its courts can immediately begin applying. Russia is certainly one of the most recent examples of this phenomenon.⁵¹⁰

Considering the two classes of nations observed by Pound which have enacted codes, it is interesting to note that both categories are at once simultaneously applicable to the present global commercial community at large, in the context of considering what form any future international contract legislation should take. On the one hand, the great common law and civil law traditions have both had centuries—even millennia—to develop, mature, ripen, and refine. Indeed, the civil tradition dates back at least to the *Corpus Juris Civilis*, and even to the Twelve Tables, over two millennia ago.⁵¹¹ Even the common law system dates back to at least around the time of the Norman invasion of Britain in 1066, or shortly thereafter.⁵¹² Although any empirical study of the rate at which new innovations of the law and legal precepts occur is beyond the scope of this article, it is undeniable that most nations, which are not relatively new, and certainly the common law and civil law systems in general, are in a period of vastly sophisticated maturity and well-developed ripeness. This is not to say that there are not entirely new areas which are legislated, as for example, new consumer protection provisions, employment law areas, corporate governance, and the like. But, with respect to the basic, well-defined areas of purely private law like contracts, property, and torts, innovations which occur are, it would seem, mostly nuanced refinements, rather than wholesale changes or reforms. In this regard, the global community is comprised of highly developed, mature systems, which are at least as ready as revolutionary France or nineteenth century Germany for codification—arguably much more so with the passage of an

system at the time of formation of the Israeli state in 1948).

510. See generally Jeffrey Waggoner, Comment, *Discretion and Valor at the Russian Constitutional Court: Adjudicating the Russian Constitutions in the Civil-Law Tradition*, 8 Ind. Int'l & Comp. L. Rev. 189 (1997).

511. See *supra* notes 97–125 and accompanying text.

512. See *supra* notes 42–56 and accompanying text.

additional century or two. So much so, in fact, that the substantive outcomes of specific disputes in both systems tend to be similar, if not identical.⁵¹³ Hence, the laws of these systems are clearly capable of overarching summarization, systematization, and classification into a comprehensive code, and as such the first of Pound's categories is descriptive of the current international status.

But the international community is describable by Pound's second category as well. Any such future international law, one that is a natural evolution from the embryonic prototype that the CISG is surely destined to be viewed as in the future, will itself be a newly created regime. It will, therefore, in that sense be analogous to the states which Pound described as having their entire legal development ahead of them, needing an "immediate basis for development."⁵¹⁴ It will be a fresh start, with no meaningful past history to assist in interpretation and application of the new code. The international community will desire a commercial legal system that is ready for immediate implementation—one that does not require a complex labyrinth of global case precedent to develop. For these reasons, a civil code to implement the new international contract law regime comports with Pound's second observation of states which have enacted codes and is a useful predictor for the logic and likelihood of a civil code for the international commercial community.

In Pound's article, he further noted that codes tended to be historically demanded in four instances, which were not necessarily mutually inclusive, but which, he observed, tended to occur in concert:

- (1) the traditional element of the law for the time being has substantially exhausted its possibilities, so that a new basis is required for a juristic new start; or, instead, a basis is required on which to build a body of law for a country with no juristic past.
- (2) Where there is a juristic past, the law has become unwieldy, full of archaisms, and uncertain.
- (3) The growing point of the law has shifted to legislation, and an efficient organ of legislation has developed.
- (4) There is need of one law in a political society whose several subdivisions have developed divergent local laws.⁵¹⁵

513. Rinfret, *supra* note 462, at 383–84 (“[I]t is not to be doubted that both systems [civil law and common law] tend, as they should, toward similar conclusions. A complete and adequate study of the genesis of each would show as kindred much that we might fancy to be foreign . . .”).

514. Pound, *supra* note 501, at 277.

515. *Id.* at 278.

