LEGISLATIVE LAWMAKING. Here we have to do with the part of the legal system which is in the form of rules or standards authoritatively promulgated by the lawmaking organ of a politically organized society in advance of decision and ordinarily in advance of action. This part, which consists of commands or prohibitions or, as many put it today, of threats, addressed authoritatively to individuals, or of rules or norms (patterns) of or guides to decision, addressed authoritatively to tribunals, I call the imperative element. In the civil-law system legislation also provides principles, authoritative starting points for reasoning, and defines legal conceptions. In the common-law system, legislation seems to provide principles only to the extent that there may be genuine interpretation by the reason of a statute. Conceptions are to be found defined in codifying statutes. But usually they define common-law conceptions.

Recalling Maine’s well known generalization that the agencies of growth of law are fictions, equity, and legislation, it may be said that the order of their appearance is in a large view (1) special fictions, (2) sweeping changes (sometimes as in equity in Roman law using special procedural fictions) under the cover of a general fiction, and
(3) avowed, deliberate lawmaking. In the first there is a belief or pretence that law is not made or altered. In the second there is a belief or pretence of interpretation or that law of higher authority is discovered and applied. In the third all pretence is given up, and new rules and new standards are avowedly invented and imposed.

It is long before the political organization of a society is well enough developed to take over the work of lawmaking as a proper function of government. Those who exercise the powers of a society in the beginnings of a legal order do not think of making law. They think of recognizing law which has an independent existence as ethical custom or precepts of religion. At this stage the state has not become the paramount agency of social control. The governing authority in a modern state may recognize law found at hand or may make new law. But the idea that law may be made and that the state has not only the power but the duty of making it is relatively modern. It came to Germanic peoples through the influence of Roman law, as it was said, *iuxta exemplum Romanorum*, with the idea of union of all political powers in a sovereign who can make law by exercise of will. Modern legislation comes from Constantinople rather than from Rome. The maturity of law is marked by regular and frequent resort to legislation as the agency of change and improvement. Legislation, indeed, exists before this stage of legislation. What, however, marks the stage of legislation in the development of a legal system is the use of legislation not as an instrument of occasional legal revolution, but as the regular, everyday agency of growth and development of law.

For example, compare in Roman law the period from Augustus to Diocletian with that from Diocletian to Justinian. In the Roman law of the classical era the agency of growth was juristic science largely under the influence of the theory of natural law. The regular, everyday development of the law took place through juristic writing.
Here and there changes were made by occasional statutes but it was not till the third century that the balance begins to incline toward the imperative element. After Diocletian, juristic writing substantially comes to an end, and from Diocletian to Justinian growth takes place through legislation. In the same way compare sixteenth, seventeenth and eighteenth-century English law with that of the nineteenth and of the twentieth century. Allowing for the legislation of Henry VIII and of the Commonwealth, none the less almost all growth down to the nineteenth century took place through judicial decision or juristic writing. On the other hand, the great reform movement of the nineteenth century was legislative. The rise of the Court of Chancery and the absorption of the law merchant marked a reforming of the law through the traditional element. The nineteenth-century reform movement, inaugurated by Bentham, involved a substitution of the imperative for the traditional element. Note also workmen's compensation legislation and the reform of English real property law by legislation in the present century. Compare German law before the empire (the Pandektenrecht) with the German law of the twentieth century in which legislation overwhelmingly preponderates. Also compare the minute American legislation of today on all sorts of matters of private law with the all but purely judicial and juristic development which went before. Unquestionably in the modern state the growing point of the law has shifted to legislation.

In the modern state the chief activities are not war and religion, as in antiquity, but administration and legislation. Both of these are growing at the expense of the traditional element, the purely professional element, in legal systems. Instead of leaving all or nearly all controversies to tribunals which apply traditional guides to decision, the modern state more and more seeks to forestall controversy by legislatively prescribed rules or summarily adjusts relations through administration. Within a generation in common-law jurisdic-
tions administration has replaced judicial application of both legislative and traditional rules and standards over great domains of social control.

Nineteenth-century science of law usually contrasted administration with law. But the real contrast is between administrative and judicial application of law, using the term "law" to mean a body of authoritative precepts as guides to conduct and to determination of controversies. The judicial process assumes an authoritative general rule or standard prescribed in advance of action and a measuring of action more or less mechanically by that rule or standard. It is true there is in practice no small administrative element in judicial decision. Nevertheless the ideal is one of treating each case as an example of a type of case governed by a universal rule. In administration the characteristic idea is to guide action in the particular case, or to substitute administrative action by a hierarchy of administrative officials for individual action governed by general legal precepts. Administration belongs to a busy age in which all things are so specialized that we must have a multitude of things done for us. Matthew Arnold's school boy may have been wiser than he knew when in his essay on Nelson he wrote: "His last words were: Every man expects England to do his duty." Primarily, administrative activity is supervisory, with legislative prescribing of ends and limits.

Along with this supervisory activity the modern state maintains a parallel activity in laying down authoritative rules and standards in advance. Instead of leaving rules and standards to develop or be developed by judicial experience and juristic science and so pass into the traditional element of the law, the modern state more and more insists on substituting the will of the lawmaking organ of the state, declared and promulgated authoritatively, for the traditional premises and precepts of the legal system. I have compared administration to the traffic officer at the corner or the cross roads, and legislation to the lines on the pavement.
To some extent the rise of legislation as the chief agency in legal development and so as the principal form of law was but a phase of the general democratic tendency in politics. It was conceived at least that legislation involves a democratization of the administration of justice; that just as the exclusive possession of law by a priestly caste was replaced by the Twelve Tables, so an exclusively scientific and professional lawmaking was replaced by popular law-making. Purely traditional and professional standards were replaced by popular standards. But they are often of popular origin only in theory. Class and local interests of some particular trade or business can procure or influence legislation, which requires no premises, where it cannot influence juristic or judicial development which assumes premises. Compare statutes as to innkeepers with the liability of innkeepers at common law. Often the jurist-made or judge-made rule takes account of the more interests. As has been said, it seems reasonably evident that legal systems are in a stage of legislative development. But a reaction is not unlikely. Division of labor in a highly organized industrial society involves a specialization and reliance upon experts and agencies of preparation for which legislation of the parliamentary type is hardly adapted. Some signs of a new tendency, at least as to purely legal matters (i.e. non-political) may be seen in delegated legislation by administrative rules and orders, in leaving legal procedure to rules of court, and in setting up of judicial councils with a function of advising both legislatures and courts.

We may now turn to the history of legislation as an agency in the growth of law. Five stages in the development of legislation on purely legal matters may be suggested for convenience of treatment: (1) unconscious legislation in the period of customary law; (2) declaratory legislation in the period when the traditional law is reduced to writing; (3) selection and amendment when by the political union of peoples having in some particulars divergent customs it
becomes necessary to choose in declaring the custom of the new whole; (4) conscious constructive lawmaking, as an occasional expedient at first to meet political exigencies, but gradually to effect important changes here and there in the legal system in emergencies; (5) habitual legislation as an ordinary agency of legal development, often culminating in codification of the entire legal system.

1. Unconscious legislation. I speak here of the beginnings of law, i.e. of law in the analytical sense; not of the beginnings of social control but of the beginnings of a specialized form of social control by politically organized society. In the first stage of legal development, the stage of traditional modes of decision based upon repeated decisions by supposed inspiration, a great deal of unconscious law-making goes on. The case in hand may not be exactly one which has arisen previously, but those who have the custody of the tradition assimilate it thereto. Or they may warp the tradition more or less unconsciously to meet new needs. Maine describes how he saw this going on in India. "In point of fact," he says, "... the various shades of the power lodged with the village council under the empire of the ideas proper to it, are not distinguished from one another, nor does the mind see a clear difference between making a law, declaring a law, and punishing an offender against a law. If the powers of this body must be described by modern names, that which lies most in the background is legislative power, that which is most distinctly conceived is judicial power. The laws obeyed are regarded as having always existed, and usages really new are confounded with the really old." Again he says: "... if very strict language be employed, legislation is the only term properly expressing the invention of customary rules to meet cases which are really new. Yet, if I may trust the statements of several eminent Indian authorities, it is always the fact or the fiction that this council only declares customary law." A like phenomenon is to be seen in Hebrew law. Just as, using law
to mean the body of received precepts, the judge precedes the law historically, so historically the court precedes the legislature. The judicial function is the first to be conceived distinctly, since the first problem of the legal order is simply to decide peaceably. The legislative function is the last so to be conceived. Logically according to the idea of separation of powers we have first a lawmaker who makes laws and second a court which applies them. But this is not the actual course of legal development.

2. Declaratory legislation. All legislation for a long time in the history of a legal system is of this type. It is not an authoritative making of new laws, it is or is taken to be an authoritative publication of law already existing. Thus, ten patricians reduced the *ius cuiile* to writing in the Twelve Tables. Theretofore it was an oral tradition. The prologue to the Senchus Mor, the great book of the Brehon (old Irish) law tells how the "bards" came together and recited the traditional law to St. Patrick. The prologue to the Lex Salica tells how certain old men from the villages of the Salian Franks were brought together and wrote out the customary law. Remnants of this idea persisted in Roman law in the formula by which the assembly of the people rejected a proposed *lex — antiquo*, i.e. let the customary law be stated as it was stated of old, and the reiterated proposition, which seems to us today to go without saying, that the later legislative enactment prevails over the earlier. A remnant may be seen in the common law in Blackstone's seventh rule of statutory interpretation: "Where the common law and a statute differ the common law gives place to the statute; and an old statute gives place to a new one." The idea of the declaratory nature of legislation hung on for a long time. But if statutes were declaratory of custom it might be asked: Why was not the older declaration the more reliable?

3. Selection and amendment. A certain conscious making of law takes place where choice must be made between conflicting traditions or conflicting traditions must be harmo-
nized through amendment. This necessity arises whenever an attempt is made to declare the common custom of a political unit formed by the union of formerly distinct tribes or people with customs of their own. An example may be seen in Alfred's laws. He tells us he had to pick and choose and even amend, but that he "durst not set down much of [his] own." There is a like disclaimer in the laws of Howell the Good. From this there is an easy progress, but one long, only occasionally and gradually achieved, to intentional and avowed making of laws as something wholly new.

4. Conscious constructive lawmaking. A first step in this direction comes when men perceive that by changing the written record of the law they can change the law, which theretofore had been held eternal and immutable. Usually at this point a legislative ferment sets in, e.g. the early republican legislation at Rome, the Frankish capitularies on the Roman imperial model, the legislation of Edward I on the Byzantine model. But this outburst of legislation is commonly soon superseded by a purely professional development of the law and it is not until the maturity of legal systems that we enter upon a real stage of legislation. There is little conscious constructive lawmaking till a legal system reaches the stage of equity and natural law. It comes first with the theory of natural law; of a law as a declaration not of custom but of natural law. It becomes wholly conscious in the maturity of law, with the analytical theory of law as a body of laws and of laws as made, not found.

Agencies of Preparation for Legislation. In the Roman polity the executive presented laws to the popular assembly for acceptance or rejection. In the English polity the popular assembly leaves the larger share in initiating and shaping of laws to those of its own members who are also members of the executive government. In the United States and in most Continental countries, the assembly delegates the elaboration of laws to committees of its own body. Another characteristic of English legislation is also significant
in the present connection. "For lawyers' law Parliament has neither time nor taste." In consequence, since hitherto Englishmen have insisted on being governed by fixed rules rather than by official discretion, legislation as to private law, when not declaratory, has taken the form of rules, prescribing definite detailed legal consequences for definite detailed states of fact rather than principles. The latter are left to judicial finding and development. It should be noted also that in Great Britain "the executive of the United Kingdom exercises greater control over legislation than probably the executive government of any other country with popular institutions."

1. Public agencies. In England, important legislation is for the most part preceded by some form of official inquiry and is based for the most part on the reports and recommendations of a commission or a committee. The inquiry is usually made by a royal commission or by a parliamentary committee, or by a departmental committee. In the United States, the category of public agencies of preparation for legislation has been greatly extended and varied, and no less than ten may be distinguished.

(1) Legislative committees. In England, a parliamentary committee is appointed by one of the two houses, or there may be a joint committee of the two. The committee is appointed by the house from its own members or in case of a joint committee each house selects members from its own membership. The institution is very old. As far back as the fourteenth century there is record of the appointment of a committee to draw a statute from a particular petition. Also in the sixteenth century Sir Thomas Smith tells us: "The Committees are such as either the Lords in the higher House, or the Burgesses in the lower House, doe choose to frame the Lawes upon such Bils as are agreed upon, afterward to be ratified by the same Houses." A parliamentary committee can compel attendance of witnesses and production of documents and can examine witnesses under oath.
But these powers, important for political investigations, have no significance for legislation on legal questions. It can only sit while the House which set it up is sitting, comes to an end with the expiration of the session, and must be provided for anew if it is to go on at a following session.

In contrast to the English system of special committees, it is the general practice in the United States to have standing committees, of which the Judiciary Committee is the important one for the present purpose. These committees, like the English special committees, do not extend beyond the legislative session. But continuity of legislative action is sometimes provided for by intersession committees. Also some states have joint committees of the two Houses, and the joint judiciary committee is of service in advancing desirable measures for improving law and the administration of justice. In our earlier legislative history all bills originated in committees. It was then a common practice to instruct a standing or a select committee to inquire into the expediency of enacting a statute on a particular subject and report with or without a bill to the House. But this is done today only in very exceptional cases. Bills introduced by individual members are referred to a committee. They may be amended by the committee without limit, or the committee may draw up and report a substitute measure. Instead of the committee drawing the bills in the first instance, it is now expected to put bills referred to it in proper shape. Today the work of legislative committees is chiefly one of recommending adoption or rejection or of amending or reshaping what has been drawn up by others.

(2) Commissions. In England, when legislation involving fundamental changes in the common law is proposed it is usually thought advisable or even necessary to appoint a royal commission. Such commissions are constituted and the members are appointed by the Crown, on the advice of a minister, to inquire into some particular subject preliminary to legislation or executive action. Unless a statute so pro-
vides, they cannot compel attendance of witnesses nor production of documents, and cannot examine witnesses under oath. But it does not appear that their work has been seriously hampered by not having compulsory powers. They are more representative than parliamentary committees. Usually there is no fixed limit of time and the commission goes on until the chairman or majority feels that it is time to stop. In a decade after the first world war a majority of the commissions finished their work in less than a year. Three years was the extreme period. On the whole, English experience of the system has been satisfactory. There has been some criticism. But whatever the deficiencies of commissions may have been in connection with far-reaching social reforms, they have amply proved their worth as an agency of preparing legislation on law reform. One need only cite the Real Property Commission, the Common Law Procedure Commission, and the Judicature Commission.

