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WITHOUT PRECEDENT: LEGAL ANALYSIS IN THE AGE OF NON-JUDICIAL DISPUTE RESOLUTION

Mark Edwin Burge*

I. INTRODUCTION

For more than a century, the American system of legal education has predominantly emphasized the role of cases and judge-made law,¹ but with the understanding that the craft of the law-making judge is constrained by the doctrine of *stare decisis*.² This case-oriented approach to teaching law extends to statutes: students learn of the role of courts in interpreting and explaining statutes, making judicial construction of statutes part-and-parcel of statutory law.³ Thus, pervading the formative first year of law school is the assumption that the role of lawyers is principally to analyze what courts have done in the past in order to predict what *stare decisis*-constrained courts will likely do in the future. Even outside of pure common law, statutory interpretation is principally a judicial function. This article describes the extent to which these assumptions are incorrect and suggests steps that we in law teaching should take to adapt our classroom approach accordingly.

* Associate Professor of Law, Texas A&M University School of Law. Special thanks to ALWD, the Association of Legal Writing Directors, for providing the grant that got this project off the ground. I also thank my colleagues Frank Snyder and Tanya Pierce for improving this article with their substantial comments on earlier drafts. Feedback following presentations of this article at the Eighth International Conference on Contracts and at regional and biennial conferences of the Legal Writing Institute was also help for which I am grateful.

¹ See generally Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 340 (2010) (noting that the case method has dominated American legal education for more than a century).

² See Charles R. Calleros, *Introducing Students to Legislative Process and Statutory Analysis Through Experiential Learning in A Familiar Context*, 38 GONZ. L. REV. 33, 56 n.17 (2003) (“Early in the first semester, students should have at least an acquaintance with the doctrine of *stare decisis*, both from their doctrinal course work and especially from their work in a legal method and writing course.”); Patrick Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 CORNELL L. REV. 411, 413 (1988) (“[S]tare decisis . . . allows the case method to evolve doctrine [T]he courts obedient to *stare decisis* have the range, at least within an outer circle of an earlier case, to push the law, often to push off in a quite different direction from the first court, without overruling its decision.”).

³ Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321 (2005) (observing that cases interpreting statutes generally receive stronger-than-normal *stare decisis* effect in federal courts).

Two areas best illustrate the growing falsity of these assumptions about *stare decisis* and statutory interpretation that law students are taught in their first year of law school. The first such area is when administrative agencies engage in non-judicial adjudication of cases and promulgating regulations. The second area is that in which contracting parties have their disputes determined by an arbitrator instead of a judge. The government agency and private arbitrator have one thing in common: the broad swath of their interpretations and applications of prior law tends to be unassailable and will likely be the last word on the matter, even if their actions are at gross variance with what a court would have been obligated to do as a matter of law. Our teaching of legal analysis should better reflect this reality of law practice. In a sense, practitioners today are likely to appear before some “judge” who will grapple with fixed statutes but who is not necessarily bound by *stare decisis*. Put another way, many cases now should be approached by prudent practitioners as though they are questions of first impression, even when they are not.

Part II of this article considers the ubiquitous role of *stare decisis* as an underlying paradigm in the first year of law school, with a particular focus on the interrelation of that common law doctrine and statutory interpretation.⁴ Next, Part III describes the increasing displacement of *stare decisis* as a controlling limitation in American law, most notably in administrative law and arbitration.⁵ Part IV evaluates the value of the traditional judicial framework for legal instruction in light of its substantial inaccuracy, concluding that *stare decisis* must remain prominent but that changing realities of law practice require it to play a lesser role.⁶ Our students must learn the ability to think outside the *stare decisis* box while maintaining the ability to be constrained by it. This article concludes that the precedent-oriented methodology we typically employ for teaching legal analysis in first-year courses—especially in the first-year legal writing course—is, despite being well-meaning and pedagogically sound, increasingly dishonest. Stepping away from the myopic focus on *stare decisis* and incorporating a more robust concept of non-judicial statutory interpretation into our first year courses are ultimately the best remedies for this problem.

⁴ See *infra* Part II, text accompanying notes 7–54.

⁵ See *infra* Part III, text accompanying notes 55–151.

⁶ See *infra* Part IV, text accompanying notes 152–198.

II. FIRST-YEAR LAW STUDENTS, *STARE DECISIS*, AND STATUTORY INTERPRETATION

Almost since their inception in American legal education, Christopher Columbus Langdell's case method and the Socratic dialogue that accompanies it as its signature pedagogy have been met with both praise⁷ and scorn.⁸ The time-worn cliché for the educational function of law school—particularly the formative first year of law school—is that it teaches students to “think like a lawyer.”⁹ Even when law schools have shifted their attention to experiential learning, practical skills, and subject-area specialization in the upper-level curriculum,¹⁰ the first year of law school is widely recognized as playing a special role in the transformation of law students into lawyers. The first year is when the most important programming of the brain occurs. That element of John Jay Osborn's *The Paper Chase* remains true to this day.¹¹

Nonetheless, both empirical and anecdotal evidence suggests that the terror-inducing side of the Socratic method is much faded from its prime as memorialized in the form of Osborn's Professor Kingsfield. Langdell's innovations certainly qualify as among the

⁷ See Amy M. Colton, *Eyes to the Future, Yet Remembering the Past: Reconciling Tradition with the Future of Legal Education*, 27 U. MICH. J.L. REFORM 963, 971–72 (1994) (noting that among the “avid supporters of the case method” was “probably the most respected legal mind of the day—Oliver Wendell Holmes, Jr.”).

⁸ See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 34–36 (1997) (recounting how Langdell's approaches to legal education were widely criticized during Langdell's lifetime); William P. Lapiana, *Langdell Laughs*, 17 LAW & HIST. REV. 141, 143 (1999) (observing that Boston University's law school was founded by disaffected Boston practitioners who found Langdellian instruction at Harvard insufficient preparation for practice).

⁹ See, e.g., James Boyd White, *Schooling Expectations*, 54 J. LEGAL EDUC. 499 (2004) (describing “to think like a lawyer” as cliché, but then seeking to explain it); Toni M. Fine, *Do Best Pedagogical Practices in Legal Education Include A Curriculum That Integrates Theory, Skill, and Doctrine? A Comment on “The Integration of Theory, Doctrine, and Practice in Legal Education,”* 1 J. ASS'N LEGAL WRITING DIRECTORS 66, 67 (2002) (finding thinking like a lawyer to be “not only cliché but beg[ing] the question: What do students really need to learn in order to ‘think like a lawyer?’”); John Lande, *Teaching Students to Negotiate Like A Lawyer*, 39 WASH. U. J.L. & POL'Y 109, 110 (2012) (“Every law professor and law student is familiar with the cliché that law school teaches students to ‘think like a lawyer.’”).

¹⁰ See generally WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 87 (2007) (stating that “developing lawyers must at some point learn another set of demanding skills” and that those skills are “the introduction to practice.”).

¹¹ JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1971); see also Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465, 468 (2010) (recounting as a signature moment of the movie adaptation when Professor Kingsfield informed his first-year contracts class, “You come in here with a skull full of mush, and you leave thinking like a lawyer.”).

most criticized aspects of legal education. The criticism seems to have had an impact, whether in professors' move to a loosely-defined "modified Socratic" approach or in their partial abandonment of the case method in favor of the use of problems.¹² How, then, are law students still learning to "think like a lawyer" when the pedagogy most credited with achieving that result is so diminished from its pure form in Langdell's day?

Despite the modifications in past decades, the fact remains that the first year of law school is still obsessively case-focused. While legal education today is delivered more gently than by either Langdell or Kingsfield, it still seeks the same results. Even with a much-weakened case method and Socratic drilling, law students are still learning core principles of analysis that have a dramatic impact on the way they perceive legal problems. That analysis is based on cases, and the cases reign supreme because of *stare decisis*.

A. *The Stare Decisis Foundation*

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases¹³

With these words in his landmark *A Selection of Cases on the Law of Contracts*, C.C. Langdell articulated the teaching innovation that became the basis for the modern American law school—the case method. The case method was actually a package of innovations, including the selection and printing of appellate decisions in a student "casebook" and the Socratic method of student examination of judicial decisions in the face of questioning by the profes-

¹² Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 957 (2005) ("While a majority of law professors continue to use some form of Socratic questioning, increasing numbers of professors engage in far less aggressive questioning of their students and adopt an array of techniques to lessen the stress, including allowing students to pass when they are called on or giving advance notice when they will be called on in class.").

¹³ C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871).

sor.¹⁴ From its introduction in 1870, Langdell's approach gained widespread acceptance and became the dominant method of legal instruction in the United States.¹⁵ One of the most remarkable traits of Langdell's success is that it happened despite the fact that one of his foundational premises has long been widely discredited: Law is, in fact, not ultimately susceptible to being "considered as a science."¹⁶

Langdell's method, however, was built on two other and stronger premises that have more successfully withstood the test of time. The first of these premises is that the core lawyering function (i.e., "what constitutes a true lawyer") is to be able to engage in predictive reasoning. Put another way, a proper lawyer does not merely know black-letter legal rules as they might be gleaned from a treatise, but he has the ability to "apply them with constant facility and certainty."¹⁷ The truly skilled lawyer can, in Langdell's view, actually predict legal outcomes—a valuable skill for clients, indeed.

The second surviving premise of the case method is built on the first: past cases matter a great deal because they define what courts will do thereafter. Having studied the developmental growth of a legal doctrine, "extending in many cases through centuries," lawyers can have a superior understanding of how the doctrine might affect a client today. Without using the term, Langdell is hinging much of the value of his pedagogy on *stare decisis*. Courts may develop and elaborate on legal doctrines to deal with new situations, but they generally will not overturn established legal wisdom.

But how did these two premises—prediction as the core lawyering function and *stare decisis* as the basis for prediction—fare in the transition from classical formalism to legal realism? As it happens, they fared quite well. Oliver Wendell Holmes, oft considered

¹⁴ Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518 (1991).

¹⁵ *Id.*

¹⁶ LANGDELL, *supra* note 13; see also Nancy Cook, *Law As Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 34 (2012) ("In a very short time, the scientific theory paradigm attributed to Langdell was 'obsolete in entirety.'" (quoting Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 635 (2007))); Robin Feldman, *Law's Misguided Love Affair with Science*, 10 MINN. J.L. SCI. & TECH. 95, 100 (2009) (describing how, after Langdell, the legal system "stubbornly refused to conform to any notion of a rational science.").

¹⁷ LANGDELL, *supra* note 13 (emphasis added).

a “proto-realist”¹⁸ who was ahead of his time, did not subscribe to Langdell’s view of law as subject to abstract scientific principles. “The life of the law has not been logic; it has been experience,” Holmes famously declared.¹⁹ So, to Holmes, the law could not properly be viewed through the lens of a science laboratory in the same way that Langdell viewed it.²⁰ Yet Holmes just as famously agreed with the Langdellian conception of the core function of properly-trained lawyer: “The *prophecies of what the courts will do in fact*, and nothing more pretentious, are what I mean by the law.”²¹ The lawyer’s core function, once again, is to “prophesy” legal outcomes. *Stare decisis* might not fully draw its essence from science or logic, but it was, despite its occasional illogic, a tool by means of which lawyers could predict one result as more probable than the other.

The “true” legal realist era followed Holmes in rejecting law as laboratory science, but prediction remained the core lawyering function and *stare decisis* an indispensable tool in its aid. Karl Llewellyn’s classic 1930 text for entering law students, *The Bramble Bush*, both affirmed the lawyer’s predictive role and continued Holmes’s notion that law functions both in light of *stare decisis* past-precedent and in present reality:

It should be clear . . . that the work of business counsel is impossible unless the lawyer who attempts it knows not only the rules of law, knows not only what these rules mean in terms of *predicting what the courts will do*, but knows, in addition, the life of the community, the needs and practices of his client—knows, in a word, the working situation which he is called upon to shape

¹⁸ R. Blake Brown & Bruce A. Kimball, *When Holmes Borrowed from Langdell: The “Ultra Legal” Formalism and Public Policy of Northern Securities (1904)*, 45 AM. J. LEGAL HIST. 278, 317 (2001) (observing that “[t]raditionally, Holmes was perceived as a proto-Realist and Langdell as the archetypal formalist.”).

¹⁹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1881); *see also id.* at 35 (“The official theory is that each new decision follows syllogistically from existing precedents. But . . . precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.”).

²⁰ Cf. Bruce A. Kimball, *Young Christopher Langdell, 1826-1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189, 236 (2002) (recounting “Langdell’s famous analogies,” supporting his pedagogical methods, including that the law library is “all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.”).