The first element listed is basically a restatement of Pound's observation that two types of nations have adopted codes—those with mature, well-developed systems of law and those with no system of law at all.⁵¹⁶ As discussed, the international community seems to simultaneously embody both of these characteristics at once.⁵¹⁷ The second element in Pound's list is perhaps the most difficult and complex one to evaluate in an international context, without a survey of every major nation's legal system. It would seem undoubtedly true that most nations have some of these characteristics in their own national legal systems⁵¹⁸—however, this would appear to be much less the case in the instance of international contract law. In fact, because any international contract legal system is still in its prototypical, formative stages, it is arguable that there are as yet no such archaisms, as there is no formal juristic past.

The third element of Pound's observations is more readily subject to analysis. It is scarcely to be doubted that the modern era of law is in large part an era of legislation. Of course, in the civil law jurisdictions which have already codified their laws, this is already the case and has been for one or more centuries.⁵¹⁹ However, notably even in common law jurisdictions, the trend for some time has been towards legislation as the positive source of law as well as cases.⁵²⁰ Indeed, the era of legislation in common law jurisdictions has been described by various commentators as the "statutory era," and even an "orgy of statuemaking," which, in the United States at least, has been argued by some to "effectively occlude . . . the common law horizon."⁵²¹ While the legislation in the United States and other common law jurisdictions has undoubtedly not been of any type of civilian character for the most part,⁵²² the fact that legislation has exploded and is increasingly the mode by which new positive law is developed, portends toward eventual codification, or at least amenability to codification, in Pound's view. So, too, does the fact that legislative bodies exist in all the major nations for drafting and promulgating such legislation, as well as in the international community. As to the latter, private bodies such as

516. See *supra* notes 501–510 and accompanying text.

517. See *supra* notes 511–515 and accompanying text.

518. See, e.g., Pound, *supra* note 501, at 289–90 (describing the "[i]rrationality due to partial survival of obsolete precepts" in common law systems, such as whether "contingent remainders could still be barred by merger").

519. See *supra* notes 231–259 and accompanying text.

520. See generally Madden, *supra* note 42.

521. *Id.* at 555–56 (citing Daniel A. Farber & Phillip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 Mich. L. Rev. 875 (1991); Guido Calabresi, *A Common Law for the Age of Statutes* 169 (1982); Richard A. Cosgrove, *Our Lady the Common Law: An Anglo-American Community 1870–1930* at 39 (1987)).

522. A decided exception would be the Uniform Commercial Code.

UNIDROIT and the CECL are effective organs for drafting prospective international contract law which could be adopted formally by the international community. On a more formal level, the United Nations Commission on International Trade Law (UNCITRAL) has shown itself capable of fashioning a formidable body of international scholars and legal professionals, eminently capable of complex negotiation, research, and promulgation of internationally applicable commercial law, of which CISG is the greatest example to date.⁵²³ Thus, Pound's third element—that the tendency of law to be legislative, with a capable legislative body, is clearly present in the current geopolitical climate.

Pound's fourth element⁵²⁴—a need of one law where different groups have different laws—is clearly present in the current international context. By definition, the global structure is comprised of nearly 200 separate sovereign nations.⁵²⁵ Though nearly all of them practice some form of common law or civil law, they have innumerable iterations, variations, and differing structures and precepts in their distinct systems.⁵²⁶ For any global commercial law to be feasible, practical, and effective, it is clear that some type of unifying, systematizing, legislative text is warranted in order to bring these varying legal systems together in one unified regime of international contract law.⁵²⁷ The need of such a law, given international trade's "enemy" of differing legal systems in different nations,⁵²⁸ is scarcely to be doubted. Hence, Pound's fourth element portends for the civilian codification of international contract law as well.

