COSTS OF CODIFICATION

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Between the Civil War and World War II, every state and the federal government shifted toward codified versions of their statutes. Academia has so far ignored the systemic effects of this dramatic change. For example, the consensus view in the academic literature about rules and standards has been that precise rules present higher enactment costs for legislatures than would general standards, while vague standards present higher information costs for courts and citizens than do rules. Systematic codification—featuring hierarchical format and numbering, topical arrangement, and cross-references—inverts this relationship, lowering transaction costs for legislatures and increasing information costs for courts and citizens as statutes proliferate. This Article takes a first look at this problem. On the legislative side, codification makes it easier for special interest groups to obtain their desired legislation. It facilitates Coasean bargaining between legislators and encourages legislative borrowing, which diminishes the laboratories of democracy phenomenon. For the courts, codification changes how judges interpret statutes, prompting them to focus more on the meaning of individual words than on the overall policy goals of enactment and to rely more on external sources, such as legislative history. For both legislators and courts, codification functions as a Hartian rule of recognition, signaling legality for enacted rules. For the citizenry, the reduced legislative costs mean increased legislative output, yielding rapid proliferation of statutes and unmanageable legal information costs. More disturbingly, codification also fosters overcriminalization. While it may not be appropriate to revert to the precodified regime now, reexamining the unintended effects of codification can inform present and future choices for our legal system.

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I. INTRODUCTION

Every state now has a code or set of statutes with systematic order, numbering, and indexing. The federal counterparts are the U.S. Code and the Code of Federal Regulations. This was not always the case; modern codes are the product of the codification movement, which came in three waves in the nineteenth and early twentieth centuries. In earlier periods, legislation appeared in chronological form in official publications. Prior to codification, there was intense academic and public debate about its likely effects on the legal system; after codification became a reality, there was almost no academic discussion about its systemic impact or consequences.

The consensus in the academic literature about rules and standards[1] is that the latter present lower enactment costs for legislatures, but high interpretive and application costs for courts and citizens. Conversely, specific rules—typified by complex code sections—are supposedly costly for legislatures to enact but impose lower costs on their audience. The consensus model, however, has focused entirely on individual laws in iso-

1. *See, e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking,* 3 J. LEGAL STUD. 257, 266–75 (1974); FRANCESCO PARISI & VINCY FON, THE ECONOMICS OF LAWMAKING 3–20 (2008); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 746–51 (8th ed. 2011); Louis Kaplow, *General Characteristics of Rules*, *in* 7 PRODUCTION OF LEGAL RULES 18–42 (Francesco Parisi ed., 2011); Barbara Luppi & Francesco Parisi, *Rules Versus Standards*, *in* 7 PRODUCTION OF LEGAL RULES 43–53 (Francesco Parisi ed., 2011).

lation, ignoring the overall systemic effects of codification. This Article argues that codification—the embodiment of enacted legislation in a topically arranged, numerically indexed compendium[2]—inverts the transaction costs posited by the traditional model.

Once a systematic code is in place, the legislature has significantly lower transaction costs when adding amendments or new sections.[3] It can also more easily borrow large sections of code from a sister jurisdiction or a model code from an entity like the National Conference of Commissioners on Uniform State Laws ("NCCUSL")[4] or the American Law Institute ("ALI").[5] Uniform laws and model codes proliferated in

2. "Codification," a term coined by Jeremy Bentham, can vary in meaning depending on the country or region in question (European, African, American, or Asian), the time period, and the individual writer employing the term. As used in this Article, and as generally used in the modern era in the United States, *codification* refers to an official collection of legislation in the form of topically-arranged, numbered-and-indexed set of volumes, such as the U.S. Code, the Code of Federal Regulations, and the codes or "revised statutes" of the fifty states. *See* Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 132 n.14 (2010) ("In the United States, the term 'code' usually refers to a set of revised statutes.") (citing NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2 STATUTES AND STATUTORY CONSTRUCTION § 36A:3 (7th ed. 2009)). Europeans would probably call these *compilations* or *digests*, as codification has a somewhat different meaning there, where judges traditionally have less lawmaking power and many national law codes derive historically from the Code of Justinian or the Napoleonic Code. Jeremy Bentham was more of a purist about the word, as philosophers often are. He insisted that the Napoleonic and other European Codes were not true "*codes*" in the sense he used the term because they were not comprehensive or systematic enough, nor were the rules derived by analytical logic from utilitarian presumptions. *See generally* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981); MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 166–86 (1924) (discussing the U.S. codification movement and its differences from European codification); DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 181–85, 239–55 (1989). During the period when the United States gradually embraced its current form of codification, writers advocating for the movement described the U.S. version of the phenomenon as *modified* codification, meaning the codes could coexist with a continuation of common-law courts. *See, e.g.*, Leonard A. Jones, *Uniformity of Laws Through National and Interstate Codification*, 28 AM. L. REV. 547, 559–60 (1894). Critics at the time associated the codification movement with Bentham's radical version or the French Code. *See, e.g.*, J. BLEECKER MILLER, DESTRUCTION OF OUR NATURAL LAW BY CODIFICATION 12, 26 (1882). The variations in usage seem to be largely a matter of degree—that is, how much lawmaking must occur via the code and how much can occur through the judiciary or other sources. This is not to suggest that the United States is a *code country* in the same way that many continental nations fit that appellation, but it seems undeniable that codes form an integral part of the modern U.S. legal system. For a similar definition of codification, see John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT'L L. 1, 5–6 (2003) (noting that with codification "many different definitions are possible and that choosing one can bear importantly on the analysis of conditions and factors of codification" but adopting an inclusive definition similar to that used in this Article).

3. For an example of a legislature's awareness of this fact, see OFFICE OF THE LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, POSITIVE LAW CODIFICATION IN THE UNITED STATES CODE, [hereinafter LAW REVISION COUNSEL] *available at* http://uscode.house.gov/codification/positive_law_codification.pdf, which explains, "Positive law codification promotes accuracy and efficiency in the preparation of amendments . . . Specifying words to be struck or the place where new words are to be inserted is simplified. Understanding the impact of proposed amendments is easier."

4. *See* UNIFORM LAW COMMISSION, http://www.uniformlaws.org/ (official website for the National Conference of Commissioners; model acts and codes are available there for public review) (last visited Mar. 25, 2014). For discussion of the history of the NCCUSL and its relationship to the codification movement in the United States, see GRANT GILMORE, THE AGES OF AMERICAN LAW 69–73, 83–84 (1977).

5. *See* AMERICAN LAW INSTITUTE, www.ali.org (last visited Mar. 25, 2014). For the interrelationship between the NCCUSL and the ALI in the American codification movement, including their shared leadership at the beginning, see GILMORE, *supra* note 4, at 72–74 (Samuel Williston was both

the wake of codification. Codification thus lends itself to extensive borrowing—legislatures can easily find, and adopt wholesale, entire codes or sections from other jurisdictions or from a bank of uniform codes and restatements. Such borrowing results in more harmonization of laws among U.S. jurisdictions; this presents many advantages, of course, but also undermines the federalist ideal of states serving as independent "laboratories of democracy."[6]

There are other important ramifications to the inversion of transaction costs caused by codification. Lower transaction costs for enactment not only increase legislative output but also make it easier for special interest groups to obtain particularized legislation that serves their agendas.[7] In other words, codification seems to facilitate various types of redistribution in society, for better or worse.[8] From a Coasean[9] standpoint, lower transaction costs make bargains more likely—and make legal rules in the surrounding environment less important for the eventual outcome.[10] Once some form of codification is in place, it lowers legislative transaction costs, so legislative bargains should become more likely. The increased likelihood of legislative bargains is another reason that codification inherently lends itself to enactments that are more numerous and more detailed. It also dilutes the import of myriad rules governing the legislative process and product—from parliamentary procedures to structural checks and balances (like bicameralism). Lower transaction costs make it easier to negotiate around these rules.[11]

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the main draftsman for the NCCUSL and the Chief Reporter for the ALI's Restatement of Contracts).

6. *See infra* Part III.D. At the same time, to the extent that codification generates statutory proliferation (more numerous statutes and statutory subsections), it can result in more opportunity for variations and conflicts between jurisdictions. Taken together, these two trends produce polarized effects in the law—in some areas, there is greater consistency from jurisdiction to jurisdiction, or at worst a majority and minority rule; yet in other areas of law, the diversity between jurisdictions becomes more radical and chaotic, a confusing array of conflicting rules and divergent definitions.

7. Those who resisted the codification movement warned about the dangers of facilitating legislative capture by special interest groups. *See, e.g.*, BLEECKER, *supra* note 2, at 8, 16.

8. In addition, it is easier and cheaper for legislatures to delegate additional rulemaking power to regulatory agencies, which contributes to the proliferation problem exponentially—notice the number of volumes in the Code of Federal Regulations compared to the U.S. Code. For a detailed history of the U.S. Code, including an explanation of legislative enactments currently missing from the Code, *see* Tress, *supra* note 2, at 129.

9. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase's article helped launch the law and economics movement in the legal academy; citations to it have become ubiquitous in the academic literature. For an excellent overview of the subsequent literature and Coase's reaction to the impact of his article, see generally Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397 (1997).

10. The Coase Theorem posits roughly that legal rules or rights matter least where parties have the most opportunity to negotiate; conversely, rules and rights matter more when parties have less opportunity to bargain around the laws. This is my paraphrasing; Coase himself did not provide a one-sentence version of his argument in his original article, and he attributed the moniker "Coase Theorem" to the economist Joseph Stigler. *See* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 157 (1988).

11. As Coase observed, "It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production." Coase, *supra* note 9, at 15.

H.L.A. Hart's rule of recognition[12] also comes into play here. Codification functions as a type of rule of recognition in our legal system. In practice, courts automatically recognize codified statutory provisions as validly enacted law from a duly elected representative legislature. Even where courts entertain a challenge to the constitutionality of a statute, codification functions as a preliminary rule of recognition, establishing that the statute in question purports to be valid legislation.

Codification changes things on the receiving end of the law as well. For the courts, codification usually means a shift toward specific rules rather than vague standards, so an individual statute should have less ambiguity to interpret. Even so, the overall increase in quantity and complexity means there is more law for courts to apply and more uncertainty about whether other provisions of the expansive code would be relevant to the case at hand. Proliferated statutes often create new legal entitlements and liabilities, which furnish the basis for more claimants appearing in court—that is, more court cases. The uncertainty that attends an environment of rapid statutory proliferation (which codification encourages) means more of those cases are likely to go to trial rather than settle, as uncertainty is the primary reason cases proceed to trial.[13] In addition, even though a code may give the courts clearer statutes to interinterpret,[14] if codification triggers rapid proliferation of statutes, the courts may end up engaging in more gap-filling interpretation overall than occurred with fewer, but more ambiguous, enactments.

The nature of the courts' interpretive role also changes. Inherent in the codified statutes is a tendency to include definition sections and to be systematic and comprehensive.[15] Codification has led the judiciary to focus on legislative intent regarding the meaning of specific words rather than the overall purpose of an enactment, which was the main approach before we had codes. The shift toward using legislative history to ascertain the meaning of individual words followed the codification movement;[16] it is a logical consequence of this change in the form of statutes.[17]

12. *See* H. L. A. HART, THE CONCEPT OF LAW 94–110 (2d ed. 1994).

13. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 119 (1985).

14. *See* Ehrlich & Posner, *supra* note 1, at 261–62 (analyzing the purpose of specific legal rules as opposed to less specific standards); *see also id.* at 264–67 (citing the greater predictability of the law with precise rules).

15. Lawrence Solan recently observed that statutes themselves tend to have a structure as definitions, in a broad sense, apart from having specific "definition sections" at the beginning of statutory sections or titles. *See* LAWRENCE A. SOLAN, THE LANGUAGE OF STATUTES 65–67 (2010).

16. *See* William S. Blatt, *Missing the Mark: An Overlooked Statute Redefines the Debate over Statutory Interpretation*, 104 Nw. U. L. REV. COLLOQUY 147, 150 n.23 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/36/ ("The 1891 edition of Sutherland's Statutory Interpretation disparaged the use of legislative history and made no specific reference to use of committee reports. The 1904 edition, however, specifically stated that committee reports were 'proper sources of information in ascertaining the intent or meaning of an act.'") (citation omitted); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 185–86 (2001) (describing the lack of reliance on legislative history by the Supreme Court prior to World War I and its growth thereafter).

17. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197 (1983) ("In the 'orgy of statute making' ushered in by the New Deal and continued relentlessly through the next fifty years, resort to legislative history became pervasive.").

English courts did not allow any legislative history into their discussions of statutory meaning,[18] but their Acts of Parliament lacked the codified attributes of modern U.S. statutes. Moreover, the same interpretive assumption applies to what the statute omits; codification created a paradigm in which legislative silence seems intentional to the judicial audience.[19] When encountering changes in wording from legislative amendments, courts usually assume the legislature intended the change to expand the scope of the rules, rather than narrow it.[20] To the extent that codification facilitates more statutory amendments, a likely downstream result is that courts tend to apply the laws more expansively.

For the citizenry, codification is a lesson in historical ironies. The advocates of codification—the first movement being led by Jeremy Bentham[21] and the second[22] by David Dudley Field,[23] among others—insisted that having a systematic code would simplify[24] the law and make it more accessible and knowable to the citizenry.[25] The result seems to be

18. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 30 (1997) (insisting that use of legislative history by courts did not gain momentum in either England or the United States until the 1940's); James C. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 60 (2007); William N. Eskridge, Jr., *Textualism: The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1542 (1998); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism,* 119 YALE L.J. 1750, 1840–41 (2010) (discussing traditional English prohibition against legislative history); Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 945 (2012) (noting that "English legal culture" at the time of the American Revolution "forbade the use of legislative history to construe statutes"); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1887 (1998).

19. *See* Kucana v. Holder, 558 U.S. 233, 247–49 (2010) (legislative silence indicating Congress meant to leave jurisdictional matter where it was pre-IIRIRA); Nken v. Holder, 556 U.S. 418, 430 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citing INS v. Cardoza-Fonseca, 480 U.S. 421,432 (1987) (internal quotation marks omitted)); Mid-Con Freight Sys. Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 440, 449 (2005) (drawing inferences from legislative silence); Heck v. Humphrey, 512 U.S. 477, 493 n.1 (1994) ("[W]e infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law."); Chem. Mfr's. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 149 (1985) (resorting to legislative history to explain legislative silence on an issue).

20. *See* SOLAN, *supra* note 15, at 67.

21. *See* George M. Hezel, *The Influence of Bentham's Philosophy of Law on the Early Nineteenth Century Codification Movement in the United States*, 22 BUFF. L. REV. 253 (1972).

22. *See* COOK, *supra* note 2, at 69 (contrasting law reform movements before and after 1820); *id.* at 167 (describing the more nuanced approach of the advocates in the second codification movement compared to the radicalism of those in the first).

23. *See id.* at 186–89 (describing Field's code and advocacy for more codification of statutory law).

24. *See, e.g.*, Lindsay Farmer*, Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45*, 18 LAW & HIST. REV. 397, 417 (2000) (describing the obsession with simplification among the British law commissioners, working in the 1830's, who were apparently devout Benthamites).