²¹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) (emphasis added).

as well as the law with reference to which he is called upon to shape it.²²

Decades later, Llewellyn continued to put great weight on the role of binding precedent, even when his attention turned to drafting statutes. In explaining Article 2 of the Uniform Commercial Code, Llewellyn called Section 2-302 on unconscionability “perhaps the most valuable section in the entire code” despite the lack of any attempt to define the term.²³ He asserted that the untethered term would nonetheless add certainty, stability, and predictability to commercial law because “precedent” would “greatly advance certainty.”²⁴

In his own introductory text for law students almost twenty years after Llewellyn’s *The Bramble Bush*, Edward Levi also described legal reasoning in part as a rebuttal to the formalists. Indeed, the formalist era’s promise of determinacy was merely a “pretense”²⁵ and not truly an accurate depiction of the American legal system.²⁶ Nonetheless, Levi still taught that legal reasoning was bound up in “the doctrine of precedent,” that is, *stare decisis*.²⁷ While the law has an “indispensable dynamic quality” of continual change, that change occurs because new cases present new facts that further flesh out the meaning of a legal rule.²⁸ Precedent still governs because “the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar” and this fact-to-fact “finding of similarity or difference is the key step in the legal process.”²⁹ In other words, the fact that past cases control future cases was not in doubt, for that is the essence of the doctrine of precedent. The lawyer is still very much

²² KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 4 (1930); *see also id.* (“And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow.”).

²³ *See generally* JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 97[B][1] (5th ed. 2011) (quoting the Statement of Karl Llewellyn in 1 STATE OF NEW YORK 1954 LAW REVISION COMMISSION REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE at 57).

²⁴ *Id.* (quoting the Statement of Karl Llewellyn in 1 STATE OF NEW YORK 1954 LAW REVISION COMMISSION REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE at 113).

²⁵ EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1 (1949) (“It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack.”) (citing JEROME FRANK, *LAW AND THE MODERN MIND* (1936)).

²⁶ *Id.* (“In an important sense, legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible.”).

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.*

the predictor of outcomes based on analysis of prior cases;³⁰ that predictor simply must account for indeterminacy arising from differing facts.

American jurisprudence and legal theory certainly did not end with the overthrow of Langdellian formalists by the legal realists, but it is appropriate for present purposes to skip directly from the era of Llewellyn and Levi to the present day. Having dispensed with Langdell's metaphor of law as science, the realists nonetheless adopted and maintained, in large part, his case method and its underlying premises: (1) that prediction of legal outcomes is a core lawyering function, and (2) that the principal means of predicting such outcomes is through case analysis informed by *stare decisis*, albeit with the recognition that *stare decisis* does not operate with scientific precision. As to these two principles, I suggest that legal education still lives very much in the world of the legal realists' variant on Langdell's case method.

A survey of some current representative first-year texts exemplifies the point that legal pedagogy remains very much in the world of *stare decisis*. Before providing the excerpts, let me be clear that I have not singled out these texts for criticism. In fact, these are excellent books that, in many instances, I myself have assigned to students and used (I hope) with some measure of pedagogical success. I have selected these quotations merely because they are representative of the current methodology in American legal education.

Consider first, for example, the following passage from an introductory text on legal analysis that is geared toward law students in the opening days and weeks of their education:

Imagine a system without *stare decisis* or precedent. If judges decided each case without regard to prior cases, litigants would indeed be at the mercy of the court. Judges would have the power to reach conclusions without the aid of a sustainable predictable body of law. Litigants would have no reliable basis to determine whether a particular act had any culpable consequence. Without *stare decisis* and precedent, the ability of lawyers to predict a legal result would be nearly impossible.³¹

These statements indeed are premised on the surviving case method principles from Langdell's day: lawyers must predict out-

³⁰ *Id.* at 7 ("What does the law forum require? It requires the presentation of competing examples.").

³¹ DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* 10 (2d ed. 2009).

comes, and in a common law system their key methodology for doing so is *stare decisis*.³²

The excerpt below, from an established and respected legal-writing text, discusses an objective legal memorandum. The predictive task of a lawyer in writing a memo has already been established. Notice, however, that the students' selection of authority is premised on the constraining force of *stare decisis*:

When you search for case authorities to help you answer the issue before you, you will search first for precedents that are binding on the court where the issue will be decided because these cases provide the constraints within which you must analyze the problem.³³

A text geared toward international students, many of whom undoubtedly have come to an American law school from a country with a civil law system, unsurprisingly also focuses on the role of binding precedent in an Anglo-American jurisdiction:

Predictability [in the common-law system] is provided by the concept known as *stare decisis*: the courts' policy to stand by *precedent* (previous decisions) and not to disturb a settled point. In other words, similar cases must be decided similarly.³⁴

Finally, lest anyone think the brooding presence of *stare decisis* methodology is confined to legal-writing and legal-methods courses,³⁵ consider an introductory passage from a modern casebook. Given the previous references to Langdell's contracts casebook and to a giant of contracts jurisprudence like Llewellyn, we can appropriately consider the subject of first-year contracts in the present day:

The study of contract law may begin in several different ways. It is logical to begin by exploring the myriad questions dealing with the "agreement process," how *a court determines* whether a contract was formed and how it was formed. There are, however, other desirable points of departure. One of the most im-

³² Goutam U. Jois, *Stare Decisis Is Cognitive Error*, 75 BROOK. L. REV. 63, 76 (2009) ("In a civil law system, courts are generally not bound by prior decisions; they are always free to change course. In the common law, however, *stare decisis* binds future courts to reach the same conclusion as prior courts, furthering the predictability of law.")

³³ HELENE S. SHAPO, ET AL., WRITING AND ANALYSIS IN THE LAW 14 (5th ed. 2008).

³⁴ NADIA E. NEDZEL, LEGAL REASONING, RESEARCH, AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS 4 (2004).

³⁵ See David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 136–37 (2003) (demonstrating the existence of a gap between doctrinal courses and legal writing courses in which the writing courses frequently better teach deductive reasoning from primary authority).

portant inquiries that must be pursued is, what will the legal system do for a party where the other party has breached a contract, i.e., what legal remedies are available and how do *courts apply them*?³⁶

The point underlying the presentation of doctrine is that courts are the single most important source of law. As a result, students will read cases in large part to see what courts do because their past decisions should guide lawyers' and parties' future actions. *Stare decisis* controls legal reasoning even in its diluted form that arises from the generic "national jurisdiction" of a doctrinal law classroom.³⁷ The past may not control the present in an absolute Langdellian scientific sense, but across the first-year law school curriculum, we teach pervasively that cases control and constrain the predictions that a competent lawyer can make. Predictions must be derived from that past, whether that means analogizing to past authority or distinguishing it.

B. *Grafting on Statutory Interpretation*

Case law is typically central to legal reasoning in the first year of law school. Statutory law has, however, assumed a greater role in recent years, perhaps most prominently in Harvard Law School's addition of a freestanding "Legislation and Regulation" course to its first-year curriculum,³⁸ an innovation that has occurred at my own institution as well.³⁹ Aside from such a stand-alone course, many professors make a concerted effort to incorporate statutory analysis into their courses.⁴⁰ Although cur-

³⁶ JOHN EDWARD MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* 10–11 (6th ed. 2006) (emphasis added).

³⁷ Romantz, *supra* note 35, at 143 ("Doctrinal courses tend to disregard the primacy of controlling authority in favor of one convenient national jurisdiction.").

³⁸ See generally Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 169 (2008) (describing this aspect of curricular change at Harvard Law School and advocating its adoption at other law schools).

³⁹ See Texas A&M University School of Law 2013–2014 Catalog 9, 26, available at http://law.tamu.edu/Portals/0/docs/cnoriega/13%20-14%20Catalog_v1_nonspread.pdf (last visited Aug. 22, 2013) (stating the requirement of a three-credit "Legislation and Regulation" course in the first semester for full-time law students and describing the course).

⁴⁰ See, e.g., Richard M. Thomas, *Deprofessionalization and the Postmodern State of Administrative Law Pedagogy*, 42 J. LEGAL EDUC. 75, 96 n.48 (1992) (contending that many law teachers "give significant attention to statutory and regulatory issues in their first-year legal methods and legal writing courses" and that such attention "will inevitably increase."); Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun* (and

ricular laments of the past have included the complaint that American law schools using the case method do not give enough attention to statutes,⁴¹ the basis for this particular complaint seems to be declining.

My concern for present purposes is not whether law schools teach statutory interpretation (because they do), or even the extent to which they teach statutory interpretation (because the extent is increasing). My concern, rather, is for *how* we predominantly present statutes: their interpretation is judicial-centric and a subset of *stare decisis*.

Having looked earlier at some first-year texts' explicit and implicit presentation of *stare decisis*-based prediction as the core lawyering function, I now consider some treatments of statutes from that same introductory time period. Once again, I note that these quotations are from excellent materials, including some that I or colleagues of mine have used and would use again without hesitation. I offer these quotations precisely because they are typical.

The tying of statutory interpretation to *stare decisis* in first-year texts is sometimes quite direct, as in the following excerpt:

Once a court interprets a statute, the principle of *stare decisis* applies and the court will then follow the interpretation it or a higher court has previously adopted unless it overrules it. For each new case with the same statutory issue, the court then reasons by analogy to the facts of the prior cases in order to apply the statute to the new case.⁴²

Thus, while the statute might provide the initial black-letter law with which analysis begins, case law ultimately achieves primacy for purposes of prediction.

Another example focuses on the particular instance of statutory ambiguity but assumes that courts will fill in the gaps:

[L]egislatures do not really finish the job of legislating. Statutes have ambiguities, and often *we do not know what a statute means until the courts tell us*. . . . Courts record their decisions in

Value of Courting Controversy, 48 ST. LOUIS U. L.J. 1143, 1166 (2004) ("Criminal Law might be the best first-year substantive class for teaching students statutory analysis.").

⁴¹ Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. REV. 285, 342 n.37 (1998) (stating that "[s]tatutory interpretation still tends to get overlooked in the first year and in law school generally" but that the situation is improving).

⁴² SHAPO, *supra* note 33, at 112.

judicial opinions, which establish precedents under the doctrine of *stare decisis*.⁴³

Upon reading statements like those above, a student could credibly ask: if the legislature enacts a statute in the forest and a court was not present to hear it, does it make a sound?⁴⁴

In another widely adopted introductory text on legal writing and legal analysis, the author attributes primacy to judges in determining the meaning of statutory language: “The ability to interpret the text and decide whether it applies gives courts broad powers to define even statutory law.”⁴⁵ In this instance, the focus is once again judicially oriented, an unsurprising result under the predominant case method.

The fact that the above statements and other similar ones are a point of emphasis in American law schools is unsurprising, considering the fact that law in the United States has its origins in the English common law.⁴⁶ How could courts *not* be front-and-center for the conversation? “Although much of the [English] common law has since been changed through [American] statute or judicial decision,” as one leading first-year text describes the situation for new law students, “it remains the foundation of our legal system. Common-law methods of reasoning dominate the practice and study of law.”⁴⁷

The relatively new Legislation and Regulation course now taught in many law schools might seem, at first blush, an exception to this approach by putting statutory text front and center. Oddly enough, this course, which is arguably the antidote to case-supremacy in the first-year curriculum, actually reinforces the pres-

⁴³ RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING* 20–21 (7th ed. 2013) (emphasis added). This view of statutory meaning is current, but it also has a long and distinguished pedigree. See, e.g., Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 *COLUM. L. REV.* 1259, 1266–67 (1947) (arguing that statutes are written for judges much the way composers write music for performing musicians—both judges and musicians provide actual realization of the source material).

⁴⁴ The actual popular philosophical question, of course, is, “If a tree falls in a forest and no one is around to hear it, does it make a sound?” Eighteenth century philosopher and Anglican Bishop George Berkeley is credited with raising the dichotomy between physical substance and its perception. See, e.g., *McGill v. EPA*, 593 F.2d 631, 636 (5th Cir. 1979) (presenting the statement as “Bishop Berkeley’s famous question”); see also GEORGE BERKELEY, *A TREATISE CONCERNING THE PRINCIPLES OF HUMAN KNOWLEDGE* (1710) (1878 reprint available at <http://books.google.com/books?id=nhpLAAAAMAAJ>) (arguing that things in the material world exist only when perceived in the mind).

⁴⁵ LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 24 (3d ed. 2011).

⁴⁶ NEUMANN & TISCIONE, *supra* note 43, at 3–5.

⁴⁷ *Id.* at 5.

entation in all the other courses: the meaning of statutes is primarily derived from what courts say about them.

Consider, for example, the text by Professors Manning and Stephenson that arose directly out of Harvard Law School's 2006 curricular reform.⁴⁸ The authors state up-front their intention to "begin by focusing on legislation, *considering the methods that federal courts use to read statutes*,"⁴⁹ and then highlight five leading issues on which students should focus.⁵⁰ Sure enough, every one of those questions revolves around the role and function of courts in statutory interpretation.⁵¹ In the book's chapters devoted to statutes, 201 out of 356 pages are occupied in full or in part by traditional edited cases, predominantly from the United States Supreme Court. Most of the remaining 356 pages are notes and commentary on the principal cases. The material is, to be sure, interesting and worthwhile, but it does absolutely nothing to disabuse law students of the idea that the most important statutory meaning flows from the precedential effect of cases. For better or for worse, the Manning and Stephenson text is still a casebook, every bit as much a typical first-year law student's primary text for Torts, Contracts, or Property.