D. Common Law Jurisdictions Are Increasingly Receptive to Codification

It has been seen that there is a long history of movements toward codification in England and later in the United States.⁵²⁹ From the days of Henry VIII, through Francis Bacon, and later Jeremy Bentham, there has been agitation toward codification in England for centuries.⁵³⁰ Likewise, in the United States, similar agitation has been present, most

523. Gerhart, *supra* note 445, at 112–13.

524. As Pound noted, this element is not indispensable, since in fact Justinian's Code was enacted in the context of a single state, the Roman Empire. *See* Pound, *supra* note 501, at 278. Nevertheless, this element was paramount in the development of codification in France, Germany, and Switzerland. *Id.*

525. According to the United Nations (U.N.) website, there are 191 member nations in the U.N. *See* The United Nations, *List of Member States*, at <http://www.un.org/Overview/unmember.html> (last visited April 1, 2005).

526. *See supra* notes 5–24 and accompanying text.

527. *See* Gerhart, *supra* note 445, at 112–13.

528. *See* Ferrari, *supra* note 379, at 2.

529. *See supra* notes 194–230 and accompanying text.

530. *See supra* notes 194–211 and accompanying text.

notably on a historical basis with the efforts of David Dudley Field in the nineteenth century, which actually did result in the codification of most of New York's Rules of Civil Procedure, which later served as the model for the new Federal Rules of Civil Procedure.⁵³¹ But these agitations toward codification are not mere historical anecdotes. Indeed, the idea of English codification has not been irrevocably discarded, and in 1961 one scholar predicted that "[i]t is difficult to believe that the codification of English law will not become a live issue within the next fifty years or so."⁵³² Indeed, Bentham would have exulted in the fact that in 1965 an English Law Commission was created and charged with the duty:

to take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernization of the law.⁵³³

Though the extent of success of this commission is open to question, as recently as 1990, a codified version of English contract law was proposed—although it has not been adopted, this speaks to the currency of the issue, even in England, the cradle of the common law.⁵³⁴

In the United States, the recent trend has been even more pronounced, with some actual positive enactments having come about as a result of the agitation towards codification in this country. The Restatements have been enacted by the American Law Institute, as a means not to codify, but to "restate" the existing state of common law precedents.⁵³⁵ The goal of a restatement is "to reduce and reformulate systematically the governing legal principles of various fields."⁵³⁶ Restatements have now been drafted in the fields of agency, conflict of laws, contracts, property, restitution, torts, trusts, security, judgments, foreign relations, suretyship and guaranty,

531. See *supra* notes 212–230 and accompanying text.

532. Weiss, *supra* note 194, at 493 (quoting Rupert Cross, *Precedent in English Law* 199 (1st ed. 1961)) (noting, however, that "the chapter [in Cross] The Question of Codification, from which this prediction is quoted, was dropped in the subsequent three editions of 1968, 1972, and 1997).

533. *Id.* at 494 (citing Law Commissions Act, 1965, 13 & 14 Eliz. 2, ch. 22, § 3).

534. *Id.* at 496. The draft was promulgated by Harvey McGregor. See *id.* (citing Harvey McGregor, *Contract Code: Drawn Up on Behalf of the English Law Commission* (1993)).

535. *Id.* at 517–20.

536. *Id.* at 518.

and laws to govern attorneys.⁵³⁷ Though the Restatements are not legislation, they have come to have highly persuasive authority, and are often adopted by judicial decision.⁵³⁸ However, it is widely perceived that the Restatements are, or could at point be, a precursor to formal codification of American law.⁵³⁹

More formal efforts at codification and unification of American law are seen in the advent of the Uniform Commercial Code (UCC). The chief reporter for the original UCC was Karl Llewellyn, who was greatly influenced by German civil law.⁵⁴⁰ In drafting the UCC, Llewellyn strove for general rules, with the idea that some of the adjudicative work would be left to the judiciary.⁵⁴¹ In this regard, it seems hard to ignore the civilian influence on Llewellyn.⁵⁴² The UCC was enacted, covering sales, leases, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, bulk sales, documents of title, investment securities, and secured transactions.⁵⁴³ It is the law, without substantial variation, in all fifty of the American states, giving the United States a truly unified national commercial law.⁵⁴⁴ It is debatable whether the UCC qualifies as a "codification" in the civilian sense, and certainly the various judiciaries do not hesitate to interpret and apply it in a common law tradition—however, it represents an interesting and historic step in the organization, systematization, and clarification of American law.⁵⁴⁵ It is a step that would have been unthinkable in England four or five centuries earlier.