Commissions for revising and codifying laws have been familiar in American legislation from an early period. But commissions for particular subjects are a matter of the present century. They have been used in connection with Workmen’s Compensation Acts, Mining and Factory Laws, and Land Title Registration. They have, however, much more prestige in Great Britain than in the United States. Indeed, royal commissions have certain advantages over American governmental and private agencies of inquiry. They have back of them a long and, on the whole, successful history. They have something of the prestige and appearance of aloofness from politics which attaches to the Crown. They may reasonably expect their recommendations to be at least supported by the government under whose auspices they were appointed. In the United States, on the other hand, governmental investigations, whether executive or legislative, tend to be partisan or to be suspected of partisanship, and the ensuing proposals are likely to encounter opposition in want of accord between the two de-
portments of government. Where commissions have worked out and formulated bills on non-political legal subjects, it has been noted that "the result is generally a measure well thought out and well formulated. Even where the subject is very controversial, the unity of the original draft secures a consistent and coordinated whole."

Both in Great Britain and in the United States, commissions are used mostly for subjects of general political significance. They are not much used for what is called lawyer's law — the body of guides to decision by which everyday relations of man with man are adjusted. But a conspicuous exception is the statutory commission in New York "to investigate defects in the law and its administration." The statute made it the duty of the commission "to investigate any defects it may find in the present law and in its administration; and to recommend such changes as are necessary, to modify or eliminate antiquated and inequitable rules of law and methods of administration, to remove anachronisms in the law, and generally to bring the law of this state, civil and criminal, into harmony with modern conditions." It made two short reports, suggesting some minor improvements in the law, and recommended a permanent Law Revision Commission, which was provided by statute in 1934. Its functions are substantially those laid down in the Act of 1923. It has made seven reports containing important studies of particular defects in the law of the state and recommendations for legislation.

(3) Legislative councils. In the British dominions, bodies of a mixed legislative and advisory character have been made part of the legislative body with authority to prepare for or recommend or initiate legislation. Such a body in New Zealand did not prove satisfactory. In the United States there has been legislation providing for councils composed of members of the legislature, appointed in the same manner as the standing committees of the two houses, and of other citizens appointed by the Governor,
or of members of the legislature appointed by the President of the Senate and the Speaker of the House of Representatives and confirmed by a majority vote of the respective houses. Their function is "to present specific and detailed proposals for legislation on any major question of state policy" (Wisconsin) or to "cooperate with the administration in devising better methods of administration and law enforcement" (Kansas). These are, as it were, standing legislative commissions analogous to those considered above.

(4) Reference bureaus. Legislative reference and drafting bureaus as organized in many states have done much incidentally in the way of preparation for legislation. But they are not organized for the investigation and research which is called for in the society of today.

(5) The Commissioners on Uniform State Laws. Although these commissions are appointed by the Governor in each state and so act under public authority, the initiative came from the American Bar Association and the Bar Association and the Commissioners have worked in close cooperation from the beginning. At the organization of the American Bar Association in 1878 the constitution then adopted declared as one of its purposes "to promote the administration of justice and uniformity of legislation throughout the Union." From the beginning the Association had maintained a standing committee on jurisprudence and Law reform which had made some important recommendations. But a decisive step was taken in 1889 when a special committee on uniform state laws was appointed. In 1890, the legislature of New York adopted "An Act to Provide for the Appointment of Commissioners for the Promotion of Uniformity of Legislation in the United States." Among other things, it was to be the duty of the commissioners to consider whether it would be advisable for the state to invite the other states of the Union to send representatives to a convention to draft uniform laws to be submitted for approval and adoption by the several states. At the annual
meeting of the American Bar Association the same year the
Association recommended the passing by each state, and by
Congress for the District of Columbia and the territories, of
a statute providing for the appointment of commissioners to
confer with commissioners from other states on the subject
of uniformity of legislation. As a result, the first National
Conference of Commissioners on Uniform State Laws was
held at Saratoga, New York, in August, 1892, immediately
preceding the annual meeting of the American Bar Associa-
tion at this same place. At first, but nine states were
represented. Since 1912 all states, territories, and the Dis-
trict of Columbia have been represented by commissioners
officially appointed. The Conference meets annually im-
mEDIATELY preceding the meeting of the American Bar Asso-
ciation. In most of the states the governor appoints three
commissioners by authority of a statute. In the others he
appoints them under his general executive powers. They
are chosen from members of the bar and serve without com-
ensation. In 1896, the Conference adopted and recom-
mended to the states the Uniform Negotiable Instruments
Law, which was soon adopted in all jurisdictions. It has
since drafted a series of important statutes on commercial
law which have been generally adopted and have done much
for improvement of that subject.

(6) State bars. In an increasing number of states the
legal profession has been organized in a self-governing
 corporate body as the state bar. One of the duties of such
a body is to further the administration of justice by consider-
ing and recommending legislation for improving the law.
Bar associations as private agencies have done much in this
way, particularly toward the improvement of legal procedure.
Carried on by state bars, this work done in the immediate
past by voluntary bar associations as a private activity,
makes the incorporated bar, as an organized body of officers
of the courts, a public agency of preparation for legislation.
(7) Executive recommendations. In the English polity bills of importance and the far greater proportion of those which become laws are introduced by some member of the executive who is also a member of parliament and are put in form by the government draftsman, the parliamentary counsel to the treasury. The content is supplied by some government department. The form is given by the government draftsman. In the United States, no such system of executive preparing and initiating legislation on any large scale has obtained. But in the present century something of the sort has been growing up. Bills are drawn up at the instance of and actively promoted by the executive. The preliminary research, however, is likely to be done in or under the auspices of some administrative department or by some private agency.

(8) Research in administrative departments. In England, a "departmental committee" is appointed by the political head of the department concerned and consists of such persons, officials or others, as he may select. In recent years it has been more usual to set up such committees than to appoint royal commissions. As to preparation for legislation as to private law, the most notable example of such a committee is the Law Revision Committee, appointed by the Lord Chancellor on January 10, 1931, "to consider how far, having regard to the statute law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the committee, require revision in modern conditions." This committee has made eight reports from 1934 to 1939, upon such important subjects of private law as contribution between tort feasors, survival of causes of action and civil liability for causing the death of a human being, liability of a husband for the torts of his wife and liability of married women in tort and contract, questions under the Statute of Frauds, questions as to the requirement of consideration in simple contracts, and contributory negligence.
In the United States, in 1930 President Hoover authorized the Attorney General, with the assistance of the Department of Commerce, to "undertake an exhaustive investigation of bankruptcy law and practice" with a view of laying "foundations of fact upon which sound conclusions and wise remedies may be predicated." But for the most part official studies and investigations in this country have come to be made by administrative agencies by their own staff with such assistance as they may call in, and not merely in preparation for legislation but more often as the basis for administrative action.

(9) Judicial Councils. In 1921, the Massachusetts Judicature Commission recommended the setting up of a judicial council. Ohio provided for one by statute in 1923, and Massachusetts did the same in 1924. More than half of our jurisdictions now have judicial councils and they have become an established institution. Their organization varies somewhat in the different states, but in general they are made up of judges of the appellate courts and courts of first instance, members of the legislature, and practising lawyers, and in many cases also a certain number of lay members; all serving gratuitously. They provide an official and continuous agency for looking into the work of the courts, considering their organization, facilities and methods in relation to their tasks, investigating the operation of the laws which the courts must apply, and discovering defects in the law and places where improvement is needed whether in substantive law, procedure, organization of the work of the courts, or methods of conducting it. They recommend legislation when need of it is indicated, but also recommend rules of court and improvements of method requiring no rules. Many of these councils publish notable annual reports containing useful materials toward the improvement of the law and of the work of the courts. In 1929, a National Conference of Judicial Councils was organized. It has been active in making the work of each council available to the others, in giving
unity to efforts to improve the administration of justice as to matters of general, not merely local concern, and in providing studies which must go before effective legislation. Five volumes of the Judicial Administration Series published by the Conference have this purpose. The Conference works in cooperation with the American Bar Association's Committee on Improving the Administration of Justice, as well as with the Section of Judicial Administration and the Junior Bar Conference of that association, in surveying judicial administration of justice throughout the land.

(10) Conferences under public authority. Since 1908, conferences of the governors of the several states have been held at the instance of the President at some of which legislation on matters of law has been considered. Also sectional conferences of governors have been held frequently since 1930, but these conferences have had to do with economic questions. Of more importance in preparation for legislation as to the law is the federal Conference of Senior Circuit Judges. The National Association of Attorneys General is affiliated with the American Bar Association. The activities of this Association and the conferences of judges, of district attorneys, and of other officials having to do with administration of justice or enforcement of law, which have come to be held commonly in connection with meetings of state bar associations, are not held under public authority and are voluntary. But their recommendations carry a certain weight as coming from officials. The work of the Institute of Government at the University of North Carolina in promoting such conferences is especially noteworthy.

(11) Ministries of justice. These agencies of preparation for legislation are not known to common-law jurisdictions. But review of the public or quasi public agencies which have developed in the United States, chiefly in the present century, to do the work of such institutions, shows a want of permanence and continuity, a want of adequate organization and facilities for research, and above all a too
restricted scope and purpose, so that many serious gaps in or defects of the law and defects of the administration of justice fall down between them. While we expect the state to furnish service in increasing measure, we do not bear in mind that efficiency of the greatest and the basic service it may render is thus impaired.

2. Private agencies. (1) Committees of professional, trade, and business associations. Characteristically in the United States we have left the greater part of preparation for legislation to private initiative. On the whole, the most active of the private agencies in the past have been professional, business, and trade associations through their legislative committees. One of these agencies, namely, the bar association, has done outstanding service in promoting law reform, especially with respect to practice and procedure, commercial law, and criminal law. This has been increasingly manifest in the several states in the present century, as the reports of the committee on law reform in every recent volume of state bar association reports bear witness. The American Bar Association in particular has many outstanding achievements to its credit in recommending, drafting, and advocating remedial legislation as to procedure and as to substantive private law.

(2) Associations and other organizations interested in social and economic problems. Such organizations have often brought together experts upon some subject of special interest to them and prepared and recommended model or standard acts which have been widely utilized in legislation. To give but one example, in 1923, the National Probation Association drafted a Standard Juvenile Court Act. The draft act was discussed at two succeeding annual conferences and was approved and published in 1925. A second edition in 1927 and a third in 1933 were revisions as to some details. In 1941, the Association sent a questionnaire to one hundred and twenty-four judges, probation officers and social workers asking for opinions on controverted questions of
juvenile court legislation. On receipt of the answers in 1942, a committee of nineteen (ten judges of juvenile courts, two probation officers, two representatives of child welfare or children’s bureaus, two practising lawyers, two experts on the staff of the Association, and one teacher of criminal law) to revise the Standard Act completely so that it might "continue to serve as a model embodying the best judgment of the present day." The draft drawn by this committee was approved and published in 1943. The standard act has been used extensively in recent legislation on the subject. Fruitful work of this sort has been done by many such organizations.

(3) Private individuals. It has happened more than once that individuals have planned and drafted important legislation. A notable example is the work of Hiram T. Gilbert, Esq. in working out the plan and drafting the statute for the Municipal Court of Chicago. His idea of court organization was much in advance of the time (1904) and is still in advance of what is generally believed in by the legal profession.

(4) The American Law Institute. This important organization must be spoken of fully in another connection. Its primary work has been upon the traditional element of our law and if codification were to come would probably be the basis of the codes. But it has drawn up two notable drafts in preparation for legislation, namely, the draft Model Code of Criminal Procedure and the Model Youth Correction Authority Act.

(5) Research in Universities and Institutes. In the formative era of American law, in the time before the Civil War, most of the research needed for lawmaking in pioneer, rural, agricultural America could be done in a law library. It could be confined to law reports, law text books, and statute books. In the relatively simple social and economic order of a century ago the judge, the law teacher, the law writer, and the lawmaker could find in his own experience,
or in the general knowledge of his neighbors, all that he
needed beyond what was in his law books. The social and
economic background of making and the application of laws
required little study. Mostly it was patent to the observa-
tion of an intelligent man without special training or special
study. Today, on the other hand, there is no generally dif-
fused body of knowledge as to what is required for the ef-
fective adjustment of law to the life it is to govern. The
problems are not obvious, nor are the application to them
of the historical materials, when discovered, or the needed
adaptations of the legal machinery to the problems, when
defined, any more obvious. Such things today call for co-
operative effort of scholars in more than one field assisted
or advised by experts of practical experience in many direc-
tions. In Story's day one man could work upon many sub-
jects. Today many men must work upon one subject.

It is futile to expect that the needed preliminary work of
searching for, organizing and making available the data re-
quired for lawmaking, judicial law finding, and administra-
tive enforcement will do itself spontaneously or may be done
by the old machinery of legislative committees, working un-
der pressure upon a mass of bills, of courts deciding con-
troversies on local fragments of national questions under
limitations of jurisdiction, venue, and parties, and of ad-
ministrative agencies tending to treat every case as unique.
Even more it is futile to expect solid results from research
done to order for some special interest or done in a com-
mercial or partisan spirit. The needed research must be
done cooperatively by scholars and experts of many types
in many subjects uniting their learning, their organized ex-
perience and their trained energies in a joint effort. It must
be carried on for its own sake in a scientific spirit. It must
be done not upon single controversies as they arise but upon
the whole field out of which controversies arise. It must
enlist long and patient labor on the part of scholars not hur-
rried by a demand that they show "results" at once or fill
out an annual report at regular intervals. If we cannot have a ministry of justice, we may turn to our universities, where the conditions of effective systematic legal research may be assured. Something has been done already in or under the auspices of such institutions. In particular a good start was made by the Institute of Law of Johns Hopkins University.

(6) Research under the auspices of foundations. Privately endowed extra-academic foundations are also in a position to meet the conditions of systematic legal research, and some of them have done not a little upon which law-making has been able to build.

AGENCIES OF LEGISLATION. Agencies of authoritatively establishing the precepts which make up the imperative element of a legal system are either primary or secondary.

