

THE COMMON LAW AS AN ITERATIVE PROCESS:  
A PRELIMINARY INQUIRY

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ABSTRACT

The common law often is casually referred to as an iterative process without much attention given to the detailed attributes such processes exhibit. This Article explores this characterization, uncovering how common law as an iterative process is one of endless repetition that is simultaneously stable and dynamic, self-similar but evolving, complex yet simple. These attributes constrain the systemic significance of judicial discretion and also confirm the wisdom of traditional approaches to studying and learning law.

As an iterative system, common law exhibits what physicists call sensitive dependence on initial conditions. This generates a path dependency from which it may be hard to escape. Escape occurs through a second attribute of iterative processes, called self-similarity. Self-similarity in an iterative process exists when the output of one operation closely resembles the output in the next operation. Applications of an existing rule to new disputes bear that quality when disputes generated by the rule's initial conditions continue to be resolved in the same way. Non-self-similar applications of a rule involve departures from earlier formulations.

When self-similarity dominates, the population of disputes cognizable under a rule is stable. Evolution and articulation of social norms promotes growth of non-self-similarity which threatens stability in the population of disputes. Such threats and path dependency created by initial conditions are overcome by what this Article calls judicial bifurcation, meaning a splintering of the input rule in a later dispute so that the population of disputes attracted by the population of rules regains stability. This produces a dominant systemic tendency towards stability in the population of disputes attracted by the population of rules.

This systemic tendency puts limits on the systemic significance of judicial discretion. The fabric of the common law absorbs social norms, more than any idiosyncratic prejudices or tastes of particular judges. Importance of facts captured by sensitive dependence on initial conditions entails a substantial complexity in law that demands a close and careful reading of individual cases to understand law. Yet resulting systemic stability and influence of bifurcations reveal a systemic simplicity in the common law process, entailing also a need to study rhythms of case law dispute resolution.