25. *See, e.g.*, COOK, *supra* note 2, at 5 ("First, the law [prior to codification] was said to be inaccessible and uncertain, a lament most often made by the law guild. Second, the law, it was claimed, was unnecessarily mysterious, complex, and overly technical, a charge usually leveled by laymen."); GEORGE HOADLEY, CODIFICATION IN THE UNITED STATES: AN ADDRESS DELIVERED BEFORE THE GRADUATING CLASSES AT THE SIXTIETH ANNIVERSARY OF THE YALE LAW SCHOOL, ON JUNE 24, 1884 at 27 ("Its merit is that it renders the whole body of the law, before vague, uncertain, dispersed, scattered, and almost beyond reach, simple concise, clear, certain, compact, and easily accessible."); *see also* R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING 36 (1898).

the exact opposite, as the reduced transaction costs of legislation inherently lead to increased legislative output, that is, statutory proliferation. The resulting code becomes increasingly voluminous, presenting overwhelming information costs for the citizenry. A citizen today without formal legal training faces a rather hopeless task in trying to master all the statutes that could be relevant to any given activity.[26] Ignorance of the law was no excuse under the common law; under modern codification, however, courts have begun to sympathize with the plight of citizens who must cope with legal information overload.[27] As enactment costs decrease, laws tend to proliferate (assuming demand for legislation remains constant or increases over time), and the ever-expanding code imposes information costs for courts and citizens that outweigh any gains from the greater specificity or precision.[28] The universal move toward codification in the early twentieth century was one of several important factors that facilitated a massive proliferation of statutes and regulations,[29] resulting in an overwhelming quantity and complexity of law for the courts and citizenry.[30] The legal system now faces the problem of too much law to know[31] in terms of information costs for those who must

26. *See* Ehrlich & Posner, *supra* note 1, at 270–71 (pointing out that while certain areas of the law are sufficiently ubiquitous and universal that general lay expertise often suffices, such as tax and insurance law, most areas of the law see increased demand for lawyers due to the greater complexity and specificity demanded by the precise rules used in codification). For more on information overload, see JAMES GLEICK, THE INFORMATION 402–12 (2001).

27. *See, e.g.*, Cook v. Principi, 318 F.3d 1334, 1357 (Fed. Cir. 2002) ("While all citizens are presumed to know the law, that legal fiction is not identical to requiring that veteran claimants must be personally conversant and proficient with the arcane intricacies of an entitlement program that requires voluminous statutes, regulations, manuals, and circulars to administer."); Johnson v. Orr, 780 F.2d 386, 394 (3d Cir. 1987) ("The statutes were voluminous and detailed.").

28. This is not to say that statutes did not proliferate, to some extent, prior to codification, but rather that codification accelerated the process. *See* COOK, *supra* note 2, at 8 (describing the burst of legislation that immediately followed U.S. Independence).

29. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691 (1987) ("The most obvious justification for greater academic attention to legislation is the twentieth century's 'orgy of statute making,' which has transformed our polity into one where law is not only primarily statutory, but also is increasingly 'statutorified.'"); Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L. J. 1022, 1042 (1975) (describing the "orgy of statute drafting" that occurred in the twentieth century after the advent of nationwide codification); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 546 (1982) ("Yet in a time of unparalleled statutory proliferation, the flourishing of the equity jurisdiction, especially the wide use of injunctions, presents a paradox."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 409 n.10 (1989) ("The proliferation of statutes in modern law has been widely observed . . . .").

30. Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 105 (2000) ("In 1928, the unannotated version of the United States Code appeared in two tall volumes that totaled six inches in width. The 1988 version of the unannotated Code included twenty-nine volumes that spanned six feet, a twelve-fold increase."); Daryl J. Levinson, *Empire-Building Government In Constitutional Law*, 118 HARV. L. REV. 915, 936 n.71 (2005) ("For another measure, in 1928 the unannotated United States Code fit into two volumes; by 2000, it filled thirty-five.").

31. *See* Cheek v. United States, 498 U.S. 192, 199–200 (1991) ("The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws."); William L. Cary, *Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal*, 60 COLUM. L. REV. 259, 266 (1960) ("Thus, it would seem that the proliferation of statutes sometimes generates, rather than clarifies confusion.").

obey it. The transaction-cost literature on legislation has largely ignored the problem of information costs when statutes become too specific and therefore too voluminous. The consensus view is that a specific statute is easier (cheaper) to understand than a vague standard. Even when commentators have discussed the problem of hyperlexis[32]—too much law—it is primarily from the standpoint of individual liberty rather than looking at the information costs posed by legislative proliferation.[33]

The plight of an average citizen in this environment has become an issue in Supreme Court decisions—*Citizens United v. F.E.C.*[34] being the prime example. There, the majority based its holding in part upon the prolixity of campaign regulations,[35] apparently adopting a "void for verbosity" rule.[36] The Court is now acknowledging an information-overload problem with rule proliferation. This Article argues that codification has significantly contributed to such proliferation.

Apart from spiraling legal information costs, the citizens are arguably worse off on another point as well: overcriminalization. Reduced legislative transaction costs accelerate the rate of criminalization. While there are many factors contributing to overcriminalization in the United States, codification facilitates the process by making it easier for those who want to criminalize activities to do so.[37] The growing body of academic literature about overcriminalization would benefit from a fresh look at the role that codification plays in the expansion of penal liability.

The discussion proceeds as follows: Part II provides background and context setting the stage for the ensuing argument. This Part introduces the reader to the prevailing views about rules and standards, briefly surveys the history of U.S. codification, discusses twentieth-century statutory proliferation, and attempts to demonstrate a connection between proliferation and codification. Part III focuses on the effects of codification on legislatures—specifically, the transaction costs of enacting new statutes. Enactment costs include information costs for legislators, Coasean bargaining costs, and legislative uncertainty, but also reflect offsetting savings from legislative borrowing—especially adopting code sections from other jurisdictions or a uniform/model statute from the NCCUSL. Part IV addresses the impact of codification on the courts and

32. *See, e.g.*, PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 11–25 (2000); Bayless Manning, *Hyperlexis: Our National Disease*¸ 71 NW. U. L. REV. 767, 767–68 (1977); Walter D. Schwidetzky, *Hyperlexis and the Loophole*, 49 OKLA. L. REV. 403, 404 (1996).

33. Guido Calabresi's seminal work, *A Common Law for the Age of Statutes*, begins with the premise that statutory proliferation has created a crisis for the judiciary but never reaches back to expose the reasons for the explosion of statutes. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–7 (1982). This Article ventures into that antecedent question.

34. 558 U.S. 310 (2010).

35. *See id.* at 324; this decision and its reasoning receive fuller discussion in Part V, *infra*.

36. *See* Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1600 (2012).

37. *See also* Ehrlich & Posner, *supra* note 1, at 271 (pointing out that greater specificity that appears to provide certainty in prohibiting behavior provides less certainty in that behavior, as in the case of a statute that prohibits sex with a person under 16 years of age; while the strict liability guarantees conviction, it also makes it far more difficult for the average person to gauge criminality of a behavior since the person may be wrong about the age of his or her sexual partner).

judicial interpretation of statutes. The problems codification poses for the citizenry are the subject of Part V, focusing on information costs and overcriminalization. Part VI provides a brief conclusion.

This Article does *not* dwell on European codes, which some readers might expect to be central to a discussion of codification; the focus here is on U.S. codification instead. Unlike European codes, U.S. codification operates in tandem with common-law courts, and there are expansive codes on both the federal and state level, in a complex federalist relationship. On the other hand, there are many formal similarities—topical arrangements, numbered or lettered sections and subsections, indexes and incorporations by reference.[38] A comparative transaction-cost analysis of U.S. and European code systems could be a fruitful topic for future research, but is beyond the scope of this Article.[39]

II. HISTORY AND CONTEXT

A. The Rules-and-Standards Dichotomy

The academic literature on the economics of legislation has not been contentious. The conventional model posits an analytical dichotomy between "rules" and "standards"—the former referring to specific laws in general, and the latter referring to vague, ambiguous laws—and proceeds to evaluate the pros and cons of each.[40] In the real world, legal rules span a continuum between these two poles (rules and standards), but the dichotomy is very useful as an analytical tool, and many legal rules do in fact fit nicely into one or the other category. There is broad agreement that legislatures face higher transaction costs for enacting rules rather than standards. Thus, legislators prefer standards, the conventional wisdom holds, as they are less work. The exception to this pattern would be instances where the legislature feels the need to rein in the judiciary by means of more detailed rules. Conversely, the literature in this field assumes that vague, flexible standards impose higher transaction costs on the courts that must interpret and apply the laws and on the citizens who must ascertain how to comport their behavior to the law's requirements.[41] With respect to individual laws, considered in isolation,

38. *See* Christopher Osakwe, *Anatomy of the 1994 Civil Codes of Russia and Kazakhstan: A Biopsy of the Economic Constitutions of Two Post-Soviet Republics*, 73 NOTRE DAME L. REV. 1413, 1438 (1998) (listing essential features of all codes—systematization, topical arrangement/common subject matter, interconnection of sections and chapters, sequential numbering of sections or articles, official adoption by a legislature, and equality with other laws in the jurisdiction).

39. It is worth noting here, though, that continental legal systems began adopting codes mostly after the American and French Revolutions, contemporaneous with Bentham launching the first codification movement in Britain and the United States. *See* COOK, *supra* note 2, at 75. "Historically, the modern [era of law] is inaugurated with the enactment of the classical codes in Tuscany (1786), Austria (1787), France (1791 and 1810), and Bavaria (1813), which limited the use of torture and the death penalty and introduced fixed punishments according to law." Farmer, *supra* note 24, at 399.

40. *See, e.g.*, PARISI & FON, *supra* note 1; Ehrlich & Posner, *supra* note 1; Kaplow, *General Characteristics of Rules, in* PRODUCTION OF LEGAL RULES, *supra* note 1; Luppi & Parisi, *Rules Versus Standards, in* PRODUCTION OF LEGAL RULES, *supra* note 1.

41. PARISI & FON, *supra* note 1, at 6–13.

these principles are sound, and so far, no significant dispute has arisen in the literature on these points.

The problem is that codification, at least in its U.S. form, turns these principles on their head. Once the legislation takes a codified form (topical arrangement, numbered sections and subsections, indices, etc.), the transaction costs of new legislation decrease dramatically, both in absolute terms and relative to standards—the format or template invites details, precision, and complexity. At the same time, the growing complexity and scope of the statutes or code impose increasing information and compliance costs on the courts and the citizens.[42] A particular lacuna or provision of the code may be easier to interpret or follow than an ambiguous standard, but at some point, this savings gives way to the fact that there is too much law to know.

Francesco Parisi has made the two major contributions to the literature in this field, with his volumes *Economics of Lawmaking*[43] and *Production of Legal Rules*.[44] These texts set forth the consensus view about rules and standards—that detailed legislation is costlier for legislators but cheaper for everyone else. Peter Schuck has included the rules-and-standards dichotomy in his discussion of legal complexity,[45] developing the point made by Parisi and others that flexible standards can, over time, contribute to the complexity of the law by injecting uncertainty into the system and generating numerous exceptions to the standard, with each exception functioning as a new standard.

Richard Posner, in recent editions of the *Economic Analysis of Law,* mentions the possibility of information costs distorting the rules-standards comparison on a systemic level, but he does not connect this with the advent of codified statutes.[46] Instead, he mentions it merely as a possible outcome of chronic legislative precision;[47] but points he makes earlier in his text[48] about standards being cheaper for legislatures to enact would seem to function as a self-limiting principle on this possibility. In other words, legal complexity should not result from pervasive precision because the legislature normally has ample incentive to avoid precision. On the receiving end, Posner states repeatedly that precision is not only cheaper for courts and citizens,[49] but also creates loopholes for compliance[50]—a benefit that citizens miss with standards that are more ambiguous.

42. *See id.*
43. *See id.*
44. *See* Luppi & Parisi, *Rules Versus Standards, in* PRODUCTION OF LEGAL RULES, *supra* note 1.
45. *See* SCHUCK, *supra* note 32, at 11–25.
46. *See Posner*, *supra* note 1, at 750–51.
47. *See id.*
48. *See id.* at 409.
49. *See id.* at 335–36, 747–48.
50. *See id.* at 665, 749.

B. American Codification: A Brief History

There were three main codification movements in U.S. history.[51] Jeremy Bentham and his followers wanted a perfect code that would displace the common law system entirely[52]—a code consisting entirely of rules deduced by utilitarian logic (the latter point differentiating it from the Napoleonic Code, for example, which partly followed French legal traditions).[53] This first codification movement attracted a few well-known adherents in the United States—most notably Justice Story[54]—but faced too much resistance from the legal establishment, which was entrenched in the common law system. This movement subsided, but revived a generation or so later with Field's Code and similar texts that gained acceptance in Western states joining the Union at the time. Proposed codes from this period also received serious consideration in New York State, and simple versions gained adoption in some South Atlantic states as well.[55] By 1894, approximately one-fourth of the states at the time had embodied their statutes in a "code."[56] The third wave[57] came in the early twentieth century and gained significant momentum from the creation of the NCCUSL and the ALI, and their subsequent achievements.[58]

A parallel development occurred during this same period on the federal level—the federal government enacted the Revised Statutes at Large in 1874,[59] the first complete compilation of federal laws[60] which replaced all previous enactments of Congress up to that point and was an

51. The movements generally follow the pattern of a Hegelian dialectic. *See* Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 COLUM. L. REV. 681, 705–06 (1951) (applying Hegelian dialectic to the codification movement and the eventual hybrid result).

52. *See* COOK, *supra* note 2 at 74–75, 97–106 (discussing the academic debate about the degree of influence Bentham had on later U.S. codifiers).

53. For a discussion of the influence of the Napoleonic Code on the U.S. codification movement, see *id.* at 71.

54. *See id.* at 48–50.

55. *See generally* CLARKE, *supra* note 25, at 33–43, 263–341 (1898 survey of the codification movements up to that point, describing the major advocates on each side and summarizing their arguments).

56. *See* Jones, *supra* note 2, at 560.

57. A Hegelian historian might call this phase the synthesis. *See* Patterson, *supra* note 51, at 706–07.

58. GILMORE, *supra* note 4, at 69–70 (describing the decline of the first codification movement before the Civil War, and the sudden revival of interest—and widespread adoption of codes—in the late nineteenth and early twentieth centuries). Gilmore attributes the movement's resuscitation and triumph partly to the fact that the English—who had always rejected codification for themselves—had produced an impressively Benthamite code for its largest remaining colony, India, which in turn might have inspired American legal experts to revive the codification movement themselves. *See id.* at 70–71.

59. *See* MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 150–52 (9th ed. 1989); Michael J. Lynch, *The U.S. Code, the Statutes at Large, and Some Peculiarities of Codification*, 16 LEGAL REFERENCE SERVICES Q. 69, 70–72 (1997). For the best historical and practical discussion, see Mary Whisner, *The* United States Code*, Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 549–53 (2009).

60. Congress first commissioned publication of the Statutes at Large in 1846, but each volume had its own index, which made it too difficult for lawyers and judges to use. *See* COHEN ET AL., *supra* note 59, at 151.

important step in the evolution of modern codes.[61] Federal codification gained traction in the early twentieth century; Congress approved the creation of the U.S. Code in 1926–27,[62] with important limitations,[63] and most states adopted *revisions* or codes around that time that took similar form—topical arrangement, sequential numbering, indexing, incorporation of other sections by reference, and so on. By the time of the New Deal, the modern framework was in place, which helped facilitate the torrent of legislation that met resistance at the end of the *Lochner* era; this statutory proliferation was the vehicle of the New Deal restructuring of the legal system.

Contributing to the movement on the state level was the NCCUSL and the ALI generating uniform codes (such as the Uniform Commercial Code and the Model Penal Code) and the Restatements. Many states adopted these model codes (especially the Uniform Commercial Code and sections of the Model Penal code[64]), and to a lesser extent the Restatements,[65] in whole or in part as their own statutes.

The form of codification that took root in the United States actually merged essential features of Bentham's codification ideal with the earlier system of common-law courts and Parliamentary enactments.[66] The difference between the modern system and the traditional system is that Parliament, and then Congress for its first 150 years, would enact public acts or statutes at large on sundry topics, published in simple chronologi-

61. Roscoe Pound and other writers from his period claimed that the emergence of topical legal treatises in the nineteenth century diluted the demand for a code and functioned as substitutes until the early twentieth century. *See* COOK, *supra* note 2, at 204–09.

62. COHEN ET AL., *supra* note 59, at 152; Tress, *supra* note 2, at 136–38, 148–50; Whisner, *supra* note 59, at 549–52.