1. Primary agencies. The primary agencies derive their authority immediately from the constitution of the state. Bryce, thinking of Roman law and English law, speaks of them as "the supreme authority in the state." But although this is true of centralized polities, where, as in the United States, the polity is based on a separation of powers and the legislative, executive and judicial are co-equal, the supreme authority is in that from which the constitution proceeds, which, therefore, can amend it, and the primary agency of legislation is not the supreme authority but is the lawmaking organ which that authority has set up.

2. Secondary agencies. Lawmaking authority may be derived directly from the constitution and so may be primary, or it may be derived from a primary agency of legislation by devolution or delegation and so may be secondary.

(1) Devolved legislative power. "Devolved" is the best word I can find for a type of legislative authority which seems to me to need distinguishing from delegated lawmaking authority. At common law the estate of the ancestor is said to devolve upon the heir. Devolution means transfer as a whole from one person to another, as when the whole
property of a bankrupt passes to the trustee in bankruptcy, whereas delegated means that one person has conferred a power on another to act as his agent or representative in doing something. I got the word from discussions of sovereignty a generation ago when a devolved sovereignty was spoken of in such connections as Canada and Australia. Recently English writers have spoken indifferently of devolved and delegated lawmaking powers. But it may well be asked whether the legislation of the Dominion of Canada, or of a Canadian provincial legislature, or of an American territorial legislature, is to be regarded as on the same footing with rules made by an administrative bureau under authority of an Act of Parliament or of an Act of Congress or of a state legislature or of a territorial legislature.

(2) Delegated lawmaking. The Statute of Proclamations of 1539 was not so much a case of delegating lawmaking power as one of recognizing and defining a residual primary legislative authority of the Crown. Perhaps the same may be said of an Act of 1602 delegating to the local peace officers the appointment of local sanitary officers and giving them such directions as necessity might require in an epidemic of plague. Also in 1710 the Privy Council was empowered to make rules for quarantine during an epidemic of cholera, and the courts held that disobedience of an order in council establishing quarantine was a common-law misdemeanor. After the industrial revolution the number of commissions and statutory boards steadily increased and more and more power of making rules and orders was conferred upon them in order to remove purely administrative matters from the domain of statute lawmaking and so relieve Parliament. In 1855, by the Metropolis Local Management Act it was enacted that the Crown in council might suspend or alter any of its provisions upon petition to the Privy Council that difficulties had arisen in administering it. After 1900, legislation delegating powers of lawmaking to administrative agencies became more frequent, but the so-called
Henry VIII clauses, clauses giving orders under the Act the effect as if enacted therein or prescribing that the making of an order or administrative confirming of a scheme under the Act should be conclusive evidence that all the requirements of the Act had been complied with, for the most part belong to the nineteenth century. After the first world war, eking out of statutes which touch only the high spots, filling out the details by administrative rules and orders, had become the ordinary course in British legislation. In 1921, there had come to be two volumes of statutory rules and orders annually to one of statutes, and the rules and orders took up five times as many pages. Most of the important statutes of today provide that the King in Council or some department or board or official may make rules or regulations for carrying it out in detail.

(a) Municipal lawmaking. This is the oldest form of secondary legislation in our law. But before taking up the usual mode of municipal lawmaking by ordinance it is necessary to look at a more recent type which has grown up under constitutional provisions for municipal home rule. Under such provisions in state constitutions instead of deriving a certain lawmaking power from the legislature, as granted by a charter, the municipality gets its authority direct from the constitution. In these municipal home rule provisions in state constitutions, and in municipal charters adopted under them, do we have a case of devolution of legislative power upon municipalities analogous to devolution of the power of Congress over the territories upon territorial legislature?

(i) Municipal home rule charters. In some state constitutions the devolution as to matters of municipal concern is complete. The municipality is given power to adopt a charter either with plenary or with limited lawmaking authority. In others, the authority is limited to ordinances in accord with the laws of the state. Under such a provision it was held that the term “laws” included the common law as well as the statutes and hence the charter could not der-
ogate from the common-law liability of the city for re-
stitution in case of unjust enrichment. But as to purely
municipal affairs municipal lawmaking may abrogate a
statute and substitute another rule for it within the munici-
pality. The constitution, however, may give power to the
city, not to the city council, so that the city must adopt a
charter giving full lawmaking power to the council in order
to authorize departure from the general law of the state.
The devolution by the constitution is a grant of power so
that only such authority belongs to the city as is granted.
But the people of the city may frame their government as
they choose by making the charter they adopt either a grant
to the city government of the powers granted by the con-
stitution or a limitation of those powers. If a grant, noth-
ing is given beyond what is granted expressly or by implica-
tion. All else is reserved to the people of the city. If a
limitation, all is given which is not withheld either expressly
or by implication.

Whether matters are of purely local or of state-wide and
general concern has not proved easy of determination. It
has been held that doubts should be resolved in favor of the
state, and hence that driving motor vehicles in the street, in
view of the general travel by automobiles, is not a purely
municipal matter. But another court, where the state law
fixed twelve tons as the maximum load to be carried by
motor vehicles in city limits while the ordinance of a city
under constitutional provision for home rule fixed the limit
at ten tons, held that the ordinance governed. Fixing of
rates for public service companies carrying on in the munici-
pality has been considered not to be a power necessary to
local self-government so that state legislation will prevail
over municipal regulation.

Thus some jurisdictions presume in favor of the state, e.g.
considering travel by motor vehicles a state concern even
where it is done in municipalities on the local streets and
hold fixing of rates for local public utilities a matter for the
state legislature. Others presume in favor of the municipality even where municipal control affects general travel. A problem of balance is presented not unlike that between federal and state government, between the general security and the individual life and between society and the individual.

(ii) Municipal ordinances. Here we have to do with municipal establishing of rules having the force of laws under a charter granted by the legislature as distinguished from municipal lawmaking under constitutional provisions giving the people of a municipality the powers of the state legislature as to purely local affairs.

Blackstone tells us that certain powers are "necessarily and inescapably incident to every corporation, which incidents, as soon as the corporation is duly erected, are tacitly annexed of course." Among these, he says, is a power "to make laws or private statutes for the better government of the corporation, which are binding in themselves unless contrary to the laws of the land, and then they are void." This, he adds, "is also included by law in the very act of incorporation." Kent, too, speaks of the power to make by-laws (as they are called in England and often in the United States, though they are more usually called ordinances with us) as an incident of being a corporation. But, he adds, although this is a necessary and inseparable incident of a corporation, it is more usual in the United States to specify this and other powers in the charter. What sort of power is this? Is it like that of a territorial legislature or of the people of a city under a constitutional home rule charter, or is it like the rule-making power of an administrative agency?

In a case often referred to, the court, citing a standard text book, said: "There can be no doubt but that it is competent for the General Assembly to delegate to corporations of this character the power to enact ordinances 'which, when authorized, have the force and effect of laws passed by the legislature of the state within the corporate limits.' . . .
Within the sphere of their delegated powers municipal corporations have as absolute control as the General Assembly would have if it had never delegated such powers and exercised them by its own laws." It will be noted that the court speaks of ordinances which are authorized. That is, on a subject with respect to which authority has been delegated. Where there is no devolution of a general power of legislation as to matters of local concern by constitutional provision, an ordinance "must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute." Moreover, ordinances made under this delegated authority must be reasonable. In this there is an important distinction between the devolved power of a territorial legislature and the delegated power of a city council under a legislative charter. There is no affirmative requirement that acts of the legislature be reasonable. At most there is the constitutional prohibition as to deprivation of life, liberty, or property without due process of law. This may forbid arbitrary and unreasonable legislation. But it is one thing to forbid what is arbitrary and unreasonable and another to require it to be shown to the courts that a by-law or ordinance is reasonable. Where a particular matter of purely municipal concern is committed by the statute which serves as the municipal charter to municipal regulation, an ordinance which is reasonable and within the delegated authority will be given effect although it differs in detail from the general statute governing municipal corporations. It is otherwise, however, where the matter is one of state and not purely local concern. As to the incidental power of lawmaking, involved in the mere creation of a municipal corporation, the legislature may define or limit so as to leave nothing to implication.

(b) Judicial rule-making. A great step forward was taken in legal procedure when in England in 1873 the Judicature Act left the matter to rules of court instead of
an elaborate practice act or code of civil procedure. The absolute supremacy of Parliament in the British polity precludes any but a purely academic question as to the nature of the power now exercised by the judges. But, as we have come to appreciate the importance of the change from statutory rules to rules of court, questions have arisen in the United States because of the constitutional separation of powers and the strict provisions with respect thereto in some state constitutions. How are regulation of the details of legal procedure, admission to practice in the courts, both preliminary and professional education and examination of applicants and details of the required qualifications, the discipline of the profession and review of disciplinary proceedings, and organization of the bar, to be regarded for the purposes of the constitutional categories? Is the legislative lawmaking power exclusive as to all or some or some part of these, or is the rule-making power with respect to all or some one or some part of them inherent and exclusive in the judiciary, or are the two departments of the government coequal as to these matters, the one supplementing the other, or is the power when exercised by the courts a delegated one? Moreover, if it is a delegated power, is the situation like that when rule-making power is delegated to a municipal corporation, or shall we say that the whole power, where of doubtful classification, has been assigned by legislation to a coordinate branch of the government appropriate to exercise it and so is like a devolved power, even if, as in case of devolution of legislative power upon a territorial legislature, it may be withdrawn?

It is well settled that the separation of powers provided for in our constitutions does not prescribe an exact analytical scheme. Experience soon showed the impossibility of drawing fine analytical lines and, as actually drawn, the lines in many places are historical. For the present purpose the language of the Supreme Court of Ohio is apt: “What constitutes judicial power, within the meaning of the con-
stitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution.” Looked at in this way the judiciary is clearly an appropriate department to regulate the details of procedure by rules of practice. The common-law courts and the Court of Chancery in England had regularly exercised this power down to the Revolution and it was not until the New York Code of Civil Procedure of 1848 that legislative regulation of every detail became the fashion. As to the superior courts of common law, when Tidd’s Practice, setting forth the procedure in England which we received in this country was published, practice was governed by a series of “General Rules and Orders” made by the judges, of which the oldest then in force in the King’s Bench went back to 1604. The oldest then in force in the Common Pleas was made in the reign of Henry VI (1457) and no less than six general rules of procedure made by the judges in that year were still in force. In the Court of Exchequer, general rules made as far back as 1594 were still in force. At the time when our American courts of equity were set up Bacon’s “ordinances” or orders as to chancery practice, with some modifications by later chancellors, governed procedure in equity and are the foundation of the old equity rules of the Supreme Court of the United States which, as revised in 1913, governed in the Federal courts till 1938. We inherited this system of regulating procedure by rules of court.

But although a claim has been made for an inherent exclusive power in the courts, a historical claim may also be made for regulation of procedure by statute. In Tidd’s Practice there is a long list of statutes as to details of legal procedure, if we take for a starting point a time when Parliament as a legislative body and the King’s courts had become clearly differentiated, beginning with a statute of Edward III as to error (1340) and including such outstanding statutes as that of Elizabeth with respect to special de-
murrers and Anne as to jeofails. It would seem therefore that we are on safer ground in regarding the rule-making power as one of doubtful classification — one which both analytically and historically might be regarded as either judicial or legislative — which hence may be exercised by the courts or may be assigned by the legislature to the judiciary as an appropriate department. That legislative elaborate codes of procedure and practice acts and continual tinkering with the details of procedure have been the bane of American administration of justice is now well recognized. Hence we could wish the subject belonged to the courts exclusively. Where it is assigned to the courts as a power of doubtful classification, there is the difficulty that the legislature may change some particular detail by statute, as like as not at the instance of some one with political influence and little or no competence for the task. In this way legal procedure comes to be cumbered with rigid details raising unnecessary questions of interpretation and difficult of improvement or elimination. But it would require something more than the usual constitutional provision as to the separation of powers to establish this. The most we can be sure of is that the power exists in the absence of legislation, that it may be assigned as a whole to the courts by legislation, and that there is ground to hope that legislatures having assigned it to the courts will come to keep their hands off.

A stronger case historically may be made for contending that the courts have an inherent and exclusive power of prescribing the qualifications and making rules for admission of those who are to practice before them. A number of courts so hold. But the legislature may enact statutes in aid of this power. Admission to practice is everywhere held purely judicial and to be exercised by the courts only. Many courts, however, consider that the legislature may, in order to protect the public, prescribe reasonable rules and regulations for admission, but not such as to deprive the courts of
their inherent power to lay down additional rules and conditions and to make finally the order of admission. There has been little tendency to regard the power as one of doubtful classification which may be exercised by the legislature or assigned by it to the courts. But at least one jurisdiction seems to regard it as a legislative power. The same arguments apply to integration of the bar, and the courts have been agreed in holding it a judicial not a legislative function.

(c) Administrative lawmaking. In the United States, administrative making of rules and orders with the force of law is not all of one kind nor all upon the same basis. It is not inherent in an administrative agency, unless with respect to details of procedure before it. It may result simply from legislation conditioned upon executive action. It may result from devolution or delegation of authority with respect to powers in the no-man’s land between the legislative and the executive. Noteworthy examples of the latter are devolution of rate-making power upon commissions and delegation of the application of standards with an incidental rule-making power.

Where the taking effect of a statute is made to depend upon executive action, so that a power is given to the executive to determine whether or when the statute or some part of it shall take effect, there is no delegated lawmaking. The statute is to take effect upon condition, and a condition of executive proclamation or a condition of some natural event or some situation of fact in the present or in the future are equally legitimate. Leaving ascertainment and pronouncement of the existence of the event or situation of fact to the executive is not delegation of legislative power. But suppose executive action is not made a condition of taking effect but it is left to the executive to determine the extent of operation of the statute or some part of it in time and space? In such case it may be that the statute provides a standard which the executive is to apply in reaching a determination. The legislature may leave to
an administrative agency a discretion in formulating tests to carry out the standard prescribed in the statute. What if the determination is left to a standard to be fixed by the executive or to the absolute discretion of the executive or of an administrative agency? If the standard is not fixed by the legislature but it declares a policy to be carried out by administrative fixing of a standard by regulations having the force of law, are we to say that the legislature may delegate application of a standard, as a power of doubtful classification but not implementing a policy by standards not prescribed or fixed by law? Implementing the legislatively prescribed policy by administrative fixing of standards is the same process as that of the French polity which expects general provisions in statutes to be made effective by administrative ordinances. To the extent that the policy is clearly defined so that there is a measure for the regulations this is within the principle of a statute taking effect or operating upon condition. Thus the condition may be a natural event, or the will of an executive or administrative official, the popular vote at an election (as in local option legislation), facts to be ascertained by some official or administrative agency, compliance with a standard fixed by the statute but to be applied by the executive or some administrative agency, or left to the executive to fix in carrying out some legislatively defined policy. In some cases a power of dispensing with or exempting from a statute has been given to an administrative official as a matter of personal discretion. It might be said that the official's discretion was a condition of operation of the statute. But where it was made a ground of exemption with nothing to indicate on what basis it was to be exercised, it was held to go beyond a condition of taking effect or of operation and amount to executive legislation in a matter not of doubtful classification. However, delegation of the application of a standard established by a statute may involve a certain fixing of limits. Here we are in the field of powers of doubtful
classification and the legislature may assign this to an appropriate department.