In addition to the trend towards codification, or at least "pre-codification," in England and the United States, there is also the observable trend away from strict adherence of *stare decisis* in these

537. *Id.* at 518.

538. *Id.* at 519.

539. *Id.* See also Pound, *supra* note 501, at 281 ("These private restatements, which are being widely followed by the courts, might well pave the way for codification.") (citing Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 Harv. L. Rev. 1367 (1934); Benjamin Cardozo, *The American Law Institute*, in *Law and Literature* 121 (1931); Arthur Goodhart, *Law Reform in the United States*, 1934 J. Soc'y Pub. Tchrs. L. 19; Charles E. Clark, *The Restatement of the Law of Contracts*, 42 Yale L.J. 643 (1933)).

540. Weiss, *supra* note 194, at 520 (citing James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 Yale L.J. 156 (1987)).

541. *Id.* (citing Shael Herman, *The Fate and the Future of Codification in America*, 40 Am. J. Legal Hist. 407, 429-32 (1996)).

542. *Id.* at 520-21.

543. *Id.* at 521.

544. *Id.*

545. See generally *id.* at 521-27.

common law bastions.⁵⁴⁶ Consider the observations of Wigmore on the subject over eighty years ago:

Is the judge to be bound by his precedent? This part of the question ought not to trouble us overmuch. *Stare decisis*, as an absolute dogma, has seemed to me an unreal fetich. The French Civil Code expressly repudiates it; and, though French and other Continental judges do follow precedents to some extent, they do so presumably only to the extent that justice requires it for safety's sake. *Stare decisis* is said to be indispensable for securing certainty to the application of the law. But the sufficient answer is that it has not in fact secured it. Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves—the government of the living by the dead, as Herbert Spencer has called it.⁵⁴⁷

There has certainly been no discernible reversal of this relaxation of the traditional rule of *stare decisis*. The United States Supreme Court has referred to *stare decisis* as not rising to the level of an “inexorable command.”⁵⁴⁸ Hence, not only can one make the case that common law jurisdictions have been gradually moving *toward* a system of codification—a defining characteristic of civil law—one can also make the case that common law jurisdictions have been moving *away* from a strict adherence to precedent—a defining characteristic of the common law (whose converse is a defining characteristic of the civil law).

While the common law jurisdictions have shown a tendency toward legislation and even codification, it would appear (though the point is worthy of debate) that a converse trend has largely not appeared in the civil law jurisdictions—that is, by and large, there has not been as dramatic a shift by civilians away from codification ideology and toward greater emphasis on case decisions as a source

546. See *supra* notes 67–69 and accompanying text.

547. John Henry Wigmore, *Problems of Law* 79 (1920).

548. *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472, 2483 (2003) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 2610 (1991)) (“*Stare decisis* is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’”). The Court noted, however, that “when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.” *Lawrence*, 539 U.S. at 577, 123 S. Ct. at 2483 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855–56, 112 S. Ct. 2791, 2809 (1992)). The Court cautioned that “[l]iberty finds no refuge in a jurisprudence of doubt.” *Id.*

of positive law. In fact, on the continent, the European Parliament has encouraged the development of efforts toward eventually implementing a unified, European civil code.⁵⁴⁹ And over thirty-five years ago, European scholars began noting the appeal of such a code, as well as the ability to effectuate one.⁵⁵⁰ This is the purpose of the Principles of European Contract Law, which have been drafted by European scholars with that end goal in mind.⁵⁵¹