The present state of affairs in teaching first-year law school courses is thus not that statutes are being neglected; rather, it is that statutes are most often presented—even sometimes exclusively presented—as a graft onto Langdell's case method tree. While canons of construction and other tools for constructing the meaning of statutes are important, the statutes must ultimately give

⁴⁸ JOHN F. MANNING & MATTHEW C. STEVENSON, *LEGISLATION AND REGULATION* (2010).

⁴⁹ *Id.* at 2 (emphasis added).

⁵⁰ *Id.* at 2–3.

⁵¹ The five bulleted issues that Manning and Stephenson highlight are:

- Is the courts' job to figure out precisely what Congress would have wanted in the circumstances of a given case, or should courts apply statutes according to the plain import of their terms because the words are what Congress enacted into law?
- Should courts consult the purposes of the statute—the reasons that Congress likely passed it in the first place—when interpreting the statute's specific provisions? How can courts figure out what those purposes are?
- Should courts pay attention to what legislators said about the statute during the process leading up to its enactment? Should they pay special attention to what a bill's sponsors said they thought it meant? What about the views expressed by the specialized legislative committees that initially considered and proposed the legislation?
- Should courts use specialized rules of thumb (in trade lingo, "canons of construction") to help resolve statutory ambiguities?
- Do we get help with any of these questions [about courts] by considering the way different techniques fit in with our government traditions?

way to judicial decision-making. Cases will control statutory meaning because of *stare decisis*, as later judges will be, in some fashion, constrained by the interpretations of their predecessors. Researching case law, then, still has primacy for the lawyer fulfilling the core function of legal prediction.⁵² Or, so we suggest to our students.

The problem with this approach, as I will discuss in Part III,⁵³ is that it is frequently untrue because of the displacement of *stare decisis*. Case precedent does not particularly control in major venues of the actual operation of the law. That is why, in Part IV,⁵⁴ I will suggest the need and means for decoupling statutory interpretation from *stare decisis* while still retaining the strong pedagogical value inherent in that doctrine.

III. OUTSOURCING STATUTORY INTERPRETATION AND DOWNSIZING *STARE DECISIS*

The description during the first year of law school of common law reasoning and roles of “controlling” cases and statutes has never been entirely true. Indeed, the charge that legal certainty was a myth is one of the primary criticisms leveled by legal realists toward their formalist predecessors,⁵⁵ so the existence of a gap between pedagogy and practice is hardly a new thing. What is new, however, is the current size of that gap, as signaled by two decisions of the Supreme Court: *National Cable and Telecommunications Association v. Brand X Internet Services*,⁵⁶ an administrative law case, and *Hall Street Associates, L.L.C. v. Mattel, Inc.*,⁵⁷ an arbitration case. These decisions and their progeny require, I suggest, diligent practicing attorneys to consider the abandonment of common law reasoning in enormous areas of practice because of a near-total displacement of *stare decisis*.

⁵² See generally CHRISTINA L. KUNZ, ET AL., *THE PROCESS OF LEGAL RESEARCH* 230 (7th ed. 2008) (“*Stare decisis* applies in the statutory setting; a court asked to interpret a statute will follow the interpretation of courts that create the precedents it must follow Thus, as you research a statute, you will also research case law interpreting the statute. Otherwise, your research will be incomplete.”).

⁵³ See *infra* Part III, text accompanying notes 55–151.

⁵⁴ See *infra* Part IV, text accompanying notes 152–98.

⁵⁵ Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255, 267 (1961) (stating that one of the “chief aims of the legal realists was to destroy the false certainty” of formalist doctrine, which was “a certainty grounded on myth.”).

⁵⁶ 545 U.S. 967 (2005).

⁵⁷ 552 U.S. 576 (2008).

This shift has an impact on the ways in which law schools should teach legal analysis during the first year, and particularly with regard to statutes. The government agency and private arbitrator have one thing in common: their interpretation of statutory law is virtually unassailable and will likely be the last word on the matter, even if the interpretation is at gross variance with what a court would do. Our teaching of statutory analysis should reflect a reality of law practice: much statutory interpretation occurs independent of the court system. In a sense, practitioners today are each a potential “judge,” or are at least likely to appear before someone in the role of “judge” who will grapple with statutes but is not necessarily bound by *stare decisis*.

A. Administrative Law

Chief Justice John Marshall famously stated in *Marbury v. Madison* that it is “emphatically the province and the duty of the judicial department to say what the law is.”⁵⁸ Taken from that starting point, the idea that non-judicial agencies would interpret statutes is far from intuitive. The New Deal, however, ushered in an era in which executive branch agencies played an increasingly large role in stating the meaning of certain statutory law enacted by Congress, especially those statutes Congress intended to be administered by agencies.⁵⁹ Once the objection was subdued that Congress could not constitutionally delegate broad rulemaking authority to an administrative agency,⁶⁰ the executive branch began to “say what the law is” in earnest and with increasing frequency and specificity.⁶¹

Of course, interpretive rules pronounced by an administrative agency are just as likely to be the basis for disputes and litigation as

⁵⁸ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁵⁹ Alfred C. Aman, Jr., *Administrative Law in A Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1109 (1988) (describing how, during and after the New Deal, “Congress was able to sidestep difficult political issues by delegating broad legislative power to administrative agencies” which then “often were able to use and expand their legislative power with relatively little apparent scrutiny from the courts.”)

⁶⁰ See generally Michael Ray Harris, *Breaking the Grip of the Administrative Triad: Agency Policy Making Under A Necessity-Based Doctrine*, 86 TUL. L. REV. 273, 286–87 (2011) (describing the context and creation of the nondelegation doctrine); cf. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁶¹ Cf. Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263 (1998) (“The expansion of federal power in the post-New Deal era has been one of the defining characteristics of twentieth-century American politics.”).

was judicially stated law,⁶² thereby raising the question of how much deference the judiciary should give to a statutory interpretation made by an agency. As it happens, the answer to this question has an impact on *stare decisis* and the ability of lawyers to predict future results based on dominant methods of legal analysis. Not only is the deference paid by courts to agency interpretation of statutes high,⁶³ but the standard of deference is so constructed as to minimize the value of otherwise “binding” case law.

Although the roots of modern concerns over agency interpretation stem from the 1930s’ New Deal, understanding the current legal era of statutory interpretation requires looking back only to 1984 and the Supreme Court’s decision in *Chevron v. Natural Resources Defense Council, Inc.*⁶⁴ A basic understanding of *Chevron* and its progeny—especially the 2005 decision by the Court in *National Cable & Telecommunications Association v Brand X Internet Services*⁶⁵—sets the stage for how the growth of the administrative state and the legal doctrine accompanying that growth have contributed to the diminishing role of *stare decisis*.

In *Chevron*, environmental groups challenged the decision by the Environmental Protection Agency (“EPA”) to modify its regulatory definition of the term “stationary source” from a prior definition that the groups thought more protective of the environment. Through the Clean Air Act, Congress authorized the EPA to require obtaining a permit when a facility sought to modify or build a “stationary source” of pollution, but the term “stationary source” was not defined by the Act.⁶⁶ The EPA originally issued a regulation identifying a stationary source as any new or modified equipment that emitted air pollutants—thus, any such installation at an existing plant would trigger the requirement that the owner seek and obtain a permit. Environmental permitting is a costly and time-consuming process that most facility owners wish to avoid.⁶⁷ The following year—which not coincidentally included the political turnover from the Carter Administration to the Reagan Administration—the EPA changed course and defined stationary source

⁶² Cf. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170–76 (2010) (collecting empirical studies of certain lawsuits against federal administrative agencies, including those implicating the *Chevron* doctrine).

⁶³ *See id.*

⁶⁴ *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶⁵ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.* 545 U.S. 967 (2005).

⁶⁶ *Chevron*, 467 U.S. at 840–41.

⁶⁷ *Id.* at 840 n.2.

with a “bubble concept” covering an entire facility.⁶⁸ The practical effect of bundling all facility equipment as a single “stationary source” was that if the owner of a plant added new polluting equipment but simultaneously offset the new pollutants by reducing emissions elsewhere at the plant, then the plant owner could avoid the permitting process.⁶⁹

The Court held that the EPA could change its regulation.⁷⁰ The far-reaching impact of *Chevron*, however, was the two-step test it laid out for how and when courts must defer to agency interpretations of statutes administered by the agency.⁷¹ Under the first step, a reviewing court must determine the intent of Congress in enacting the statute in question. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁷² If, however, a statute is silent or ambiguous with respect to the issue in question within the agency’s interpretation, then the reviewing court should proceed to step two:

[T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.⁷³

Irrelevant to the question is whether the court would have reached the same interpretive result.⁷⁴ Exceptional cases notwithstanding, the agency will win a dispute in step two of the analysis, though the question of when congressional intent is “clear” in step one has admittedly been a source of much judicial disagreement.⁷⁵

⁶⁸ *Id.* at 840.

⁶⁹ *Id.* at 852.

⁷⁰ *Id.* at 859.

⁷¹ Cf. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* 427 (Peter L. Strauss, ed., 2006) (“*Chevron* presents a striking instance of a case that became great not because of the inherent importance of the issue presented, but because the opinion happened to be written in such a way that key actors in the legal system later decided to make it a great case.”).

⁷² *Chevron*, 467 U.S. at 842–43.

⁷³ *Id.* at 843 (footnote omitted).

⁷⁴ *Id.* at 843 n.11.

⁷⁵ See generally Linda D. Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 *ADMIN. L. REV.* 725, 743–71 (2007) (detailing a decades-long running battle between supporters of intentionalist and textualist views of *Chevron* on the Supreme Court); Mark Edwin Burge, Note, *Regulatory Reform and the Chevron Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 *TEX. L. REV.* 1085, 1096 (1997) (noting that deter-

One reason *Chevron* was so far-reaching is that statutory interpretation by administrative agencies has become so pervasive. Indeed, Thomas Merrill noted in 2006 that at over seven thousand separate federal case citations, *Chevron* is easily the most cited case in administrative law, and he speculated that the decision might even surpass the reigning most-cited case,⁷⁶ that staple of first-year civil procedure, *Erie R.R. Co. v. Tompkins*.⁷⁷

So far, so good on the question of methodological predictability in the administrative law setting. A lawyer, post-*Chevron* at least, in the absence of judicial interpretation would actually gain highly valuable tools for analyzing and interpreting a statute through an authoritative interpretation by the agency's administration of the statute.

But what happens if a court interprets a statute before an administering agency does? May a lawyer properly rely on the case as authoritative, just as she surely learned to do in the first year of law school? Despite subsequent disagreement by the executive branch, one could reasonably assume that it is still "emphatically the province and the duty of the judicial department to say what the law is."⁷⁸ *Chevron* did not necessarily abrogate that judicial duty but merely circumscribed it, requiring courts not to contradict an agency that has already reasonably interpreted a statute. In theory, at least, a deferential court and a reasonable agency will not disagree as to what the law is. A deferential court will not contradict an agency acting permissibly, while a well-behaved agency would not advance an interpretation contrary to existing judicially stated law. After all, such an agency would surely not be "reasonable" for *Chevron* purposes.

Or maybe it would. *National Cable & Telecommunications Association v. Brand X Internet Services*⁷⁹ squarely presented this issue to the Supreme Court and, while the result is not surprising in light of two decades of *Chevron* jurisprudence, this case shows how

mining congressional intent under step one based on traditional tools of statutory construction "depends largely on who gets to choose the tools.").

⁷⁶ Merrill, *supra* note 71 at 399 nn.1-2.

⁷⁷ 304 U.S. 64 (1938). For anyone who might enjoy the parlor-game aspect of such matters, the KeyCite service on Westlaw shows that, as of August 22, 2013, *Erie* was cited 16,297 times (federal and state) and *Chevron* was cited 12,995 times (federal and state) excluding all citations by secondary sources and practitioner-drafted documents. This performance by the 1984 *Chevron* opinion is all the more impressive when considering that the 1938 *Erie* decision had a forty-six year head start in the race.

⁷⁸ *Marbury*, 5 U.S. at 177.

⁷⁹ 545 U.S. 967 (2005).

fully the traditional relative roles of the executive and the judiciary can be turned on their respective heads. For present purposes, perhaps the best way to tell the story of *Brand X* is through the eyes of a practicing attorney—one who is faced with the initial facts of the case yet without knowledge of the final result.

Imagine that you represent a cable company with a problem involving the meaning of the term “telecommunications service”⁸⁰ as used in the Telecommunications Act of 1996.⁸¹ Your client is subject to regulations applicable to providers of a statutorily defined “telecommunications service.” Your client’s specific problem is one of its competitive positions. The Federal Communications Commission (“FCC”) has determined that your client’s competitor, a broadband Internet service provider, does not provide a “telecommunications service” and is thus not bound by the FCC’s mandatory common-carrier regulation.