Devolution of plenary rate-making power as to public utilities upon administrative boards and commissions raised a different question. Rate-making power had been said to be legislative and legislatures had long exercised it. Could it then be turned over to a board or official requiring to be classified as part of the executive department? The old Commerce Court considered that Congress could fix a standard to be applied by an administrative commission or could leave it to a commission to determine whether or not conditions existed on which the taking effect of a statutory provision as to rates was to depend, but that the commission could not be given power to fix rates in its own discretion. This, it was considered, would be a giving of legislative power to the commission. In reversing the decree of the Commerce Court, the Supreme Court of the United States was more clear as to the result than as to the reason. Chief Justice White said that it was absurd to hold "that the authority in question was validly delegated so long as it was lodged in carriers but ceased to be susceptible of delegation the instant it was taken from the carrier for the purpose of being lodged in a public administrative body." This ignores the real question. Fixing of rates was never delegated to the carrier. A reasonable rate could be agreed on. The carrier in publishing a rate offered it as a reasonable rate. If the carrier insisted on it and the patron had to pay it, the carrier could be sued at law to recover the unreasonable excess. When the legislature fixed a rate, it determined by a rule of law what was conclusively a reasonable rate, precluding any agreement. Later, Chief Justice Taft, in his eulogy on Chief Justice White speaks as if there were nothing but a question of delegation of power, whereas the question was whether a legislative power might be delegated to an agency of the executive department. For sometimes the courts, with a sound instinct for the right result,
did not see how to meet squarely the difficulty that here was a power always held to be legislative which was conferred on a body clearly part of the executive. The true solution, that these are cases of legislative assigning of a power of doubtful classification to an appropriate department was at least foreshadowed in *Village of Saratoga v. Saratoga Gas & Electric Light Co.*, 191 New York, 123. As has been seen above, Chief Justice Marshall had long before pointed this out as to judicial regulation of procedure by rules of court. Thus devolution of rate-making power is entirely consistent with the separation of powers.

Delegation to administrative officials and bodies of application of standards may be disposed of in the same way. The power of applying them had been exercised by the courts. But application of the standard of due care was left to juries, and application of the standard of conduct imposed on fiduciaries had been exercised by courts of equity in an administrative fashion. Analytically the power might be held either judicial or administrative. Thus in turning it over to administrative agencies as to particular standards the legislature is only assigning a power of doubtful classification to an appropriate department. But how is it as to delegation of a power of fixing standards to such agencies?

Application of a standard to the individual case is of doubtful classification. Implementing by supplemental regulations a standard established or recognized by legislation may be so far a power of doubtful classification as to be assignable to administrative agencies as between the legislative and the executive departments. Where the line is not easy to draw or doubtful, it is for the legislature to draw it. A standard cannot be wholly objective. It has to be applied in view of times, places, and circumstances. Witness the standard of the reasonable prudent man in the law of torts, the standard of reasonable facilities in the law of public utilities, the standard of fair conduct of a fiduciary in equity, the standard of fair competition in the law on that
subject, and the standard of acts tending to corruption in the common law of misdemeanors. The standard established by a statute need be no more clearly defined than these in order to admit of leaving implementation as well as application to an administrative agency. But an administrative regulation setting up a new rule outside of the statute, and not in furtherance of the standard it establishes, is not allowable, and the legislature must "erect guide posts" which will enable the administrative official or agency to carry out its will. The English courts do not have to consider questions as to a constitutional separation of powers. All that comes before them is whether the prescribed mechanics of making and promulgating the rule or order have been observed, and whether the rule or order is within the power conferred. The courts construe the statutes liberally even when "against common right" so that they would be construed strictly at common law.

As to the mechanics of administrative lawmaking, it came to be the English practice to require laying of rules on the tables of both houses of Parliament, the rules to have effect as if enacted in case neither house within a time fixed annulled them by resolution. But some statutes gave regulations and orders made under it the effect of an Act of Parliament upon confirmation by an executive official. In such case it was held that if a rule contravened or went beyond the statute under which it was made the courts might hold it invalid upon certiorari, distinguishing cases where the rules had been laid before Parliament. It has been pointed out that supervision by Parliament is often ineffective and may be impossible, that review by the courts is often excluded because the rules made by administrative agencies are required to be regarded as if enacted in the statute, or because they have been laid before Parliament and so cannot be questioned although Parliament has never actually considered them, and that submission to an administrative official, particularly to the busy head of a great department...
of the executive, is no real check. In the United States, legislation has sometimes required judicial rule-making as to procedure to be laid before Congress, to become effective in the absence of Congressional action in a certain time, or has sometimes required rules to be filed with and confirmed by some executive official. Often the rules are put substantially beyond effective judicial scrutiny.

Want of effective checks in the mechanics of administrative lawmaking raises one of the most important problems of our public law.

(3) Autonomic lawmaking. Autonomic (giving law to itself) is a term which comes from the power of towns and guilds, and associations to legislate for themselves in the Middle Ages. A development of it in Continental Europe from the fourteenth century was a power of noble families to enact family statutes for their internal family concerns, regulating succession to their titles, heirlooms, family seats, and the like.

A power of associations to make rules and regulations having the force of law is recognized at common law. Today it is often expressly conferred on private corporations by general statute or by charter. But there is no requirement of express statutory or charter power to make such regulations or by-laws. It is a power inherent in such organizations. A bit of history is involved here. Corporations and organizations on the model of the organized kindred are older than politically organized society. There were societies and organizations of this sort in antiquity which governed themselves and were a strong agency of social control when the state was feeble and only developing its power. This situation recurred in Germanic law. Associations are older than the state. They had a rule-making power when Parliament was in its infancy. In the sixteenth century the state became the paramount agency of social control. But the rule-making power had come down from conditions of the past. It did not need to be given by the state although now
recognized by and exercised in subordination to the state. It is exercised by private corporations, especially public utility companies, but also by groups or associations such as fraternal and benevolent orders and associations, mutual and fraternal insurance organizations, religious societies, business associations, e.g. chambers of commerce, stock exchanges, and produce exchanges, professional associations, e.g. bar associations and medical societies, trade unions, and social clubs. The rules are as binding upon those affected by them as are statutes, so that members who complain of their application must exhaust their remedies under the rules before going to the courts. Also such rules and regulations are subject to judicial scrutiny as to their reasonableness. They not only bind members, but public service companies can make regulations which may bind their patrons and even those who come on their premises to deal with their patrons.

The basis of the binding authority of such rules has often been referred to contract — a contract of each member with the others or of patron with public utility. But in case of a contract the law recognizes the intention of the parties to bring about legal consequences and gives their agreement the intended effect. In autonomic lawmaking, members of the body who dissent at the time of making the rules and those who join after they are made are none the less bound. When it is said that the dissentient members have by joining consented to be bound by rules to be made and those who join after they are made have by joining consented to the rules then existing, the same implied agreement is resorted to by which eighteenth-century writers justified the binding force of laws enacted by the legislature.

**Relation of the Imperative to the Traditional Element.** Until recently not the least notable characteristics of American law were, on the one hand, the excessive output of legislation in all our jurisdictions and, on the other hand, the indifference amounting sometimes almost to contempt with which that output was regarded by lawyers, law
teachers, and text writers. Text writers who scrupulously gathered up from every remote corner the most obsolete decisions and cited all of them, seldom cited any statutes except those landmarks which had become a part of our American law, or, if they did refer to legislation, did so through the judicial decisions which applied it. This was especially true in the last quarter of the nineteenth century, but hardly less true in the first decade of the present century. The courts likewise have inclined to ignore important legislation, sometimes deciding it to be declaratory, at other times silently assuming it was declaratory, citing prior decisions and making no mention of the statute. Eminent lawyers as legislators often conceived it expedient to make of a statute the barest outline, leaving details of the most vital importance to be filled in by judicial lawmaking. It was fashionable to point out the deficiencies of legislation and to declare that there were things which legislatures could not do, try how they might. It was the settled practice to preach the superiority of the law found by judges. In this way a wide gulf grew up in the legal system between the traditional (one might say the judicial) element and the imperative element. Instead of becoming parts of one body of law they became in some measure competing bodies of law, and in this way uncertainty was brought about. Moreover, the influence of the law established by judicial decision often determines the course of reforming legislation and holds it back. Four ways in which courts in such a legal system as ours might deal with an innovation in the law are conceivable. (1) The courts might receive the innovation fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold the principle so established superior in authority to judge-made rules on the same general subject as being a later and more direct expression of the general will. Accordingly, they might reason from the legislatively introduced precept by analogy, that is, might reason from its
principle in cases not within its purview by analogy to reasoning from a pre-existing judicially established principle. For example, at the end of the nineteenth century and in the beginning of the present century, legislation in the way of so-called anti-trust laws everywhere in the United States adopted a principle of repression of combinations where they threatened free individual action or free competition in business or industry. Here conceivably might have been a starting point for reasoning by analogy. But such is not the technique of the common law. The courts continued to resort to the traditional common law except as to cases within the statutes and indeed molded the statutes to the common law in the course of applying them. There has been a certain practical reason for continued adherence to the common-law technique in this connection. Our legislation too often is not on any clear theory consciously worked out. Legislation in civil-law countries is apt to be much more expert as to legal matters. However, the reason for the difference in this respect between the two systems is historical.

(2) The courts might receive the legislative innovation fully into the body of the law, to be reasoned from by analogy the same as any other legally established proposition; regarding it, however, as of equal or coordinate authority as a basis for reasoning with the judicially established precepts on the same subjects. Thus there might be a choice between competing equally authoritative starting points for legal reasoning, something which happens not infrequently as between principles of the common law and is the chief source of difficulty when new questions come before the courts.

(3) The courts might refuse to receive the legislative innovation fully into the body of the law, and instead give effect to the legislative enactment directly only. That is, they might refuse to reason from it by analogy, but never-
theless give it a liberal interpretation to cover the whole field it may reasonably be made to cover.

(4) Or finally, the courts might not only refuse to reason from the legislative provision by analogy and insist upon applying it only directly as a rule rather than as giving a principle, but they might also give it a strict and narrow interpretation, holding it down rigidly to the exact cases which it clearly covers expressly. This fourth hypothesis represents the orthodox common-law attitude in the nineteenth century toward legislative innovations. Probably the third hypothesis represents more nearly the attitude toward which the course of decision has been tending in the present century. The second and first hypothesis in the past appealed to the common-law lawyer as absurd. He has seemed unable to conceive that a rule of statutory origin may be treated as part of the permanent body of the law except in the case of certain landmarks of old legislation which have been incorporated into the traditional element of our law. It is submitted, however, that when the growing point of a legal system shifts definitely to legislation, the legal system must come at least to the method of the second hypothesis.

That the attitude of the common-law courts toward legislation is not necessary to and inherent in a legal system is apparent when we turn to a great legal system in which it is wholly unknown. Not only is this view of legislation unknown to the Roman law, but quite the opposite doctrine was established in countries following the modern Roman law even before they adopted codes. Indeed, the Romans developed the more significant part of their law of private wrongs by the analogy of the lex Aquilia, and the modern Roman law carried this still further by making Aquilian fault the basis of a whole theory of liability. In the same way, the modern Roman law worked out liability for death by wrongful act on the analogy of the edict de deiectis et effusis and the text of the Digest based upon it. The idea is that the jurists have developed the principle which they find be-
hind the text, exactly as a common-law court, in reasoning from the analogy of a leading case, finds a principle behind it and gives the principle further development. Indeed, Coke developed the legislation of Edward I and the significant chapters of Magna Carta in this way in his Second Institute. But the relative scantiness of legislative lawmaking and growth of the law through judicial decision after the thirteenth century, until the legislative reform movement in the nineteenth century, led to loss of the method which Coke employed so effectively. In civil-law countries, under the modern codes it is a matter of course.

An example of the common-law mode of dealing with legislation in this respect may be seen in the judicial application of Lord Campbell’s Act. If any piece of legislation has become universal in common-law jurisdictions it is legislation to permit of recovery for causing death by wrongful act. Such legislation has surely been in force long enough to be thoroughly incorporated in the law. Moreover, its policy is regarded everywhere as sound and just. Nevertheless, the Supreme Court of the United States has thought of it as introducing a mere innovation of detail which is not at all to be thought of as on the same footing with common-law doctrines. In the same spirit the Supreme Court of Missouri laid down that while every physical interference with the person of another short of killing is presumptively wrongful, killing is not presumptively wrongful but must be shown to have been wrongful by the party complaining, since it gave rise to no action at common law. Likewise if a statute makes a sale or agreement void upon grounds not declaratory of the common law, one who depends on that ground must plead it specially. But if what would otherwise be a contract is void at common law or because of a statute declaring void what was void at common law, advantage of the defence may be taken under the general issue. Indeed, so rooted in the mind of the common-law lawyer is this idea of the role of legislation in the legal system that a majority
of the Supreme Court of the United States could hold that a husband could not maintain an action in the Canal Zone for wrongfully causing the death of his wife because the code there in force, although in language used in all the codes in civil-law jurisdictions and substantially everywhere held to allow such an action, as was also true in the civil law before the codes, was in terms of a general principle and did not make a specific provision for the case.