63. The U.S. Code is technically not law itself, but is *prima facie* evidence of law. Only the Revised Statutes at Large are "legal evidence of laws," or absolute law, except where Congress explicitly adopts a section of the U.S.C. as positive law, which it has done for about forty percent of the Code. *See* 1 U.S.C. § 112 (2012); 1 U.S.C. § 204 (2012); COHEN ET AL., *supra* note 59, at 152; Tress, *supra* note 2, at 148–50; Whisner, *supra* note 59, at 549–52.

64. *See* Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1943 (2010) ("Since 1962, the Code has been the model for the codification of criminal law in three-quarters of the states and, for the most part, has represented the epitome of instrumentalist thinking.").

65. Restatements more commonly influence the courts as a proxy for precedent rather than becoming legislative enactments or statutory provisions. *See* Nelsen v. Nelsen, 23 P.3d 424, 428 (Or. Ct. App. 2001) (suggesting Restatements do not become legislation); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures,* 143 U. PA. L. REV. 595, 608 n.33 (1995) ("[L]egislatures do not enact restatements."). Even so, there are instances where legislatures have indeed adopted Restatement sections as part of their code. *See, e.g.*, Hughes v. Tobacco Inst. Inc., 278 F.3d 417, 425 (5th Cir. 2001) (noting that part of the legislature's stated purpose in amending its statute was to adopt the relevant Restatement section verbatim); *In re* Eli Lilly & Co., Prozac Prods. Liab. Litig., 789 F. Supp. 1448, 1452 (S.D. Ind. 1992) (noting that its state statute tracks the language of the relevant Restatement section nearly verbatim); Senn v. Merrell-Dow Pharms., Inc., 751 P.2d 215, 217 (Or. 1988) (noting state legislature had adopted the verbiage of the Restatement for its product liability statute); Garrett v. Chapman, 449 P.2d 856, 860 (Or. 1969) (stating the legislature intended to adopt rule from relevant Restatement section); *see also* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 40 (1994) (noting a trend of legislatures borrowing from Restatements). Courts sometimes urge legislatures to enact Restatement sections as statutes. *See* Convergys Corp. v. Keener, 582 S.E.2d 84, 87–88 (Ga. 2003) (Sears, J., concurring); Estate of Jeruzal v. Jeruzal, 130 N.W.2d 473, 481 (Minn. 1964).

66. *See* Jones, *supra* note 2, at 559 (discussing the "modified form of codification" embraced by the U.S. codification movement in the late nineteenth century).

cal order (if at all). There was no official text that contained all the legislation on a topic, like property transfers or crimes, currently in force.

Beginning in the 1600's, a few privately-produced compilations and digests appeared,[67] but it was hard to know whether an author had read every act of Parliament or Congress from all time to catch everything that might be relevant. It was even difficult to determine whether a statute had been repealed or replaced by subsequent enactments that the digester had not found.[68] It was also difficult for the courts (and even more so the lawyers and citizens) to ascertain the statutory law on a point with complete certainty, except for a few well-known exceptions (e.g., Statute of Frauds, Copyright Act).[69] This fact contributed to the primacy of the courts and precedents as the source of law; statutes were less accessible than cases.[70] The same difficulty confronted legislatures themselves—when drafting or debating new legislation, there was endless confusion about previous or existing statutory law on the point.[71]

This noncodified system of legislation affected both legislative drafting and judicial interpretation of statutes. Precodified legislation resembled edicts[72]—more like standards than rules—the Statute of Frauds and the Copyright Acts are examples, and differ in form from modern statutes and regulations.[73] The courts, in turn, treated the primitive legislation like edicts.[74] The primary rules of statutory construction from this common law period all contain the underlying assumption that the legislature had a single, basic purpose for enacting any statute. Courts in this period assumed that legislation was reactive or responsive, addressing a

67. *See* LIEBERMAN, *supra* note 2, at 32–40.

68. *See, e.g.*, COOK, *supra* note 2, at 6 (discussing the unavailability of statutory law in the eighteenth century).

69. *See id.* at 62.

70. *See* CLARKE, *supra* note 25, at 335–37.

71. The adoption of codified statutory systems in the United States did not happen in a vacuum; it coincided, unsurprisingly, with other cultural trends that bear conceptual overlap, such as the introduction and rapid adoption of hierarchical library classification systems by Cutter and Dewey. *See* ALEX WRIGHT, GLUT: MASTERING INFORMATION THROUGH THE AGES 165–82 (2007). The topical sorting, hierarchical logic structure, and numbering systems were a method of information management that suddenly had a burst of popularity in the society; the library system was emblematic of the cultural norm of making books and information more accessible to the public, as codification did with the Statutes at Large.

72. *See* CALABRESI, *supra* note 33, at 5; Desmond Manderson, *Statuta v. Acts: Interpretation, Music, and Early English Legislation*, 7 YALE J.L. & Human. 317 (1995) (discussing, throughout the article, the differences between modern codified statutes and the enactments of earlier periods); *see also* CLARKE, *supra* note 25, at 98 (describing statutes in 1898 before codification); Roger H. Davidson, *The Presidency and Congressional Time*, *in* RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 26 (James A. Thurber ed. 1996) (noting that in modern times, "The number of enacted private bills (that is, granting benefits to named individuals as in pension or land claims) has slowed to a trickle. In the early postwar period, private bills typically equaled or exceeded public laws; today they are rare.").

73. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 17 (1977) (observing that as late as the seventeenth century, there was virtually "no suggestion of a distinction between statute and common law, for statutes were still largely conceived of as an expression of custom"); *see also* HOADLEY, *supra* note 25, at 28 (describing older acts of legislatures as "merely the enactment, into written law, of rules" that were preexisting legal customs).

74. *See* CALABRESI, *supra* note 33, at 5; HORWITZ, *supra* note 73, at 17 (noting that in the eighteenth century, "statutes began to be understood as a command of the sovereign . . . .").

particular problem. In sum, common-law courts treated legislation as situational edicts.[75]

Codification—the U.S. version of it—helped change all this.[76] Congress and state legislatures now draft—and debate—new legislation with more complete knowledge of the existing body of statutory law, and most acts contain indicators about which provisions amend which sections of the existing code.

The courts have responded accordingly. The advent of codes in the United States brought with it a new interpretive approach by the judiciary—quests for the intended meaning of specific words, concerns about the intended reach or scope of legislative provisions, and endless deliberation about how individual enactments affect the balance of powers (between branches or state-federal), and the degree of delegation to other government actors. Justice Frankfurter wrote in 1947 that the newer members of the court "had many more statutes to construe" and that statutes were becoming "increasingly complex, bringing in their train a quantitatively new role for administrative regulations."[77]

Rapid statutory proliferation followed in the wake of codification on both the federal and state levels. Previously (in the nineteenth century), when codification was the subject of much debate and voluminous literature, most advocates asserted that codification would condense the law significantly and make it more accessible; but a few opponents worried that codification would shift the legal system toward statutory law, and that the result would be endless proliferation of statutes through amendment.[78] That prediction was accurate—and is not surprising, as one would expect reduced transaction costs for legislation to result in an increase of legislative output.

C. Statutory and Regulatory Proliferation

It would be imprudent to assert a direct line of causation between codification and statutory proliferation in the twentieth century—the latter being a phenomenon that defies precise quantification and depends upon numerous sociological, political, and technological factors, not a single movement within the legal system. It would similarly be difficult to measure the proportionate impact of, say, the codification movement versus the overall social disruption caused by rapid urbanization, industrialization, and an influx of immigrants in the early twentieth century. Nevertheless, it seems reasonable to make the point that lowering legislative transaction costs (via codification) would increase legislative out-

75. *See* CLARKE, *supra* note 25, at 224–26 (discussing pre-codification judicial interpretation of statutes).

76. Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 628 (1993) (discussing Justice Frankfurter's response to the rapid growth in statutes during his tenure on the Court).

77. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530 (1947).

78. *See* CLARKE, *supra* note 25, at 32.

put, and unprecedented statutory proliferation did indeed follow codification in U.S. history. Given that the model's prediction did in fact occur, it is reasonable to infer, at least tentatively, some causal connection between the two. Codification facilitates proliferation of laws. This is a purely descriptive point, not normative—those who favor more laws and regulation can view codification as beneficial, while those with a deregulatory bent should probably view it as baleful.

In the 1974 Storrs Lectures at Yale Law School, Professor Grant Gilmore observed the profound change in American law that attended the advent of codification:

> Between 1900 and 1950 the greater part of the substantive law, which before 1900 had been left to the judges for decision in light of common law principles, was recast in statutory form. We are just beginning to face up to the consequences of this orgy of statute making . . . . Unfortunately, with "the New Deal, a style of drafting which aimed at an unearthly and superhuman precision came into vogue, on the state as well as the federal level."[79]

Gilmore associates the codification movement itself with the "law is science" movement championed by Langdell and Holmes, which became ascendant after the Civil War.[80] The "law is science" movement, however, ascribes some blame to the advent of West Publishing Company and the sudden availability of an overwhelming number of cases—too many cases for judges or lawyers to distill into coherent precedents. "A precedent-based, largely non-statutory system could not long continue to operate under such pressures."[81]

There is some empirical evidence for the idea that changes enhancing legislative capacity will bring an increase in the number of bills introduced and enacted. Alan Rosenthal and Rod Forth published an impressive empirical study in 1978 demonstrating that legislative capacity directly contributes to legislative production, even controlling for social demands, population growth, industrialization, and urbanization.[82] Legislative capacity includes staff, time, facilities, etc.[83]—but would also include the streamlining that inherently results from systematization, sequential numbering, and indexing—that is, codification.

Codification, of course, is not the only factor contributing to rule proliferation. Societies grow in complexity,[84] requiring expanded rubrics of rights, responsibilities, and ownership. Politicians naturally tend to

79. GILMORE, *supra* note 4, at 95–96.

80. *See id*. at 69–72.

81. *Id.* at 59.

82. Alan Rosenthal & Rod Forth, *The Assembly Line: Law Production in the American States*, 3 LEGIS. STUD. Q. 265, 265 (1978).

83. *See id.* at 286–87 ("The legislature's capacity, as is indicated by its expenditures, appears to have a pronounced influence on law production in the states. . . . [T]he capacity of a legislature appears to influence not only the amount of bills introduced, but the number of bills passed as well.").

84. *See* COOK, *supra* note 2, at 46 (discussing the outpouring of new legislation by the states after the American Independence, attributing it to "increased and various legal needs that constantly arose in America's rapidly developing economy and society in the nineteenth century.").

expand the law because they score points with constituents by passing new laws or ratcheting up penal sanctions but rarely gain supporters by repealing or ratcheting down.[85] Overall, politicians have an incentive to propose new laws to protect their constituents' rights and to criminalize more unpopular activities,[86] so the corpus of legislation and regulations continues to grow. Tensions between the branches of government also add pages to the law books. In a pendulum-type process, courts respond to the politicians' increasingly severe enactments by pushing back, diluting the harshness of statutes by layering on the procedural hurdles, affirmative defenses, mitigated punishments, and by narrowing the reach of the law.[87]

To compound the problem, prolonged seasons of judicial obstruction trigger political backlash, a wave of even harsher laws or mandatory sentences, to offset the perceived judicial leniency.[88] This back-and-forth between the legislature and the judiciary lengthens the roster of enactments and mandatory guidelines for courts to follow.[89] Yet where legislative transaction costs are lower, all of these influences work more effectively, and the codebooks grow. To the extent that codification lowers the legislative transaction costs, it accelerates this political-based ratcheting effect.[90] Many factors can affect the production rate of the legal system, but codification facilitates all of these influences by making legislation easier.[91]

III. CODIFICATION AND LEGISLATORS' TRANSACTION COSTS

Codification, once in place, lowers the transaction costs for legislators in several ways. It significantly reduces information costs (a subset of transaction costs) about the current statutory framework and existing laws in force. The codified format highlights for legislators both the gaps in the current law and potential conflicts (or other confusing interac-

85. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 81–85, 173–74 (2011).

86. *See id.*

87. *See id.* at 250–51.

88. *See id.* at 252–54 (describing the legislative backlash against a period of judicial leniency); *see also* William J. Stuntz, *Local Policing after the Terror*, 111 YALE L.J. 2137, 2139, 2145–46 (2002).

89. *See* STUNTZ, *supra* note 85, at 81–85, 259–74.

90. Some writers also attribute waves of criminalization partly to anti-immigrant reactions. *See, e.g.*, *id.* at 15–18 (describing the crime waves and reactionary criminal legislation in the wake of the major wave of European immigration in the seventy years prior to World War I); Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1012–13 (1970) (attributing early narcotics prohibitions to anti-immigrant sentiment); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 574–75 (2001) (noting that vice laws, which now predominate the criminal justice system, originally targeted blacks, ethnic minorities, and the poor); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1811–12 (1998) (describing the effect of immigration and class conflict on the development of vice laws); Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1446 (2012) (reviewing WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011)) (connecting waves of criminalization to public reactions against immigration).

91. *See* STUNTZ, *supra note* 85, at 162–69, 177–78.

tions) that proposed legislation would have with extant provisions. Even apart from these costs, codification reduces the costs of amending or expanding the current law due to the ease of adding new subsections, definition sections, or exceptions.[92] These modification or switching costs (which codification reduces) are another distinct set of transaction costs in legislation. "Like nature, regulation abhors a vacuum, and the existence of one law may create problems requiring more laws."[93]

Beyond the impact on legislative information and switching costs, however, a collateral effect is that codification facilitates the Coasean bargains[94] that characterize the legislative process, making it easier for special interest groups to get specific enactments they want.[95] The change in the bargaining field probably also enhances the role of political parties as collective bargaining blocks. Due to the ease of amendments, codification also reduces legislative concerns about uncertainty, a frequent topic in the existing literature about legislative costs. An additional major effect of codification is the facilitation of legislative borrowing, for example, adopting a large section of code, with minor or no revisions, from a sister state, the ALI, or even model-legislation lobby groups like the American Legislative Exchange Council, a conservative nonprofit organization that generates model legislation for adoption by states.[96] The following sections explore each of these effects in more detail.

A. Information Costs

Information costs constituted the chief complaint of the early advocates for codification, especially Bentham and his followers. Carps about legal complexity are present even in classical literature,[97] of course, and appeared in early British political writings such as Moore's *Utopia*.[98]

92. *See* Jones, *supra* note 2, at 565 (describing the technical writing of statutes as the primary transaction cost, rather than the policy or ethical component).

93. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 550 (1983).

94. *See generally* Coase, *supra* note 9.

95. *See* MILLER, *supra* note 2, at 8, 16 (complaining that nineteenth-century codification in California had allowed nefarious corporate interest groups to obtain favorable legislation); SCHUCK, *supra* note 32, at 15–16.

96. Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 555 (2009) ("State legislation also is likely to be introduced in this area and will most likely be based on the approach found in model legislation approved by the American Legislative Exchange Council (ALEC) in August 2007."); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 527–28 (2005) (describing ALEC's sources of funding as well as proposed legislation affecting private prisons); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 675 n.232 (2012) (describing ALEC model legislation, the Private Attorney Retention Sunshine Act, already adopted by ten states); Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1229–30 (2008) (discussing ALEC's model legislation for sentencing).

97. *See* COOK, *supra* note 2, at 51–52.

98. *See* SIR THOMAS MOORE, UTOPIA 87 (Arc Manor 2008):

> They have but few laws, and such is their constitution that they need not many. They very much condemn other nations whose laws, together with the commentaries on them, swell up to so many volumes. They think it an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk and so dark as not to be read and understood by every one of the subjects.

Complaints about legal complexity seem to be a proxy for information costs in most instances, but they sometimes refer to the excessive slowness of the legal process (especially administration of justice) or dilution of democracy. Historically, most complaints about legal complexity rested on the information costs for the citizens.