Fortunately for your client, years before the FCC ruling, the Ninth Circuit decided that Internet service by a cable modem is indeed a “telecommunications service” subject to FCC regulations.⁸² At a minimum, then, this is highly persuasive authority in your favor, especially given that your client’s facts are nearly on “all fours” with the previous case. But even more fortunately, numerous other cable companies have challenged the FCC ruling, and a judicial lottery has sent the consolidated litigation for resolution in a district court in the Ninth Circuit. For purposes of your analysis, that nearly clinches the outcome: *stare decisis* requires the Ninth Circuit to follow its prior decision—at least absent compelling reason not to do so—and interpret the phrase “telecommunications service” as covering your client’s competitor.

Your post-research position for meeting with your client is an enviable one. You bring not only a prediction, but also a prediction your client will like, and your analysis could hardly be on firmer ground. If an appellate court has already spoken on the issue—and not just any appellate court but *your* court—that would be nearly an unquestionable basis on which to make a prediction. Put another way: to predict otherwise would be tantamount to malpractice, right?

⁸⁰ 47 U.S.C. § 153(44) (2010).

⁸¹ Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

⁸² AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

Wrong. In *Brand X*, the FCC interpreted the definition of “telecommunications service”⁸³ in the Communications Act of 1934 as subjecting to mandatory common-carrier regulation all providers of a “telecommunications service.”⁸⁴ Furthermore, the FCC had interpreted that statutory term to exclude broadband Internet service, contrary to a prior Ninth Circuit case decided when the FCC had not issued a definitive interpretation of the term.⁸⁵ Could the later agency interpretation overrule the prior case? Yes, it could. “Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation,” held the Supreme Court, “and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”⁸⁶

Brand X has apparently had its intended effect and has led to similar outcomes elsewhere: courts defer to agency interpretations of statutes despite prior court precedent to the contrary, and the agency is free to supersede such precedent.⁸⁷ For example, in 2008, the Third Circuit Court of Appeals reversed a Tax Court’s determination that the Internal Revenue Service lacked statutory authority to revise a regulation that had been in place in 1957 and was repeatedly construed by that court.⁸⁸ Although *Brand X* deference does not—like the rest of *Chevron* deference—apply where an agency-interpreted statute is unambiguous, ambiguity is frequently in the eye of the beholding judge. In sum, to whatever extent *Chevron* had already undermined the predictive function of lawyers in the administrative-agency setting, *Brand X* makes that undermining complete.

The triumph of *Chevron* deference over *stare decisis* is rather expansive, indeed. From the common law tradition mandating adherence to precedent, we find ourselves in a reality where precedent means little. I do not describe this situation to either criticize or praise it, but merely to point out its existence. In an era in which substantial and increasing numbers of legal outcomes are in the hands of administrative agencies, the *stare decisis* paradigm for instruction is often a poor fit. Though the lawyer’s core function of prediction does not possess scientific certainty, *Brand X* illustrates

⁸³ 47 U.S.C. § 153(44).

⁸⁴ *Brand X*, 545 U.S. at 982.

⁸⁵ *Id.*

⁸⁶ *Id.* at 982–83.

⁸⁷ Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of A Divided Supreme Court*, 61 EMORY L.J. 1, 18 (2011).

⁸⁸ *Swallows Holding, Ltd. v. Comm’r of Internal Revenue*, 515 F.3d 162, 168–70 (3d Cir. 2008).

that predictive possibility of the sort contemplated by the *stare decisis* doctrine is even further on the wane in a prominent area of American law.

Nonetheless, perhaps this one area of declining adherence to precedent is not of great importance. After all, many legal practitioners can and do conduct their professional lives without substantial interaction with administrative law. Maybe the concern, if any, diminishes in correlation to greater distance from Washington D.C. Administrative law is only one arena of non-judicial dispute resolution. The arena that law students are exponentially less likely to be able to avoid in law practice is contractual arbitration.

B. Arbitration

Arbitration—the contractual and non-judicial resolution of disputes—has a centuries-long history,⁸⁹ but the modern legal landscape for arbitration in the United States dates from when Congress enacted the Federal Arbitration Act (“FAA”)⁹⁰ in 1925. In theory, at least, arbitration is nothing but a non-judicial means of adjudicating a dispute; arbitrating, rather than litigating, a case is only a choice of a private, rather than a public, forum. With that understanding, the private forum is still deciding cases under largely the same substantive law that a court would apply. And, as the Supreme Court asserted in 1987, “[t]here is no reason to assume at the outset that arbitrators will not follow the law.”⁹¹

The availability of flexible “rough justice” is a vaunted feature of arbitration.⁹² Most, however, of the four decades since 1967 when the greatly expanded use of arbitration occurred enjoyed a minimal legal backstop: the manifest-disregard doctrine. This doctrine held, in effect, that while courts would defer to arbitrators

⁸⁹ See Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 445 (1984) (“Common law arbitration was sufficiently developed by the seventeenth century for John March to devote part of a treatise to the subject.”).

⁹⁰ 9 U.S.C. §§ 1–16 (2006).

⁹¹ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987).

⁹² See, e.g., Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 46 (1999) (contending under multiple models of arbitration that the arbitrators “are still likely to temper their awards with the rough justice of equity”); see also Russ Bleemer, *The Calm and the Storm: Arbitration Experts Speak Out on Hall Street Associates*, 26 ALTERNATIVES TO HIGH COST LITIG. 104, 107 (2008) (“Parties willingly enter arbitration knowing that the resulting award will be the product of a mix of law, practicality, compromise, and rough justice.”)

whose decisions might inadvertently apply the law incorrectly, awards rendered by arbitrators who ignore the law entirely could be judicially vacated or modified. The Second Circuit described its formulation thus:

[T]his court has also recognized that an arbitration award may be vacated if it is in “manifest disregard of the law.” We have also pointed out, however, that the reach of the doctrine is “severely limited.” Indeed, we have cautioned that manifest disregard “clearly means more than error or misunderstanding with respect to the law.” We have further noted that to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.⁹³

Manifest disregard of the law was difficult to prove, and the doctrine was certainly deferential to the arbitration process. Nonetheless, it provided at least the assurance that arbitrators must try to follow the law, even if unsuccessfully. Parties who contracted with an understanding that applicable law would actually be applied had a more-than-colorable basis for their understanding.

But manifest-disregard review is effectively a dead letter, whether one is in state or federal court. Interpretations of the FAA have, step-by-step, closed down most judicial means of avoiding arbitration awards for legal error. Two cases in particular closed off most review for legal error in both federal and state courts, while a third has sealed any remaining cracks by dismantling manifest disregard.

First, in the 1967 case of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁹⁴ the Supreme Court held that an arbitration clause is “separable” from the remainder of the contract containing it. As a result, a party alleging fraud in the inducement of a contract containing an arbitration agreement cannot have the fraud claim judicially determined unless that party proved that the arbitration clause itself—as opposed to the entire contract—was the result of fraud in the inducement. Despite the oft-recited maxim that the 1925 congressional intent behind the FAA was merely to “overrule the judiciary’s longstanding refusal to enforce agree-

⁹³ *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998) (internal citations omitted).

⁹⁴ 388 U.S. 395 (1967).

ments to arbitrate”⁹⁵ and thus place arbitration agreements “upon the same footing as other contracts,”⁹⁶ the separability doctrine of *Prima Paint* actually placed arbitration clauses in a place of privilege. Arbitration clauses are protected even when an entire contract might have been procured through fraud that did not specifically involve the boilerplate language of the arbitration clause.

Second—with the FAA firmly interpreted as “a national policy favoring arbitration” that “withdrew the power of the states to require a judicial forum for the resolution of claims”⁹⁷—the Supreme Court determined in *Southland Corp. v. Keating* in 1984 that the FAA applied to state law claims brought in state courts.⁹⁸ While states could and did have their own laws governing arbitration after *Southland*, those statutes faced severe limits in the extent to which they could vary from the FAA or, indeed, whether they could be applied at all.⁹⁹ The Supreme Court in 1989 raised the possibility that state law could play a robust and different role in policing the arbitration process, holding in *Volt Information Sciences, Inc.* that the California choice-of-law provision in a contract meant that the parties had also agreed to California’s law of arbitration instead of the FAA.¹⁰⁰

The door cracked open in *Volt* to variant state arbitration law was largely forced shut in the 1995 *Mastrobuono* case.¹⁰¹ In that case, a securities brokerage contract with a New York choice-of-law provision arguably incorporated a New York statute forbidding

⁹⁵ *Volt Info Sciences v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Dean Whitter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985)).

⁹⁶ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (quoting H.R. Rep. No. 96, 68th Cong. 1st Sess. 1–2 (1924)).

⁹⁷ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

⁹⁸ *Id.* at 16.

⁹⁹ See Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 369 (2010) (stating that *Southland* has led to “the mandatory enforcement of the [FAA] in state courts because the FAA does not contain a federal jurisdictional statement. States are ordered by federal courts to enforce a federal act in state courts even though that act may be contrary to the public policy of the state.”); see also Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2251 (2002) (“Although the Court has placed limits on the FAA’s eviction of state law, some lower courts addressing the problem have subtly expanded those limits, replacing state contract and arbitration law with federal ‘contract’ rules and the FAA.”).

¹⁰⁰ *Volt Info. Servs.*, 489 U.S. at 479 (“Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward.”).

¹⁰¹ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

arbitrators from awarding punitive damages.¹⁰² The Seventh Circuit Court of Appeals accepted that argument, substantially on the basis of *Volt*, and vacated an arbitral award of punitive damages.¹⁰³ The Supreme Court reinstated the punitive damages award, holding that the FAA preempted New York law: “[I]f contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.”¹⁰⁴

Together, *Prima Paint*, *Southland*, and their progeny created a place of favor for arbitration in which meaningful review of the legal substance of arbitral awards by any American court was barred by the FAA. The result is an odd one, given the contractual nature of arbitration and the fact that the general law of contracts is state law, not federal law.¹⁰⁵

The third major case that has substantially eliminated judicial review of erroneous application of the law is *Hall Street Associates, L.L.C. v. Mattel, Inc.*¹⁰⁶ In this 2008 case, the Supreme Court nearly eliminated a longstanding possible common-law ground for review of arbitral awards. The parties had agreed mid-litigation to arbitrate their dispute but expressly provided that the United States District Court should “vacate, modify or correct any award . . . where the arbitrator’s conclusions of law are erroneous.”¹⁰⁷ The arbitrator had erroneously interpreted the Oregon Drinking Water Quality Act as not being an “applicable environmental law” that would require indemnification under the parties’ disputed commercial lease, and the district court vacated the arbitrator’s award on the basis of this erroneous conclusion of law.¹⁰⁸

Ultimately, the Supreme Court held that the district court erred by vacating the award because contracting parties do not have the right under the FAA to contractually permit broader judicial review than the FAA itself provides. Since the FAA does not

¹⁰² *Id.* at 54–55.

¹⁰³ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713, 716–17 (7th Cir. 1994), *rev’d* 514 U.S. 52 (1995).

¹⁰⁴ *Mastrobuono*, 514 U.S. at 58 (emphasis in original).

¹⁰⁵ See Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 347 (2010) (observing that “contract law is state law, so that formally there are fifty different bodies of contract law” but that in substance the law is “largely uniform among the states.”).

¹⁰⁶ 552 U.S. 576 (2008).

¹⁰⁷ *Id.* at 579.

¹⁰⁸ *Id.* at 580.

expressly provide for an award to be vacated after the arbitrator erroneously interprets the law, the parties cannot create such a right by their contract.¹⁰⁹ If any party invokes the FAA to enforce an arbitration award, then the grounds for vacating or modifying that award are limited to those expressly provided in Section 10¹¹⁰ and Section 11¹¹¹ of the FAA.

The most far-reaching casualty of the *Hall Street* decision may have been a matter that was not directly before the Court but was unavoidably implicated by its reasoning—manifest disregard of the law as a basis for vacating or modifying an arbitration award. In the 1953 case of *Wilko v. Swan*, the Supreme Court stated that mere misinterpretations of the law by an arbitrator were not subject to review by federal courts, but such misinterpretations stood “in contrast to manifest disregard” of the law,¹¹² a far more serious error that presumably could be reviewed. Following the dicta in *Wilko*, the federal courts of appeals determined that “manifest disregard of the law” was a basis for vacating arbitration awards in cases of extreme legal error that was beyond the grounds specified in the FAA.¹¹³ Though manifest disregard was a backstop of sorts where it applied, it was not much of one. For example, the Eighth

¹⁰⁹ *Id.* at 592.

¹¹⁰ Section 10(a) authorizes a court to vacate an arbitration award in the following specific circumstances:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

10 U.S.C. § 10(a) (2006).

¹¹¹ Section 11 authorizes a court to modify an arbitration award in the following specific circumstances:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

10 U.S.C. § 11 (2006).

¹¹² *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds* by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

¹¹³ *See, e.g.*, *McCarthy v. Citigroup Global Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395–96 (5th Cir. 2003); *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998) (all allowing manifest disregard of the law as a basis to vacate or modify an arbitration award and cited by the Supreme Court as so holding).