Another feature of this common-law notion of a sharp division between the traditional element and the imperative element whereby, as it were, the imperative element is regarded as an intruder in the body of the law, is a doctrine of strict construction of statutes in derogation of the traditional element. It is said commonly that three classes of statutes are to be construed strictly, namely: (1) penal statutes; (2) statutes in derogation of common right; and (3) statutes in derogation of the common law. There is more justification for some of these categories than for others. With respect to the doctrine that penal statutes are to be construed strictly it may at least be remarked that political liberty requires clear and exact definition of the offense which is to be visited with loss or impairment of life, liberty, or property. In the same way, the rule as to statutes in derogation of common right has some excuse in England where there are no constitutional restrictions on legislation. It really is but a way of saying that interpretations which involve mischievous consequences are to be avoided. In the United States, it means that interpretations which would make an act unconstitutional are to be avoided. Whenever it is applied beyond these limits it is without excuse and is only an incident of the historical attitude of the common-law courts toward legislation. The proposition that statutes in derogation of the common law are to be construed strictly has no analytical or philosophical justification. It assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation
of private law, unless declaratory, can be anything but in derogation of the common law, under this doctrine the social worker and the legal reformer must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed narrowly, and will be made to achieve as little as possible. Yet the doctrine has been extolled as a fundamental principle of jurisprudence by those American writers who adhered to Savigny's views as to the futility of legislation.

In consequence, we have in this country two opposing theories of the relation of courts to legislation, neither of which, I submit, should be accepted. First, there is the political theory, proceeding on an extreme analytical theory of the separation of powers. According to this theory courts can only interpret and apply. All making of law must come exclusively from the legislature. Courts "must take the law as they find it" — as if they could always find it ready-made. They are without power to improve it. To do anything but adhere narrowly to the old books is said to be usurpation. The attempt to put this in practical operation in Frederick the Great's draft code and later in the Prussian Landrecht of 1794 failed. Much the same thing happened in France. The French Civil Code provided that the judges should not decide a cause in such a way as to lay down a general rule. Nevertheless, at the end of one hundred years French jurists were compelled to admit that the exigencies of the administration of justice had made of the usus fori or course of decision in the courts, and even single decisions of the court of ultimate review, a form of law.

Second, there is the juristic (historical) theory that law cannot be made. While, on the one hand, the political doctrine in this country has been that the judicial function is purely one of application of rules made by the legislative organs of the state or established extra-judicially in a received custom, the juristic doctrine, the doctrine of courts
and lawyers and law teachers has been that legal precepts could not be made by any one but were only discovered and that the legislative attempt to bring forth a legal precept depending upon the legislative will for its authority was simply futile. Here, as in the political theory, an eighteenth-century idea is at the bottom. Each develops a phase of the natural-law idea that lawmaking is declaratory. The one sees an attempt at authoritative pronouncement of a rule of natural law. The other sees a formulation of a precept found by judicial experience. As statements of the whole truth of the matter these theories are equally to be rejected. But we are concerned here more with the juristic theory, which has become part of the traditional element of American law, and its corollary that legislative provisions in derogation of the common law are to be construed strictly. This rule was derived from one that statutes are to be construed by the common law; i.e. are to be fitted into the entire body of the law and so are to be taken to have been meant to be a harmonious part of the legal system. Hence the old authorities laid down that courts were to construe together common law and statute upon the same general subject, as rules in pari materia. Statute and common law should be construed together just as statute and statute must be. But fitting into the body of the law a statute not made primarily as an innovation is a very different matter from holding that when a statute does purport to change the law on some point radically it is to be construed narrowly and strictly and given as little effect as construction can allow. "The general words of an act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched." So put, it goes beyond the proposition that a statute is to be taken to alter the law only where it expressly purports to do so, a proposition which has been regarded as "an essential guiding rule, for without it the continuity of legal development would be
gravely imperilled.” A distinction must be made, however, between a change of detail not necessarily affecting a general policy, and a change of the whole policy of the law as to a large field, such as in the Workmen’s Compensation Acts. A rule which makes for continuity of development in the legal system is certainly of no mean importance. But there are other considerations at least no less important. When the rule requires disregard or impairment of the policy of legislation changing the common-law doctrine as to matters of the highest concern in the urban, industrial society of today, the common law may have to be adjusted to the statute rather than the statute to the common law.

A number of abuses in state legislation in the United States in our formative era led to drastic provisions and restrictions in state constitutions which go far to explain the persistence of the common-law attitude toward statutes which is a feature of the Anglo-American legal tradition. Instead of legislatures and courts working together toward the ends of law, if they were not in conflict in the last century they tended each to be suspicious of the other. Partly this was an inheritance from the seventeenth-century English polity upon which ours was built. Partly it was involved in the application to legislation of our common-law doctrine of the supremacy of the law. Partly, perhaps, it is a phase of the general regime of non-cooperation of independent agencies of government, each pursuing its own ways independently, which was characteristic of pioneer America on every side. In the form which the doctrine took in the nineteenth century it was shaped by professional reaction against the legislative reform movement, strengthened later by the reading of Savigny or his followers on the part of American jurists.

Not only must we reject the doctrine of strict construction of legislation in derogation of the common law, but we must come to regard legislation on matters of legal significance (as English writers put it, “lawyer’s law”) as part
of the law so that where a policy is shown at variance with that received at common law, the policy may be resorted to in analogous cases in order to choose a starting point for judicial reasoning when choice has to be made between starting points of equal authority. This is not spurious interpretation. It is not meant that the statute is made under the guise of interpretation to cover what it does not cover. Rather it is meant that the statute is to stand as part of the legal system no less than judicially found precepts of the common law, so that the principle it affords may be used as the basis of reasoning no less than a principle afforded by cases decided upon a policy which legislation has rejected. There is, one must admit, a difficulty, and one which has weighed heavily in keeping up the traditional attitude of the lawyer toward legislation. Legislation is by no means so consistent in pursuing and adhering to a policy as is judicial decision. Unhappily, acts of the same session and on the same subject and even at time different sections of the same act proceed upon different theoretical bases or considerations of policy. Moreover, even now, after much improvement, legislation in the English-speaking world is by no means habitually well drafted. Something more than mechanics of drafting is required to make statutes and the body of the law a harmonious system. But judicial opinions are not always easy to understand and much that courts lay down has to be explained or distinguished or modified in later cases.

In recent decisions there have been some signs of recognizing the policy of a statute as a basis of legal reasoning on matters not governed by it.
IV

CODIFICATION

HISTORY AND ACHIEVEMENTS OF CODIFICATION. 1. The Status of codification in the common-law world. When the legislative reform movement was at its height in the middle of the nineteenth century, there was a strong movement for codification both in England and in America. Discussions of codification were the staple of juristic controversy in England down to about 1875, and in the United States down to about 1880. In England, the matter went so far as to produce a number of drafts of codification of the law on particular subjects. The drafts are now well known text books. A Royal Commission on Digest of the Law was appointed and made some progress in the way of experimenting with drafts on different plans. But interest in the matter died out perhaps because of the rise of social legislation, diverting attention from "lawyer's law," and the Judicature Act and sweeping reform of procedure from 1875 to 1890 through rules of court. In the United States from 1848 to about 1880 the matter was much agitated and a vigorous and protracted controversy arose in New York over the draft codes prepared by David Dudley Field. Here, also, before the end of the century interest had waned. In the present generation interest has revived in England and a new movement for codification seemed to be setting in when it was arrested by the first World War. Thus in September, 1910, codification was the subject of a discussion at the provincial meeting of the Law Society at Bristol. Lord Robson in an address about that time favored codification and considered it inevitable. In 1912, Sir Frederick Pollock said that codification of English law was perfectly feasible and was to be expected in the near future. In the United States, the matter is still dormant, but it seems reasonable to think that a revived interest in it must be expected and that codification is not unlikely to be one of the chief problems of American law in the next generation.
To the common sense of the layman nothing could be more clear than that the whole body of the law, the whole body of precepts by which justice is administered, by which relations are adjusted, by which conduct is regulated in civilized society, may be and ought to be reduced to definitely formulated statements and set down in chapter and verse of a published code. Indeed, the layman acts upon this faith whenever he is called upon to adjust relations or regulate conduct in some matter which the law leaves open to government by private agencies. One may vouch the most diverse phenomena in support of this proposition. He may vouch the printed "rules and regulations" posted in any establishment where many persons are employed. He may vouch the elaborate codes of rules for games — the laws of whist, the baseball rules, the football rules. He may vouch the elaborate constitutions and by-laws framed for clubs and associations and fraternal orders. He may vouch the army regulations. He may vouch the lawmaking of men who find themselves without law in a pioneer environment, as in the case of the Mayflower Compact or the District Rules of the pioneer miners on the public domain. In every connection and as a matter of course the ordinary man formulates a code. Nor is it easy for him to understand the obstinate opposition with which lawyers in all times have met his demand that the same course be taken with the law of the land. Whenever and wherever he attains political power, the layman begins to legislate. He sets out to formulate the law in definite written precepts.

Thus the subject of codification is intimately connected with the idea of a written law. It is a form of the demand for a complete, intelligible, authoritative statement of the precepts governing individual relations and individual conduct. It is a phase of the demand that every man shall be assured of knowing what he may do and what he may not do. It is related to the idea behind our bills of rights. It is a part of the quest of a government of laws and not of
men; it is part of the claim that men be assured that the magistrate shall regulate their conduct and adjust their relations according to pre-established law and not in accordance with his more or less arbitrary will. It has to do with an important aspect of the social interest in the general security in that it is one means of excluding the personal element in the administration of justice and thus of insuring uniformity, equality, and certainty. Indeed, the idea of a written law is urged not only to assure these things, but in order to make the lay public believe that they are assured. For if it is important that justice be done, it is no less important that people feel justice has been done. The stability of the legal ordering of society depends quite as much upon the latter as upon the former.

A whole book could be written on the subject. But it will be enough to give an outline of the history of codification, of the controversy over the advisability of codification, and of the different ideas of what a code should be and what we may hope to achieve through a code.

2. Ancient and modern codes. Codification in the modern sense begins in the maturity of the Roman law. The so-called ancient codes, authoritative publication of traditional law, are attempts to secularize the law in transition from the stage of undifferentiated social control to the strict law, i.e. to law in the lawyer's sense. They are not lawyer's codes. They precede lawyers. Codes in the modern sense come after a full legal development and simplify the form of developed law, systematize and harmonize its elements, and formulate its principles. They are lawyers' codes. But there is likeness in this that each sums up a past development and puts it in form to serve as the basis for a juridical new start.

3. Codification in Roman law. The maturity of Roman law had inherited a tradition of reduction of the law, or at least of the written law, to systematic form either of a single statute or of a compilation. Down to the codification by
Justinian, the Twelve Tables (450 B.C.) remained the theoretical foundation of the *ius ciuile*. There was at least a tradition of a collection of the *leges regiae* by a certain Papirius, and a commentary on this collection is referred to in Justinian's Digest. We are told that Julius Caesar had among other plans one of making a digest of the law, reducing the *ius ciuile* to a certain method and bringing together in the fewest books what was best and essential in the vast and diffuse mass of statutes and writings. In the reign of Hadrian the praetor's edict was revised and given permanent form by legislation. Under Marcus Aurelius, one Papirius Justus made the first collection of imperial legislation of which we have knowledge. Also in the first third of the third century the great jurist Paul (Iulius Paulus) made two collections of imperial decisions having the force of legislation. In the reign of Diocletian (about 291) Gregorius published a collection of the earlier constitutions (enactments) of the emperors, and a little later (perhaps about 295) Hermogenianus published a like collection of the constitutions of Diocletian. None of these have come down to us. They are known only from quotations in later compilations or citations in the codification by Justinian. The collections by Gregorius and Hermogenianus were called codes from the word *codex* meaning here a book of leaves of parchment in distinction from a roll of papyrus. They were private compilations analogous to such things as the United States Compiled Statutes put out by the West Publishing Company before the official compilation called the United States Code.

In 429, Theodosius II planned a complete codification. He appointed a commission to compile the imperial legislation after Constantine. This was to be preliminary to putting the whole law in one compilation, including what was still in effect both in the preliminary compilation of legislation ordered as well as in the prior compilations, and what was of importance in the writings of the jurisconsults.
This ambitious plan failed. But a new commission appointed in 435 was directed to compile the legislation after Constantine and authorized to make alterations needed to fit the order and style of the code. This official compilation, completed and promulgated in 438 (to take effect in 439) is known as the Theodosian Code (Codex Theodosianus). It is not a code in the sense in which we speak of the French Civil Code or the German Civil Code, but is simply an authoritative compilation of legislation. It is of the same kind as the official compiled statutes of one of the United States except that the compilers had no power of eliminating the obsolete such as is usually given to the revisers of our state legislation. Compilations of American state statutes are often called codes. They are to be compared with the Statutes at Large. In the latter the laws are in chronological order, not classified or in systematic arrangement. In the former they are arranged logically and systematically, all the laws on any one subject being brought together and arranged in a title or chapter; and sections of the same act may be taken over into different titles or chapters. The code of Theodosius was of the latter type as compared with collections after the manner of the Statutes at Large.

In 528, substantially one hundred years after Theodosius planned a complete codification, Justinian, at the instance of Tribonian who might be called his minister of justice, planned to republish the whole body of Roman law in statutory form. The first step was the appointment, the same year, of a commission of ten, made up of magistrates, advocates, and one law professor, to compile a new codex to be a complete revision of the imperial legislation, omitting everything obsolete, eliminating contradictions and repetitions, making needful additions, changes, and consolidations. In preparation for this Justinian abrogated a number of obsolete rules, altered others, and settled controverted questions which had arisen under the pre-existing law. This
code was completed in a year and enacted, and all the pre-existing legislation not incorporated therein was repealed. The next year (530) Justinian proceeded to compile and systematize the traditional element in the Roman law of his day and to give the compilation legislative authority. To this end he appointed a commission of sixteen, made up of magistrates, advocates, and four professors of law, two from the law school at Constantinople and two from the law school at Berytus. The traditional element at this time was all contained in the treatises of the great jurisconsults and commentaries thereon. Accordingly, this commission was ordered to make a systematic collection of extracts from those writings, extracting whatever was still of practical use, eliminating what was obsolete or superfluous, reconciling contradictions, and deciding controverted questions by adopting one view or the other. To do this they were allowed to alter the text of the extracts chosen; but in other respects they were to and did preserve the form of the extracts and state from what writer and book they were taken. In preparation for this task it was thought best to clear the way by determining certain juristic controversies and abolishing certain obsolete institutions referred to in the classical texts. This was done by a series of constitutions which seem to have been published as a collection and are known as the Fifty Decisions. The work of digesting the juristic writings was done rather hastily in three years and the Digest (or Pandects) was given statutory authority in 533, all further use of the original writings being expressly forbidden. In fifty books (about 900 double column royal octavo pages) it digests the Roman juristic writings from the generation before Cicero to the time of Constantine, much as the Century Digest digested American case law before 1896. It differs from an Anglo-American digest of case law in two respects: It is arranged systematically in books and titles in the traditional order of the edict, not alphabetically, and it does not repeat (at least theoretically
it does not), giving only one chosen extract for each point. It is not an index to the law. It is an authoritative expression of the law.