U.S. codification introduced topical organization, logical numbering, indexing, cross referencing, and incorporation by reference.[99] These techniques are not unique to legislation; they are features of information management in general. Topical organization of laws first emerged in the "digests" promoted by Blackstone and Lord Mansfield.[100] It is difficult to exaggerate the extent to which topical arrangement lowers information costs for drafters—it enables them to look up the current law governing an area, such as successions of estates, where this was relatively impossible before. Topical arrangement invites gap-filling,[101] both within provisions and where a topic is simply missing. Such organization also discourages duplicative and redundant laws, thereby shifting legislative efforts to new topics instead. It allows almost instant comparison with the laws in neighboring jurisdictions on a given topic.[102]

Consecutive section numbering[103] itself is also extremely important for four main reasons. First, it streamlines conversations, debates, and negotiations among legislators by allowing the passage of references to specific section numbers rather than quotes of the text: *"We must amend Section 123.45 to exclude state employees or individuals having a conflict of interest. . . ."* Numbering makes cross-references and incorporation by reference much easier.[104]

These are now ubiquitous—without them, the page length of modern codes would become unimaginable—but this also shows that modern codes, for all their bulk, mask a much greater volume of statutory law,

99. *See* Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1092 (1988) ("But the American style codification takes on a particular importance because it makes law accessible through its organization, its precision, and its constant updating. The formal organization of these codes is meant to make their updating easy.").

100. *See* LIEBERMAN, *supra* note 2, at 32–35.

101. Judicial analysis of legislative history often reveals a *gap-filling* intent in the enactment of amendments. *See, e.g.*, Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 184 (1997) ("The Court simply concluded from the legislative history that Congress meant to fill 'an interstitial gap' . . . ."); Califano v. Yamasaki, 442 U.S. 682, 699 n.13 (1979) ("[T]he legislative history . . . points only to language indicating that § 205(g) was intended to fill a gap in the original Act."); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 512 (1962) ("[T]he entire tenor of the 1947 legislative history confirms that the purpose of § 301, like its counterpart in the Case bill, was to fill the gaps in the jurisdictional law . . . ."); United States v. Ehle, 640 F.3d 689, 698 (6th Cir. 2011) ("Indeed, the legislative history of the 1990 amendments . . . indicates that the crime of 'knowingly possessing' child pornography was meant as a gap-filling provision . . . .").

102. Electronic databases, designed to work well with Boolean word searches, undermine this side-by-side comparative component of codes, shifting the inquiry toward verbal similarities; we lose the turn-the-page effect that codes originally brought to statutory research.

103. *See* Louis F. Del Duca et al., *Simplification in Drafting—The Uniform Commercial Code Article 9 Experience*, 74 CHI.-KENT L. REV. 1309, 1313 n.15 (1999) (describing the adoption of subsections with numbering in the UCC in the 1990's).

104. *See* LAW REVISION COUNSEL, *supra* note 3 ("Streamlined citations.--Statutory citations in court documents, legal academic papers, and other legal work are streamlined as a result of positive law codification.").

compressing the real length via the device of cross-references or incorporations.[105] After the numerical codification of the law was in place, legislators could save time and verbiage by incorporating other specific sections.[106] Incorporations by reference, for example, not only save time in drafting/enacting legislation that refers to a previously existing subsection; it also empowers a legislator to change the reach of dozens of statutes at once by altering the subsection to which they all refer.[107] Clause-subordination, in contrast to incorporations by reference, allows legislators to tweak one subsection without risking unwanted spillover effects—i.e., that a court would later apply an amendment laterally to an unrelated, higher-ranked provision.[108]

Numbering enables a host of different indexing techniques—helpful not only for researchers,[109] but also for legislators who want a proposed act codified at various places throughout the code.[110] Numbering, via in-

105. *See generally* F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201 (2008) (analyzing different types of referential legislation and analyzing the interpretive issues with each); John Mark Keyes, *Incorporation by Reference in Legislation*, 25 STATUTE L. REV. 180 (2004) (describing the drafting technique of incorporation by reference, and its advantages and disadvantages, with suggestions on when its use is most appropriate).

106. *See* William D. Popkin, *Incorporation by Reference*, *in* A DICTIONARY OF STATUTORY INTERPRETATION 127–29 (2007). "The common law rule was that a statute which incorporated another statute by *general* reference included later amendments of the incorporated law [i.e., references to *the laws of this state*], but a *specific* reference to a prior statute did *not* include [later amendments to the incorporated provision—it was frozen in time]." *Id.* at 127. The Uniform Statute and Rule Construction Act § 12 (1995) changes this rule and makes later amendments to a specifically incorporated provision effective on the referring statute as well. For more discussion on referential legislation, see Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261 (1941).

107. *See* LAW REVISION COUNSEL, *supra* note 3 ("Even when no words are changed, improvements in form may make the text more understandable. For example, an overlong and complex provision may be broken down into labeled parts to aid the reader in following the text and focusing on relevant material.").

108. *See* Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1057–58 n.61 (2005):

> The difference between the numbering of Title VII and other similarly structured statutes is noticeable and potentially significant. This is true despite the facts that Congress does not explicitly oversee the numbering of statutes at codification (that task falls to the Office of Law Revision Counsel) and that Congress did not write Title VII with the structure adopted in the codification; the statute, as passed, featured definitions in the first section, followed by substantive provisions in stand-alone sections subsequently numbered. Despite the differences between the initial legislation and the codification, the U.S. Code is the primary source for substantive federal law, and, to the extent that structure affects interpretation, it is the structure of the codification that informs those efforts.

(internal citation omitted).

109. For an interesting case about intellectual property in consecutive numbering of code sections, see Howell v. Miller, 91 F. 129, 138–41 (6th Cir. 1898); *see also* L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 725 n.16 (1989) (providing a history of litigation by Illinois and Texas to claim the numbering of their statutes as part of the public domain, rather than property of West); Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 183 n.22 (1998) ("The organization and numbering schemes of some statutory compilations were specifically designed or adopted by the legislature or a state agency, but the organization and numbering of other codes or parts thereof were created by publishers."). The numbering of the U.S. Code is in the public domain. *See* Peter B. Maggs, *The Impact of the Internet on Legal Bibliography,* 46 AM. J. COMP. L. 665, 666 (1998).

110. *See* Jean McKnight, *Finding Illinois Law Researching Illinois Statutes*, 85 ILL. B.J. 135, 135 (1997) ("This numbering makes it easy to locate the section you need using headings on the spines of the code volumes and along the tops of their pages.").

dexing, connects a single legislative product (and Act) with the code as arranged by topic.[111]

Section numbering also lowers the costs of amendments, such as the addition of exemptions, repeals, expansions, and so forth, by allowing legislators to isolate specific provisions (subsections) from the rest of the enactment(s) on that subject.[112] It is much easier and cheaper for the legislature to expand[113] or repeal a single exemption or inclusion than to overhaul an entire act—in other words, numbering and lettering helps legislators visualize and articulate severability. Code numbering also allows logical subordination of provisions, helping legislators express intent regarding the relative importance of sections,[114] to signal which antecedent particular verbiage should modify, and so forth. All this we take for granted today, but it was all much more difficult in the centuries before codification.[115]

Indexing, incorporations by reference, and clause-subordination are all largely the results of numbering, though not entirely—all these are possible without numbering but would be much more difficult. Each of these features reduces legislative transaction costs. Recent commentators have drawn a connection between numbering, hierarchical structuring of statutes, and the overcriminalization problem: "[l]egislatures learned to lighten the burdens on police and prosecutors by enacting descending menus of lesser included offenses such as theft in certain specified places, along with a generous dollop of enhancements and upgrades for various extra motives or attendant circumstances."[116] Topical organi-

111. *See* Vincent C. Henderson, II, *The Creation of the Arkansas Code of 1987 Annotated*, 11 U. ARK. LITTLE ROCK L.J. 21, 29 (1989) ("The principle behind the new numbering system is that, insofar as possible, every hierarchical level (title-chapter-subchapter-section) within the Arkansas Code will be linked to a unique number.").

112. *See* Mahaffey v. State, 316 S.W.3d 633, 644 (Tex. Crim. App. 2010) (noting that the codification process "involves the transfer of provisions from the revised civil statutes into 'codes' that arrange the statutes in a more logical order, employ a numbering system designed to facilitate citation of the law and accommodate future expansions of the law, [and] eliminate provisions that are duplicative or no longer effective"); Medical City Dallas, Ltd. v. Carlisle Corp., 251 S.W.3d 55, 59 n.2 (Tex. 2008) (noting that the numbering of sections in the state code was "designed to facilitate citation of the law and to accommodate future expansion of the law").

113. *See* Henry G. McMahon, *The Louisiana Code of Civil Procedure*, 25 F.R.D. 287, 304 (1960) ("This [numbering] system was adopted to permit the continuous revision of the new code after adoption, by the inclusion in appropriate places thereof of special procedural statutes adopted by the legislature in the future."); Jefferson B. Fordham & Carroll C. Moreland, *Pennsylvania's Statutory Imbroglio: The Need of Statute Law Revision*, 108 U. PA. L. REV. 1093, 1118 n.118 (1960) ("Ohio made provision for the insertion of new material in its code by skipping the even numbers in numbering titles, chapters and sections.").

114. *See* United States v. Nader, 542 F.3d 713, 719–20 n.6 (9th Cir. 2008) ("The sequential numbering of the Travel Act, and the original version of the murder-for-hire statute . . . show that the murder-for-hire statute was intended to supplement the Travel Act.") (internal citations omitted)).

115. *See* Richard C. Wydick, *Should Lawyers Punctuate?*, 1 SCRIBES J. LEGAL WRITING 7, 17 (1990) (discussing pre-codification environment).

116. Weisberg, *supra* note 90, at 1445 (paraphrasing STUNTZ, *supra* note 85, at 81–82); *see also* United States v. Loniello, 610 F.3d 488, 492 (7th Cir. 2010) (discussing and rejecting defendant's argument from section numbering that the statute could contain only one crime).

zation, numbering, and subordination of subsections or clauses all work toward greater ease of amendment or expansion.[117]

Codification allows for—or even invites—micro-legislation, minor tweaks that can pass as riders on another bill.[118] A number of U.S. states eventually passed statutes or constitutional amendments to limit or prevent this type of practice—"logrolling,"[119] omnibus bills,[120] and substantive legislation attached to budget legislation (which is not codified).[121] Congressional rules forbid logrolling on the federal level.[122] In essence, these are rules forbidding the blending of codified and uncodified law in the same bill. Substantive provisions such as riders could, of course, occur before the advent of codification, in the era of edictal statutes—an omnibus bill could have included numerous specific edicts. Codification makes this less cumbersome, however, because substantive provisions can be minor alterations to an existing corpus or text[123]—this is much easier than *de novo* statutes or legislating from scratch.[124] Codification can help legislators work around prohibitions on logrolling or omnibus bills by making a rider so terse that it appears to be outside the category of "substantive legislation," and therefore permissible.[125] In other words, codification helps create a gray area or margin for short riders that amend an existing code section; such microlegislation can fly under the radar but still have serious impact.[126]

A final way that codification reduces legislative transaction costs is that the code functions as a Hartian rule of recognition for legislators. Even where the code is only *prima facie* evidence of the law, as with the U.S.C., this is normally sufficient as a rule of recognition—a quick signal

117. *See* LAW REVISION COUNSEL, *supra* note 3 (discussing how codification streamlines the amendment process).

118. *See* Easterbrook, *supra* note 93, at 550; Tress, *supra* note 2, at 138–43 (describing in detail how riders to federal appropriations bills function as temporary legislation but do not appear in the U.S.C.).

119. *See* SCHUCK, *supra* note 32, at 17.

120. *See* Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 651 (2012) (discussing the recent trend of large, consolidated omnibus bills, allowing legislators to "avoid individual hard votes on controversial issues by packaging those issues with other measures that command broad support").

121. *See, e.g.*, Daniel F.C. Crowley et al., *Perspectives on Dodd-Frank Wall Street Reform and Consumer Protection Act*, 7 J.L. ECON. & POL'Y 307, 308 (2010) (discussing important statutory amendment "housed in such a huge omnibus bill" that it "largely went unnoticed as all the other provisions went through").

122. *See* Tress, *supra* note 2, at 139–42.

123. *See id.* at 139–43.

124. *See id.*; *see also* Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 464 ("Therefore, limitation riders are often introduced on emotional issues where the stakes are high. At other times, members of Congress introduce limitations riders out of sheer frustration with the committee system.").

125. *See* Tress, *supra* note 2, at 142 (discussing ways in which House rules fail to stop substantive riders from passing through—with hundreds of instances in a single legislative term); Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Bills*, 12 J.L. & Pol. 481, 510–11 (1996).

126. *See id.* at 513 (explaining how legislative waivers "might actually decrease the cost of 'purchasing' rent-seeking legislation, thus encouraging interest groups to pursue their ends through the coercive and wealth-reducing legislative process instead of through consensual and value-increasing market exchanges"). When interest groups find it too difficult to move their desired legislation out of a relevant committee, they can lobby the Appropriations Committee instead to add a rider onto upcoming appropriations measures that accomplishes the same result. *See id.*

as to the existing law that controls. Constitutional issues aside, a legislator does not necessarily have to check the case law on a point before legislating about it, although such information might be helpful, because the legislation, if passed, will control. The legislature knows that courts will generally follow (defer to) the code. Courts have additional rules of recognition, of course—binding precedent in the caselaw, constitutional clauses, etc.—but the code is the primary *shared* rule of recognition between the branches of government, especially between the judiciary and the legislature.

B. Coasean Bargains and Public Choice

Legislation inherently involves bargains—typically, a complex series of bargains, both within and between political parties, between legislators and interests groups and sometimes between branches (i.e., the legislature and the executive). From the standpoint of the Coase Theorem,[127] bargains are more likely to occur when transaction costs are low.[128] Codification lowers legislative transaction costs; legislative bargains are therefore more likely to occur. The two most obvious results are (1) a greater quantity of legislation will pass, and (2) special interest groups can more easily obtain specific legislative favors.[129] More subtle effects include (3) other rules or procedures governing the legislative process have less import—a corollary of the Coase Theorem,[130] and (4) political parties become more important as collective bargaining units, giving the appearance of more partisan gridlock which functions as a counterweight to an otherwise excessively easy legislative environment. Each of these four effects merits individual attention.

The Coasean bargaining[131] illustrates how codification triggers statutory proliferation. Codification lowers transaction costs, which makes legislative bargains easier to initiate and consummate, so bargains become more frequent and plentiful. This affects both the number of statutes and their complexity. The former is easier to see—more bills will pass as legislative bargains become easier.[132] Complexity is secondary;

127. *See generally* Coase, *supra* note 9. Coase's article is widely considered to be the most-cited article of all time in legal scholarship. *See, e.g.*, R. H. Coase, *The Problem of Social Cost: The Citations*, 71 CHI.-KENT L. REV. 809, 809 (1996); Farber, *supra* note 9, at 399; Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1189 (1989).

128. *Cf.* Jonathan R. Macey, *Transactional Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 478–79 (1988) (pointing out that the transaction costs do not actually have to be that low—a purely rational actor will invest $99.99 to get $100 from the government, while a more *rational* rational actor will still spend a good deal of money). Macey also points out that these costs are highly inefficient—it is money spent to transfer wealth, rather than money spent to generate wealth, and represents a *deadweight cost*. *Id.*

129. *See* SCHUCK, *supra* note 32, at 16–17.

130. *See* Dru Stevenson, *Jury Selection and the Coase Theorem*, 97 IOWA L. REV. 1645, 1654–58 (2012).

131. Coase, *supra* note 9, at 3–6 (rancher vs. crop growers), 8–10 (noisy confectioner adjacent to family physician's office), 10–11 (smelly production of woven mats irritating neighbors), 11–13 (smoke nuisance to neighbors).

132. *See* James H. Fowler, *Connecting the Congress: A Study of Cosponsorship Networks*, 14 POL. ANALYSIS 456, 456 (2006),

while there will be a tendency for unimpeded bargaining to result in "something for everyone," often resulting in a lengthy, complex, kitchen-sink bill, some compromises will produce intentional ambiguity so that neither party gets explicitly favorable language.[133] Even so, statutory complexity or precision can still creep in through subsequent amendments, expansions, and other microlegislation.