Circuit standard was that an arbitrator's decision "only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it."¹¹⁴ Under such a version of manifest disregard, failure to follow the law must be blatant and nearly self-identified by the arbitrator. A few courts went farther, such as the Fourth Circuit, which held that "manifest disregard for the law may be found where an arbitrator disregards or modifies an ambiguous contract term, bases his award on his own notions of justice, or where an arbitrator failed to hold a hearing in contravention of the parties' contract."¹¹⁵ Nonetheless, by 1999, all eleven numbered circuit courts of appeals and the D.C. Circuit had adopted some variant of the manifest disregard standard for vacating arbitration awards.¹¹⁶

Manifest disregard of the law was not directly before the Court in *Hall Street*, but the Supreme Court could not avoid discussing the matter. Petitioner Hall Street used manifest disregard as its cornerstone proof that the FAA's grounds for vacating an award under Section 10 (or modifying an award under Section 11) were non-exclusive and that it could therefore get an award vacated on grounds not explicitly stated in the FAA.¹¹⁷ As the Court explained, "if judges can add grounds to vacate (or modify), so can contracting parties."¹¹⁸ So, having foreclosed review of an arbitration award under non-FAA grounds, the Court sought in dicta to explain away its frequently re-quoted language from *Wilko*. Maybe the term manifest disregard "merely referred to the [FAA Section 10] grounds collectively, rather than adding to them."¹¹⁹ In any event, the Court ultimately exonerated its use of those words: "We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges."¹²⁰ With that pronouncement, *Hall Street* effectively drained any independent meaning from the manifest disregard standard.¹²¹

¹¹⁴ *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001).

¹¹⁵ *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006).

¹¹⁶ Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137, 158–59 (2011) (listing cases and years of circuit adoption of the standard).

¹¹⁷ *Hall Street*, 552 U.S. at 583.

¹¹⁸ *Id.* at 585

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *Volvo Trucks N. Am., Inc. v. Dolphin Line, Inc.*, 50 So. 3d 1050, 1054 (Ala. 2010) ("[I]n *Hall Street* . . . the United States Supreme Court rejected manifest disregard of the law as

Thanks to *Southland* and cases expanding upon it, the number of contracts with arbitration clauses that are not subject to the FAA is scant. The suggestion in *Hall Street* that the FAA “is not the only way into court for parties wanting review of arbitration contracts”¹²² is true theoretically, but it is of little practical consequence. A party benefiting from an arbitrator’s legal error need only be careful to seek enforcement under federal law rather than state law, and must meet the easy threshold showing of a nexus with interstate commerce. To the extent state law sought to restrain arbitration to a field less expansive than that held by the Supreme Court, state law has been preempted by the Supreme Court’s interpretation of the FAA.¹²³ As two commentators have observed about the current state of variance between state and federal arbitration law, “[s]tates can at most mimic the federal pro-arbitration standards.”¹²⁴

So why exactly does the expansive scope of the FAA—and its now compliant state counterparts—matter for purposes of teaching legal analysis to first-year law students? Justice Black actually answered that question in his 1967 dissent in *Prima Paint*:

The Court holds what is to me fantastic. . . . [T]he arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers . . . and even if qualified to apply the law, not bound to do so.¹²⁵

Consider the implications of the last part of that statement. If arbitrators are not bound to apply the law in even the grossest sense,

an available ground for reviewing arbitration awards under the FAA.”); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) (“In the light of the Supreme Court’s clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected. Indeed, the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards. *Hall Street* made it plain that the statutory language means what it says: ‘courts must [confirm the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title,’ 9 U.S.C. § 9 (emphasis added), and there’s nothing malleable about ‘must,’ *Hall Street*, 552 U.S. at 585. Thus from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10.”); *but see* Nicholas R. Weiskopf & Matthew S. Mulqueen, *Hall Street, Judicial Review of Arbitral Awards, and Federal Preemption*, 29 REV. LITIG. 361, 388 (2010) (raising the possibility that the manifest-disregard standard might still survive in a much-diminished form).

¹²² *Hall Street*, 552 U.S. at 588.

¹²³ See Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 177 (2002) (“In this [preemptive] core, the validity of arbitration agreements and matters that can be arbitrated are beyond state regulation.”).

¹²⁴ *Id.*

¹²⁵ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting).

then *stare decisis*-based analysis in that setting can be forced to the margins, a mere rhetorical nicety with no actual teeth, more of a policy argument than anything else. Past decisions have lost their predictive benefits. Prior cases might matter, but the law does not place any backstop requiring that they do so.

Yet one fairly could ask whether Justice Black's position was overwrought. Arbitration certainly has its defenders who insist that the process is fundamentally fair and that the quality of dispute resolution is as good as or better than what happens in the American court system.¹²⁶ Others have suggested, despite an increasingly losing battle, that arbitration is inappropriate in settings where contracting parties have great disparities in bargaining power, such as in employment law and consumer law.¹²⁷ Arguments over the costs and benefits of arbitration are beyond the scope of this article. Here, I mean to focus on dealing with what the situation for contractual arbitration *is* rather than argue over what it *should be*. In fact, the current prevalence of arbitration combined with the federalized deference to the process means that law students are increasingly being sent out into a world that is structurally far different than that for which law school prepared them.

¹²⁶ See, e.g., Paul B. Marrow, *Determining If Mandatory Arbitration Is "Fair": Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks*, 54 N.Y.L. SCH. L. REV. 187, 189 (2010) (stating that mandatory arbitration "affords a flexible, efficient, timely, and cost effective method for dispute resolution and assists businesses competing in uncertain markets"); Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 811 (2008) (concluding that "employees subject to mandatory arbitration not only have access to relief that otherwise would seldom be available; the system works for them"); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003) (asserting that "employment arbitration offers affordable, substantial, measurable due process to employees arbitrating pursuant to mandatory arbitration agreements and to middle- and lower-income employees."); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171 (2003) ("Arbitration . . . is increasingly popular because it allows the parties to avoid court litigation and structure dispute resolution in a manner that best suits each party's needs.").

¹²⁷ See, e.g., Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 301 (2012) (contending that the FAA has become "a hammer for the strong and powerful" and that Congress needs to revisit the act); but see Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1079 (2009) (contending that accusations of systematic arbitration unfairness to consumers have been exaggerated and remain unproven); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 470 (2000) (arguing that "[w]hatever advantage mandatory arbitration may have provided employers has been lost over the last several years" and that large employers actually fare better in court.).

At a fundamental level, law schools are sending their students out not just ill-prepared for the world that faces them, but actually actively misinformed about it. How so? A set of New Jersey cases illustrates a state-law arbitration framework that effectively abandoned the notion of manifest disregard even before the push from the Supreme Court in *Hall Street*. Next, a set of Alabama cases likewise shows the effect of *Hall Street* on the jurisdictions that had adopted manifest disregard of the law.

In *Perini Corporation v. Greate Bay Hotel & Casino, Inc.*, the New Jersey Supreme Court confirmed a \$14.5 million arbitration award in favor of a casino owner for lost profits against the general contractor hired to manage renovation of the casino.¹²⁸ The court, however, evaluated the legal decisions by the panel of arbitrators by a standard that allowed for “mere mistakes of law” yet requiring their interpretation of the law to be “reasonably debatable.”¹²⁹ Thus, vacating the award would require “that the arbitrators must have clearly intended to decide according to the law, must have clearly mistaken the legal rule, and that mistake must appear on the face of the award.”¹³⁰ Even further, the arbitrator’s legal error “must result in a failure of intent or be so gross as to suggest fraud or misconduct.”¹³¹ The *Perini* court confirmed the arbitral award, but did so only after carefully considering whether the award reasonably fell within state contract law principles such as the standard and timing for computation of lost profits—rather an important proposition in a \$14.5 million case—and the doctrine of substantial performance.¹³²

The exercise drew a rebuke from the Chief Justice who, in his concurrence, viewed the entire analysis as misguided and substantially defeating the purposes of arbitration. Indeed, Chief Justice Wilentz was adamant that the legal correctness of the decision should be of no moment to the court:

For all we know, the arbitrators concluded that the sun rises in the west, the earth is flat, and damages have nothing to do with the intentions of the parties or the foreseeability of the consequences of a breach.¹³³

¹²⁸ *Perini Corp. v. Greate Hotel & Casino, Inc.*, 610 A.2d 364, 367–69 (N.J. 1992) (plurality opinion).

¹²⁹ *Id.* at 371.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 373–79.

¹³³ *Id.* at 392 (Wilentz, C.J., concurring).

The statement smacks of hyperbole, certainly. If indeed it were guidance regarding the potential outcome of a breach-of-contract case under New Jersey law where the contract contains an arbitration clause, one might wonder what such a standard does for predictive analysis. Can a non-malpractice committing lawyer truly predict to her client that the sun will probably rise in the west?

Of course, the opinion is a concurrence, so perhaps the rough edges of Wilentz's statement could not possibly reflect actual law. But think again. A mere two years after *Perini*, the New Jersey court reversed course in *Tretina Printing* and explicitly "adopt[ed] as a rule governing judicial review of private contract arbitration awards the standard set forth in the Chief Justice's concurring opinion in *Perini*."¹³⁴ On second thought, maybe that attorney predicting that the sun will rise in the west was not risking malpractice at all.¹³⁵ Still, the *Perini* concurrence's comfort with New Jersey law *not* being applied may have derived from the absence of a choice-of-law provision in the contract at issue: "[I]f nothing is said in the agreement, the arbitrators may use any standards they want to reach a just and equitable result, unrestricted by any law or laws."¹³⁶ The Chief Justice assumed that if parties want New Jersey law to apply and their award to be reviewed for gross errors of New Jersey law, then they can and must "say so in their agreement." Query, however, whether contracting parties actually have that ability following the disavowal of expanded judicial review of arbitration awards in *Hall Street*.

The *Perini* standard does not stand alone, even though most courts might not describe the judicial deference so vividly. A collection of Alabama cases effectively illustrates the impact of *Perini*-style deference on legal doctrine. In a 2004 decision, the Alabama Supreme Court largely deferred to arbitrators and largely upheld a multi-million dollar arbitration award against the Birmingham News Company in favor of franchise dealers that Birmingham News systematically eliminated from its newspaper distribution process.¹³⁷ *Birmingham News* is notable, however, in two respects. First, the court decided, after considerable evaluation, to adopt manifest disregard of the law as a basis for vacating

¹³⁴ *Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 640 A.2d 788, 789 (N.J. 1994).

¹³⁵ Cf. Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 *Nev. L.J.* 271, 280 (2007) (noting that "while many do, commercial arbitrators generally are not required to apply the law in rendering their decision.").

¹³⁶ *Perini Corp.*, 610 A.2d at 397 (Wilentz, C.J., concurring).

¹³⁷ *Birmingham News Co. v. Horn*, 901 So. 2d 27, 30 (Ala. 2004).

or modifying an arbitration award.¹³⁸ It found particularly persuasive the fact that every single federal circuit court had done likewise, and it went so far as to catalogue the cases.¹³⁹ Second, the court laid out a policy rationale for the manifest disregard rule that gave great deference to arbitrators yet still justified a party's *stare decisis*-based reliance on the law.

In the face of seven listed challenges by Birmingham News to the award based on manifest disregard, the *Birmingham News* court found only one error worthy of modification. The panel had awarded each of the plaintiffs separate categories of compensation for both "loss of franchise value" and "loss of future profits."¹⁴⁰ But, "Alabama law is clear" that an injured party may not recover duplicative damages for a single wrong and "[b]oth good will and future profits are computed into lost business value" making the award of both categories "impermissibly duplicitous."¹⁴¹ The Alabama Supreme Court ultimately rendered judgment in the amount of the arbitrators' award, less the duplicative compensatory damages and a concomitant reduction in the punitive damages, as those had been based on a multiplier of 2.5 applied to the total compensatory damages.¹⁴²

The *Birmingham News* court's policy reasoning supporting the existence of manifest disregard review is especially persuasive for present purposes. It was deferential to arbitrators and respectful of the arbitration process while still requiring a showing of ostensible adherence to the law:

Carte blanche judicial approval of decisions rendered by arbitrators not shown to have been guilty of fraud, partiality, or corruption and not made "in excess of the arbitrator's powers," but that egregiously and manifestly depart from clearly established law of which the arbitrators were patently aware, would serve only to undermine the public's confidence in the arbitration process.¹⁴³

¹³⁸ *Id.* at 52.

¹³⁹ *Id.* at 48–49.

¹⁴⁰ *Id.* at 62 (quoting from the arbitrators' award).

¹⁴¹ *Id.* at 62, 64.

¹⁴² *Id.* at 69.

¹⁴³ *Birmingham News*, 901 So. 2d at 49 (quoting *Saturn Constr. Co. v. Premiere Roofing Co.*, 680 A.2d 1274, 1281 (Conn. 1996)); see also Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 248 (2007) (arguing that an award that manifestly disregards a mandatory rule of law should be vacated "because court enforcement of such an award would threaten 'the integrity of the courts as an institution.'" (quoting Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1206 (2000).).