A new edition of the Code had to be made to conform to the changes in the law made while the Digest was compiling. This was drawn up by a commission of five and enacted in 534, the first code being repealed.

Also an institutional book primarily for students, in large measure a new and revised edition of the institutional book of the classical period, the Institutes or Commentaries of Gaius, was drawn up by a commission of three (Tribonian and two professors of law) and was given statutory authority in 533.

The subsequent legislation of Justinian was brought together in an unofficial collection, not a compilation, which we call the Novels. This was no part of Justinian's republication of the law, but it is part of what we now speak of as Justinian's codification — the Corpus Juris Civilis.

It will be seen that this is not like what we think of as a code today. It is as if we gave statutory authority to (1) a revision and compilation of the statutes; (2) a digest of our case law; (3) a modern edition of Blackstone's Commentaries. But it was a great achievement. It put in systematic form the results of a thousand years of development of Roman law so that in the twelfth century it could serve as the basis of a juristic new start. Indeed, the Digest has been a quarry for jurists ever since.

4. The modern codes. (a) The forerunners. In the modern world the first important legislation which might be called a code is the Constitutio Criminalis Carolina (Penal Code of the Emperor Charles V [1552]), commonly called the Carolina, although the Emperor had very little to do with drawing it up or enacting it. It eliminated many abuses, and did away with obsolete rules of proof. It stood as the basis of criminal law in the domain of the German Roman Empire for more than three hundred years.
There had been proposals of codification in France as far back as the reign of Louis XI (fifteenth century). In the sixteenth century codification was urged by Dumoulin, voted by the States General in 1560, and attempted to the extent of a compilation of the principal provisions of the royal ordinances in force under Henri III by Brisson about 1580. A code was recommended by the States General in 1576, and again in 1614, but nothing was done. Some progress, however, was made in the seventeenth century under Louis XIV. The circumstances made for codification at this time. In the first place, there were two systems of law in France. In the north of France, in what was called the pays du droit coutumier, there was the customary law, partly a feudal land law, not unlike the English land law in Littleton's Tenures in many ways, and a body of local customary law differing in each province, and indeed often in each locality, representing the Germanic law as worked out in local jurisdictions but eked out with a great deal of Roman law which had come into use in the tribunals. In the south of France, the pays du droit écrit, the Roman law was more thoroughly received. Secondly, France of the seventeenth century was a highly centralized monarchy and the French jurists and publicists had given currency to a Byzantine theory of sovereignty which was thoroughly suited to the circumstances of the French government of the time. Accordingly, it was possible to achieve a partial unification of the law by royal legislation. Colbert, the minister of Louis XIV (1667-1670) projected a code, and a beginning was made in a succession of royal ordinances regulating particular portions of the law for the whole kingdom. There were two further attempts under Louis XV. But it was not till after the Revolution that the local opposition to unification of the law was overcome.

(b) The eighteenth-century codes. Codification in Prussia began under the auspices of Frederick the Great. It was done under the influence of the theory of natural law;
the idea that by a pure train of reasoning a complete and perfect code could be worked out which would be of universal application and would meet the demands of justice in every case. Under the influence of this theory that universal principles of universal validity were discoverable by reason and could be developed by logic into a complete system of universal rules, juristic theory of the eighteenth century looked forward to a complete and perfect code as the goal of all juristic study. Frederick the Great was strongly impressed with this theory and required his chancellor to draw up a code for Prussia. A draft of the first part of this code was published in 1749 as a draft of the "Corpus Iuris Fredericiani." But it was not completed and was not enacted. In 1780, the King ordered a new code. This was completed after his death and was put in force in 1794 as the "Allgemeines Landrecht fur die Preussischen Staaten." It remained in force in Prussia until the taking effect of the German Civil Code in 1900.

An Austrian code was projected by the Empress Maria Theresa as far back as 1713. She appointed a commission to draw up a code. A draft was completed in 1767 but was rejected. A second draft was prepared and a part of it, the law of persons, was put in force in 1787. The whole code, Allgemeines burgerliches Gesetzbuch, was put in force in 1811. It was an independent piece of legislation, not a copy of anything.

(c) The French Civil Code and its progeny. In the course of the French Revolution the movement to unify the law revived. The Convention planned a code and ordered its legislative committee to present a draft within a month. Accordingly, in August, 1793, Cambaceres in the name of the committee reported a draft civil code of 695 articles. But the Convention was suspicious of the Roman law and of the droit coutumier and found the draft not revolutionary enough. It was felt that attempt should be made to realize a philosophical idea of simple democratic laws accessible to
all citizens. The draft was rejected and it was voted to appoint a committee of philosophers to draw up a new draft. Political events prevented carrying out of this idea. In 1794, after the fall of Robespierre, Cambaceres brought forward a second draft even shorter and more laconic than the first (297 articles). Some parts were adopted, but nothing further was done. Under the Directory in 1796, Cambaceres brought forward a third draft which, however, was not considered.

In 1800, Napoleon, as First Consul, took the matter up with characteristic vigor and determination, appointing a commission of four to draw up a draft. They divided the work, charging each with the drawing up of a part, and handed in a draft in four months. It was submitted to the Court of Cassation and to the Courts of Appeal, which made useful suggestions. The legislative organization in 1800 was very complicated, consisting of a Council of State, a Tribunate, a Legislative Body, and a Senate. In the Tribunate there were many representatives of the Revolution who systematically opposed all projects of the First Consul. They insisted that the proposed code was only a servile copy of the Roman law and the old droit coutumier, and as a result of their opposition the Legislative Body rejected the first title and was about to reject the second when a message from the First Consul withdrew the draft. Napoleon then by a coup d'état reformed the Tribunate, reducing it to 50 members of his own liking, and then resubmitted the draft to the Council of State. Through the pressure of the government it was adopted in 36 statutes successively enacted after March, 1803, and these were then united in the Code Civile des Francais in March, 1804. As finally enacted it was composed of 2281 articles.

An express provision in the statute which put the Code in force abrogated, as to all matters dealt with by the Code, the Roman law, the ordinances, the general and local customs, the statutes, and the regulations which had had the
force of law. But it is held that as to any matter of private law not treated of in the Code, resort may be made to the pre-existing law if there is no subsequent legislation on the point. It should be added that much subsequent legislation has modified, added to, or supplemented, and in places abrogated particular articles or parts of them, so that the Code as it stands is by no means wholly what it was in 1804.

The French Civil Code was adopted or copied with minor changes in Latin countries, European and American, and in Holland. Thus we have, as it were, a great family of codes derived from the Code Napoleon.

(d) The German Civil Code and twentieth-century codes. In the meantime a reaction against legislation set in along with giving up of the eighteenth-century natural law and the influence of the historical school, which was skeptical as to the efficacy of lawmaking and thoroughly disbelieved in codification. There were a number of projects for codes in the German states, largely in connection with or influenced by the liberal movement of 1848. But general interest in codification did not revive until the last quarter of the nineteenth century, when the legislative activity of the German Empire led to a succession of new codes. In the wake of the Burgerliches Gesetzbuch (Civil Code) completed in 1896 and in effect in 1900, there came the Japanese Civil Code (completed and in effect in 1898), the Swiss federal codes (Code of Obligations, 1901, Civil Code, 1907, took effect in 1912), the Civil Code of Brazil (1917, 1919), and the Chinese Civil Code (1930).

In the preparation of the German Civil Code the first commission was appointed in 1874. It consisted of six judges, three practicing lawyers, and two professors of law. They divided the work into five parts and in 1880 each section had its draft. From 1880 to 1887 they all went over the whole and the draft code was complete in 1887. Then the draft was published and general criticism was invited. The whole and every part was subjected to searching criti-
cism by everybody — lawyers, publicists, business men, clergymen, and labor leaders. At the end of three years the government brought all the controversial literature together, published it, and in 1890 appointed a new commission of eight judges, two practicing lawyers, and one professor, to draw up the code \textit{de novo} with the first draft and the criticisms for a guide. It took six years to finish the final draft. It was published in 1896 and after much discussion was enacted and took effect in 1900. It was the result of twenty-three years of thorough work. No other legislation has ever been done so thoroughly and carefully.

When a code was projected for the Japanese Empire, a question arose whether it should be English, French, or German in its lines. One American, one English, one French, and one German professor of law was appointed to teach the respective systems at Tokyo. For a time it appeared that the French law would prevail. Professor Boissonade was appointed to draw up a draft code and drew up a modernized Code Napoleon. But before it was to go into effect pressure led to appointment in 1893 of a Code Investigation Committee or Committee of Revision. This Committee, instead of merely revising Boissonade's draft, drew what is in effect a new one chiefly along German lines. It was the product of four Japanese professors of law at Tokyo. This draft was promulgated in parts successively between 1896 and 1898. It is noteworthy that the head of this Committee got his legal education at the Inns of Court. He was a barrister of the Middle Temple. German modern Roman law, however, lent itself to a code better than English law. In such a competition the Anglo-American law is at its worst. The strong point of English law is not in legislation.

Among recent codes the Swiss Civil Code is especially noteworthy. It is the work of Eugen Huber, Professor of Swiss Private Law at Basel and afterwards at Bern, who when he was commissioned (1892) to draw up a federal
civil code had become the recognized authority upon the law which was to be codified. His draft was published in 1900 and a commission of 31 was appointed to examine it. Criticism by the public was solicited and the material resulting was collected and submitted to the commission along with a discussion by Professor Huber of the motives and reasons behind the several provisions. After this commission had reported an editing commission of seven, of which Professor Huber was a member, put the draft in final form in which it was submitted to the Federal Assembly in 1904. It was discussed before the National Council and the Council of the States from 1905 to 1907 and adopted in December, 1907, to take effect January 1, 1912. Thus there was nothing hurried in the preparation or adoption of this code.

In Russia under the old regime there was a compilation of legislation only. There had been a number of commissions for codification of the laws in force but their work had been interrupted and broken off when Nicholas I in 1826 ordered it proceeded with. The result was a compilation of the legislation on private law from 1649 to 1832 promulgated in 1833 to take effect in 1835. It was called the code of statutes of the Russian Empire. At the outbreak of the first world war a project for a civil code was pending, but nothing came of it because of the revolution. Under the Soviet regime codification has gone forward.

5. Conditions which have led to codification. Some common features in the circumstances which led to codification should be noted. In Justinian's time (1) juristic development of the law had come substantially to an end; the possibilities of further juristic development of the traditional element were exhausted. (2) The authoritative legal materials were unwieldy in bulk involving great labor in finding what the law was. (3) The law was full of more or less obsolete rules depending only upon history and fitting in ill with the more modern parts of the system. For example, there was legal title and equitable title; there were two
orders of succession — there was legal heir and equitable heir. (4) Many fundamental questions which had been debated by jurists for centuries remained unsettled. (5) A period of legislation had been in progress for more than a century and the growing point of the law had shifted completely to legislation. Legislation had become the ordinary form of lawmaking.

When Napoleon’s code was adopted, (1) again juristic development of the purely Roman materials and of French customary (Germanic) law had substantially come to an end. Pothier had for the time being exhausted the possibilities of purely juristic development of the traditional materials. (2) The law was very unwieldy in bulk and uncertain in form: (a) The modern Roman law; (b) French exposition and commentary; (c) French customary law and exposition and commentary; (d) French legislation; (e) French judicial decision so far as it had brought about a usus fori. (3) Again the law was full of obsolete rules of a historical character, some Roman and some Germanic. (4) Many fundamental questions which had been debated upon the basis of the Roman texts since the revived study of the Roman law in the twelfth century still remained open. (5) A period of legislation had been in progress for one hundred years; since the ordinances of Louis XIV in which he began to make royal legislation the ordinary agency of legal growth. The growing point of French law had definitely shifted to legislation. One more point must be added. There was imperative need of a unified law. The old provinces had each to a great extent its own law. The customary law (the Germanic element) differed much with each locality. The abolition of the old provinces at the Revolution and thorough political unification of France demanded a legal unification. There had to be one law of France.

In the same way when the German code was adopted, (1) the German jurists of the historical school had so thoroughly worked out the possibilities of purely juristic
development of the Roman texts and the Germanists had so completely worked out the juristic possibilities of what there was of Germanic law that a new start, a new basis for future juristic development was imperative. (2) The law was unwieldy in bulk and uncertain in form. It was made up of: (a) The *Corpus Iuris Civilis*; (b) the academic development of the *Corpus Iuris* from the twelfth to the sixteenth century; (c) the *usus modernus*, that is, German juristic exposition of the modern Roman law on the basis of the practice of the courts; (d) Germanic law (customary) and juristic exposition of it; (e) local codes and legislation; (f) *usus fori*, the settled course of decision on certain points. (3) Many historical rules and traditional doctrines were wholly out of touch with the modern world, e.g. the contract theory of agency. (4) Many fundamental questions, e.g. the will theory or the declaration theory of a legal transaction, remained open and controverted. (5) The growing point had definitely shifted to legislation and an efficient organ of legislative lawmaking was at hand in the empire. Moreover, here again there was an imperative need of a unified law. Each of the old states had its own legislation and more or less its own law. The modern Roman law, which was called *gemeines Recht* (the common law of Germany) was a bond more or less feebly uniting these diverse bodies of law just as our common law more or less holds together forty-eight diverse bodies of state law.

A like condition was behind codification in Switzerland.

It will be noticed that two classes of countries adopted codes: (1) Those with well developed systems which had exhausted the possibilities of juristic development through the traditional element and so needed a new basis for further juristic development — Justinian's empire, revolutionary France, Austria at the end of the eighteenth century, the German Empire after 1871, are in this class; (2) those that had their whole legal development ahead of them and needed an immediate basis for development. Japan is a conspicuous
example. But the Latin-American republics are in this class also. They started from adaptations of the French Civil Code as we started from the seventeenth-century English law.

Another point is significant. In the case of each original code there was a strong organ of legislation which could insure adequate preliminary study and resist the pressure of those who were not competent to the work. Justinian, Napoleon, the German Empire, the Japanese Empire engaged the best legal and juristic talent that could be had. Also the German Empire gave the commissioners ample time.