Because England—the mother of the common law—is part of this Europe—the cradle of Roman civil law—the question inevitably arises as to whether a European civil code is hopelessly doomed to fail.⁵⁵² It is ironic to note, with England's role in Europe in perspective, that notwithstanding that the historical reason for English "common law" was to make the law uniform throughout the kingdom, it now has a converse effect given the European continent's otherwise near unanimous application of civil law methodology. Some scholars, citing "the historical resistance of common-law tradition to the idea of codification," state that a European civil code is unfeasible and undesirable.⁵⁵³ This argument has been met by other scholars, who state that the perceived historical opposition is not as great as may be conventionally believed, given the historical receptiveness to codification in common law jurisdictions which belies the popular notion that such jurisdictions are hostile to it.⁵⁵⁴ It

549. Weiss, *supra* note 194, at 442–43 (citing Parliament Resolution on Action to Bring Into Line the Private Law of the Member States of 5/26/1989, 1989 O.J. (C 158) 400; Parliament Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States of 5/6/1994, 1994 O.J. (C 205) 518).

550. *Id.* at 442–43 (citing Alexander G. Chloros, *Principle, Reason, and Policy in the Development of European Law*, 17 Int'l & Comp. L.Q. 849 (1968); Walter Hallstein, *Angeleichung des Privat- und Prozeßrechts in der europäischen Wirtschaftsgemeinschaft*, 28 *RechtsZ* 211 (1964)).

551. *Id.* at 444.

552. *Id.* at 446–47.

553. *Id.* at 447. Weiss quotes Pierre Legrand, *Codification and the Politics of Exclusion: A Challenge for Comparativists*, 31 U.C. Davis L. Rev. 799, 805 (1998):

[T]o promote a civil code for the whole of the European Continent, given the historical resistance of the common-law tradition to the idea of codification, is necessarily to affirm performatively what is otherwise denied, that is, to assimilate the agents within one legal tradition to a different way of speaking and acting and to different moral preferences that, because they are culturally embedded, are arguably incompatible and incommensurable with their horizon of expectations.

Id. at 447 n.39. He also cites Pierre Legrand, *Against a European Civil Code*, 60 Mod. L. Rev. 44, 56–59 (1997), which he says argues "for 'polyjurality' instead of codification and calling it arrogant to promote the adoption of a European civil code." *Id.*

554. *Id.* at 447 ("The historical perspective illustrates that a European civil code would not artificially graft codification onto a legal environment to which such an

would thus appear that the trend among the jurisdictions of the world is from a system of positive case law toward a ripening and systematizing system of statutes. In this regard also, then, it would seem that a civil law type of code is the more likely natural result of the geopolitical trends in legal thought, than a converse result away from codification.

E. Other Practical Considerations Portend Eventual Codification

At least a couple of other pragmatic observations can be made about the prospects for codification of a future international contract law regime. For one, the ratios of nations and populations practicing civil law on the one hand, and common law on the other, is worthy of comparison. It will be recalled that, according to statistics cited earlier, Common Law (exclusive of any Civil Law), whether in “pure” or “mixed” form, is utilized by some fifty-one nations, or 26.7% of all nations of the world. These nations account for 34.81% of the world’s population.⁵⁵⁵ On the other hand, Civil Law (exclusive of any Common Law), whether in “pure” or “mixed” form, is utilized by some 115 nations, or 60.21% of all nations of the world.⁵⁵⁶ These nations account for 59.01% of the world’s population.⁵⁵⁷ Thus, it is readily seen that some form of civil law is practiced by well over twice the number of jurisdictions than those which practice some form of common law. In terms of population, the numbers are slightly closer, but civil law is still practiced by nearly twice the population as populations which practice civil law. This discrepancy is even greater when it is considered that India—which has a disproportionate share of the common law population figures—is counted in this “common law” group of statistics, even though it is quite a mixed system and is heavily codified though it retains basically a common law underpinning.⁵⁵⁸

Moreover, it is difficult to overestimate the geopolitical influence of the dominantly civilian character of the ever-expanding European Union, which seems headed inexorably toward a supranational European code.⁵⁵⁹ The effect of such a code on the rest of the world, once put into practice and governing the commercial enterprises of

idea is by nature anomalous, antagonistic, or alien, and it thus disproves the historical argument against a European codification.”). *See also supra* notes 204–240 and accompanying text.