And a showing of manifest disregard would not be easy to establish under Alabama's version of manifest disregard review:

To avoid summary confirmation of an arbitration award, a party "must show that a governing legal principle is well defined, explicit, and clearly applicable to the case, and . . . the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature."¹⁴⁴

In other words, judicial review of arbitral determinations of questions of law needs to exist in some minimal form, at least as a back-stop against error. Minimal judicial review would not necessarily prevent the law being applied wrongly, but it would protect against the law not being applied at all.¹⁴⁵

Juxtapose this minimal—but meaningful—review of the process with the *Perini* concurrence, which would overlook the fact that "the arbitrators concluded that the sun rises in the west, the earth is flat, and damages have nothing to do with the intentions of the parties or the foreseeability of the consequences of the breach."¹⁴⁶ Under *Birmingham News*, an Alabama contracting party could still rely on the clear and widely established prohibition against double recovery, while a New Jersey contracting party under *Tretina Printing* should have no expectation regarding application of the governing law of damages.

Today, however, American lawyers and future lawyers live under the arbitration law of *Hall Street*, which gives us the uncertainty of the *Perini* concurrence ("the sun rises in the west") but without the saving grace assumed by that concurrence—an ability to enforceably contract for substantive law to apply to their arbitration. Alabama cases after *Birmingham News* illustrate that the post-*Hall Street* disavowing of manifest disregard of law is both deep and wide in its impact. In the 2009 case *Hereford v. D.R. Horton, Inc.*, a family claimed a breach of a limited warranty against a homebuilder for failure to repair leak damage.¹⁴⁷ The arbitrator ultimately entered (in the court's words) a "summary judgment" in favor of the builder that the family sought to va-

¹⁴⁴ *Birmingham News*, 901 So. 2d at 51 (quoting *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003) (internal quotation marks omitted)).

¹⁴⁵ *Accord* *Drahozal*, *supra* note 143 at 247 ("Without manifest disregard of the law as a ground for vacating an award, courts may be faced with the prospect of having to enforce an arbitration award where the award on its face openly refuses to follow established law.").

¹⁴⁶ *Perini Corp. v. Greate Hotel & Casino, Inc.*, 610 A.2d 364, 392 (Wilentz, C.J., concurring).

¹⁴⁷ *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 377–78 (Ala. 2009).

cate.¹⁴⁸ An award based on an arbitrator's use of a summary judgment process would seem to involve a question of law and an easily defined record for review. Nonetheless, the Alabama Supreme Court declined to consider the family's claim premised on manifest disregard, determining that the United States Supreme Court's decision in *Hall Street* compelled it to overrule *Birmingham News* and affirm the award under the FAA without further review.¹⁴⁹ A year later, the court reached the same decision in a case under the Alabama Arbitration Act, which the court necessarily interpreted to conform to the FAA on this matter.¹⁵⁰ Manifest disregard of the law as a basis for reviewing arbitration awards is effectively dead and gone.

Although I could question the wisdom of a standard where gross, but non-fraudulent, legal error is irrelevant to enforcement of the law, my present purpose is not to attack the standard. Consider, instead, if in discussing the importance of legal research with first-year students we were to state: "What is legal research and why do you need to know about it? Researching the law means *finding the rules that govern conduct in our society*."¹⁵¹ Should we put an asterisk by that statement? Perhaps we need to note that significant rules—like the entire doctrine taught in a first-year contracts course—may not "govern" in the literal sense of that word if a contract contains an arbitration clause. For the moment, my goal here is to point out this state of affairs and observe that it is a real and increasingly prevalent problem for a lawyer advising a client. Traditional law school instruction in legal analysis does not account for this problem. But it should.

IV. MOVING AWAY FROM THE JUDICIAL PARADIGM

While law schools have expanded their commitment to teaching in areas touching on administrative law and arbitration in recent years (the latter often under the broader umbrella of dispute resolution), the doctrinal training in both fields does not necessarily integrate skills with the doctrine. To be sure, many current efforts and admonitions regarding curricular reform advocate an

¹⁴⁸ *Id.* at 378.

¹⁴⁹ *Id.* at 380–81.

¹⁵⁰ See *Volvo Trucks N. Am. v. Dolphin Line, Inc.* 50 So. 3d 1050, 1054–55 (Ala. 2010).

¹⁵¹ AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* 1 (5th ed. 2012) (emphasis added).

increased role for skills training in the curriculum.¹⁵² This training, however, is still premised on the overarching existence of a *stare decisis* doctrinal paradigm for law practice.¹⁵³ What is missing, I contend, is an explicit and fully explained departure from the judicial paradigm.

In this section, I first recognize the value of the judicial paradigm to law school pedagogy in establishing an anchor that forces law students out of the free-wheeling, open-ended analysis with which they likely arrive at law school. The cliché that law school is above all else teaching its students to “think like a lawyer” is persistent because it is true. Lawyers evaluate problems differently than non-lawyers and that fact is a fundamental part of the value added by lawyers to problem solving (and, to many, is also the principal transactional cost added by lawyers). The *stare decisis*-based pedagogy of problem solving has too great a benefit to abandon it even in the face of its growing variance with actual law practice.

Having recognized the value of the *stare decisis* instructional paradigm, I next consider how to deal with the fact that our teaching frequently does not accurately present the methodology of law practice where *stare decisis* may not play a role. Thus, rather than abandon entirely such a valuable tool, I instead advocate scaling back the prominence of *stare decisis* in teaching legal analysis while filling the pedagogical gap with a more prominent placement of statutory interpretation in non-judicial settings. Though this proposal has pitfalls, it offers some discrete benefits for the future lawyers roaming the halls of law schools. I conclude this section by offering some concrete suggestions for ways to implement this intentional move away from *stare decisis* without losing the distinctive benefits of current pedagogy.

¹⁵² The most notable documents for the most recent law-school curricular reform movement tend to be WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007), often simply referred to as the “Carnegie Report,” and ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* (2007), often simply referred to as the “Best Practices” report.

¹⁵³ See, e.g., SULLIVAN, ET AL., *supra* note 152, at 195 (asserting that “the teaching of legal doctrine needs to become fully integrated into the curriculum” as “part of learning to think like a lawyer in practice settings”); STUCKEY, ET AL., *supra* note 152, at 73–74 (finding that a program of legal instruction should cover core knowledge of the law, which includes “jurisdiction, authority, and procedures of the legal institutions and the professions that initiate, develop, interpret, and apply the law of relevant jurisdictions, including knowledge of constitutional law and judicial review.”).

A. *Lies and the Well-Meaning Liars Who Tell Them*

I am a liar. Nonetheless, I comfort myself with the fact that I share this trait with many effective and talented law teachers. The term *liar* may be more provocative than necessary, but it truly is not meant as an insult. The lies to which I am referring are unintentional lies of omission. And we liars have particularly good intentions—we desperately want to teach our students how to analyze a legal problem, whether in an objective memorandum, a persuasive brief, or an examination essay.

Consider why—after so many years and so many rounds of criticism—American law schools, especially in their first-year curriculum, are wedded to Langdell’s fundamentally judicial-centric approach to teaching what the law is.¹⁵⁴ Yes, we teach about the existence and the importance of statutes and regulations at a greater level of prominence than ever before, but even our students’ understanding of statutes is dominated by some degree of *stare decisis*. Understanding what a statute means—we imply or directly state—requires seeing how a court has interpreted it.¹⁵⁵ Our students legitimately could believe that a statute without judicial interpretation is like the proverbial tree that fell in the forest with no one present.¹⁵⁶ Neither one actually makes a sound.

If *stare decisis* has substantially diminished as an organizational principle, then why is American legal education so insistent, even to the point of misrepresentation, on building the first-year curriculum around it? The answer is nothing more sinister than this: it works and it works fairly well.

Law school, unlike other professional or graduate programs, does not have anything resembling a standard undergraduate pre-

¹⁵⁴ See Jeffrey S. Wolfe, *The Times They Are A Changin’: A New Jurisprudence for Social Security*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 515, 571 (2009) (“Until 1890, no other U.S. law school used this method, which is now standard. Moreover, the standard first-year curriculum at all American law schools—Contracts, Property, Torts, Criminal Law, and Civil Procedure—stands, mostly unchanged, from the curriculum Langdell instituted.”); Kate Nace Day & Russell G. Murphy, *“Just Trying to Be Human in This Place”: Storytelling and Film in the First-Year Law School Classroom*, 39 STETSON L. REV. 247, 249 (2009) (noting that despite changes in technology, the traditional law school curriculum has remained “sacrosanct,” and the traditional law school pedagogy has remained “largely unchanged”); Jeffrey E. Lewis, *“Advanced” Legal Education in the Twenty-First Century: A Prediction of Change*, 31 U. TOL. L. REV. 655, 657 (2000) (stating that, despite some innovations, “the structure of the J.D. curriculum has remained largely unchanged” for decades).

¹⁵⁵ See *infra* Part II.B, text accompanying notes 38–54.

¹⁵⁶ See EDWARDS, *supra* note 45.

paratory program.¹⁵⁷ While this void might be a weakness in some respects, it is also a strength. People of diverse educational experiences—whether in language, literature, social sciences, hard sciences, business, or engineering—and of diverse life experiences—whether new graduates, mid-career professionals, or retirees—can add legal training to their skill set and intellectual experiences. Because the law school curriculum does not assume any background beyond an undergraduate degree,¹⁵⁸ it must meet and mold students precisely where they are with their biases and thinking habits.

One consequence of this breadth of credentials and experience is that much of the first year of law school is spent on disabusing students of the notion that their unsupported opinions have great value. Moreover, support for an opinion that has at least a logical or ethical basis behind it may still not be legal in nature.¹⁵⁹ That is to say, the support may not be of a type that people versed in and carrying out the legal process would recognize as carrying weight.

Enter *stare decisis*. It forces legal logic by anchoring the students' thought processes so they can become proficient in legal analysis. In precedent's weaker form, such as what underlies traditional courses in Torts, Contracts, and Property, the authority may well be a vague national jurisdiction consisting of the "correct" or even the "majority approach" from the casebook. Courses like Civil Procedure and Legal Writing push the development or reasoning through use of the strong form of precedent.¹⁶⁰ Federal court cases interpreting the Federal Rules of Civil Procedure or

¹⁵⁷ Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 74 (2003) (observing that medical schools in the United States require a specific premed curriculum but that "[t]here is no comparable requirement for law students."); see also Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 474 (1996) ("[T]oday, law students study social sciences, such as psychology, medicine, economics, and business and financial subjects. Thus, students come to law school having acquired a far more specialized realm of scholarship and are likely to be unfamiliar with the context and assumptions made by the Langdellian method.").

¹⁵⁸ See Steven B. Dow, *Rethinking Legal Research: Preparing Law Students for Using Empirical Data*, 2011 MICH. ST. L. REV. 523, 537 (2011) (observing that because there is "no prescribed set of courses, set of skills, or knowledge for beginning law study" that "skills in statistics and empirical research methods are randomly scattered among the law student body and most likely at the introductory level.").

¹⁵⁹ See SULLIVAN ET AL. *supra* note 152 ("Case teaching may be powerful pedagogy because it distills into a method the distinctive intellectual formation of professionals.").

¹⁶⁰ Accord Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1360 n.175 (2010) ("The need to respect *stare decisis* is especially strong in cases where the precedent is

Title 28 of the United States Code certainly will control in federal civil litigation. Legal analysis must reach an even finer point in the required first-year Legal Writing course.¹⁶¹ There, the student must ultimately discover that not all primary sources are created equal.¹⁶² Even a nominally statutory assignment in a first-year legal writing course will often hinge more on judicial interpretations of statutes than on interpretive analysis of the statutes themselves.¹⁶³ Only cases within the jurisdiction of the problem are controlling, and within those, higher court and more recent opinions tend to mean more than those from lower courts and older cases. And within each circle of controlling or persuasive authority, narrower factual analogies will tend to carry more weight than more distant factual analogies. Indeed, the common law and precedent-oriented approach of American legal education has, by most measures, been a tremendous success, and not the least of the reasons for this success is the extent to which it attunes future lawyers to skillful grappling with actual facts in solving legal problems.¹⁶⁴

Students thus learn in their first year of law school, perhaps above all other things, a framework that in the quest for law school success ultimately forces them into thinking like lawyers. The judicial-centric instruction built on *stare decisis* has tremendous pedagogical value,¹⁶⁵ including the enablement of students to grasp and internalize the qualitative differences between a legal argument and a non-legal argument. It sets boundaries for problem solving

based on the interpretation of sub-constitutional law such as the Federal Rules of Civil Procedure.”).

¹⁶¹ See Romantz, *supra* note 35, at 146 n.203 (2003) (observing that legal writing’s constant concern with authority and precedent “separates it from other types of composition.”).

¹⁶² See, e.g., Carrie W. Teitcher, *Rebooting the Approach to Teaching Research: Embracing the Computer Age*, 99 *LAW LIBR. J.* 555, 567 (2007) (describing a comparative study in which, left to their own choices, “all writing professors began teaching research by discussing the hierarchy of authority, primary and secondary sources, binding and persuasive authority, and when and how to use secondary sources.”).