Perhaps the most disturbing aspect of codification is the way it empowers special interest groups. This was actually one of the main objections to codification in the nineteenth century,[134] an objection that helped delay the codification process by decades. The concern was that it would facilitate populist disruption of the legal system and enable radical redistribution of wealth. The original concern was about redistribution from the rich to the poor (that is, the property owners and their retained lawyers feared codification), but today many who are concerned about special interest groups are worried about corporate interests enhancing their perks and privileges via the legislature.[135]

A more subtle effect of codification on legislative bargaining is the dilution of various rules surrounding the negotiations, such as parliamentary procedures (including filibusters and cloture), separation of powers, federalism, and various safeguards emphasized by the legal process school. The Coase Theorem suggests that *ex ante* legal rules and entitlements matter less when parties can easily transact around them.[136] From this perspective, transaction costs—the things that prevent people from agreeing automatically—are what animate the legal rules, or give them their verve.[137]

Of course, transaction costs are never zero (a point Coase himself emphasized[138]), and the import of the relevant legal rules or assignment of rights thus correlates to the actual transaction costs that are present.[139]

("Connectedness predicts which members will pass more amendments on the floor, a measure that is commonly used as a proxy for legislative influence. It also predicts roll call vote choice even after controlling for ideology and partisanship.").

133. *See* Katzmann, *supra* note 120, at 650 (discussing "many reasons which account for ambiguous or vague legislation").

134. *See, e.g.*, MILLER, *supra* note 2, at 8, 16 (attributing the favorable legislation obtained by *grasping corporations* in late nineteenth-century California to that state's early move toward codification); *see also* Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 588 (2002) ("In fact, the anticodification pamphlets produced by the city bar association hinted that the code was a plot by plutocratic interests to shape the law in their favor.").

135. Ironically, advocates in the early codification movement in the United States asserted that codification would make the legal system *less* political. *See* HORWITZ, *supra* note 73, at 258.

136. *See generally* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972) (examining "whether and under what conditions a legal decision about liability affects the uses to which resources will be put and the distribution of wealth between owners of resources").

137. *See* Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. 77, 78 (2011) (coining the phrase "Coase Corollary" for the notion that "in a world of zero transaction costs, wealth maximization will occur regardless of the nature and scope of property rights"); *see also* Coase, *supra* note 9, at 15–19; R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 178 (1988) ("The same approach which, with zero transaction costs, demonstrates that the allocation of resources remains the same whatever the legal position, also shows that, with positive transaction costs, the law plays a crucial role in determining how resources are used.").

138. *See id*. at 174–75.

139. *See* Merrill & Smith, *supra* note 137, at 92–99; Stevenson, *supra* note 130, at 1654–58.

Where transaction costs are quite high, bargaining becomes difficult and the legal rules exert more control over the eventual outcome; the converse is also true. Numerous rules surround the enactment of law—legislative (or parliamentary) procedure, separation of powers, and federalism—and each of these become less significant when legislative transaction costs decrease, as with codification.[140]

Codification also affects legislative coalitions, as it makes bargaining easier for everyone involved, by lowering the transaction costs of achieving their respective goals.[141] This leveled playing field for all interest groups[142] creates an incentive to join coalitions to (re)gain bargaining power—hence, political parties take on more importance in a post-codification environment, and the parties are more likely to stabilize into an entrenched two-party system. The last time our country saw the emergence of a major national political party was the generation immediately preceding nationwide codification. The parties function as a collective bargaining system once the Coasean transaction costs for legislation are lower, which is a primary effect of codification. Increased reliance on parties as collective bargaining units, in turn, creates at least the appearance of legislative partisan gridlock. Partisan gridlock, in essence, is legislative friction designed to offset the lower transaction costs after codification occurs.

C. Legislative Uncertainty

Uncertainty plays an important role in the conventional modeling about legislative transaction costs; commentators such as Parisi[143] and Schuck[144] offer three primary observations. First, (vague) standards present legislators with uncertainty about how courts or enforcement officials will interpret the law in the future. Second, legislators face uncertainty regarding future events and circumstances that could make specific rules obsolete or even counterproductive. Third, the courts, officials, and citizens must deal with uncertainty about the legislative intent behind the standards; but they have less uncertainty about the meaning of precise rules. This Subsection addresses the first point—uncertainty from the legislators' vantage point—and later sections will focus on the interpretive problems presented to courts and citizens.

From the legislators' standpoint, codification changes the landscape of potential unknowns. While lawmakers are more certain about the downline interpretation of rules than about standards, codification af-

140. The relative impact or control that each of these exerts over an instance of legislating would be very difficult to quantify, of course, but codification tends to undermine them in any case.

141. As Peter Schuck observes, "Legislators who wish to reduce conflict, minimize rulemaking costs, and reach consensus in the face of their strong incentives to behave opportunistically often resort to complex legislative forms." SCHUCK, *supra* note 32, at 17.

142 *See id.* at 16.

143. *See* LUPPI & PARISI, *Rules Versus Standards*, *in* PRODUCTION OF LEGAL RULES, *supra* note 1, at 47–49.

144. *See* SCHUCK, *supra* note 32, at 11–12.

fects the salience of any enactments, whether specific or vague. Statutory proliferation, which follows codification, creates information costs, and one result is that any changes to the law are more likely to escape notice. This can be disappointing for the legislator hoping for immediate impact or implementation of a new enactment but also means there will be less potential political cost for legislation that would otherwise be unpopular.

With codification in place, new statutory provisions that amend an existing statute—adding or repealing a subordinate subsection, for example—will probably have more salience for courts, lawyers, and officials than an entirely new section or title in the code. Lawyers and judges routinely check the current language of a statute relevant to their case[145] and will notice changes—or at least will follow the current verbiage, regardless of whether they notice what parts are new. A completely new law, however, could go unnoticed and therefore have low implementation or enforcement, unless there is an unusual amount of media attention devoted to it. Codification, therefore, means a legislator has less uncertainty about the impact of a change to existing section of the code (expansions, partial repeals, etc.) than about the impact of a new standalone section or title. A completely new section or title could go unnoticed by an unpredictable number of legal actors for some time.[146]

On the other hand, enacted changes sprinkled around the existing code sections are less likely to elicit political attribution—for better or worse—than an entirely new section or title. The legal actors (judges, lawyers, enforcement officials, citizens) who would notice a small change to an already familiar code section are probably unlikely to associate the change with an individual politician or political party. In contrast, a pioneering enactment, staking out new legislative territory, is more likely to

145. As discussed below, however, one of the problems with statutory proliferation is that judges and lawyers may be unaware of a statute that is somehow relevant to their current case—the main problem with *too much to know* in the legal arena is not knowing what we do not know, that is, the inability to know what one might be missing. Here, the point is that when legal actors are aware of a relevant law, they ought to check its current wording.

146. One recent example would be the new part of the Texas Limited Liability Company Law that went unnoticed for years in court decisions—courts continued to follow the previous rule, now abrogated by statute but unknown to most practitioners. *See* Val Ricks, *Three Suggestions for the Texas Limited Liability Company Law*, 44 TEX. J. BUS. L. 29, 58–60 (2011).

be associated with the name of its legislative sponsor,[147] or to be something voters associate with the current executive or at least one party.[148]

From a legislator's *ex ante* perspective, sponsoring legislation can present political costs and benefits on a personal level.[149] Individual legislators (or an individual caucus) face some uncertainty about whether a proposed enactment will be popular or unpopular in the long term[150] and uncertainty about whether voters will associate the enactment with an individual politician or party. Sprinkled enactments[151] may have less political visibility and attribution than new titles or sections; the latter type provide more potential reward for a politician if the enactment turns out to be a success but more cost if it turns out to be a mistake. A risk-averse legislator, therefore, will probably prefer sprinkling changes throughout the code, especially where the changes could prove ultimately unpopular.[152]

147. For discussion of bill sponsorship and legislator reputation, *see* Gregory Koger, *Position Taking and Cosponsorship in the U.S. House*, 28 LEGIS. STUD. Q. 225, 225–26 (2003) (arguing that bills in Congress have one official or primary sponsor but an unlimited number of cosponsors who endorse the bill, therefore members' motivation to cosponsor is twofold: to provide information of the legislative agenda and to take positions for constituents, donors, or interest groups); Gerard Padró I Miquel & James M. Snyder, Jr., *Legislative Effectiveness and Legislative Careers*, 31 LEGIS. STUD. Q. 347, 372 (2007) ("[S]uperior effectiveness yields electoral benefits for legislators in the form of higher reelection rates and higher probabilities of being unchallenged."); Michael S. Rocca & Stacy B. Gordon, *The Position-Taking Value of Bill Sponsorship in Congress*, 63 POL. RES. Q. 387, 387 (2010) ("[W]hile most voters remain unaware of their representative's positions, members of an attentive public pay close attention to legislators' stances. Representatives know this and use non-roll call forums to signal attentive groups that they are 'on their side.' Groups, in turn, reward representatives sympathetic to their causes with campaign contributions.").

148. *But see generally* Keith Krehbiel, *Cosponsors and Wafflers from A to Z*, 39 AM. J. POL. SCI. 906 (1995) (arguing that individual legislators' preferences, rather than party affiliation, primarily define waffling and consistency on individual bills).

149. *See* Scott R. Meinke, *Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of Direct Election*, 61 POL. RES. Q. 445, 445 (2008) (arguing that "direct election intensified existing electoral incentives in the early-twentieth-century Senate, shifting the audience for senators' reelection efforts with measurable behavioral consequences"); Rocca & Gordon, *supra* note 147, at 393 (noting a strong relationship between bill sponsorship and donations from PACs); Barbara Sinclair, *Washington Behavior and Home-State Reputation: The Impact of National Prominence on Senators' Images*, 15 LEGIS. STUD. Q. 475, 475 (1990) (noting that legislators who often proffer amendments on the floor and ask for roll-call votes are disliked by others); Jonathan Woon, *Bill Sponsorship in Congress: The Moderating Effect of Agenda Positions on Legislative Proposals*, 70 J. POL. 201, 201 (2008) (arguing, using game theoretic models, that low-profile legislators tend to sponsor more radical bills, to garner attention, while high-profile legislators moderate their bill proposals).

150. *See* Wendy J. Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 AM. J. POL. SCIENCE 186, 189 (1999) ("Despite the senator's efforts to judge the possible reaction to a bill, there is always the risk of misjudging the strength of opposition to it. Such miscalculations can harm a senator's reputation, influence, and ultimately the chance to be reelected."); Stephen Frantzich, *Who Makes Our Laws? The Legislative Effectiveness of Members of the U. S. Congress*, 4 LEGIS. STUDIES Q. 409 (1979) (arguing that electorally weak legislators are (or should be) more risk averse in proposing new legislation).

151. By *sprinkled enactments* I mean those scattered across various titles and sections of the code. *See, e.g.*, Inv. Co. Inst. v. Camp, 401 U.S. 617, 619 n.2 (1971) ("The provisions of the Glass-Steagall Act are codified in various sections scattered through Title 12 of the United States Code."); Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2053 n.55 (2012) (noting that the Berne Convention Implementation Act of 1988 (Pub. L. No. 100-568, 102 Stat. 2853) is "codified as amended in scattered sections of 17 U.S.C.").

152. *See, e.g.*, Jay P. Kesan & Carol M. Hayes, *Mitigative Counterstriking: Self-Defense and Deterrence in Cyberspace*, 25 HARV. J.L. & TECH. 429, 509 (2012) (describing a provision of the National Defense Authorization Act that "largely went unnoticed by the public.").

In sum, codification reframes the legislative choices about managing uncertainty.[153] The classic rules-or-standards dichotomy assumes that standards present more uncertainty about their eventual interpretation and implementation, with the caveat that specific rules present uncertainty about unforeseen circumstances for which the specific rules would be a bad fit. This observation about rules and standards is generally correct, but codification superimposes on it a more pressing decision for lawmakers: the tradeoff between salience and attribution.[154] Legislation whose provisions appear scattered throughout the code as amendments to existing sections will be more salient to practitioners (judges, lawyers),[155] and therefore its implementation is more certain than it would be if the legislation were a new stand-alone section or title. On the other hand, scattered code provisions sacrifice political attribution, making it harder for individual legislators or a party to claim or receive credit for the legislation.[156] Of course, escaping attribution can be beneficial for the lawmakers if the law turns out to be unpopular.

A legislative failure may take the form of judicial invalidation rather than simple unpopularity with voters. If courts strike down a stand-alone law, the judicial rejection which renders the lawmakers' efforts futile more easily reflects on the competency of the legislators who sponsored it than, say, it would when courts strike a single subsection that was a legislative amendment.

Codification facilitates severability of unconstitutional portions of the law, and severing a subsection is inherently less severe than invalidating an entire code section or title. For the legislators themselves, the political fallout from a judicial invalidation should be less dramatic with enactments that scatter their provisions throughout the code. Furthermore, codification—especially its feature of subordination of subsections in the layout—arguably gives courts something analogous to a line-item veto when ruling on a constitutional challenge to the law. The precodification form (or template) of statutes, which were more like legislative edicts,[157] lent themselves less to severability of individual provisions.

153. *See* CLARKE, *supra* note 25, at 40.

154. For a helpful discussion of bill sponsorship and issue salience, see generally Carol S. Weissert, *Issue Salience and State Legislative Effectiveness*, 16 LEGIS. STUD. Q. 509, 518 (1991) (empirical demonstration that legislators who introduced bills related to a currently salient issue were rewarded with effectiveness ratings higher than those of other legislators).

155. It appears that the first mention in the legal academic literature of the now ubiquitous phrase "codified in scattered sections . . . of the United States Code" was in 1946, after codification was prevalent throughout the United States. *See* George K. Gardner, *The Great Charter and the Case of* Angilly v. United States, 67 HARV. L. REV. 1, 24 n.38 (1953).

156. Ironically, during the third (and most successful) codification movement, advocates of codification envisioned their system as bringing an end to *scattered* statutory law, meaning statutory topics scattered across the chronologically arranged Statutes at Large. *See* Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 YALE L. J. 132, 136 (1897) ("The true opposition is between codified law, and scattered statute law.") (quoting Ernest J. Schuster, *The German Civil Code* 1 J. Soc'y Comp. Legis. 1, 210 (1895)).

157. *See* CALABRESI, *supra* note 33, at 5.

D. Legislative Borrowing

Justice Brandeis first introduced the metaphor "laboratories of democracy" into our legal discourse[158] and the metaphor has become a meme for federalism.[159] "[T]he power of the States-as-laboratories metaphor has propelled Justice Brandeis' conceit far beyond the sphere of social and economic regulation."[160] The laboratory image conceives of states as experimenting with diverse, innovative policies and laws so that those producing the best results (whatever that means) can become the standard that other states follow.[161]

Susan Rose-Ackerman famously challenged[162] the laboratory metaphor with a twofold critique: (1) many states will opt for freeriding on the innovations of others, and (2) elected officials have incentives to choose policies that will help ensure reelection rather than those that might (or might not) yield true progress.[163] These factors, she argued, make states less likely to innovate, and therefore not serve as laboratories.[164] Despite Rose-Ackerman's critique, an ongoing assumption continues in the academic literature that states compete in terms of legal policy and therefore serve as Brandeisian "laboratories," with Rose-Ackerman's argument minimized along the way.[165] Few would deny, however, that legislative

158. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

159. The meme is a favorite on the Supreme Court, especially in dissenting and concurring opinions. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting) (noting "the interest of the States to serve as laboratories for innovation and experiment"); Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (applying laboratory metaphor to state college admission policies); Atkins v. Virginia, 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting) (discussing "the workings of normal democratic processes in the laboratories of the States"); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 502 (2001) (Breyer, J., dissenting) (calling for a rule of deference "in situations in which the citizens of a State have chosen to 'serve as a laboratory' . . . ."); Boy Scouts of Am. v. Dale, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting) (quoting Brandeis to argue in favor of state antidiscrimination law); Smith v. Robbins, 528 U.S. 259, 275 (2000) (leaving "the more challenging task of crafting appropriate procedures . . . to the 'laboratory' of the States in the first instance.") (quoting Cruzan v. Director Mo. Dept of Health 497 U.S. 261, 290 (1990) (O'Connor, J., concurring).