555. *See Ottawa Website, supra* note 6; *see also supra* note 18 and accompanying text.

556. *See Ottawa Website, supra* note 6.

557. *See id.*; *see also supra* note 19 and accompanying text.

558. *See, e.g., Weiss, supra* note 194, at 483–86.

559. *See Lando, supra* note 384, at 1019.

Europe, will be inestimable. There is also the reality that, notwithstanding the diversity of participants in drafting such international contract texts as the UNIDROIT Principles and the Principles of European Contract Law, these have a decidedly civilian—rather than common law—flavor.⁵⁶⁰

Given the inclination of the sheer numbers in favor of civil law practicing jurisdictions, it seems at least plausible to suggest that—presuming that a future international contract law regime will be likely either inclined toward a civil law ideology or a common law ideology, which are the two dominant methods of the world—promulgating such a future code in the form of a civilian one will have a profound effect on the fewest number of jurisdictions and populations. That is, simply put, it is arguably more pragmatic and politically expedient for the common law minority of the world to concede to the majority of the civil law majority of the world, in the limited context of a future international contract law legislation. This is especially compelling in light of the other facts militating in favor of an international civil law contracts code, as discussed herein.

Again, in response to any indignant reaction that such an imposition on common law practitioners is an unfair requirement that they learn a system which is foreign to their domestic one, the answer is that

the CISG has already theoretically obligated them to do so.⁵⁶¹ Arguably, since there is a wealth of literature on the methodologies and interpretational processes of the civil law system, whereas there is utter confusion as to how to interpret and apply the CISG, this actually lessens the burden on the common lawyers. That civil law practitioners may be technically advantaged by such a development is hard to contest, but the overall considerations would seem to weigh in this direction, rather than having nearly two-thirds of the world's nations and populations reverse two millennia of history with the civil law system dating to the Romans, in order to emulate that proud, grand—but, comparatively recent by historical standards—system of case precedent invented by the English in the eleventh and twelfth centuries which is the common law.

A final consideration which will be offered is the impact which could be contemplated if any type of international *stare decisis* were to be formally implemented.⁵⁶² Such a system would likely be immobilizing. As has already been observed by Professor Murray, it

560. See *UNIDROIT Principles of International Commercial Contracts*, in G. Gregory Letterman, *UNIDROIT's Rules in Practice: Standard International Contracts and Applicable Rules* 66–67 (2001); Lando, *supra* note 384, at 1019.

561. See CISG art. 7; see also Cook, *supra* note 2 (describing the CISG as a “mandate to abandon ethnocentricity”).

562. See *supra* notes 440–443 and accompanying text.

is unlikely now that domestic courts tend to even bother themselves with seeking our foreign precedent on the CISG, for example, let alone accord it precedential weight as positive law.⁵⁶³ In the United States alone, the amount of precedent has become staggering. Dean Pound, in his 1954 article on the prospects for codification in Anglo-American law, commented that one of the recurrent problem areas in the United States common law system was the “[w]aste of labor entailed by the unwieldy form of the law.”⁵⁶⁴ He stated that the problem is not in understanding what the rules are, but in knowing how to locate the rules given the voluminous reporting of cases.⁵⁶⁵ Relating the “heavy labor” of sitting on the bench, Dean Pound reported that, as long ago as 1885, in a sample of seventy-nine case decisions reported in a single volume of New York case law, 449 precedential cases were cited in the seventy-nine published opinions.⁵⁶⁶ The courts in these cases gleaned the 449 cases utilized from 5,300 cases cited by the litigants.⁵⁶⁷ One judge commented that the volume of case law is a “frightful calamity which threatens us, of being buried alive, not in the catacombs, but in the labyrinths of the law.”⁵⁶⁸ This was a statement not made in the present day—it was made by Justice Story in 1821.⁵⁶⁹ As of 1872, 2,000 volumes of judicial decisions were reported in the United States.⁵⁷⁰ In 1954, Justice Frankfurter noted that that the United Supreme Court alone had published over twice the decisions that had existed from all courts at time of Justice Story’s anxious hand-wringing over the volume of case law.⁵⁷¹ And indeed, since Justice Frankfurter’s day, the case law has continued to explode. Whereas the West reporting system for all United States federal cases (the Federal Reporter) had issued some approximately 500 volumes at the time of Justice Frankfurter’s observations, well more than double that amount have since been issued, in only about two-thirds of the time.⁵⁷² And