¹⁶³ Accord SHAPO, *supra* note 33, at 28 (“Cases that interpret and apply statutes are case law and become precedents in that jurisdiction.”); STEVEN M. BARKAN, ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 135 (9th ed. 2009) (noting the value of annotated codes for legal research because “the meaning of a statute passed by a legislative body is not always clear, and a court must frequently interpret the language used in the statute.”).

¹⁶⁴ Cf. JEROME FRANK, *COURTS ON TRIAL* 325 (1949) (criticizing legal education for failing to properly recognize that trial lawyers need skill in inducing trial courts to adopt their version of the facts before focusing on legal rules.).

¹⁶⁵ Cf. McDonnell, *supra* note 41, at 342 n.36 (collecting arguments advanced in favor of the case method and Socratic instruction, including that “it is a superior way to introduce students to the law and to develop critical analysis skills,” and that it develops “mental toughness and the ability to think on one’s feet”); see also Weaver, *supra* note 14, at 552–53.

and requires that students operate within those boundaries. While *stare decisis* has never been as much of a source of determinative certainty as students might think in their first year of law school, the methodology enables a sharpening of analytical skills by narrowing the field for what is legally possible. Yes, much of the hype of *stare decisis* is untrue, but not all of it is. *Stare decisis* based case analysis thus is a valuable anchor for the students' developing legal reasoning. And it is an exceptionally useful tool. My suggestions in this section thus focus merely on downsizing the role of *stare decisis* to better reflect the reality of law practice.

B. *Equipping Lawyers for Determinacy and Indeterminacy*

A predominant challenge for the American law school curriculum is to meet the pedagogical goal of equipping law students to deal with varying degrees of determinacy and indeterminacy. These future lawyers must deal with relative determinacy in the stereotypical setting of trial court litigation, but they must also recognize the potential indeterminacy inherent in re-analyzing established law as a question of first impression. Ironically, what law students need in this age of non-judicial dispute resolution is the mindset of a judge. They must be able to approach legal problems in contexts—such as in arbitration and administrative law—where no real judge may ever touch the case.¹⁶⁶ Without *stare decisis*, every legal question is arguably a question of first impression and the practitioner needs the concomitant ability to think like a high court judge at even the lowest levels of a legal conflict.

But to the extent *stare decisis* is not used, it must at least be explained away. In legal education, the central role of *stare decisis* in its weak form (the imagined national jurisdiction of traditional doctrinal courses) and in its strong form (particularly in first-year legal writing courses) is much too pedagogically useful to abandon. The ability to closely analogize and distinguish facts is essential to law students of diverse backgrounds as they develop a consciousness of what constitutes a *legal* argument, as opposed to an argument that merely sounds good. That insight and that ability to critically analyze facts is, as much as anything else, what people mean by the euphemism of “thinking like a lawyer.” Indeed, these

¹⁶⁶ See Leib, *supra* note 38, at 170 (noting the disadvantages of a litigation-focused curriculum for “the many law school graduates who will ultimately be engaged in largely administrative, political, regulatory, ADR-oriented, or transactional work in their professional lives.”).

skills are part of the reason American law school training is a value adding proposition for the international students who seek it and also for the enterprises outside the United States who seek to engage or employ American-trained lawyers.

Given this situation of having oversold *stare decisis* for instrumental reasons, what can professors who are teaching legal analysis to first-year law students do to better equip them? My suggestions are three. Since these suggestions are each progressively more difficult to implement, I propose that those teaching first-year law students get as far down the list as possible.

1. Sound a Warning

The first change to implement—even in the absence of the other two—is the incorporation of intentional and explicit classroom discussion on the issue of the diminished practical utility of *stare decisis*. Clear addressing of the topic is appropriate in all existing first-year courses, but most particularly those involving legal writing and analysis. And, yes, that means even the overloaded semester to which your mind just turned. The opportunity to be heard and have an impact during the first year is too great and it will not be repeated again.

The first year of law school is a formative experience in which almost everything is new, and the students have begun actively building a professional identity.¹⁶⁷ And while the first year of law school does not stand alone, it does stand out. The first year creates a complete heightened awareness for students that arises, in part, from consistently facing the unknown. Law students in the first year are building a context from which to understand both the remainder of their law school experience and their own place in the profession.¹⁶⁸ The later years simply do not create the same heightened sense of awareness because so much context has already been set. By the third year, the formerly heightened sense has been replaced by a cognitive filter of “been there, done that.”¹⁶⁹

¹⁶⁷ See SULLIVAN, ET AL., *supra* note 10, at 129 (stating that “law schools shape the minds and hearts of their graduates in enduring ways” that are “especially salient in the development of professional purpose and identity.”).

¹⁶⁸ See STUCKEY, *supra* note 152, at 276 (finding that the goals of the first year of law school should “include beginning the process of helping students develop their legal problem-solving experience, self-efficacy, and self-reflection and lifelong learning skills.”).

¹⁶⁹ Cassandra M.S. Florio & Steven J. Hoffman, *Student Perspectives on Legal Education: A Longitudinal Empirical Evaluation*, 62 J. LEGAL EDUC. 162, 168 (2012) (suggesting based upon 2009 data that “first-year students are intensely engaged in their education but that by third year

Since the first year is so critical to setting context, that is where a discussion of analysis in a non-judicial setting should occur, probably in the second semester after some introduction to persuasive writing. After our students have developed a competency in *stare decisis* based legal analysis, we need to discuss the circumstances where it does not necessarily apply. They must be prepared for the situation where, on a very basic level, law does not operate in the way they expect. Put another way, the students need to be warned that there are settings where *stare decisis* is, at best, a persuasive argument: do not relax your advocacy merely because you have found the law to be strongly on your side, as that may not be enough.

Although both administrative law and contractual arbitration are possible vehicles for this discussion, arbitration is probably the more accessible point of entry in the Legal Writing and Analysis course. Students are likely already familiar with the concept of arbitration clauses through their Contracts course. Arbitration clauses have, since at least the Seventh Circuit's seminal (and much-criticized) decision in *Hill v. Gateway 2000, Inc.*¹⁷⁰ become quite prominent in Contracts courses.¹⁷¹ They have proved to be rich topical fodder for students to grapple with current issues of how contract formation occurs and the role that mutual assent plays (or does not play) in that process. Arbitration may also get a nod in the first-year Civil Procedure course as part of an introductory discussion of non-judicial dispute resolution, which would also encompass negotiation and mediation.¹⁷²

Although we can do more and should aspire to do more than mere identification of increasing limits on the presence of *stare decisis* in legal analysis, flagging the concern is better than ignoring it or putting it off until another—probably unknown and unspeci-

they are relatively disengaged"); James Backman, *Externships and New Lawyer Mentoring: The Practicing Lawyer's Role in Educating New Lawyers*, 24 *BYU J. PUB. L.* 65, 72 (2009) (suggesting based on 2006 data that "courses and externships are an antidote to the boredom and endemic lack of preparation reported regularly during the final year of law school.").

¹⁷⁰ 105 F.3d 1147 (7th Cir. 1997).

¹⁷¹ See, e.g., E. ALLAN FARNSWORTH, ET AL., *CONTRACTS CASES AND MATERIALS* 216–23 (6th ed. 2001); ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 268–76 (4th ed. 2007); DAVID G. EPSTEIN, ET AL., *MAKING AND DOING DEALS: CONTRACTS IN CONTEXT* 24–37 (2d ed. 2006) (all using *Hill* to teach a variety of aspects of contract doctrine).

¹⁷² See, e.g., RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE CASES, MATERIALS, AND QUESTIONS* 842–52 (6th ed. 2012); JACK H. FRIEDENTHAL, ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 626–48 (Compact 10th ed. 2010); RICHARD L. MARCUS, ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 491–503 (5th ed. 2009); STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 475–513 (6th ed. 2004) (all discussing non-judicial dispute resolution).

fied—upper-level course. If you, as a professor teaching legal analysis—whether in a skills course or in a doctrinal course¹⁷³—are unsure of what else to do with relating the downsizing of *stare decisis* to your students, at least talk about it. Sound a warning while they are most keenly listening.¹⁷⁴

2. Change the Classroom Language

The first recommendation is the easiest to implement because it involves only one point in time to initiate a discussion of *stare decisis* in decline. This second proposal is more difficult in the sense that it requires implementing a persistent change throughout the Legal Writing and Legal Analysis course (and arguably in doctrinal courses too) throughout the entire first year. Just as *stare decisis* has been downsized in actual law practice, we should also downsize it in our courses. But how? The great pedagogical value of *stare decisis* cautions against removing it from a place of primacy in teaching legal analysis, so the need is for a means of reducing the general pervasiveness of precedent even while it dominates actual classroom activity. One way to accomplish this challenging balancing act—keeping *stare decisis* prominent yet not wholly pervasive—is by changing our language in the classroom.

Elizabeth Mertz, a sociolinguist and law professor at the University of Wisconsin, conducted a linguistic study of the use of language through recordings of first-year Contracts classes at eight different law schools.¹⁷⁵ The fit between language and law is stronger than between language and most other disciplines because, as Mertz notes early on, it is “through language that social problems are translated into legal issues.”¹⁷⁶ The extensive study resulted in seven central conclusions,¹⁷⁷ but for my present limited purposes I wish to draw only upon Mertz’s second conclusion, which is that the “legal worldview and the language that expresses it are imparted . . . in large part through reorienting the way stu-

¹⁷³ See generally Suzanne J. Schmitz & Alice M. Noble-Allgire, *Reinvigorating the 11 Curriculum: Sequenced “Writing Across the Curriculum” Assignments As the Foundation for Producing Practice-Ready Law Graduates*, 36 S. ILL. U. L.J. 287, 292 (2012) (observing that “mastery of research, writing, and other skills listed above suffers when those skills are taught solely through a standalone Legal Writing or Lawyering Skills course” and that such skills “can be better mastered when reinforced in other settings, including doctrinal courses.”).

¹⁷⁴ See Florio & Hoffman, *supra* note 169, at 168 (observing that first-year law students are most “intensely engaged” in legal education).

¹⁷⁵ ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 4 (2007).

¹⁷⁶ *Id.* at 12.

¹⁷⁷ *Id.* at 4–6.

dents approach written legal texts. This reorientation relies in important ways on a subtle shift in linguistic ideology.”¹⁷⁸ Because of this linguistic reorientation, “[a] key function of law school is actually training to a common language that lawyers use to communicate about the conflicts with which they must deal.”¹⁷⁹ Whatever collective bundle of meanings we attach to the phrase “thinking like a lawyer” when we use it to describe the change in mental processes that occurs during the first year of law school, those changes are occurring through language.

Initially, this thought transformation occurs through “a distinctive approach to reading written legal texts [that] is inculcated in law school classrooms.”¹⁸⁰ Mertz, however, found the next essential ingredient in the classroom to the shift toward learning to talk like a lawyer,¹⁸¹ in which development of the student into a “legal person” arises from discussion and role-play in the classroom.¹⁸² The linguistic analytical framework of the Mertz study suggests that the first year of law school has a tremendous impact on how law students of varying backgrounds ultimately come to see themselves socially, culturally, and morally in their roles as lawyers.¹⁸³

These insights into the impact of language in the law school classroom have large-scale implications,¹⁸⁴ but here I wish to suggest a comparatively smaller one: law students will tend to see their developing professional selves largely as actors in a *stare decisis*-oriented and judicial-centric world of law practice. That, after all is substantially all that is ever presented to them, especially during that engaging first year of law school. If, as Mertz quite reasonably finds, thinking like a lawyer derives from both reading like a lawyer and talking like a lawyer, then the potential places where we can shift the developmental conversation of law students are in as-

¹⁷⁸ *Id.* at 4–5.

¹⁷⁹ MERTZ, *supra* note 175, at 5.

¹⁸⁰ *Id.* at 97.

¹⁸¹ *Id.* at 130.

¹⁸² *Id.*

¹⁸³ See generally *id.* 207–23

¹⁸⁴ See, e.g., John M. Conley, *Can You Talk Like A Lawyer and Still Think Like A Human Being? Mertz's The Language of Law School*, 34 LAW & SOC. INQUIRY 983, 1011–12 (2009) (“For linguists, Mertz’s work shows precisely how the linguistic practices and linguistic ideologies of first-year law students are transformed. For legal scholars, the research yields a deeper understanding of what common law reasoning really means. It is not simply arguing from precedent, but it is a highly specific set of practices for the manipulation of texts. For all those interested in power, Mertz’s work reveals the specific mechanisms whereby the patterns of thought that dominate the law perpetuate their dominance.”).

signed texts, classroom speech, or both. In this section, I advocate changing part of the classroom discussion away from the judicial paradigm. In the next section, dealing with writing assignments, I will consider texts.