160. Gilliard v. Mississippi, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting).

161. *See generally* Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009) (surveying the literature and conceptual issues surrounding the "laboratories" idea).

162. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980).

163. *See id.* at 604.

164. *See id.* at 614; *see also* Galle & Leahy, *supra* note 161, at 1337–38. Galle and Leahy argue that "certain regulatory regimes, such as corporate governance regulation, might best be centered at the national level, where collective action problems affecting public officials are lessened" but "that this result would depend on the likely effectiveness of industry itself propagating 'good' regulation, or the effectiveness of contracting regulatory functions out to intermediaries, such as private consulting firms or nonprofit organizations, who might use property rights to more fully capture the gains of policy innovation." *Id.* at 1334.

165. *See, e.g.*, Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011); Michael C. Dorf, *The Supreme Court, 1997 Term-Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60 n.322, 61 (1998); Galle & Leahy, *supra* note 161, at 1337–38; Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Vicki C.

borrowing occurs.[166] Missing from this debate is the issue of codification and its impact on legislative borrowing.[167]

Where transaction costs are lower (as in a codified regime) for new enactments, both borrowing *and* innovation would become more likely. Yet codification probably escalates the former more than the latter. Once a state's statutes are in codified form—sorted topically, with numbered and subordinated sections, indexed, and so forth—it becomes much easier to plug in a code or section, borrowed either from a sister jurisdiction or a model act, to fill a gap or to replace an existing hodgepodge section with a systematic treatment of a legal subject. Codified law makes interjurisdictional comparisons easier, replacement or gap-filling more precise, and the advantages of harmonization more apparent to lawmakers. Just as codification lowers information costs for legislators regarding their own statutory corpus, it also lowers information costs about available alternatives—the laws of other states or those crafted by the NCCUSL—making borrowing cheaper than many commentators seem to have realized. It is very easy, for example, to compare subsection-by-subsection the statutes of several jurisdictions covering first-degree murder or eminent domain. In emerging areas of law, it is straightforward for legislators to ascertain whether their state has a statutory provision for the item under consideration, and if not, to find a model statute that they can drop neatly into the existing business code. This borrowing can also have undesirable results, as seen with the extensive borrowing of anti-immigrant ordinances by municipalities.[168]

The topical and systematic form of codes highlights the appeal of harmonization, rather than competition, with neighboring jurisdictions. While much of the literature has assumed that states compete in a Tieboutian zero-sum game,[169] many legislators may see advantages in lowering legal transaction costs and uncertainty, especially for commercial

Jackson, *Federalism and the Uses and Limits of Power:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2214 n.157 (1988); Shannon K. McGovern, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519 (2011); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 n.47 (1988); Michael S. Mireles, Jr., *States as Innovation System Laboratories: California, Patents, and Stem Cell Technology*, 28 CARDOZO L. REV. 1133 (2006); Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg's Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593 (2008).

166. *See, e.g.*, Galle & Leahy, *supra* note 161, at 1390–91.

167. For more discussion of statutory borrowing between jurisdictions of the British Empire, see Bruce P. Smith, Review Essay*, Imperial Borrowing: The Law of Master and Servant*, 25 COMP. LAB. L. & POL'Y J. 447, 45–53 (2004) (overview of literature on borrowing between portions of the British Empire).

168. *See, e.g.*, Sofía D. Martos, Note, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099 (2010).

169. *See* PAUL E. PETERSON, The Price of Federalism 17–18, 25–26 (1995); Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 AM. ECON. REV. 93, 93, 95–97 (1981); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1161–62 (2000).

buyers from neighboring states.[170] Codification encourages legislative borrowing.

The ease of adoption and borrowing helped the ascent of the NCCUSL and the ALI; codification expanded the market (or at least the demand) for their model codes, uniform acts, and restatements. At the same time, the NNCUSL and the ALI fueled the codification movement in the early twentieth century, providing legislatures with high quality, ready-made code sections on many subjects.[171] The model codes, uniform acts, and restatements come in codified form, with numbering, subsections, and definition sections, so their adoption necessarily contributed to the codified shape of modern state statutes. The accompanying commentary further enhanced the appeal, functioning as both persuasive precedents for the law's interpretation, and as quasi-legislative history. The fact that courts often follow these official commentaries gave new legislators considering adoption more predictive power about the model laws' subsequent interpretation and application.

The traditional rule for borrowed legislation is that the judicial interpretations of the original jurisdiction—up to the time of adoption—are presumptively a component of the adopting legislature's intent regarding meaning.[172] The sister jurisdiction's cases become super-persuasive or near-binding precedent for the adopting state's courts. A significant risk-related cost of any legislation is uncertainty about how courts will interpret it; borrowing a statute from another jurisdiction automatically includes some known judicial interpretations.[173] Further, the legislative history of the statute in the original state becomes part (albeit a secondary part) of the legislative history for the law in the adopting state, allowing legislators to preview some of the historical materials that courts will consider in resolving interpretive issues that have not yet arisen.[174]

Model acts and uniform codes take this advantage to the next level because the judicial interpretations of *any* state that has adopted the same code become highly persuasive precedent for future courts in the adopting jurisdiction. This interpretive custom allows for even more predictability for legislators considering the adopting of such measures.

170. *See, e.g.*, Hans W. Baade, *The Historical Background of Texas Water Law—A Tribute to Jack Pope*, 18 ST. MARY'S L.J. 1, 88 (1986) (discussing the borrowing of codes for water rights among western states).

171. *See* GILMORE, *supra* note 4, at 69–73.

172. *See* Metro. R.R. Co. v. Moore, 121 U.S. 558, 572 (1887); McDonald v. Hovey, 110 U.S. 619, 630 (1884); SUTHERLAND STATUTORY CONSTRUCTION § 52:2 (7th ed. 2012) ("When a state legislature adopts a statute which is identical or similar to one in another state or country, courts of the adopting state usually adopt the original jurisdiction's construction."); UNIF. STATUTE & RULE CONSTR. ACT §20(b) (1995); Note, *Construction of a Statute Adopted from Another Jurisdiction*, 43 HARV. L. REV. 623, 623–24 (1930).

173. *See* S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 626–27 (2001) (discussing the borrowing by courts of precedents and judicial interpretations from similar statutes).

174. For an argument that this type of judicial inquiry should be more prevalent to expose borrowed legislation being promoted by special interest groups, see Martos, *supra* note 168, at 2129–30.

The flip side is that there is an opportunity cost for the legislature that does *not* borrow but that tries to innovate instead.[175] Given that codification has lowered the transaction costs for any kind of enactment, the opportunity cost for not borrowing is actually higher than would have been the case before codification. The legislature could use that time for even more additional enactments than it could before. Codification increases the opportunity cost of *not* borrowing and thus reduces the "laboratory" component of federalism.[176]

Professor Nils Jansen has demonstrated that most "codes" throughout history—whether European or American—have originated with private parties or nongovernmental entities, outside of the legislature itself.[177] Field's Codes, the first to gain traction in the United States, are an example, as are the NNCUSL's Model Acts. Jansen's book chronicles many cases in which this private formation of the codes comes at the behest of a legislature or monarch,[178] but the point is that codes generally do not originate within the legislature itself—they begin as borrowed material for the legislature to enact.[179] The transaction costs for a legislature to switch to codification, therefore, are relatively low, at least in terms of drafting and formulation, contrary to what the law and economics literature has argued. The nonlegislative origin for most codified law should inform our discussions about lawmaking and the political process.

IV. CODIFICATION AND THE COURTS

A. More Statutes, More to Interpret and Apply

Twentieth-century statutory proliferation altered the enterprise of the judiciary, at least regarding the interpretation of statutes. Other commentators have observed that courts escalated their review of the constitutionality of statutes,[180] especially on equal protection grounds, using invalidation both as a way to thin the dense forest of new legislation and as a check against a hyperactive legislature. Canons of construction took on greater importance and refinement, and many in the judiciary developed or embraced overarching philosophies about statutory interpretation—textualism, originalism, and so forth. Judicial opinions became longer and more intricate, as the courts not only needed to address

175. *See, e.g.*, Martin C. McWilliams, Jr., *Thoughts on Borrowing Federal Securities Jurisprudence Under the Uniform Securities Act*, 38 S.C. L. REV. 243 (1987) (discussing South Carolina's adoption of the Uniform Securities Act and the attendant borrowing of judicial interpretations and legislative history from elsewhere as a result). The NCCUSL and the ALI, therefore, have contributed to statutory proliferation in two ways—by providing numerous model acts for easy adoption, and by freeing up legislators to spend more of their time generating even more enactments.

176. For more discussion of the opportunity cost of waiting to legislate, see Luppi & Parisi, *Rules Versus Standards*, *in* PRODUCTION OF LEGAL RULES, *supra* note 1.

177. *See* NILS JANSEN, THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATIONS IN HISTORICAL AND COMPARATIVE PERSPECTIVE 14–18 (2010).

178. *See generally id.*

179. *See id.*

180. *See* CALABRESI, *supra* note 33, at 1–7; GILMORE, *supra* note 4, at 94–98.

relevant judicial precedent, but also needed to analyze and interpret the relevant statutes in more and more cases. To the extent that codification contributes to statutory proliferation, as Parts II and III argued, these effects on adjudication are indirect results of codification. Codification lowered the transaction costs of legislation, which increased legislative volume, which triggered countermeasures, coping mechanisms, and compliance efforts by the courts.

Apart from these responses by courts to an increased volume of legislation, courts simply have more cases to decide—additional statutes provide more grounds for litigation or prosecutions, meaning there will simply be more decisions for courts to write as the statutory system grows in complexity. Bentham and his disciples believed codification and an ascendant legislature would phase out judicial lawmaking and even a significant portion of adjudication but obtained the opposite result.

The academic literature about rules-versus-standards also seems to have missed this part of the equation—that even where statutes are more specific and precise, presumably decreasing the interpretive work for the courts, an increase in the number of statutes means there is more to interpret (more laws) and more to apply (more disputes to resolve).[181] Even if each individual rule requires less interpretive work than a vague standard—a point disputed in the next Subsection—the sheer number of rules to interpret and apply even cursorily can overwhelm any savings gained through greater specificity.[182] Because codification generates proliferation, a multitude of rules can become more labor-intensive for courts than a handful of even the more oblique and mysterious standards.

B. Enhanced Concept of Legislative Intentionality or Purposefulness

Codification also changes the interpretive role of courts endogenously. Inherent in the codified statutes is a tendency to be systematic, comprehensive, and to include definition sections. This codified form of statutes naturally encourages interpreters (lawyers, judges) to focus on legislative intent about the meaning of specific words, rather than the overall purpose of an enactment, which was the main approach in the precodification era, when statutes were more like edicts.[183] This is another point ignored in the rules-versus-standards literature—standards are more edictal and elicit inquiry about the overall legislative purpose, while rules are more technical, suggestive to the reader that the wording

181. *See, e.g.*, PARISI & FON, *supra* note 1, at 16.

182. *See* SCHUCK, *supra* note 32, at 12–13 (stating a similar principle in the rise of regulatory authority and administrative law; the greater technicality, specificity, and density of regulations has led to greater indeterminacy in the application of the law).

183. *See* CLARKE, *supra* note 25, at 29 (arguing, as an opponent of codification at the end of the nineteenth century, that codification would turn jurisprudence from "general reasoning" (the common law approach) toward "verbal criticism"—"[b]ut from the moment you *enact* all these rules, they are adopted and promulgated as positive law, and must be interpreted as such.").

or verbiage was by choice, and therefore individual words elicit an analysis of their "intended meaning."[184]

The shift toward using legislative history to ascertain the meaning of individual words followed the codification movement;[185] it is a logical consequence of the change in the statutes. English courts did not allow any legislative history into their discussions of statutory meaning,[186] but their acts of Parliament lacked the codified attributes of modern U.S. statutes. The resort to legislative history is a natural result of analyzing every word—and this is a more natural enterprise when reading and applying a rule instead of a standard. "In the 'orgy of statute making' ushered in by the New Deal and continued relentlessly through the next fifty years, resort to legislative history became pervasive."[187] This is not to say that rules confer more discretion than standards—normally they do not—but rather that with rules, the exact wording matters due to the inherent precision and specificity of the drafting. Standards may require more through policy analysis from courts, but rules require more linguistic analysis. The need to ascertain the meaning of individual words sent the courts—only *after* codification of U.S. statutes—rummaging through the legislative committee reports looking for clues about the meaning of that individual word, whether it should be narrow or broad.[188]

Two other components of codification exacerbate the judicial focus on word meanings—the format of subordinated subsections and the tendency for legislative amendments to change or remove individual words (or to modify definitions in the definition section[189]). The template of subordinated clauses can give the reader the impression that each subsection is a conceptual subset of the passage at the next step up in the hierarchy. For example, in a hypothetical statute §123.45(a)(3), the words in subsection 3 have a meaning that is a subset of the ideas in (a), which in turn are a component of Section 123.45 of the code. This layout invites careful grammatical analysis (e.g., to which antecedent clause does a prepositional or adverbial clause refer?[190]) and precise comparison of words (e.g., does the word "party" mean the same thing throughout the

184. *See* United States. v. Champion, 387 F.2d 561, 564 (4th Cir. 1967) ("If the words relate to each other, then it is not innovation to say . . . the words used in this section mean 'more . . . .'").

185. *See* Vermeule, *supra* note 16, at 185–86.

186. *See* sources cited *supra* note 18.

187. Wald, *supra* note 17, at 197.

188. This is not to say that the use of legislative history is necessarily inappropriate; rather, that the Supreme Court first turned to this approach in 1892, and it became a regular practice of the Court only in the twentieth century. *See* SOLAN, *supra* note 15, at 116.

189. *See* State *ex rel.* KCP & L Greater Mo. Operations Co. v. Cook, 353 S.W.3d 14, 23 (Mo. Ct. App. 2011) (discussing 2005 amendments changing the statutory definition section of state workers' compensation law); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962, 966 n.26 (1980) ("The twentieth century proliferation of statutory definitions of different crimes is a well-recognized phenomenon.").

190. *See, e.g.*, Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 344 (2005) (invoking last antecedent rule in construing a statute); LAWRENCE SOLAN, THE LANGUAGE OF JUDGES 29–38 (1993); Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 352 n.198 (2002) (providing definitions for last antecedent rule).

entire code section, or does each new subsection provide a new context from which to glean its meaning?).[191]

The second point mentioned above is the tendency for legislative amendments to change or remove individual words. With diminishing costs of enactment for legislators, it becomes easier (and thus more commonplace) for legislatures to pass amendments making discrete changes to the statutory verbiage—adding, deleting, or replacing an individual word.[192] Courts take note of these minute changes and tend to see them as eminently purposeful, that is, judges give more import to that word (or its omission) than they would otherwise.[193]

Codification goes hand in hand with an *expressio unius* interpretive assumption[194]—the judicial assumption that legislative silence is loud,[195] or pregnant with intended meaning. The omission of an item from a statutory provision—especially a codified provision that is evidently systematic and coherent—suggests to courts that the legislature intended to exclude it from the ambit of the enactment. *Expressio unius* is currently out of fashion as an explicit canon or rule of construction,[196] but it seems to linger as a tacit, underlying assumption in judicial opinions.

191. *See, e.g.*, Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 638 (2009) ("This Court has consistently held that § 1447(d) must be read *in pari materia* with § 1447(c), thus limiting the remands barred from appellate review by § 1447(d) to those that are based on a ground specified in § 1447(c)."); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229 (2007) (applying in pari materia rule); Branch v. Smith, 538 U.S. 254, 281 (2003) (applying *in pari materia* rule); United States v. Alaska, 521 U.S. 1, 69 n.5 (1997) (applying *in pari materia* rule); David Ogles, Comment, *Life During (and After) Wartime: Enforceability of Waivers Under USERRA*, 79 U. CHI. L. REV. 387, 404–05 (2012) (describing *in pari materia* canon).