563. See Murray, *supra* note 1, at 373.

564. Pound, *supra* note 501, at 289.

565. *Id.*

566. *Id.*

567. *Id.*

568. Lawson, *supra* note 29, at ix (citing Joseph Story, *Address to the Suffolk Bar*, September 4, 1821, 1 Am. Jurist 1, 31 (1829)).

569. *Id.* Justice Story, it will be recalled, was an early American codification proponent. See Weiss, *supra* note 194, at 501 (citing Joseph Story, *Progress of Jurisprudence*, in *The Miscellaneous Writings of Joseph Story* 213–14, 237–39 (1852)).

570. *Id.*

571. *Id.* (citing Felix Frankfurter, *Foreword*, 2 Am. J. Comp. L. 1, 2 (1954)).

572. The first series of Federal Reporter began with volume 1 in 1880, and ended with volume 300 in 1924. Federal Reporter, Second Series, began with volume 1 in 1924, and ended with volume 999 in 1993, which was also when volume 1, Federal Reporter, 3rd series, began. The third series currently stands, as of about August 1, 2004, at around 375 volumes. Hence, whereas only about 500

this is without regard for the length of the volumes. This, and other factors, led Cambridge professor Arthur Goodhart to remark as long ago as 1931:

[I]n no distant time the American doctrine will approximate to that of the civil law. This will be due in large part to five reasons: (1) the uncontrollable flood of American decisions, (2) the predominant position of constitutional questions in American law, (3) the American need for flexibility in legal development, (4) the method of teaching in the American law schools, and (5) the restatement of the law by the American Law Institute.⁵⁷³

Whereas the United States may be somewhat unique amongst the world's jurisdictions in litigiousness and prolificity of judicial opinions, the point remains that, multiplying and extrapolating this phenomenon by many countries over, the amount of international case decisions would have the potential to become simply overwhelming, for purposes of recitation as authority in international cases. For these pragmatic reasons also, the idea of a supranational *stare decisis* is not promising, setting aside the deeply ingrained hostility in civil law nations to treatment of cases as positive law.⁵⁷⁴ Rather, it would seem that encapsulating all positive international contract law into a single civil code, without the requirement of resorting to foreign cases, would be much simpler and much more straightforward towards a unifying international regime of contract law.

V. CONCLUSION

There is an irresistible, seemingly irreversible trend toward the international unification of contract law.⁵⁷⁵ The efforts of UNIDROIT, the CECL, UNCITRAL, and other bodies testify to this, as does the monumentally important landmark CISG.⁵⁷⁶ The growing needs of sophisticated cross-border commerce and multinational enterprises, not to mention borderless innovations such as the

federal West volumes had been published at the time of Justice Frankfurter's statements in 1954 over a span of seventy-four years, an additional approximately 1,175 volumes have been issued since then in the span of fifty years.

573. Jeffrey T. Renz, *Stare Decisis in Montana*, 65 Mont. L. Rev. 41, 87 n.171 (quoting Arthur L. Goodhart, *Essays in Jurisprudence and the Common Law* 65 (1931)).

574. See Koch, *supra* note 28, at 56 (noting that though in the future global system cases will have some effect, "it is doubtful that case law will ever attain *stare decisis* effect.").