In teaching legal analysis, whether through skills courses or doctrinal courses, we are frequently dependent on the judicial paradigm to such an extent that many of us would find it difficult to conduct class without it. If you do not believe that statement, try playing your own personal version of the party game *Taboo*¹⁸⁵ in an upcoming class. Try to avoid, for one regular class period, use of any of the following words or phrases associated with judicial decisionmaking:

- court
- judge
- jury
- lawsuit
- plaintiff
- defendant
- precedent
- binding
- controlling
- persuasive
- majority rule
- holding

While this task is not impossible, it is surprisingly difficult.

Now, I do not suggest that there is any inherent virtue in avoiding “court language” of the sort listed above as a matter of course. These words are necessary and useful for law training. We do, however, need to recognize and account for the growing number of legal practice situations in which students will find themselves where few or none of these terms will apply. In that light, we cannot justifiably ignore the pervasive extent of our dependence of such language and the impact it has on first-year law students. If our classrooms cannot, at least on a few limited occasions,

¹⁸⁵ *Taboo* is a word-guessing party game first published by Hasbro in 1989. The principal challenge is to elicit a certain word from your teammates within a limited time while not using any of the prohibited words or phrases on the *Taboo* card for that word. For example, a player drawing a card with the word “lemon” at the top might be prohibited from using the words *yellow*, *sour*, *citrus*, *fruit*, and *tea* in soliciting a response. See generally TABOO, (May 17, 2013) [http://www.hasbro.com/common/instruct/Taboo\(2000\).PDF](http://www.hasbro.com/common/instruct/Taboo(2000).PDF) (containing instructions for the game that were published in 2000).

consider the existence of legal reasoning apart from the doctrine of *stare decisis*,¹⁸⁶ then small wonder that students would have trouble seeing themselves in situations where precedent is not inherently controlling.¹⁸⁷ It behooves us to change the classroom discourse by occasionally blocking *stare decisis* from classroom speech, especially on the professor's side.

3. Change the Assignments

The most labor-intensive change, but one that stands to be the most fruitful in outcome, is to modify student writing and analysis assignments to incorporate non-judicial decision-making. As law schools that emphasize "writing across the curriculum,"¹⁸⁸ some of the suggestions described in this section could, in theory, occur in any first-year course. The practical reality of most law schools' required course of study, however, is that the greatest opportunity for assignment modification is in the first-year Legal Writing course. Not only does it have the largest number of tangible writing assignments with which to work, but it also is the class in which students are confronted with *stare decisis* in its strongest and most confining form.

Objective problems designed around the assumption of actual judicial decision-making certainly require the classic skill of analogizing and distinguishing primary legal authority. Persuasive problems set in a trial or appellate courtroom most obviously do as well because the problems are, at their inception, an exercise in persuading judges. And, as previously noted, this anchoring of the students' reasoning through *stare decisis* is quite desirable. The present goal is to retain that training but provide a sufficient counterbalance to prevent it from being misleading.

That goal brings us to statutory interpretation, which I suggest to be a replacement constraint in the absence of *stare decisis*. Re-

¹⁸⁶ Accord William N. Eskridge, Jr., et al., *Teaching Legislation: A Conversation, Articles, Comments, and Speeches*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 49 (2004) ("[I]f students themselves start with the statute rather than with the judicial opinion, almost every one of them will be engaged, at both the practical and theoretical levels, with the unique features of statutory interpretation.").

¹⁸⁷ See Douglas R. Haddock, *Collaborative Examinations: A Way to Help Students Learn*, 54 J. LEGAL EDUC. 533, 550 (2004) (observing that "impressionable first-year students" tend to believe that "answers are generally found only in judicial opinions and that the interpretation of statutes is not a task for lawyers and law students.").

¹⁸⁸ Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73, 100-06 (2004) (describing and advocating elements of a write-across-the-curriculum program).

ardless of whether students have a Legislation course somewhere in their first-year curriculum, most of them will, perhaps in criminal law, have had a brush with the “canons of statutory construction” and interpretive methodology. Even with varying student experience levels, statutory text can serve a similar anchoring function for students’ legal reasoning once they are freed from the constraints of *stare decisis*. Karl Llewellyn, for example, famously showed opposing canons of statutory construction pointing to opposite outcomes on the same legal question.¹⁸⁹ The zone within which students can craft predictive analysis or persuasive arguments is quite large and can go multiple directions, more than under constraints of mandatory precedent. The skill they must apply is that of justification of an outcome under lesser constraints. Still, students must use *some* justification that can be tied to statutory text and interpretive rules that exist apart from precedent. This skill is that of “thinking like a judge,” or more specifically, a judge who is dealing with a question of first impression. Llewellyn held up the opinion-crafting of Judge Benjamin Cardozo as an example of this sort of outcome justification,¹⁹⁰ and the analogy is an apt one for our students.

Statutory interpretation is already a robust field with resources that our students can and should be able to use, such as its interpretive canons and abundant scholarship.¹⁹¹ The moderate amount of order imposed by tools of statutory interpretation lets students think creatively, invoke considerations of policy, and yet avoid the tempting-but-erroneous perception that all arguments are created equal. *Legal* analysis must still have support, and that support must be *legal* in nature. That which qualifies as “legal” can vary anywhere from technical rules of parsing text, to use of legislative history, and to the invocation of social policy—even (and

¹⁸⁹ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

¹⁹⁰ Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 7 J. APP. PRAC. & PROCESS 173, 186 (2005) (reprinted from 29 U. CHI. L. REV. 627 (1962)) (“You must remember that Cardozo was a truly great advocate, and the fact that he became a great judge didn’t at all change the fact that he was a great advocate.”).

¹⁹¹ Cf. Carlos E. Gonzalez, *The 2006 David J. Stouffer Lecture: Statutory Interpretation: Looking Back. Looking Forward*, 58 RUTGERS L. REV. 703, 708 (2006) (“The last 25 years has been a particularly active period for statutory interpretation scholarship.”); Gregory Scott Crespi, *Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9, 11 (2000) (“[T]here has been a very significant recent expansion in scholarship in this area; at least 132 articles were published over the past decade alone that address statutory interpretation issues at a broad, theoretical level.”).

perhaps especially) policy positions that might previously have lost in court.

Thus, an assignment change of the sort contemplated here must satisfy the dual goals of: (1) giving students experience working outside the *stare decisis* framework, and (2) implementing constraints that require use of statutory interpretation skills. I do not pretend or attempt to offer a full-fledged “idea bank” of problems here, as I suspect such an endeavor would be well beyond the ability of any single law teacher, and too much specificity might even poison the well by establishing preconceived notions of what such problems could and should be. The most important point is to identify possible escape routes from the *stare decisis*-centric first year where even statutory analysis is a subdivision of Langdell’s case method.

The possibilities for problem design may not be endless, but they are substantial. On the administrative law side, for example, find an agency enabling statute that has already been found ambiguous by an appellate court. Provide your students a set of interpretive regulations, but assign them the task of developing alternative regulations that would still be permissible interpretations of the statute. This exercise could work particularly well as group projects, where sets of students represent clients with widely varying interests, with an industry organization at odds with a public interest group (a situation akin to the original *Chevron* case described above),¹⁹² or even competing groups within a single industry (rather like the situation in *Brand X* described above).¹⁹³

In the area of contractual arbitration, find a section of a uniform act, perhaps even the ubiquitous Uniform Commercial Code, where states have interpreted identical textual provisions differently.¹⁹⁴ Place the problem in a jurisdiction that follows the approach that is worse for your client and requires the students to marshal arguments for why an arbitrator ought to follow another jurisdiction’s interpretation. Or present the same problem at an earlier stage: one party has brought a breach-of-contract lawsuit and your client must decide whether to waive its right to arbi-

¹⁹² See *supra* text accompanying notes 64–77.

¹⁹³ See *supra* text accompanying notes 65–86.

¹⁹⁴ See, e.g., 1 UCC TRANSACTION GUIDE § 2:4 (West, Westlaw through Aug. 2012) (describing and collecting cases on the divergent “predominant purpose” and “gravamen” tests followed in various UCC jurisdictions for determining whether Article 2 applies to a mixed transaction in both goods and services.).

trate¹⁹⁵ or to seek to compel arbitration.¹⁹⁶ The students' goal would be to identify the statutory arguments that could be available in arbitration; or alternatively, to identify certain constructions of a statute that would be preclusive in court, but could be argued around in arbitration.

Lest anyone think these sorts of assignments involve mere "getting around the law" and promote a jaded view by the general public of the lawyer's task,¹⁹⁷ understand that these situations ultimately are just another place for the analysis and advocacy skills we already hope to impart to our students. If anything, a better understanding of legal mechanisms outside of *stare decisis* opens up possibilities for seeking justice where the usual system may have none to offer. Just as the courts of equity developed to provide redress that was unavailable from the courts of law,¹⁹⁸ use of training in legal systems beyond the reach of *stare decisis* provides another possibility for greater equity. The builder has tools but also has the ultimate responsibility to use them properly; the possibility of misuse is no excuse to pretend that the tools do not exist. If possible to do so—and it is—we owe it to our students to enable them to deal with the legal system as it actually is, and not as Langdell or anyone else has idealized it.

The three steps for implementation of a downsized *stare decisis* with an upsized reliance on statutory interpretation are more

¹⁹⁵ See, e.g., *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1277 (11th Cir. 2012) (observing that waiver of a contractual right to arbitrate occur when a party substantially invokes the litigation machinery prior to demanding arbitration and has thereby prejudiced the other party); *In re Pharmacy Ben. Managers Antitrust Litig.*, 700 F.3d 109, 117 (3d Cir. 2012) (stating that waiver of an arbitration will normally be found only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery); *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 586 (4th Cir. 2012) (describing the rule as a "default" of a party's right to arbitration when it so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.).

¹⁹⁶ See 9 U.S.C. § 4 (2012) (authorizing courts to "make an order directing the parties to proceed to arbitration" in accordance with the terms of their agreement to arbitrate.).

¹⁹⁷ James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 603 (2007) (reporting results of a 2005 survey showing approval for "getting around the law" as a minority position among the American public.).

¹⁹⁸ See H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 998 (1994) ("The growing inadequacy of the equitable relief which could be obtained from the common law courts drove litigants into the Chancery; and when Chancery, acting on different principles and with a different procedure, took over the administration of equitable relief, the equity formerly administered by the common law courts completely decayed." (quoting 2 WILLIAM S. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 344–45 (1903))).

incremental than revolutionary. But my hope is that they are a step in the right direction.

V. CONCLUSION: ARE OUR STUDENTS READY TO PLAY JUDGE YET?

Solomon is attributed with the observation that “[o]f making many books there is no end.”¹⁹⁹ That insight from three thousand years ago might well be said of law school curricular criticism and reform movements today. The Carnegie Foundation for the Advancement of Teaching saw fit to issue comprehensive critiques of legal education in both 1914²⁰⁰ and 2007,²⁰¹ and there was certainly no shortage of other prominent criticism both in the interim²⁰² and since the latter report.²⁰³ And one suspects a savvy bookmaker would place much higher odds on the likelihood eighty years from now of observing heated debate over the content and methods of legal education instead of observing resolution.²⁰⁴

This article’s goals, accordingly, have been modest. The first goal is to draw attention to a problem—the increased inconsistency between American legal education and American law practice on one foundational organizing principle of the first year of law school, *stare decisis*. Administrative law and arbitration are two areas where the practical decline of *stare decisis* has been most pronounced over the past decade. A second goal is to show that this particular dissonance between education and practice is not susceptible to a sweeping solution, certainly none that involves sweeping away the role of precedent in our first-year instruction. While

¹⁹⁹ *Ecclesiastes* 12:12.

²⁰⁰ JOSEPH REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* (1914).

²⁰¹ WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

²⁰² See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (complaining prominently that law schools “are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both.”).

²⁰³ See, e.g., Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 356 (2012) (“This [2012] essay challenges Carnegie’s [2007] conclusion that law school successfully teaches students to think like lawyers.”).

²⁰⁴ Accord A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1956 (2012) (noting that “over the past 130 years we have heard from many sources that law schools are not truly fulfilling their obligation to prepare students for legal practice.”).

stare decisis has long been recognized as far from an absolute truth in actual judicial habit, it has retained a role as a brooding shadow over legal reasoning.

Finally, having described the problem of diminished *stare decisis* in American legal practice while the doctrine remains critical to a hallmark success of American legal education, this article proposes some steps for improving the situation. Once we recognize the problem and its potential detrimental impact on our students, the corrective steps we can take now begin with intentionally discussing it rather than ignoring it. Hopefully, we can change some (but not all or even most) of our students' tangible legal analysis assignments, particularly in our first-year Legal Writing courses, such that they eliminate the primacy of analysis based on controlling precedent. In the absence of *stare decisis*, stepped-up use of statutory interpretation skills can serve as the substitute anchor that allows greater analytical freedom but not unlimited drift.

In the end, students leaving their first year of law school should have a more accurate base of knowledge from which to apply their skills and more ably serve their future clients. This pedagogical goal is a worthy one because, after all, the need for skilled service to clients is the reason we have any students to teach in the first place. Are law students ready to think like a high court judge in a decidedly non-judicial age? Perhaps not, but we can do more to improve their chances of being ready.