192. *See, e.g.*, W. Elec. Supply Co. v. Abbeville Elec. Light & Power Co., 197 U.S. 299, 302 (1905) (discussing legislative amendment deleting a single word in a South Carolina statute); Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 271 n.268 (2006) (discussing single-word changes in the early amendments to Rule 68); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 541 n.39 (2005) (single word change to federal judicial recusal statute); Phillip T. Kolbe et al., *Bodily Injury Liability and Residential Property Values: Canine Risks*, 34 REAL EST. L.J. 43, 50 (2005) (discussing the addition of specific words to the statute governing tort liability for dog owners); Thomas W. Maddi, Nodak Bancorporation v. Clarke *and* Lewis v. Clark*: Squeezing Out "Squeeze-Out" Mergers Under the National Bank Act*, 51 WASH. & LEE L. REV. 763, 796 n.180 (1994) (discussing single-word change to the National Bank Act); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 248 (1993) (discussing discrete additions of words to the Sentencing Commission statute).

193. *See, e.g.*, Commonwealth v. Seyler, 929 A.2d 262, 266 (Penn. 2007) ("Additionally, significant changes were made to this section of the statute . . . which added specific words such as single incident (internal quotations omitted)) (quoting Commonwealth v. Hake, 738 A.2d 46, 50 (Penn. 1999)); Young v. Hammond, 139 S.W.3d 895, 908 (Ky. 2004) (Cooper, J., dissenting) ("For ease of understanding, I have divided the statute into three paragraphs, enclosing in brackets the language added by subsequent amendments, which are numerically designated, indicating by strike through any language deleted by an amendment (only one word), and emphasizing the language pertinent to the present litigation."). *But see* Lange v. United States, 443 F.2d 720, 723 (D.C. Cir. 1971) ("Almost all of the amendments suggested are made to correct clerical oversights . . . .").

194. Traditionally, the full name of this interpretive canon was *expressio unius est exclusio alterius*, that is, the "expression of one is exclusion of another." BLACK'S LAW DICTIONARY 1830 (9th ed. 2009).

195. *See, e.g.*, Catawba County, N.C. v. EPA, 571 F.3d 20, 38 (D.C. Cir. 2009) (referring to "overwhelming statutory silence").

196. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 387 n.23 (1983).

The modern judicial obsession with legislative intent implies, among other things, intentionality in the phrasing of statutory verbiage, making it unavoidable that lacunae or missing terms will receive mention when relevant to a case, and the noted absence receives some weight. Codified statutes inherently suggest the idea of *expressio unius*, given their systematic form, careful enumeration, definition sections,[197] and rampant cross-referencing (a byproduct of indexed codes); why, the court understandably asks, did Congress not include the crucial word in a list of twenty-seven near-synonyms? The prevalence of this underlying assumption in judicial decisions, in turn, bears upon the legislature the necessity of being exhaustive whenever possible. An evidently well-thought set of laws generates an intent-based interpretation, and intent-based interpretation bids for still more extensive drafting.

C. Hartian Rules of Recognition

H.L.A. Hart proposed a model for understanding legal systems that has become well known to legal philosophers—the idea that legal systems have primary rules (those creating legal duties for the citizens) and secondary rules (the rules underlying the legal system that dictate how it works). These secondary rules, according to Hart, come in three types: rules of recognition, rules of change, and rules of adjudication. The rule of recognition is probably the most important—it is the way members of a particular society recognize what a law is, or the way to distinguish what is a law from what is a custom, ritual, habit, religious practice, and so forth. Hart proposed that the rule of recognition for Great Britain, for example, is "whatever the Queen in Parliament enacts as law. . . ." Commentators since Hart have debated about what might constitute a rule of recognition in the U.S. legal system (or rules—there is ongoing debate about whether there could be multiple rules of recognition, or only one), such as a particular provision of the Constitution.

Rules of change are the protocols within the legal system for making accepted, legitimate changes to the laws that govern the citizenry. This would include the protocols for constitutional amendments, statutory enactments, judicial invalidations of enactments, rules permitting or banning retroactivity, and so on.

Codification on the federal level provides a fascinating illustration of Hart's principles but also demonstrates how rules of recognition and rules of change can interact. Until the Civil War, Congress legislated along the same pattern as the British Parliament—incidental edicts, pub-

197. United States v. Yochum (*In re* Yochum), 89 F.3d 661, 666 (9th Cir. 1996) ("[I]n statutes that contain statutory definition sections, it is commonly understood that such definitions establish meaning wherever the terms appear in the same Act."); Richard L. Barnes, *UCC Article Nine Revised: Priorities, Preferences, and Liens Effective Only in Bankruptcy*, 82 NEB. L. REV. 607, 620 (2004) (explaining how Congress can impose sweeping changes to an area of law "by amending statutory definition sections"); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1780 (2010) (discussing recent judicial reliance on statutory definition sections).

lished annually, typically arranged chronologically. By the 1870's, this had become a morass of disorganized statutes, with great uncertainty about which laws were still in effect, which version of the same law were "official" when numerous versions were in circulation, and which laws prevailed when there were conflicts.[198] As previously discussed, Congress authorized a revision after the Civil War that produced the Statutes at Large—a chronologically arranged compendium—which repealed and replaced all prior enactments up to that time.[199] This was an enormous improvement over the confusion that prevailed before the Civil War[200] but was still difficult to use, as it did not have topical arrangement.[201] In 1926, Congress authorized the publication of the U.S. Code, in tandem with the Statutes at Large, with the stipulation that the former should be prima facie evidence of law[202] while the Statutes at Large are absolute law.[203] In practice, however, legal practitioners normally rely on the U.S. Code,[204] as it is so much easier to use.[205] Where the two differ (which is incredibly rare), the Statutes at Large wins; the Supreme Court has recognized this on several occasions.[206]

Here we see an interesting real-life variation on Hart's rule of recognition, as Congress officially created *two* rules of recognition for the federal legal system. The first, and closest to what Hart imagined, is "whatever Congress enacts as law," which automatically appears in the Statutes at Large. In fact, the Statutes at Large version of an enactment is absolute, regardless of which version of a proposed statute the members of Congress thought they were voting on. The Senate and House versions of a law very often differ—the bills that are the subject of the floor debates and the main vote—and a conference committee representing each house meets to reconcile the two versions. The conference committee's final version then goes to a vote in each house that is typically perfunctory; the legislators behave as if they already passed the bill. This final bill synthesis ends up in the Statutes at Large as absolute or positive law.

Yet Congress explicitly authorized a second workaday rule of recognition when it created the U.S. Code, which sorts the enactments topically, assigns numbers and letters to sections and subordinate subsec-

198. *See* Lynch, *supra* note 59, at 70–71.

199. *See* COHEN ET AL., *supra* note 59, at 149.

200. *See* Tress, *supra* note 2, at 133–36.

201. *See* COHEN ET AL., *supra* note 59, at 150–52; Whisner, *supra* note 59, at 546–50.

202. *See* 1 U.S.C. § 112 (2006); *see also* Lynch, *supra* note 59, at 70–71; Whisner, *supra* note 59, at 547–50; Tress, *supra* note 2, at 136–38, 148–50.

203. 1 U.S.C. § 204 (2006); *see also* COHEN ET AL., *supra* note 59, at 150–52. There is an ongoing reconciliation project to move more and more of the U.S.C. into the *positive law* category, and about forty percent of the U.S.C. is now positive law (endorsed explicitly as such by an act of Congress).

204. *See* Lynch, *supra* note 59, at 73–74

205. Whisner, *supra* note 59, at 546–47.

206. Stephan v. United States, 319 U.S. 423, 426 (1943); *see also* Goldstein v. Cox, 396 U.S. 471, 477–78 (1970); Preston v. Heckler, 734 F.2d 1359, 1367 (9th Cir. 1984); Flensburger Dampfercompagnie v. United States, 59 F.2d 464, 471 (Ct. Cl. 1932); Woner v. Lewis, 13 F. Supp. 45, 47 (N.D. Cal. 1935); Lynch, *supra* note 59, at 74–77. For detailed discussion of what is "missing" from the U.S.C., with suggestions for remedying the problem, *see* Tress, *supra* note 2, at 153–63.

tions, etc. The designation "*prima facie* evidence of law" is exactly how Hart originally defined a rule of recognition—how participants in the legal system can identify a law and distinguish it from non-law. Ironically, the Code itself is not law, according to Congress, but is a rule of recognition—citizens can presume that its contents *are* law until someone demonstrates that the Statutes at Large does not align with it.[207]

Notice the interesting variation on Hart's rule of recognition: the sovereign has decreed, in the form recognized by courts as absolute law (the Statutes at Large) that the federal code may function as a secondary rule of recognition to facilitate quotidian implementation by courts and officials. In quotidian practice, however, the roles are reversed, as the U.S. Code normally functions as absolute law, and many officials and lawyers are barely cognizant of the Statutes at Large and would be surprised to learn that they are higher in the legal hierarchy than the Code. In practice, courts automatically recognize codified statutory provisions as validly enacted law from a duly elected representative legislature;[208] in fact, Congress instructs them to treat the Code as presumptively valid or official.

Codification ties together Hart's rule of recognition and his rule of change because the method for changing statutes is to promulgate a change (which automatically is recorded in the Statutes at Large) but most will recognize the change only when it appears in the appropriate place(s) in the U.S. Code (as it has more salience). In other words, the rule of change is a bit more complicated than Hart described because he did not imagine a dual system with two rules of recognition, one absolute (but largely unused) and the other workaday but slightly tentative. The rule of change must reach each corpus of law—the first (voting on an enactment that will be an addition to the Statutes at Large) necessary to change the absolute law, the second (codification) necessary in order for the change to be recognized. In a sense, then, codification collapses the distinction between a rule of recognition and a rule of change, because the code serves as the rule of recognition *for* the rule of change.[209]

207. *See* LAW REVISION COUNSEL, *supra* note 3 (explaining the entity's ultimate goal: "organizational structure of the law is improved, obsolete provisions are eliminated, ambiguous provisions are clarified, inconsistent provisions are resolved, and technical errors are corrected").

208. *See In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) ("Statutes are law, not evidence of law."); SOLAN, LANGUAGE OF STATUTES, *supra* note 15, at 88.

209. Bentham and subsequent codification advocates emphasized the importance of "notoriety." JEREMY BENTHAM, *Letter to the President of the United States of America (Oct. 1811)*, *in*, 'LEGISLATOR OF THE WORLD:' WRITINGS ON CODIFICATION, LAW AND EDUCATION 5, 13 (Phillip Schofield & Jonathan Harris eds.1998). Bentham's concept of notoriety is seemingly straightforward. His view was that any law that would affirmatively bind a citizen should be plainly understandable and readily accessible to that citizen. In Bentham's view, the rules of the game of life should be known to all and understood by all. *See also* Hezel, *supra* note 21, at 242–43 (explaining that Bentham believed that the Common Law was a perversion of justice because it did not provide proper notice of the law and would therefore only be a vehicle for arbitrary enforcement of law by judges). Bentham's direct solution was to craft a body of laws promulgated by elected representatives that would serve as a type of reference or guidebook, almost like a user's manual for the law. *Id.* at 244.

V. CODIFICATION, PROLIFERATION, AND THE CITIZENS

A. Proliferation and Information Costs

As mentioned in the Introduction, the consensus view in the academic literature has been that rules present lower transaction costs—in the form of information costs—for the citizenry, when compared to standards. Rules are more specific and detailed, so in theory there should be less uncertainty and less need for sophisticated interpretation. Codification seems to invert this relationship due to a rebound effect similar to Jevons Paradox;[210] because codification makes legislation more efficient, the output of the legislature increases enough to cancel out any gains from precision and specificity, at least in information costs. The *quantity* of the law after codification raises the noise-to-signal ratio for a citizen trying to ascertain the legality of some action. The extra noise in the system (due to the accelerated proliferation of statutes) offsets the *quality* gains from codification for individual laws—even though codified laws are clearer and more precise, their quantity creates an information overload problem that leaves the citizenry in roughly the same state of legal ignorance as the precodified scenario.

For the citizenry, codification increases legal information costs due to the proliferation of statutes, which is a consequence of the lower transaction costs for rulemakers (i.e., legislators and regulatory agencies). Even though an individual statute may be clearer and more precise in a codified system, the sheer number of rules, and the quantity of details present information costs that outweigh the benefits of the greater precision.[211] None of this takes a position on the merits of the laws themselves, or on the normative question of whether there is too much law (or how to benchmark that question). The discussion here is descriptive—a fresh look at the transaction costs of legislation after codification takes place. We have misconceived the benefits and costs of codification, overlooked the real tradeoffs involved, and have sometimes obtained the exact opposite of the result that reforms intended.[212]

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210. *See generally* STANLEY JEVONS, THE COAL QUESTION (A.W. Flux ed., 3d. rev. ed. 1906) (discussing the Jevons Paradox, as society uses a resource more efficiently consumption of the resource increases); JOHN M. POLIMENI, ET. AL., THE JEVONS PARADOX AND THE MYTH OF RESOURCE EFFICIENCY IMPROVEMENTS (2008) (providing a historical overview of the Jevons Paradox, including evidence for its existence, and applying it to complex systems); Paul Boudreaux, *The Impact Xat: A New Approach to Charging for Growth*, 43 U. MEM. L. REV. 35, 44 n.29 (2012); Sara C. Bronin, *Building-Related Renewable Energy and the Case of 360 State Street*, 65 VAND. L. REV. 1875, 1887 n.47 (2012).

211. *See* Schuck, *supra* note 32, at 13, 22–23 (recognizing and commenting on the issues here: "if the complex legal landscape contains many pitfalls for the governors, it is *terra incognita* for the governed.") Schuck goes on to comment on the density and technicality of modern laws raising the information costs considerably to the average person. *Id.* at 13–14. Schuck points out that, where possible, cost-bearers will simply contract around the law at higher transaction cost than face the information costs of utilizing the law. *Id.* at 23.

212. See Farmer, *supra* note 24, at 425 ("There are no easy lessons to be drawn from this history, only the difficult conclusion that we have failed to reflect adequately on either the meaning of codification or its impact on the form of the modern law.")

Early advocates of codification imagined that there would be one or two volumes of statutes for citizens to own and read. Today, no state has fewer than twenty volumes of official statutes, and states that are more populous have more than ten times that number. As commonly occurs in the age of information overload, the normal psychological response is to disengage entirely, to ignore the information altogether. The immensity and complexity of the law deters knowledge of its contents.

A larger archive of rules will involve higher search costs to find the rule most relevant to the case at hand, plus uncertainty about whether other rules, elsewhere in the code's corpus, could be at least somewhat relevant as well. A statutory exemption elsewhere in the code can undo the applicability of a rule to an individual case. Some of the information costs are those that characterize the information age in general, regardless of the field—as more information becomes instantly available or accessible, information overload can actually undermine good decision making. The need for sorting mechanisms increases. Yet with legal proliferation there is a second information overload problem—not merely the amount of information available, but the increased number of new legal rules about which to obtain such information.

Standards—general, vague rules—present a certain type of information cost: the need for citizens to construe or interpret them, and the uncertainty about how a court will interpret and apply the standard to the individual case. There is also an agency cost problem between the legislature and the citizenry, as citizens could easily interpret and apply the law differently than the legislature intended. The uncertainty pertains to the semantic scope of the law's wording. Overabundant rules present a different type of uncertainty: whether other relevant rules are present in the code that eluded the initial search (as there is a high noise-to-signal ratio). As subsets of information costs, standards present interpretation or communication costs, along with agency costs, while proliferated rules present various types of search costs. The information costs presented by statutory proliferation have implications for certain important legal doctrines, such as notice and *ignorantia juris*, for the role of lawyers in society and the level of legal compliance.