575. See *supra* notes 339-343 and accompanying text.

576. See *supra* notes 384-414 and accompanying text.

Internet, testify to the necessity for such a law.⁵⁷⁷ There is as yet, however, a global uncertainty as to what form or shape a future, evolved international contract law regime will take. The CISG, and other prior global legislative efforts, have taken pains at compromise between the two dominant legal systems of the world—the common law and the civil law. Both have proud and distinguished histories, and each has much to recommend it. The dominant characteristic of the common law is the precedential effect of cases as sources of positive law,⁵⁷⁸ whereas statutes have a merely supplemental effect.⁵⁷⁹ The dominant characteristic of the civil law in its modern stage seems to be the embodiment of the majority of private law (including contract law) in a unitary code, which is the sole source of positive law.⁵⁸⁰ Cases are not law, and thus *stare decisis* is largely rejected in civil law systems.⁵⁸¹ Though much convergence can arguably be observed between the two systems over the past two centuries, it is unlikely that they will ever fully naturally merge into a single legal identity, but will likely be asymptotic at best.

Compromises effected in the enactment of prior supranational commercial law regimes such as the CISG have resulted in excessive dilution of the principles of both systems, as reflected in the CISG.⁵⁸² Courts and practitioners in many jurisdictions have shunned the CISG, at least in part because there is a vast amount of confusion as to how to go about applying it in the “international manner” which is expressly required, without resort to the interpretational methodologies of one or the other of the great systems of law—the civil law or the common law.⁵⁸³ Hence, to this observer, unless someone creates an ingenious “third way” of engineering a legal system—unlikely since the present two dominant systems have taken millennia to develop—it seems inevitable that the world will turn to one of them or the other, while doubtlessly being influenced by both.

The thesis of this article has been, to the extent that the development of future regimes of international contract law ultimately depend for their enactment and reality on a choice between adopting a predominantly common law model or a predominantly civil law model, that ultimately adopting a civil law model is the most geopolitically inevitable, most efficacious, most unifying, most politically expedient, and most pragmatic solution. The civil law is

577. See *supra* notes 327–343 and accompanying text.

578. See *supra* notes 57–73 and accompanying text.

579. See *supra* notes 74–83 and accompanying text.

580. See *supra* notes 231–259 and accompanying text.

581. See *supra* notes 273–289 and accompanying text.

582. See Murray, *supra* note 1, at 371.

583. See, e.g., Murray, *supra* note 1; Kilian, *supra* note 2; Cook, *supra* note 2.

distinctively unifying.⁵⁸⁴ It would involve much less surrender of sovereignty by nations, given the elimination of open-ended extraterritorial development of the law that a supranational *stare decisis* would involve.⁵⁸⁵ The geopolitical conditions of the international community would appear ripe for codification.⁵⁸⁶ The trends in common law jurisdictions, especially the United States, have been toward more legislation and potential codification, as especially evidenced by the Restatements and the Uniform Commercial Code, and away from *stare decisis*; while the trend in civil law jurisdictions has remained more stable—there is no significantly observable trend in such jurisdictions toward a system of *stare decisis*.⁵⁸⁷ Indeed, the nations on the European continent have been busily drafting and planning implementation of a continent-wide applicable European civil code.⁵⁸⁸

Finally, from a pragmatic perspective, the sheer number of jurisdictions and populations militate in favor of at least a plausible argument for treating the civil law as the “majority” and the common law as the “minority.”⁵⁸⁹ There is, moreover, the seemingly immobilizing effect that a formal, supranational *stare decisis* would have on the tribunals of all nations.⁵⁹⁰ Though the political obstacles are admittedly quite formidable, a civil law, international, contract code may well be the best solution at a workable, certain, and unifying regime of global contract law, which would have the desired effects of reducing obstacles to global trade and commerce, thereby increasing the standards of living of all peoples.

584. See *supra* notes 473–487 and accompanying text.

585. See *supra* notes 488–500 and accompanying text.

586. See *supra* notes 501–528 and accompanying text.

587. See *supra* notes 529–554 and accompanying text.

588. See *supra* notes 549–553 and accompanying text.

589. See *supra* notes 555–560 and accompanying text.

590. See *supra* notes 561–573 and accompanying text.