It would seem, then, if historical experience is to be relied on, that codes are demanded where (1) the traditional element of the law for the time being has become sterile; its possibilities are substantially exhausted, so that a new basis is required for a juristic new start; or, instead, a basis is required on which to build a body of law for a country with no juristic past. (2) The law is unwieldy, full of archaisms, and uncertain. (3) The growing point has shifted to legislation and an efficient organ of legislation has developed. (4) There is need of one law in a political community whose several subdivisions have developed divergent local systems. The fourth is not essential, as Justinian's legislation shows. But it played a great part in bringing about the French and German and Swiss codes.

CODIFICATION IN ANGLO-AMERICAN LAW. 1. Bacon's plan. A proposal to codify the common law was made by Francis Bacon, then Attorney General, in 1614. It is intitled "A Proposition to His Majesty by Sir Francis Bacon, Knight, His Majesty's Attorney General, and one of his Privy Council, Touching the Compiling and Amendment of the Laws of England." His plan, as he stated it, contemplated: (1) An institutional part to be made up of (a) a Book of Institutes, (b) A Treatise on Maxims, (c) Terms of the Law (i.e. an authoritative law dictionary); (2) a new edition of the Year Books, abridging the reports of the cases,
leaving out repetitions and queries, and collecting antinomies, which were then to be settled by the opinion of the judges in the Exchequer Chamber or in Parliament; (3) a compilation of statute law, cutting out the obsolete, repealing what was dormant, and “snaring,” mitigating the old severe penalties which had come down from the Middle Ages, and reducing “concurrent” statutes to “one clear, uniform law.” Pursuant to this proposal among four bills proposed by Bacon at the instance of the Crown in 1614, the second was “An Act giving authority to certain commissioners to review the state of penal laws to the end that such as are obsolete and snaring may be repealed and such as are fit to continue and concern one matter may be reduced respectively to one clear form of law.” This contemplated a compilation of penal legislation. The project submitted to the King contemplated codification on the lines of Justinian’s Institutes, Digest, and Code. Owing to political controversies this Parliament was dissolved. Bacon thereupon persuaded the King to take the matter up by royal commission. Accordingly, in 1620 a report was made of what had been done “by direction from the King and the lords of the council upon the advice of the now Lord Chancellor.” Bacon was then chancellor. Seven lawyers, including Sir Edward Coke, Noy (afterwards Attorney General to Charles I), and Finch, who were the commissioners appointed by the King, were to “survey all the statutes and draw all the statutes concerning one matter into one plain and perfect law, and consider which were fit to be repealed, which enforced, and which fit to be continued.” The report set forth that the commission had found almost six hundred statutes fit to be repealed. Accordingly, a select committee was appointed to report on the subject, but owing to political controversies nothing came of it. On Bacon’s retirement the first item in the program of work which he laid out for himself was the recompiling of the laws, and afterward in a letter to the King he offered to undertake the making of a digest of the laws of England. Nothing came of this.
2. The Anglo-Indian Codes (1837-1886). A next essay at codification was brought about by the conditions of administration of English law in India. The first of the Anglo-Indian codes was a penal code drawn up by a commission of which Lord Macauley was a member. It was presented to the Governor General in 1837, but did not become a law until 1860. Holland said of it that it was the most scientific piece of legislation in the English language. Lord Bryce after a pretty full inquiry in India, reported that in 1899 it was regarded by Indian practitioners as eminently satisfactory. A code of civil procedure was enacted in 1859 and a code of penal procedure in 1861. As far back as 1840 agitation began in India for a code of substantive law and a commission was appointed, of which Sir John Romilly and Lord Chief Justice Jervis were members, which in 1855 reported that such a code was required by conditions there. Accordingly, a commission was set up, of which Sir John Romilly, Sir William Erle, and Sir John Shaw Willes were among the members, which in 1863 reported a Succession Act codifying the law of successions except for Hindus, Mohammedans and Buddhists. A further installment, known as the Contract Act, was reported in 1866 and adopted. Since that time the larger part of the English law in force in India has been codified. Except for the penal code the statutes are not well done. They follow too much the Field draft code.

3. The New York Code. Agitation for codification in New York was in part a phase of the legislative reform movement of the fore part of the nineteenth century and influenced by the wide attention given to the writings of Bentham. In part it grew out of the hostility toward English institutions and English law in the period after the Revolution and favor toward things French which went along with Jeffersonian democracy. Both were well marked in New York. The French civil code had fascinated many, as it had almost every one abroad. Lay discussions of
American law in the first quarter of the nineteenth century abound in demands for an American code. Very likely the connection of Livingston with the code in Louisiana was an influence also. But the prime mover was David Dudley Field. Before the New York Constitutional Convention in 1846, he had urged a general code. Largely as a result of his agitation, the constitution in 1847 provided for commissioners to reform procedure and codify the law. The commission to reform procedure was appointed in 1847 and in 1848 reported the first installment of the code of civil procedure, which was enacted in April of that year and put in effect in July. The rest of the code was reported from time to time in four different reports until in 1850 complete codes of civil and criminal procedure were submitted to the legislature. The history of the code of civil procedure is well known. Either substantially as reported by Field's commission or in the form of codes based upon his draft, it came to be in force in about thirty jurisdictions. After the adoption of the code of civil procedure the enthusiasm for law reform in New York waned, and in 1850 the legislature repealed the act appointing a commission to reform procedure and codify the law. One reason seems to have been that the commission on codifying the substantive law, which was headed by Chancellor Walworth, had proceeded with a deliberation which was not satisfactory to the public.

Upon this Field renewed his agitation for codification of the common law, and in 1857 the legislature provided for a new commission “to reduce into a written and systematic code the whole body of the law of this state or so much and such parts thereof as shall seem to them practical and expedient.” The commissioners were David Dudley Field, William Curtis Noyes, and Alexander W. Bradford; obviously too small a commission for such a purpose. Noyes undertook the penal code and Field the political and civil codes. In preparing the civil code Field was assisted by Thomas G. Shearman and Austin Abbott, both well known as text
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writers. This commission put forth the first draft of a civil code in 1862. The draft of the penal code, which had been assigned to Noyes, was presented in 1864. The political code was reported by Field in 1860.

In 1865, after Field had been at work upon these codes for eighteen years, the full text of the five codes, namely, the code of civil procedure, the code of criminal procedure, the penal code, the civil code, and the political code, were submitted in the ninth and last report of the commission. Of the eighteen years in which Field devoted a large part of his time to these codes, he received no compensation except for the first two years.

The original code of civil procedure adopted in New York was Field's first draft. His final draft was not adopted, but a different one, prepared on a different plan, although founded on Field's code, was adopted between 1876 and 1880. This code, which was prepared by Throop, went into great detail. Whereas there were 392 sections in Field's original code, in Throop's version this was extended to 3356, and further additions in 1890 and 1897 made the whole number of sections 3441. A great deal of the deservedly severe criticism which has been directed against the New York Code of Civil Procedure applies rather to this attempt to regulate by precise rule every action of the judge from the time he enters the court room than to the original Field draft. The Civil Practice Act of 1920 reduced this to 1540 sections (still too much detail) and further simplification has been going on.

In 1881, the code of criminal procedure was enacted, but the other codes failed of adoption in New York. As has been said above, some thirty jurisdictions adopted the code of civil procedure. Sixteen jurisdictions adopted the penal code and the code of criminal procedure. California, Montana, and North and South Dakota adopted all five of Field's codes. California, North Dakota and South Dakota have in addition a code of probate law. But it should be
said in this connection that the civil code has accomplished little in the four jurisdictions which adopted it. The courts, especially in California, frequently ignored the civil code, deciding questions as matters of common law, seldom referring to the code or, if they did, assuming that it was merely declaratory. This attitude of the courts, however, was not the sole cause of the comparative failure of Field's civil code. It must be admitted that the code was by no means well drawn. The work was too much for one man, even though as good a lawyer and tireless a worker as David Dudley Field. It was fortunate both for the substantive law of New York and for the cause of codification that that state did not adopt his draft.

4. The Movement for Codification in Massachusetts. Along with the movement for codification in New York there was for a time a like movement in Massachusetts. In 1835, the Massachusetts legislature provided for the appointment of commissioners "to take into consideration the practicality and expediency of reducing to a written and systematic code the common law of Massachusetts or any part thereof, and report to the next legislature, subjoining to their report a plan or plans of the best method in which such reduction can be accomplished." The commission appointed consisted of Joseph Story, Theron Metcalf, Simon Greenleaf, Charles E. Forbes, and Luther S. Cushing. It reported in December, 1836, on the whole distinctly in favor of codification. Its report, which was reprinted in 1882, in connection with one of Bentham's letters to the people of the United States with respect to codification, is one of the classical authorities on the subject. This movement for codification in Massachusetts was during the full tide of the legislative reform movement, and interest in the subject seems to have waned quickly. Judge Story's books soon supplied the need which had been behind the agitation for codification.

5. The Civil Code of Georgia (1860). In Georgia in 1858 an act of the legislature provided for the election of
three commissioners to “prepare for the people of Georgia a Code, which should, as near as practicable, embrace, in a condensed form, the laws of Georgia, whether derived from the common law, the Constitutions, the Statutes of the State, the Decisions of the Supreme Court, or the Statutes of England in force in this State.” Three commissioners accordingly were elected. They prepared a code divided into four parts, namely: First part, the political and public organization of the State; Second part, the civil code; Third part, the code of practice; Fourth part, penal laws. For the most part this was simply a revision and compilation of the statute law of the state. But the part known as the civil code, consisting of 1586 sections, is made up of extracts from the ordinary text books of the common law in use in this country at that time. The best that can be said for this is that it furnished an authoritative text book of the common law at a time when there were few extensive libraries in the state and few law books at hand in many rural court houses and many questions remained unanswered in the local reports.

It should be added that the code was prepared in about a year, was reported in 1860, and was adopted in that year to take effect in 1862. It goes without saying that codification of the common law by three commissioners in one year is a wholly impossible undertaking. The code has had little effect. For the most part the courts treat it as declaratory and usually go on the common law.

6. Lord Westbury’s plan. In 1860, Lord Westbury, then Sir Richard Bethell and Attorney General, announced in Parliament a plan of the government which he represented for a revision and compilation of the statute law of England. In 1863, when he had become chancellor, in a speech in the House of Lords, he proposed that in addition to the revision of statute law then in progress, a digest should be made of the reported cases with a view to an ultimate combination of statutes and cases alike in a digest and finally in a code
of the whole English law. In 1866, a royal commission was set up, the members of which were, among others, Lord Cranworth, Lord Westbury, Lord Cairns, Vice Chancellor Wood (afterward Lord Hatherley) Sir Roundell Palmer (afterward Lord Selborne) and Mr. Thring (afterward Lord Thring and Parliamentary Counsel), which was to "inquire into the expediency of a digest of law, and the best means of accomplishing that object and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions." The first report of this commission in 1867 endorsed the idea of codification and recommended that the commission be authorized to superintend the preparation of a portion of the proposed digest as an example of what might be done. I have already referred to some of the results of the work of this commission in what finally took the form of text books on branches of the common law. Nothing else came of this project. The movement for reorganization of the courts and reform of procedure which culminated in the Judicature Act (1873) directed the energies of law reformers in a different direction.

7. The project in Victoria (1879-1888). In Victoria, in 1879, there was a bill "to declare, consolidate, and amend the general substantive law relating to certain duties of the people." It covered the greater part of the substantive law except as to property. It got no further than a second reading. In 1880, the bill was revised and completed and passed by the Legislative Council but was not considered by the Legislative Assembly. In 1881, a part covering obligations was introduced in the Legislative Council but was not proceeded with. But Parliament made an appropriation for the expense of revision and a Draft Code of the General Substantive Law of Victoria was prepared. In 1882, this draft was turned over to a committee of eight barristers for revision. It was in complete form in 1885 and was submitted to the Legislative Council. It was not enacted, but in 1888 it was reintroduced as "The General Code, 1888."
Nothing further was done. The draft, containing in all 3244 sections, was the work of W. E. Hearn, a writer on economics, jurisprudence, and politics.

8. **Gradual codification.** Perhaps the pioneer bit of partial codification in the formative era of American law is the New York Real Property Law of 1828, revised in 1896. It was a better job than judicial construction and application have made it appear. American law was not far enough along in its development in the first third of the nineteenth century to make such an act achieve its purposes. Moreover, common-law lawyers are not at their best in developing legislative texts. They seem bound to treat them as declaratory or else to ignore them. But codification of particular branches of the common law as distinguished from reforming legislation is a phenomenon of the last decades of the century and of the present century. After the adoption of the Judicature Act the need of putting commercial law in England into a more certain form led to three statutes in which portions of the Law were codified. These are the Bills of Exchange Act of 1882, codifying the law of negotiable instruments, the Partnership Act of 1890, and the Sale of Goods Act of 1893, codifying the law of sales. This sort of codification, legislative restatement of particular fields of the law has been going forward in Great Britain, for example, the English Law of Property Act, 1922, a reforming codification, and the Administration of Estates Act, 1925.

Agitation in the United States for uniform commercial law was stimulated by the example of the English Bills of Exchange Act. As a result of this, at the instance of the American Bar Association, an annual Conference of Commissioners on Uniform State Laws was organized. It is composed of commissioners appointed by the Governors of the several states and meets in connection with the annual meetings of the American Bar Association. It had its inception in a special committee of that Association on Uniform State Laws, appointed in 1889. In 1895, the com-
missioners appointed a committee to draw a draft of an act codifying the law of negotiable instruments, to be submitted at the annual meeting in 1896. This draft, drawn in a year, was agreed upon, and with some changes of detail in some of the states, has been adopted in fifty-one jurisdictions. In 1901, the commissioners authorized draft of a law to make uniform the law of sales. This was drawn up much more carefully. The first draft was prepared by Professor Williston in 1902 and 1903, was printed in 1903, and was distributed to teachers of law, text writers, and practicing lawyers with a request for criticism. In the light of criticisms submitted a revised draft was drawn up and presented to the commissioners in 1904. This was gone over section by section at the conference in 1904. A second revised draft was presented and considered in 1905, and then a final draft in 1906, which was adopted by the commissioners. This draft was enacted by some twenty-seven jurisdictions. It is the first thoroughgoing bit of codification in the United States. None of the drafts prior to this had been drawn with the thoroughness and care that characterize this act. The important codifying acts drafted by the Commissioners on Uniform State Laws are: The Negotiable Instruments Law (1896), Sales Act (1906), Warehouse Receipts Act (1906), Stock Transfer Act (1909), Bills of Lading Act (1909), Partnership Act (1914), and Conditional Sales Act (1918).