Information costs are a component of the doctrine of "notice" in our legal system.[213] For example, in *Cheek v. United States*, the Supreme Court refused to apply strict liability to certain income tax delinquencies, observing that the "proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws."[214] Despite the maxim that ignorance of the law is no excuse, courts sometimes excuse defendants who could not have discovered the law's require-

213. *See generally* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1539 (2005) (discussing the relative ignorance of the laws amongst the general public and setting forth a "new model of notice and deterrence that attempts to explain these paradoxes, reconcile some of the apparent inconsistencies and offer guidance for making the laws more effective.").

214. Cheek v. United States, 498 U.S. 192, 199–200 (1991).

ments. This is a type of due process argument, albeit very limited. As Justice Holmes wrote, "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."[215]

The Supreme Court took a new turn in *Citizens United v. Federal Election Commission*,[216] invalidating a campaign finance law due in part to the information costs associated with voluminous regulation:

> These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975 . . . Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'[217]

Professor Mila Sohoni recently commented that this "may be the first modern instance of the Supreme Court treating the volume and complexity per se of a federal regulatory scheme as an unacceptable burden on the exercise of a fundamental right."[218] She describes *Citizens United* as a case in which "the Court incorporated a condemnation of hyperlexis into its holding"[219] and suggests that the Court's holding was "that federal statutory schemes can be (to coin a phrase) 'void for verbosity' when their complexity makes them not easily understandable and they impinge upon a fundamental right."[220] The Supreme Court is now acknowledging an information-overload problem with rule proliferation.

As codification has facilitated the proliferation of statutes and regulations, raising the information costs for the citizenry, there has been a growing dependence on lawyers, and changes in the roles lawyers play, shifting from advocate to analyst. In previous generations, the litigator was predominantly a hired spokesperson, hired partly for his familiarity with the legal system and partly for his eloquence and rhetorical sophistication. While these are still part of the lawyer's skillset, increasingly the lawyer's task is to do statutory and regulatory analysis for the client. Ac-

215. McBoyle v. United States, 283 U.S. 25, 27 (1931); *see also* Coleman v. City of Richmond, 364 S.E.2d 239, 241–43 (Va. Ct. App. 1988) (requiring that the language of the statute provides a person of average intelligence a reasonable opportunity to know what the law expects from him or her, and that it must not encourage arbitrary and discriminatory enforcement of the statute); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 201–12 (1985) (discussing the interrelation of notice and vagueness).

216. 558 U.S. 310 (2010).

217. *Id.* at 324, 334 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). For another example of an appellate court taking a similar approach, see Sampson v. Buescher, 625 F.3d 1247, 1259–60 (10th Cir. 2010) ("The average citizen cannot be expected to master on his or her own the many campaign [laws and regulations] . . . Even if those rules that apply to issue committees may be few, one would have to sift through them all to determine which apply."). *See also* Doctor's Hosp. of Hyde Park, Inc. v. Appeal of Daiwa Special Asset Corp., 337 F.3d 951, 958 (7th Cir. 2003) ("There are an enormous number of state laws, and it might be unreasonable to expect a person . . . to determine in advance the possible bearing of all of them.").

218. Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1600 (2011).

219. *Id.* at 1599.

220. *Id.* at 1600.

cess to, and familiarity with, Westlaw and Lexis databases have also become an important value-add for professional legal services, a feature differentiating the professional from the amateur who proceeds *pro se*. Given the percentage of cases that settle before trial (over ninety percent in both the civil and criminal context), the lawyer's role as a statutory-regulatory analyst, able to ascertain the relevant rules and to predict outcomes, has increased even more.

Some writers have claimed that citizens comply less with the law when they perceive that the laws are too numerous[221]—a subset of the rebelliousness that sets in when governance is perceived to be unfair or oppressive.[222] While not talking about codification as a cause, Peter Schuck has described the delegitimation that results from excessive legal technicality and detailing the law: "its legitimacy—the sense of 'oughtness' that the lawmakers hope will attach to it—is diminished."[223] Regardless of the merits of the rules currently in force, the information overload problem with modern rule proliferation could have the undesirable effect of stimulating illegality—either the citizens flouting the rules, or their showing dismissive disregard for them. Similarly, when proliferation reaches a point where the citizenry knows very little of the law, it undermines democratic values and representative governance. Legislators have less accountability to voters.

Again, there is a historical irony here. Bentham and Austin believed that topical arrangement of statutes would make the law more accessible to the citizenry,[224] possibly obviating the need for lawyers.[225] They believed that if the statutes were "reduced as to *bulk* . . . our laws would be adopted to every man's information, and most persons could spare some leisure moments to be acquainted with their general principles."[226] Providing greater notice of the law to the citizenry was the primary impetus for the American codification movement;[227] the advocates

221. For example, in environmental law full compliance is impossible to maintain at all times due to such detailed and obscure regulations; fair notice is obscured when administrative agencies maintain broad discretion to define what is and is not a violation of the law. *See* JAMES V. DELONG, OUT OF BOUNDS, OUT OF CONTROL: REGULATORY ENFORCEMENT AT THE EPA 35–55 (2002); *see also* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 213 (2002) (arguing that the citizens' perceptions of a law's legitimacy affect their compliance with the law).

222. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 33 (1990); Emanuela Carbonara & Francesco Parisi, *Legal Innovation and the Compliance Paradox*, 9 MINN. J.L. SCI. & TECH. 837, 849–50 (2008); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534 (2003).

223. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 22–23 (1992) (explaining that when "the rules are technical, they will often be opaque to the common mind, common sense, common experience, and even common morality.") Additionally, [i]ntelligible only to experts, the law is likely to mystify and alienate lay citizens whose intelligence it often seems designed to mock."). *Id.*

224. See COOK, *supra* note 2, at 16.

225. *See id.* at 161 ("In effect, codification of the law would obviate the need for the law craft by making the law simple enough for every man to be his own lawyer. Such ideas reflected the radicalism of the democratic approach to law reform through codification.").

226. *Id*. at 16 (quoting BENJAMIN AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF LAW 37 (1786)).

227. *See id.* at 81–89.

of codification primarily wanted the existing law to become more accessible and certain through the process of an official restatement.[228] The law becomes inaccessible as it proliferates, and codification facilitates—even invites—proliferation.[229]

B. Overcriminalization

Penal law is particularly susceptible to the proliferation problem. There is perennial popular demand for punishment of wrongdoers, and politicians cater to this impulse to garner votes.[230] In addition, a less obvious reason for overcriminalization is traceable to Bentham and his utilitarian paradigm that framed his codification proposals. Bentham's utilitarianism led him, in his later legal writings, to espouse punishment of virtually any noncompliance with the code. Once behavior control is an overarching goal, and deterrence the means to achieve it, every act deviating from the ideal must carry at least a token threat of punishment; utilitarianism pushes toward an ever-more elaborate set of threats and inducements.[231]

The explosion in the number of criminal statutes, both state and federal, has been a topic of discussion among commentators for some time. As mentioned previously, some have tried to quantify the problem: Ronald Gainer, former Associate Deputy Attorney General, claimed in 1998 that there were, scattered throughout the United States Code, "3,300 separate provisions that carry criminal sanctions for their violation,"[232] more than one-third of which are concentrated in Title 18, the Federal Criminal Code.[233] John C. Coffee famously estimated that including the Code of Federal Regulations raises the number to 300,000 federal rules that can possibly carry criminal sanctions.[234] Yet quantification of the "level of criminalization" is much more complex than counting statutory sections, as enforcement is uneven across code provisions. For example, all narcotics prosecutions in the federal system, regardless of the controlled substance, fall under the same code section,[235] meaning there are more prosecutions for that one section than over most other code sections combined, and other criminal code sections are rarely, if ever, the basis for a prosecution. Thus, some commentators have taken to counting the words or pages in a state's criminal code to measure

228. *Id.* at 83.

229. *See* Cary, *supra* note 31, at 266 ("Thus, it would seem that the proliferation of statutes sometimes generates, rather than clarifies confusion.").

230. *See* STUNTZ, *supra* note 85, at 173.

231. *See* Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 90, at 577; Stuntz, *Race, Class, and Drugs*, *supra* note 90, at 1831 (1998).

232. Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 53 (1998).

233. *See id.*

234. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991); *see also* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 9–10 (2008).

235. *See id*. at 9.

criminalization instead.[236] Others focus instead on the numbers of prosecutions, or the numbers of inmates incarcerated (alarmingly high), or the length of most sentences being served.

The point here is not to join the fray in debating about how to measure the level of criminalization (which seems to be partly an attempt to measure a metaphor), but rather to talk about the mechanism. William Stuntz has made major contributions to this area, describing various political, judicial, religious, and social trends that escalated criminalization in the twentieth century. In one place, Stuntz approached, in passing, the problem of codification:

> Three mutually reinforcing changes were key: criminal liability rules grew broader, the number of overlapping criminal offenses mushroomed, and the definition of crimes grew more specific. These changes rested on a larger change in criminal lawmaking legislators, not appellate judges, became the nation's chief lawmakers. Instead of restating the common law of crimes, American criminal codes have become more code-like and more expansive.[237]

Stuntz proceeded to argue that overlapping criminal statutes provide prosecutors with more leverage during plea bargaining, by threatening multiple charges and the possibility of consecutive sentences.[238] Greater specificity, he argued, always works in the direction of ratcheting up the criminal law, and specific legislation is normally the product of special interest groups (including lobbyists for prosecutors, police, or prisons) who favor more criminalization and longer sentences, not the reverse.[239] This is a point this Article made earlier—that codification lends itself to accelerated specificity, by lowering the transaction costs for special interest groups to seek new legislation or expansive amendments, and by inviting incorporations by reference, definition sections, and so forth.[240] Stuntz's observation adds a nuance to the argument made thus far, that codification presents special problems in the criminal law arena because the lobbying for new legislation will come almost entirely from one side of the issue. In criminal law, increasing specificity ratchets up the number of offenses, gradations of offenses, and longer sentences—all of which, in turn, strengthen the position of prosecutors both in the bargaining negotiations and at trial.[241]

Codification's impact on statutory specificity has special significance for a particular issue in criminal law—double jeopardy. Specificity generates multiple offenses from the same event of illegality, providing prosecutors with distinguishable charges to bring after a defendant has successfully defended against charges (or already pled guilty and com-

236. *See id.* at 10.
237. STUNTZ, *supra* note 85, at 260.
238. *Id.* at 263–65.
239. *See id*. at 267.
240. *See* SCHUCK, *supra* note 32, at 16.
241. Interestingly, nineteenth century opponents of codification seemed to concede that codification was more suited for criminal laws than civil law, as it would be useful to specify the prohibited activity. *See* CLARKE, *supra* note 25, at 97–99.

pleted a sentence) related to the same activity. The Supreme Court noted this problem in *Ashe v. Swenson*:[242]

> In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. As the number of statutory offenses multiplied, the potential for unfair and abusive re-prosecutions became far more pronounced.[243]

Greater specificity and proliferation of subsections allow prosecutors to heap on charges within a single prosecution for a single criminal event. Some courts have observed this same pattern,[244] as have academic commentators.[245]

Turning to the prevalence of model codes and uniform laws, Professor Stuntz also observed that these off-the-shelf criminal statutes also exacerbated the overcriminalization problem, by leading legislators to adopt a ready-made statute (drafted by legal experts or academicians), an easy road compared to the tedium of tailoring a statute from scratch to the wishes of their constituents.[246] In the criminal context, however, this is particularly problematic, because legislative borrowing makes penal law and sanctions too far removed from local community values and needs, a point that is a major concern for Stuntz. As codified criminal law expands and proliferates (due in part, at least, to the lower transaction costs of legislating), it results in more of the population incarcerated—with an increasingly disproportionate percentage being minorities.[247]

Stuntz, Husak, and other commentators have offered tentative solutions to the overcriminalization problem and have described its many ad-

242. 397 U.S. 436 (1970).

243. *Id.* at 445 n.10 (internal citations omitted); *see also* Notes & Comments, *Twice in Jeopardy*, 75 YALE L.J. 262, 279 (1965) ("But the profusion of offense categories, and the courts' willingness to discern separate offenses in essentially unitary behavior, have made it possible for the prosecutor to frustrate the three policies of double jeopardy."); Note, *Double Jeopardy and the Multiple-Count Indictment*, 57 YALE L.J. 132, 133 (1947) ("This problem has been accentuated by the development, in the quest for more efficient law enforcement, of a drafting technique which extends the coverage of criminal statutes by defining a single substantive offense into a series of separate crimes.").

244. *See, e.g.*, McGlothlin v. State, 260 S.W.3d 124, 127 (Tex. Ct. App. 2008) ("[W]hen a statute prohibits disjunctively separate acts of sexually assaultive conduct, 'this specificity reflects the legislature's intent to separately and distinctly criminalize any act which constitutes the proscribed conduct.'") (quoting Vick v. State, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999)).

245. *See* Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 90, at 512–19 (arguing that that the growing number of statutory offenses means that defendants whose crimes would have constituted a single offense at common law now face punishment for multiple offenses); *see also* Bryon L. Land, *Increased Double Jeopardy Protection for the Criminal Defendant:* Grady v. Corbin, 27 WILLAMETTE L. REV. 913, 918 (1991); Jane A. Minerly, *The Interplay of Double Jeopardy, the Doctrine of Lesser Included Offenses, and the Substantive Crimes of Forcible Rape and Statutory Rape*, 82 TEMP. L. REV. 1103, 1105–06 (2009) ("Due to the growth in number and specificity of statutory offenses, prosecutors increasingly charge multiple offenses arising from a single criminal act or transaction.").

246. STUNTZ, *supra* note 85, at 194.

247. *See* CLARKE, *supra* note 25, at 360–63 (distinguishing codification of criminal law from that of civil law based on the appropriateness of legislative detail and specificity).

verse consequences in detail. Any proposal, however, that seeks to stem the tide of criminalization needs to take more seriously the nature of codification and its unavoidable connection to legislative proliferation. This is not necessarily to suggest the abolition of criminal codes, as codification seems to be here to stay, and will become more entrenched with each wave of *criminal law reform*. Instead, the consequences of codification need to inform the reform proposals to bring a dose of realism to the suggested solutions.

VI. CONCLUSION

The codification process throughout the United States in the late nineteenth and early twentieth centuries brought about a fundamental change in our legal system. Codification lowers transaction costs for legislators. A topically organized, systematically numbered, and uniformly formatted code is easy to tweak with pinpoint amendments and expansions. The greater ease and impact of legislation following codification may incentivize legislators to pass more laws than they otherwise would. Reducing transaction costs of producing legislation also makes it easier for special interest groups to exploit the political process and obtain enactments they want—facilitating the very problem of factions that the Framers hoped to reduce through a system of checks and balances.

The courts have the task of interpreting legislation, and following the widespread implementation of codification, the judiciary's interpretive method shifted noticeably toward the use of legislative history, dictionaries, and other external sources. While judges in previous eras focused on the overall purpose of an enactment—as if enactments were a type of legislative edict—post-codified interpretation delved into the "intended meaning" of individual words and phrases. The codified structure of the statutory corpus suggests and elicits this type of reading—more so than the chronologically arranged Statutes At Large of earlier eras, which made the historical context of legislative texts more evident.

For the citizenry, codification's main impact is indirect: the escalating information costs inherent in statutory and regulatory proliferation, a result that codification drives by suppressing the transaction costs of lawmaking. The most insidious side effect of rule proliferation, however, has been its facilitation of overcriminalization, which has had a tremendous impact on our society. Ultimately, codification has accelerated the very problems in the legal system it was supposed to resolve.

It is not realistic to suggest a reversion to precodified forms of legislation; the trend does not seem to move in reverse, at least historically. Nevertheless, recognition of how our modern structure or form of legal rules can distort our legal system should inform our discussions of lawmaking, legal policy, federalism, and statutory interpretation.