9. "Private Codification" — i.e. private texts in code form and private restatements which put the law in form for codification. Following the example of books which represented drafts prepared for the commissioners under Lord Westbury's plan, it became common in England at one time to put text books of the law in the form of codes. In addition to the books noted in another connection Dicey, Rules for the Selection of the Parties to an Action (1870), Dicey, Law of Domicil as a Branch of the Law of England stated in the form of rules (1879), Dicey, Digest of the
Law of England with reference to the Conflict of Laws (1896), Bower, Code of Actionable Defamation with a Continuous Commentary (1908), and Bower, The Law of Actionable Misrepresentation Stated in the Form of a Code, followed by a Commentary (1911), may be referred to. We have a book of this sort in the United States in Wigmore, Pocket Code of Evidence (2 ed). Such books could well prepare the way for an ultimate codification. In this connection the work of the American Law Institute in restating the law is specially significant. This private restatement, which is being widely followed by the courts, might well pave the way for a code.

POSSIBILITIES AND ADVISABILITY OF A CIVIL CODE. 1. Purposes of codification. Three different ideas of a code have been urged. The first, which may be called the Benthamite idea, is really the idea of the eighteenth-century law of nature school. It regards a code as a complete legislative statement of the whole body of the law so as to put it authoritatively in one self-sufficing form.

A second view, at the other extreme, is that which was adopted by a number of the commissioners under Lord Westbury's plan and has been urged particularly by Holland and by Sir James Stephen. According to this idea, orderly arrangement, convenience of ascertainment, and publicity are the chief objects; so that preparation of a code involves (a) republication in systematic form of the whole mass of existing law of every kind, and (b) separate codification of statute and common law, adhering as closely as possible to the language, conceptions, and methods of the old law.

A third view, which was the one taken, on the whole, by the framers of the French Civil Code and by those who framed the German code, is that the purpose must be primarily to provide so far as possible a complete legislative statement of principles so as to furnish a legislative basis for juristic and judicial development along modern lines; laying down rules sparingly and for the analogies they fur-
nish, except in the law of property and of inheritance where precise rules are called for.

Bentham and Austin following him conceived that it would be possible not only to make the law certain and accessible but to remove all ground for dispute as to the meaning of terms or interpretation of the code provisions. In other words, they conceived that the function of the judge could be limited to the application to concrete cases of rules so clearly formulated that nothing more than genuine interpretation would be necessary except for new and unforeseeable situations of fact. The notion that something of this sort can be done has been widespread but is refuted by all juristic and judicial experience. In Frederick the Great's Code the lawmaker's intention was to formulate with such careful minuteness that no possible doubt could arise in the future. Hence it was provided that the judges were not to have any discretion as to interpretation but were to consult a royal commission on any points they found doubtful and were to be absolutely bound by the answer of this commission. This stereotyping of the law was in accordance with the doctrine of the law of nature school which believed that a perfect and complete system could be worked out for which no changes would ever become necessary. Thus rational propositions could be laid down once for all so as to be available for every possible combination of circumstances. Perhaps it need not be said that the attempt to realize such an ideal proved impossible. After a time the royal commission was abolished and the right and duty of judges to interpret and develop by analogy had to be recognized.

Conceding that the first idea is impracticable, the second plan seems not worth while. Sir James Stephen's idea was that it would furnish a prelude to an eventual code in which the results of the development of the imperative element and of the traditional element were to be combined as was proposed by Lord Westbury. Justinian's codification shows
us that a parallel compilation of the legislature-made and
digest of judge-made law are likely to come into conflict
not merely by overlapping of precepts but because the pre-
supposition of a precept in the one way may not be that of a
precept on the same point in the other. In this respect the
codifier of Anglo-American law will encounter a difficulty in
the distinction of our substantive law into law and equity.
It would be much greater if he started with a compilation
of statutes and a digest of decided cases. He would have
much more to do than be sure to choose between all con-
flicting precepts. He would need to be sure that precepts
presupposing divergent starting points for reasoning were
not in his code side by side.

Those who drew up the French civil code made the first
attempt to put the third idea into operation. In that code,
on the whole, the attempt was made not to lay down minute
rules on every conceivable point but to formulate broad
principles. Of course this may be carried too far. On cer-
tain points and in certain fields of the law definite rules are
expedient or even necessary. But in general, as has been
seen in other connections, the lawmaker, whether legislative
or judicial, must not be over-ambitious to lay down universal
rules. Property and succession require many rules. Torts
admit of relatively few. Sometimes in the law of property,
as in case of what the civilians call specification, a rule is
necessary yet no rule has been found wholly satisfactory.
In the German code and the codes since 1900 this idea has
been carried out consistently. The aim has been to formu-
late the principles which have been worked out by juristic
or judicial or legislative experience, to develop them ana-
lytically, and to set forth as clearly as possible a body of
principles representing the highest development of the law
in modern times, rather than a complete body of rules, while
at the same time laying down carefully formulated rules
where, as in property and succession, rules are required.
2. Objections to codification. Many Anglo-American lawyers have insisted that codification of the common law would be, if not impossible, at least highly unfortunate. Almost everything which has been written in English in opposition to codification has its basis directly or indirectly in Savigny's tract on the Vocation of our Age for Legislation and Jurisprudence. Savigny's objections to codification were answered by Austin. But the weight of Austin's arguments is somewhat impaired by his acceptance of Bentham's idea of a code.

Savigny's objections resolve themselves to three. First, he argues that the growth of the law is likely to be impeded or diverted into unnatural directions. Experience, however, shows that this is not necessarily true. It can hardly be doubted that, on the whole, the French code brought about a juristic new start which has favored the development of the law in France. No doubt an ill drawn or too hastily drawn code might afford so poor a basis for further juristic or judicial development as to impede the progress of a system of law. There is no reason to suppose, however, that the carefully drawn codes of the present century have had any such effect.

Savigny's second objection is that a code made by one generation is likely to project directly or indirectly the intellectual and moral notions which existed at that time into days when such notions have become anachronisms. There is undoubted truth in this and it might well result from a code made on the basis of such a digest as was contemplated by Holland and by Sir James Stephen. But it must be observed that development of the law through juristic working over of the traditional element is open to the same objection. Our common law today can show more than one example of projection into the present of the ideas and modes of thought of the past. The law of the last part of the nineteenth century was full of such cases.
Savigny’s third objection is based upon defects in the codes of the past. They may be summed up in two. (a) The codifiers but too often had only superficial knowledge of the law they tried to codify. Partly this was due to the eighteenth-century notion of natural law which made men think they could make a wholly new system by pure reason without regard to the juristic or judicial experience of the past. Partly it has been due to the attempt of one person or of a small number of persons to codify the whole law. The law of a modern state is too complex to be so thoroughly mastered in all its parts by one man or a few men as to enable that man or those few men to draw up a code. (b) In most cases codes in the past have been drawn too hurriedly. Justinian’s commissioners set a bad precedent in that matter which was followed unhappily by those who drew the French civil code. The French code, the Georgia code, and the Negotiable Instruments Law in the United States are examples of the defects which necessarily result from undue haste. Field’s civil code is an example of the defects which are sure to result from the attempt of one man to cover the whole field. The German code shows what may be accomplished by a sufficiently large commission taking sufficient time for its work and utilizing full criticism from every side.

To the points which Savigny made against the codes of the past, Austin added two others which are noteworthy. (1) He objected to them because they made no adequate provision for the incorporation from time to time of judicial interpretation. He insisted that there should be some provision whereby periodically the results of judicial application or interpretation of the code should be incorporated therein and in that way the traditional element which grows up around a code be made part of it. (2) He objected especially to the French code because it was not complete and was intended to be eked out by the pre-existing law. This is based largely on his idea that a code can be made
substantially self-sufficing. It is probably impossible to draw up a code in such a way that all reference to the pre-existing law to throw light upon it will be oviated. It is true that so far as possible this necessity of looking into the law before the code should be done away with since otherwise a tendency will arise to treat the code sections as only declaratory. Herein is one of the chief defects of Field's civil code. It assumed at every point a pretty thorough knowledge of the common law, and was not in itself so clear and sound as to be any real help toward ascertaining the pre-existing law. On the other hand, the attempt to foreclose all judicial or juristic working over of the material of the code must in view of the experience of the past be pronounced futile. The most serious objection to a code in a common-law jurisdiction is that we have no well developed common-law technique of developing legislative texts. Our technique of statutory interpretation is not adequate to the application of a code.

3. Advisability of codifying Anglo-American law. If we apply to common-law jurisdictions what experience has shown as to the conditions which lead to codes, it must be evident that, especially in America, we are rapidly approaching a condition in which codification is likely to be resorted to.

(1) It can hardly be questioned that our case law is by no means able to rise to new situations as it could do in the past. Practically it broke down on the important subject of employer's liability and workmen's compensation. There was clear failure in holding promoters to their duties. Development was too slow in the law of public service agencies and conspicuously too slow in labor law. In these fields legislation and administrative commissions and boards have replaced common law and adjudication. Even in legal procedure it took legislation in England, Canada, and Australia to provide a modern system, although judicial rule-making has done the most for that subject in the present century.
It must be admitted that the traditional element has shown signs for a time of having exhausted its possibilities.

(2) The defects of form in Anglo-American law of today are obvious. They may be summed up as five. (a) Want of certainty. This is very marked in jurisdictions in which questions which have been passed upon in other jurisdictions are still open. There is no certain assurance that the solution which has been adopted elsewhere will be followed. Moreover, it often happens that different solutions have been reached in other jurisdictions so that on many questions there are a number of competing rules of persuasive authority from which to choose, with respect to which the law is still open in some of our most important states. All sorts of trivial questions receive elaborate answers in the books while great and fundamental ones remain in a provoking state of uncertainty because lawyers advise clients to settle rather than pursue a doubtful litigation. Statutory changes are piecemeal and haphazard and the law has to be settled in each jurisdiction as to each controverted point by an elaborate system of judicial opinions which detracts much from thorough judicial consideration of individual cases.

(b) Waste of labor entailed by the unwieldy form of the law. As Chief Justice Sharswood put the matter, the difficulty is not so much to know the law as to know where to find it. Undoubtedly in the long run it is a good thing for the science of law to leave rules and principles to be worked out, in the language of Mr. Justice Miller, by a process of judicial inclusion and exclusion. But the process is hard on the community and the law and takes time away from thorough consideration of cases. Our appellate courts have often to put in so much time in finding the law that they cannot always give adequate consideration to the case. In 1885, a committee of the American Bar Association found that in one volume of New York Reports, in 79 decisions reported, the judges cited 449 cases or between five and six to each, of which 353 were from New York, 56 from Eng-
land, and the rest from 16 different states. But these 449 cases cited by the court were taken from 5300 cited in the briefs of counsel. In other words, a conscientious court was expected to look at 5300 reported decisions in order to decide 79 cases. From personal experience I can testify that the labor is very heavy. The judges in important appellate courts today must have law secretaries to enable them to reduce this task to reasonable proportions.

(c) Lack of knowledge of the law on the part of those who amend it. It must be admitted that the fault in our sometimes crude legislation on matters of private law is not all with the legislators. It is sometimes an almost impossible task in jurisdictions where many controverted questions, often fundamental, are still open, to ascertain with assurance what the law is which is to be changed or amended or abrogated.

(d) Irrationality, due to partial survival of obsolete precepts. In Illinois in 1910, the Supreme Court had to decide that contingent remainders could still be barred by merger. After that, real property lawyers in Chicago trembled for a decade. What other supposedly obsolete common-law rules must they reckon with? No one knew. In Nebraska in 1907, title to valuable lots in the business center of the capital turned on whether there were possibilities of reverter in that jurisdiction. It was not thought safe to try and a compromise was made. Anomalous rules and rules based on history only, which are out of touch with the legal system as a whole, embarrass many important fields of the law. Our analytical methods have been fast identifying these anomalies. But we do not get rid of them. Moreover, irrationality of form continually breeds irrationality of substance, as was seen above in connection with fictions.

(e) Confusion. Courts are frequently led into mistakes between the two parallel lines of case law and statute law, dealing with the same subjects, the one potentially with the
whole, the other unsystematically with parts here and there. No court has authority and no legislature, as a rule, undertakes to reduce any subject to systematic and complete orderly statement.

(3) Passing to the third point which we have seen in connection with the enactment of codes, we come to a matter which is likely longest to retard effective codification in the United States. Where significant codes have been enacted the growing point of the legal system had shifted to legislation and an efficient organ of legislation on matters of law had developed. Undoubtedly with us the growing point has largely shifted to legislation. But we have not developed an efficient organ of lawmaking for the ordinary civil side of the law. In England, if the government takes up a proposal for legislation it has the machinery for pushing it through Parliament. Also through the institution of parliamentary counsel England has got rid of some of the causes of crudity in legislation as to private law. But as has been said, Parliament is not interested in "lawyer's law." In the United States, both houses of Congress now have competent legislative counsel and this is true in some states. This, however, does not suffice to do more than insure the form of statutes. It seldom involves grasp of the legal difficulties at the root of a question. Moreover, there is nothing with us comparable to the taking up of a measure of detailed law reform by the cabinet in England and thus giving it the right of way in a crowded session.

(4) On the other hand, the fourth point, the need of one law, is of more importance with us today than any of the others. It is suggestive that with the economic unification of the country conflict of laws is becoming one of the most important everyday subjects in the average American practice. The demand for one law was behind the growth of the common law. Prior to the Conquest there was no one law of England. Local customary law differed greatly. As one of the demands in Magna Carta was for one measure
of corn and one measure of ale for all England, so another demand of the time was for one measure of law. Such a demand may some day lead to codification of the common law in the United States.

Our condition is much worse than that of England in respect of uncertainty, unwieldy bulk, and need of unification.

Attempt to reshape the law by judicial overruling of leading cases is no substitute for well drawn, comprehensive legislation. The English have an advantage in that down to the nineteenth century, and indeed till the second half of that century, relatively few cases were decided by the House of Lords. Hence old cases decided by tribunals not of ultimate authority may be questioned, whereas with us the ultimate reviewing court is likely to have fixed a century ago or more the law we should like to see changed or given up. Patchwork overruling along with patchwork legislative tinkering often does at least as much harm to the legal system as it does good. Our situation calls for a ministry of justice or a code; and a code will need a ministry of justice also.

Roscoe Pound.